

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

JEANNE JOHNSON,

Plaintiff,

v.

REPORT AND
RECOMMENDATION

JO ANNE B. BARNHART,
Commissioner of Social Security,

05-C-129-C

Defendant.

REPORT

Plaintiff Jeanne Johnson has filed this action pursuant to 42 U.S.C. § 405(g) to challenge a decision by the Commissioner of Social Security denying her application for Disability Insurance Benefits under sections 216(I) and 223 of the Social Security Act, codified at 42 U.S.C. §§ 416(I) and 423(d). The administrative law judge who decided plaintiff's case at the hearing level concluded that although plaintiff suffers from severe physical and mental impairments, these impairments do not prevent her from performing substantial gainful activity. Plaintiff challenges the ALJ's conclusion that plaintiff retains the residual functional capacity for a limited range of light work, contending that it rested upon an improper assessment of plaintiff's credibility, gave too little weight to the opinions of plaintiff's treating physicians and failed to account for all of plaintiff's limitations. In addition, plaintiff contends that the ALJ failed properly to apply the Medical Vocational Guidelines.

This is a close case. Although plaintiff presented a strong case for benefits and the ALJ could have authored a better-reasoned decision, it appears that the ALJ properly applied the regulations, considered and weighed all the important evidence and reached a decision that reasonable minds could accept. Having carefully reviewed the record and considered plaintiff's challenges to the ALJ's decision, I am recommending that this court affirm the decision of the commissioner.

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 she 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)(c).

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 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, then 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 ("AR"):

FACTS

Plaintiff Jeanne Johnson was born March 28, 1954, making her 49 years old at the time of the hearing and 50 years old on the date of the ALJ's decision. She is a high school graduate and has past work experience as a certified nursing assistant and office worker. Plaintiff's last job was as a part-time certified nursing assistant, which ended April 29, 2002.

Plaintiff filed an application for disability insurance benefits on May 21, 2002, alleging that she was unable to work as a result of leg and knee deformities, left shoulder and lower back injuries, depression and anxiety. After her application was denied initially and again upon reconsideration, plaintiff requested a hearing before an administrative law judge.

On December 17, 2003, an ALJ held a hearing at which plaintiff, a medical expert and a vocational expert testified. Plaintiff testified that she quit her job as a certified nursing assistant in April 2002 because of joint pain. Plaintiff reported that her doctors had diagnosed her pain as arthralgia and had ruled out inflammatory arthritis. She testified that because of her colitis, she was unable to tolerate various pain medications prescribed by her doctors. In addition to her joint pain, plaintiff testified that she suffers from migraines, depression and anxiety characterized by panic attacks. Plaintiff took prescribed medications for each of those conditions and found them helpful.

Plaintiff testified that she was able to sit for about an hour, walk about four to six blocks before she needed to rest and could stand for about a half-hour at a time. She said she performed only a few household chores, indicating that if she was on her feet for more

than a half hour, she had to take a break. She testified that she would lie down or raise her feet up in a recliner frequently during the day to relieve foot pain. Plaintiff testified that because of her pain and depression, she could not perform any job on a regular, full-time basis because she would be absent frequently.

Plaintiff also submitted medical records from November 2000 to October 2003 that documented her physical and mental problems. In November 2000, plaintiff began counseling with therapist Phil Koestler, to whom she reported struggling with depression, marital problems, grief over her mother's death, and physical problems including back pain. Plaintiff scored a 51 on the Beck Depression Inventory-II, placing her in the severe category of clinical depression. Koestler diagnosed plaintiff with recurrent, severe major depressive disorder.

Plaintiff saw Koestler on a fairly regular basis until January 2003. During that time, therapy focused on plaintiff's relationship with her husband and her daughters. Plaintiff concurrently received medication from Dr. William Weggel. On March 29, 2001, plaintiff told Dr. Weggel that she was not doing well on Paxil, reporting decreased libido, stomachaches and constipation. Dr. Weggel noted that plaintiff was slightly anxious and had little range in her affect; however, she was cognitively clear and not suicidal. Dr. Weggel told plaintiff to taper her use of Paxil and to start taking Celexa. Plaintiff did so, but continued to experience anxiety and depression. On September 27, 2001, plaintiff reported having problematic panic attacks and a general sense of anxiety. On exam, Dr. Weggel noted

that plaintiff was very pleasant and cooperative but seemed moderately anxious. He changed plaintiff's medication back to Paxil.

On May 9, 2002, Dr. Weggel noted that plaintiff had improved on a higher dosage of Paxil. He noted that the biggest factor contributing to plaintiff's depression was her work as a nursing assistant because it aggravated the pain in her knees and shoulder which in turn aggravated her depression. Dr. Weggel noted that plaintiff had been off work for the past week and her mood had improved. They discussed applying for disability benefits, but Dr. Weggel told plaintiff it would "be hard to support medically." AR 227.

