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

KENNETH MATZKE,

Petitioner,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Respondent.

REPORT AND
RECOMMENDATION

05-C-606-C

This is an action for judicial review of an adverse determination of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). Plaintiff Kenneth Matzke appeals a final decision of the commissioner finding that he is not disabled and therefore ineligible for Supplemental Security Income under Title XVI of the Social Security Act