Dr. Weggel did not see plaintiff again for almost eight months, on January 23, 2003. Plaintiff reported feeling more anxious; Dr. Weggel opined that this was the result of plaintiff's recent bout of the flu. Dr. Weggel described plaintiff's affect as "calm and reasonable," with no thought disorder. He recommended she that continue taking Paxil and return in six months.

On February 3, 2003, plaintiff saw Marcus Desmonde, a licensed psychologist, for a consultative mental health examination. AR 249. Plaintiff reported that she typically went to bed between midnight and 2 a.m. and got up at noon. She watched television and, with her husband, did laundry, housework, meal preparation and cleanup. She said they drove to the store once a week for groceries. She said she might eat once or twice a day but stated that her medications had reduced her appetite. Desmonde noted that plaintiff was outgoing, cooperative, spontaneous and uninhibited during the evaluation, but she admitted to

symptoms of depression such as difficulty falling asleep, variable energy levels, irritability, hopelessness and social withdrawal. Plaintiff's husband told Desmonde that plaintiff was "in too much pain to do much of anything," but her symptoms had improved since she stopped working. Desmonde noted that plaintiff displayed some signs of fatigue, but he did not detect problems with plaintiff's concentration, memory, judgment or insight. He diagnosed plaintiff with an adjustment disorder with mixed anxiety and depressed mood and a major depressive disorder, recurrent by history. He concluded:

The claimant does appear capable of understanding simple to moderately complex instructions and would be able to carry out tasks within any limitations set by her treating physicians. She does appear capable of interacting appropriately with supervisors, co-workers and the general public. She may have difficulty tolerating the stress and pressure of full time, competitive employment at this time.

AR 251.

As for physical impairments, the records submitted with plaintiff's claim document a history of abdominal complaints, including constipation, cramping and bouts of diarrhea. The administrative record includes notes of office visits with Dr. Charles Nordstrom, a gastroenterologist, who labeled plaintiff's symptoms alternately as irritable bowel syndrome, colitis, or a combination of both. In addition, plaintiff was treated for left shoulder impingement syndrome by Dr. Todd Wright, who performed a bursoscopy with subacromial decompression on the shoulder on January 8, 2003.

On May 8, 2002, plaintiff saw Dr. Wright for complaints of bilateral knee pain that worsened with bending or squatting, climbing stairs or walking longer distances. X-rays were normal and the knee joints were stable with only mild crepitation. Dr. Wright determined that plaintiff's symptoms likely were caused by biomechanical factors, namely, plaintiff's toes-outward stance and a significant "Q angle," which caused her knees and ankles to function in different planes.¹ AR 182-83. Dr. Wright recommended a conservative course of treatment including strengthening and stretching. After conservative treatment provided plaintiff with little relief, Dr. Wright referred her to another orthopaedist, Dr. Morin, for a second opinion. Dr. Morin agreed that surgery was not indicated; however, he referred plaintiff to a rheumatologist to determine whether her complaints might have a rheumatic basis. AR 178.

Plaintiff began seeing rheumatologist Dr. Gina Adel on July 31, 2002. Plaintiff reported having pain mainly in the knees and feet, stating that it was difficult for her to walk. She also reported pain in her wrists, elbows and fingers. Plaintiff reported that she had tried anti-inflammatories in the past but they caused gastrointestinal problems. Physical examination was largely normal. Dr. Adel ordered a total body bone scan and lab tests to look for signs of inflammation; none were found. Thereafter, Dr. Adel prescribed a series

¹ The "Q" angle describes the alignment of the patella with respect to the tibia and femur. Roughly speaking, it is determined by drawing a line from the front of the hip joint to the center of the kneecap and a second line from the center of the knee cap to the site on the tibia where the tendon below the kneecap inserts. <http://www.massgeneral.org/ortho/PatellofemoralInstability.htm>.

of different medications for plaintiff's pain, eventually landing on salsalate, an anti-inflammatory. On November 22, 2002, plaintiff reported that the salsalate was helpful and did not cause any side effects, although she still had some pain.

At a visit with Dr. Adel on May 16, 2003, plaintiff reported ongoing problems with pain in her joints, stating that she was taking Darvocet in addition to the salsalate. None of plaintiff's joints were red, hot or swollen. Dr. Adel referred plaintiff to the Mayo Clinic for a second opinion. A thorough workup by Dr. Shreyasee Amin detected no features of inflammatory arthritis or connective tissue disease. He noted that although plaintiff reported significant tenderness, her symptoms were inconsistent with his physical examination, which found excellent range of motion in almost all of the joints and only minimal degenerative changes. Dr. Amin could not offer any good explanation for plaintiff's symptoms. AR 291-94.

In a letter to plaintiff's attorney dated November 18, 2003, Dr. Adel indicated that her "working diagnosis" was that plaintiff's pain was an inflammatory arthritis associated with inflammatory bowel disease. Dr. Adel wrote:

Due to Ms. Johnson's diffuse joint complaints and her fatigue, she does have a limited ability to work. Contributing to this is her depression.

I feel that the interaction between her chronic pain syndrome and her depression does make it very difficult for her to be competitively employed. She would not be a reliable worker in that going to work eight hours a day five days a week would be quite problematic. She is limited in her ability to stand due to her knee and foot involvement and is limited in her ability to

use her left shoulder due to her continued pain there after her surgery.

AR 332.

Dr. Weggel, plaintiff's treating psychiatrist, offered a similar opinion. In a letter dated November 19, 2003, Dr. Weggel wrote:

While I do not believe that [plaintiff's] depression is so severe as to incapacitate and disable her, I do believe that it is the anxiety and depression combined with her medical problems, in particular the arthritis and resultant chronic pain, as stated in Dr. Adel's letter of November 18, 2003, that suggests disability. It is my opinion that the arthritis and chronic pain feed into her depression and likewise the reverse.

AR 334.

At the administrative hearing, the ALJ called Dr. Peter Ihle to testify as a medical expert. From his review of the medical records, Dr. Ihle concluded that plaintiff suffered from irritable bowel syndrome or ulcerative colitis. However, he noted that a recent note from an evaluation of plaintiff at the Mayo Clinic indicated that plaintiff had not had a flare-up of her irritable bowel condition for over a year and a half and the disease was under control with medication. AR 381. He also noted that plaintiff had symptomatic pain in her feet, ankles, knees and hands, the cause of which plaintiff's doctors had been unable to identify. He noted that X-rays of plaintiff's joints and a bone scan were all normal, and that the evaluation at the Mayo Clinic found no evidence of inflammatory arthritis. AR 378-79. Dr. Ihle testified that although plaintiff's treating doctors had diagnosed her with an inflammatory arthritis associated with inflammatory bowel disease, the most recent workup

at the Mayo Clinic had determined that plaintiff's pains were "arthralgias," in other words, subjective complaints unsupported by any objective findings. AR 378.

Dr. Ihle concluded that none of plaintiff's physical impairments met or equaled any listed impairment. On the basis of the medical records alone, Dr. Ihle concluded that plaintiff retained the functional capacity to perform "light" level jobs that did not require her to perform work below the waist or above chest level; climb stairs or ladders; or perform extended reaching. Dr. Ihle testified that plaintiff would not be able to perform work that required her to walk more than one-third of the day, but that she could be on her feet at her work station so long as she had the ability to alternate between sitting and standing. AR 381-82. Dr. Ihle did not take plaintiff's subjective complaints or mental impairments into account when formulating his residual functional capacity assessment.

Sidney Bauer testified as the vocational expert. The ALJ posed a hypothetical to Bauer asking whether an individual with plaintiff's education, work experience and impairments who was limited to work at the "light" exertional level (lifting no more than 10-20 pounds and a good deal of walking or standing) that involved routine, repetitive work between waist and chest height, no frequent bending or stooping, no extended reaching except for light items like paper, and allowed for a sit-stand option could perform plaintiff's past work. Bauer testified that such an individual would not be able to perform plaintiff's past work, which required a greater lifting capacity. However, she gave the opinion that such an individual could perform work as a desk clerk or counter clerk. AR 387-88.

The ALJ posed a second hypothetical to Bauer, this time asking if an individual limited to simple, unskilled light work with a sit-stand option who would need ready access to the bathroom and a job with no high production goals or more than “brief, superficial contacts with the public” could perform work as a desk clerk or a counter clerk. AR 388-89. Bauer responded that those jobs would not be available only because they would require an individual to have more than brief and superficial contact with other persons. AR 389. Bauer further opined that the jobs of desk clerk and counter clerk could also be performed by a person limited to sedentary work with a sit/stand option. AR 394.

On June 7, 2004, the ALJ issued a decision denying plaintiff’s application for benefits. Applying the commissioner’s five-step sequential evaluation process, the ALJ found at step one that plaintiff had not engaged in substantial gainful activity since her alleged onset date of April 29, 2002. At step two, the ALJ found that plaintiff suffered from foot pain; residual pain in her left shoulder following surgery; migraines; a depressive disorder/adjustment disorder; an anxiety disorder; ulcerative colitis; and arthralgias, and that these qualified as severe impairments. At step three the ALJ found that plaintiff’s mental or physical impairments did not meet or medically equal one of the listed impairments in Appendix I, Subpart P, 20 C.F.R. Part 404.

At step four, the ALJ determined that plaintiff had the residual functional capacity to perform work requiring her to lift ten pounds frequently and twenty pounds occasionally; perform routine and repetitive work between table top and chest height; use stairs and

ladders, bend and stoop occasionally; and perform extended repetitive reaching for weights such as pieces of paper. In addition, he found that plaintiff would require a job that had a “sit/stand” option. On the basis of the vocational expert’s testimony, the ALJ concluded that plaintiff could not perform her past relevant work as a certified nursing assistant. However, he concluded at step five that plaintiff could perform the jobs of desk clerk or counter clerk, and that such jobs existed in significant numbers in the regional economy.

The Appeals Council denied plaintiff’s request for review on December 6, 2004, making the ALJ’s decision the final decision of the commissioner for purposes of judicial review. Additional aspects of the ALJ’s opinion will be discussed in the body of this report.

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. Thus, where conflicting evidence allows reasonable minds to differ as to whether a claimant is disabled, the responsibility for that decision falls on the commissioner. *Edwards v. Sullivan*, 985 F.2d 334, 336 (7th Cir. 1993). 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).

Plaintiff attacks the ALJ's assessment of her residual functional capacity and the corresponding hypothetical posed to the vocational expert. She contends that the ALJ's conclusion that she is able to work eight hours a day, five days a week is not supported by substantial evidence because it resulted from the ALJ's flawed assessment of the credibility of her own statements and the reports of her treating physicians, Dr. Adel and Dr. Weggel. Alternatively, she contends that the ALJ should have found that she was limited to sedentary work and that she was limited to jobs requiring only brief and superficial contact with the public.

B. Credibility Assessment

Plaintiff first contends that the ALJ improperly concluded that her allegations of total disability were not credible. As an initial matter, the ALJ did not completely disregard plaintiff's allegations of pain as she suggests. The ALJ credited plaintiff's claims of pain insofar as he found that plaintiff was limited in her ability to sit, stand, lift and reach. Indeed, the ALJ's residual functional capacity assessment was largely consistent with plaintiff's own estimation of her abilities. With one exception discussed below, plaintiff and the ALJ part ways only on the question whether plaintiff can perform even the relatively undemanding jobs identified by the vocational expert on a regular and consistent basis.

The most striking aspect of this case is the failure of plaintiff's doctors to identify any medical condition that might explain why plaintiff has joint pain. In light of the dearth of objective findings, the ALJ was entitled to view skeptically plaintiff's complaints of disabling pain. *See Carradine v. Barnhart*, 360 F.3d 751, 753 (7th Cir. 2004) (ALJ must evaluate with great care a disability claim based on claims of pain unsupported by objective evidence). Nonetheless, the ALJ could not reject plaintiff's statements about her limitations merely because they were not substantiated by the objective medical evidence:

If the allegation of pain is not supported by the objective medical evidence in the file and the claimant indicates that pain is a significant factor of his or her alleged inability to work, then the ALJ must obtain detailed descriptions of claimant's daily activities by directing specific inquiries about the pain and its effects to the claimant. She must investigate all avenues presented that relate to pain, including claimant's prior work record, information and observations by treating physicians,

examining physicians, and third parties. Factors that must be considered include the nature and intensity of claimant's pain, precipitation and aggravating factors, dosage and effectiveness of any pain medications, other treatment for relief of pain, functional restrictions, and the claimant's daily activities.

Luna v. Shalala, 22 F.3d 687, 691 (7th Cir. 1994) (citations omitted); accord 20 C.F.R. § 404.1529(c) (listing credibility factors); Social Security Ruling 96-7p.²

This court must defer to the ALJ's credibility determination unless it was "patently wrong." *Zurawski*, 245 F.3d at 887 (7th Cir. 2001) (citing *Powers v. Apfel*, 207 F.3d 431, 435 (7th Cir. 2000)). Credibility determinations are entitled to special deference because the ALJ is in a better position than the reviewing court to observe a witness. *Shramek v. Apfel*, 226 F.3d 809, 811 (7th Cir. 2003). Even so, credibility determinations are not immune from review: "[a] court has greater freedom to review credibility determinations based on objective factors or fundamental implausibilities, rather than subjective considerations." *Briscoe ex rel. Taylor v. Barnhart*, 425 F.3d 345, 354 (7th Cir. 2005) (citation omitted). In addition, SSR 96-7p requires ALJs to articulate the reasons behind credibility evaluations:

The reasons for the credibility finding must be grounded in the evidence and articulated in the determination or decision. It is not sufficient to make a conclusory statement that "the

² Under Social Security Ruling 96-7p, evaluation of these factors becomes necessary only if there is "an underlying medically determinable physical or mental impairment(s)—i.e., an impairment(s) that can be shown by medically acceptable clinical and laboratory diagnostic techniques—that could reasonably be expected to produce the individual's pain or other symptoms."

Arguably, the ALJ could have found that plaintiff failed to meet this threshold requirement, but he did not so find.

individual's allegations have been considered" or that "the allegations are (or are not) credible." . . . The determination or decision must contain specific reasons for the finding on credibility, supported by the evidence in the case record, 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.

1996 WL 374186, at *4 (S.S.A. July 2, 1996). *See also Zurawski*, 245 F.3d at 887 (ALJ must explain bases for credibility determination clearly enough to permit meaningful appellate review).

Like too many disability decisions that are appealed to this court, the ALJ's credibility assessment in this case is heavy on recitation and light on analysis. For example, in the last paragraph on page 7 his decision, the ALJ wrote:

The undersigned, thus, concludes that because the claimant's testimony is only partially credible, her alleged pain disorder does not significantly limit her either physically or mentally in her ability to meet the basic demands of work activity as demonstrated in her residual functional capacity assessment. The undersigned bases his conclusion upon a thorough review of the record including the claimant's description of her activities and life style, the degree of medical treatment required, efforts to achieve relief of symptoms, the claimant's demeanor at the hearing, the reports of the treating and examining practitioners, the medical history, and the findings made on examination. As a result, the undersigned has granted the claimant's testimony only partial weight finding it to be not fully consistent with the record as a whole.

AR 20. The ALJ did summarize plaintiff's testimony, medical treatment, reports of daily activities and medications in his decision. However, nowhere does he explain what it was about plaintiff's demeanor or "lifestyle" that led him to conclude that she was exaggerating

her pain; whether the “degree of medical treatment required” was consistent or inconsistent with plaintiff’s allegations; or what he concluded from the findings on examination. By merely summarizing the types of evidence he considered without describing *how* that evidence supported his decision, the ALJ prevented this court from performing an informed review of the reasons underlying his credibility assessment. As noted previously, ALJs must “show their work.”

Having carefully reviewed the ALJ’s decision, I can discern only two instances in which the ALJ articulated his rationale for rejecting plaintiff’s allegation of disabling pain and depression. First, the ALJ relied on plaintiff’s work history, noting that although plaintiff’s earnings record reflected 18 years of work, only 3 of the years were performed at the substantial gainful work activity level. AR 20. From this, the ALJ concluded that plaintiff’s “rather tenuous connection with the workforce is not indicative of an individual highly motivated to work.” AR 20.

It was not improper for the ALJ to consider plaintiff’s work history in evaluating plaintiff’s credibility. *See* Soc. Sec. Ruling 96-7p. However, this court has indicated in other cases that “an ALJ considering a claimant’s poor work record should consider other factors apart from motivation that could have contributed to a poor work history, such as the alleged disabling condition itself, a lack of education, a lack of job opportunities or transportation or child care obstacles.” *Fahnel v. Barnhart*, 04-C-606-C. Rep. and Rec., Feb. 9, 2005, dkt. 11, at 22-23 (*citing Sarchet v. Chater*, 78 F.3d 305, 308 (7th Cir. 1996) (ALJ

erred in discounting claimant's credibility based on work history where ALJ failed to consider claimant's minimal education, long list of medical ailments, and numerous medications) and *Schaal v. Apfel*, 134 F.3d 496, 502 (2d Cir. 1998) ("An ALJ should explore a claimant's prior work history to determine whether her absence from the workplace cannot be explained adequately (making appropriate a negative inference), or whether her absence is consistent with her claim of disability").

In other words, before drawing adverse inferences from a claimant's poor work history, an ALJ should give a plaintiff an opportunity to explain her earnings record. Plaintiff in this case asserts that she did not work much because of her impairments and because she was home raising her children. The ALJ did not have an opportunity to consider these explanations because he never asked the question. Accordingly, his negative inference drawn from plaintiff's spotty work record is entitled to little weight.

The only other discernible reason for the ALJ's credibility finding is his conclusion that plaintiff's symptoms were alleviated by her medications. The ALJ found that "[t]he claimant testified and the record agrees that her migraine headaches, ulcerative colitis, depression, anxiety, and to some degree her arthralgias are controlled or the symptoms are reduced by her medications." AR 20. Plaintiff does not dispute this conclusion except with respect to her joint pain and anxiety, pointing out that she has been unable to tolerate anti-inflammatories for her pain and that she still has anxiety attacks. However, the record shows that plaintiff takes salsalate for her joint pain and that she has asked her doctors to refill her

prescription for that medication. It was proper for the ALJ to infer from this that the medication provided plaintiff at least some benefit. Moreover, in light of plaintiff's contention that her pain and depression were interrelated, the ALJ could infer that a medication that alleviated symptoms of one would alleviate symptoms of the other. Finally, as for plaintiff's panic attacks, there is no evidence in the record that they occur so frequently or are so severe as to prevent plaintiff from working. The ALJ's conclusions about the benefits of plaintiff's medication is adequately supported by the record.

In further defense of the ALJ's credibility finding, the commissioner asserts that the ALJ "discussed Ms. Johnson's daily activities, not as 'proof' that she could work, but to explain that her strong daily activities contradicted her claims of disabling pain (Tr. 20)." However, I am unable to find any "discussion" of plaintiff's daily activities on the page cited by the commissioner. The only place in his decision where he comes close to "discussing" plaintiff's daily activities is on page 6 (AR 19), where he cited plaintiff's activities of gardening, knitting, emptying litter boxes, weekly vacuuming and occasional cooking and cleaning as evidence that contradicted Dr. Adel's conclusion that plaintiff would have problems using her shoulders, knees and feet.

Although I agree that the activities cited by the ALJ tend to contradict Dr. Adel's report and support the ALJ's finding that plaintiff has the exertional capacity for light work, they are not necessarily inconsistent with plaintiff's contention that she cannot work on a regular and sustained basis. Plaintiff's reported activities are limited and sporadic: there is

no evidence that she gardens, cooks and cleans all day or every day. Faced with such equivocal evidence, the ALJ was obliged to explain *why* he determined that plaintiff's daily activities undermined her claim. See *Zurawski*, 245 F.3d at 887 (washing dishes, doing laundry, helping children prepare for school and preparing dinner did not necessarily contradict claim of disabling pain); *Shramek v. Apfel*, 226 F.3d at 813 (claimant's ability to care for home and her children was not basis to find her testimony incredible because "[s]uch work by its nature provides the type of flexibility to alternate standing, sitting and walking, and to rest and elevate the legs when necessary"). The ALJ's failure to do so means that this court cannot evaluate his reasoning with respect to plaintiff's daily activities.

Accordingly, the only reason cited by the ALJ for rejecting plaintiff's credibility that withstands scrutiny is his conclusion that plaintiff's symptoms were reduced by her medications. Is this enough to sustain the ALJ's conclusion that plaintiff was not credible insofar as she claimed to be unable to work on a regular, full-time basis? Standing alone, probably not. But when combined with plaintiff's lack of objective abnormalities, likely it is enough. As noted previously, the ALJ credited most of plaintiff's pain allegations; what he did not accept was plaintiff's contention that she could not work because of the pain. The record adequately supports the ALJ's conclusion that plaintiff's medications were effective enough to allow her to perform a limited range of light jobs.

Plaintiff suggests that the ALJ should have found her credible because she has a combination of physical and mental impairments. Plaintiff points out that her testimony

that her joint pain increases her depression and vice versa was corroborated by the medical expert, who agreed that a person with a psychological impairment would have a harder time coping with pain than a person without such an impairment. However, the ALJ did not reject plaintiff's pain complaints merely because they were not in keeping with the objective medical evidence or dispute that plaintiff has the pain she does. The fact that plaintiff's pain may have been the combined result of two impairments as opposed to a single impairment did not mean that the ALJ was required to find that her pain was debilitating.

In sum, plaintiff is correct that some evidence favors her position—for example, her willingness to try various medications and her persistent attempt to find an explanation for her pain—but the evidence was not so one-sided that the ALJ was bound to credit her assertion that she was disabled. The ALJ's decision shows that he reviewed all the important evidence. Although the ALJ could have—indeed *should* have—provided more thorough explanations and more cogent reasoning, he provided enough for the court to conclude that his credibility determination was not patently wrong.³

³ In other contexts (for instance, when upholding shoddy but constitutional search warrants, *see United States v. Mykytiuk*, 402 F.3d 773, 777-78 (7th Cir. 2005)), this court has voiced concern that failing to grant relief from below-average but passable work by the government nurtures mediocrity. Concerns of this nature, however, are not an allowable ground to substitute the court's judgment for the ALJ's. Finding that the ALJ's decision passes muster under a highly forgiving standard of review does not make the court an apologist for the commissioner.

C. Opinions of Treating and Consulting Physicians

Next, plaintiff contends the ALJ erred in rejecting the opinions of Dr. Weggel and Dr. Adel, who both opined that plaintiff was disabled from a combination of depression and arthritis. Treating physician opinions are entitled to controlling weight if they are well supported and "not inconsistent with the other substantial evidence in the case record." 20 C.F.R. § 404.1527(d)(2); *Gudgel v. Barnhart*, 345 F.3d 467, 470 (7th Cir. 2003). However, because a treating physician's objectivity often is difficult to determine, a patient is not entitled to benefits simply because a physician reaches the conclusion that the patient is disabled. *Dixon v. Massanari*, 270 F.3d 1171, 1177 (7th Cir. 2001); *Diaz v. Chater*, 55 F.3d 300, 308 (7th Cir. 1995).

The ALJ did not err in rejecting the opinions of Dr. Weggel and Dr. Adel. The ALJ properly noted that Dr. Weggel's opinion tended to conflict with plaintiff's testimony that her medications had improved her depression and anxiety, and with the record as a whole, including Dr. Ihle's testimony, which showed that plaintiff was able to work. Further, the ALJ noted that Dr. Weggel's general opinion that plaintiff was disabled was not conclusive on the issue of disability, which is reserved to the commissioner. *See Clifford*, 227 F.3d at 870 (commissioner charged with determining ultimate issue of disability) (citing 20 C.F.R. § 404.1527(e)). These were adequate reasons for rejecting Dr. Weggel's opinion.

With respect to Dr. Adel, the ALJ noted that although Dr. Adel stated that plaintiff had difficulty walking, that statement was inconsistent with the record showing that plaintiff

walked without a noticeable limp and did not report problems with balance or her leg giving out. In addition, he noted that in spite of Dr. Adel's conclusion that plaintiff would have problems standing and using her left shoulder, plaintiff in fact was able to stand and use her shoulder when cooking, gardening, vacuuming and emptying litter boxes. Although these were not significant inconsistencies, they were sufficient to allow the ALJ to question the reliability of Dr. Adel's opinion. It is worth noting even if the ALJ had credited Dr. Adel's report, Dr. Adel did not opine that plaintiff was not able to work, only that it would be difficult for her to do so.

Plaintiff argues that the ALJ could not adopt the opinion of Dr. Ihle over that of Drs. Weggel and Adel because Dr. Ihle stated that his conclusions about plaintiff's abilities did not account for her subjective complaints. However, in arriving at his residual functional capacity assessment, Dr. Ihle accounted for some degree of pain insofar as he considered plaintiff's arthralgia, which essentially is a medical word for "joint pain." In light of the evidence that showed that plaintiff had essentially normal function and range of motion in her joints, the restrictions found by Dr. Ihle and adopted by the ALJ could only have been those caused by pain. The ALJ's evaluation of the competing medical opinions was proper.

D. Errors in RFC Assessment and Corresponding Hypothetical

Finally, plaintiff complains that the ALJ's RFC assessment and corresponding hypothetical to the vocational expert failed to capture all of her limitations. First, plaintiff

suggests that the ALJ should have included a restriction limiting her to “brief, superficial contacts with the public.” Plaintiff points out that the VE testified that such a limitation would preclude plaintiff from performing the clerk jobs that he identified. However, the only evidence to which plaintiff cites to support her suggestion that she needs limited contact with the public is Dr. Desmond’s prediction that plaintiff “may have difficulty tolerating the stress and pressure of full time, competitive employment.” Not only is Dr. Desmond’s prediction too equivocal to constitute a concrete limitation, the remainder of his report undermines plaintiff’s argument. In the sentence immediately before the one quoted by plaintiff, Dr. Desmond stated that plaintiff “does appear capable of interacting appropriately with supervisors, co-workers and the general public.” AR 251. Dr. Desmond’s report provides substantial evidence to support the ALJ’s conclusion that plaintiff would not have problems relating to the public.

Next, plaintiff contends that the ALJ should have concluded that she had a residual functional capacity for sedentary, not light, work. Success on this claim would be an automatic win for plaintiff: under the Medical-Vocational Guidelines, a 50-year old limited to unskilled, sedentary work automatically is entitled to an award of benefits. 20 C.F.R. § 404, Supt. P, App. 2, Rule 201.12. To support her argument, plaintiff points to the testimony of the medical expert and the vocational expert.

First, plaintiff argues that the ALJ failed to account for Dr. Ihle’s testimony that plaintiff should spend less than a third of the day “on her feet.” 20 C.F.R. § 404.1567(b)

indicates that a job falls into the “light” category if it involves a “good deal” of walking or standing, but the regulation does not specify the amount of time a person must be able to spend on her feet in order to perform light work. However, Soc. Sec. Ruling 83-10 provides that “the full range of light work requires standing or walking, off and on, for a total of approximately 6 hours of an 8-hour workday.” 1983 WL 31251, *4 (S.S.A. 1983). The regulation goes on to explain that “[m]any unskilled light jobs are performed primarily in one location, with the ability to stand being more critical than the ability to walk.” *Id.* at *6. Sedentary work, by contrast, requires periods of standing or walking totaling no more than about 2 hours of an 8-hour workday. *Id.* at *5.

Plaintiff argues: “[I]t is clear that Plaintiff’s RFC should actually have been for sedentary, not light work because the ME opined that Plaintiff could only be on her feet intermittently for 3 out of 8 hours, which does not equate with the 6 out of 8 hours necessary for light work as stated in 20 C.F.R. § 404.1567(b).” Plaintiff’s argument misconstrues Dr. Ihle’s testimony:

Q. Okay. How about time on her feet, would you limit her to one third or less of an eight-hour day on her feet?

A. I would say less than one third of the time. I would like her to have a sit/stand option at that type of work.

Q. So less than one third of the day on feet with a sit/stand option?

A. Um-hum. So we don’t get mixed up, sit/stand option means that when she’s at an area she can sit and stand. That doesn’t include the time on her feet. When I talk about time on her

feet, I'm talking about her walking some place to pick up something and walking back.

Q. Okay. So you would limit that?

A. Yes, I'd limit that.

Q. Okay. But when she's at her workstation she should have the option to sit or stand?

A. Yes.

AR 381-82.

Dr. Ihle did not testify that plaintiff could *only* be on her feet for three hours, but rather that she should spend no more than three hours *walking* around away from her workstation. He also testified that she could lift 20 pounds occasionally and 10 pounds frequently, although not with her arms fully extended. Dr. Ihle's description of plaintiff's abilities is more consistent with the definition of light work than sedentary work.

Second, plaintiff points to the VE's testimony that the identified desk and counter clerk jobs also could be performed by an individual who was limited to sedentary work with a sit-stand option. From this testimony, plaintiff reasons that this means that *she* can perform *only* sedentary work. Plaintiff's reasoning is unsound. The VE was not opining as to plaintiff's limitations, she was stating the unremarkable proposition that the jobs she had identified were so limited in their exertional requirements that they could be performed by workers limited to less than light work. A person who has a residual functional capacity for light work generally also can perform sedentary work. 20 C.F.R. § 404.1567(b). It is a non

sequitur to argue that because plaintiff suffered conditions that limited her job base essentially to sedentary jobs, the ALJ erred in concluding that plaintiff was able to perform a limited range of light work. The commissioner's regulations make clear that the ALJ should state the individual's residual functional capacity as the *most*, not the least, the person can do despite her limitations. 20 C.F.R. § 404.1545(a) (RFC is the "most you can still do despite your limitations"). That is what the ALJ did in this case.

Finally, remand is not required to correct the ALJ's failure to specify in his residual functional capacity assessment how often plaintiff would need to alternate between sitting and standing. The ALJ's second hypothetical asked the vocational expert to assume, among other things, that plaintiff needed a job with a sit/stand option and could sit for only an hour at a time. AR 388. According to the vocational expert, that limitation would not eliminate the desk clerk and office clerk jobs that she had previously identified. Plaintiff has not suggested that she is not able to sit for an hour at a time.

CONCLUSION

The ALJ's assessment of plaintiff's credibility is borderline adequate; but for that assessment, the disability determination could have gone in plaintiff's favor. Given the deferential standard of review, overturning the ALJ's decision would appear to be an improper substitution of this court's opinion for the commissioner's. Therefore, I am recommending that this court uphold the commissioner's decision.

On the other hand, if the district judge determines that the ALJ's adumbration of his thought process on credibility simply is too sketchy to merit deference, then the commissioner cannot be heard to complain too loudly, since her own regulations impose upon her ALJs higher standards of clarity and cogency than were met in this case.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that the decision of the Commissioner denying plaintiff Jeanne Johnson's application for Disability Insurance Benefits be AFFIRMED.

Entered this 29th day of November, 2005.

BY THE COURT:

/s/

STEPHEN L. CROCKER

Magistrate Judge

November 29, 2005

Frederick J. Daley
Daley, Debofsky & Bryant
One North Lasalle Street, Suite 3800
Chicago, IL 60602

Richard D. Humphrey
Assistant U.S. Attorney
P.O. Box 1585
Madison, WI 53701-1585

Re: ___ Johnson v. Barnhart
Case No. 05-C-129-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 December 16, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by December 16, 2005, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/ S. Vogel for
Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures

cc: Honorable Barbara B. Crabb, District Judge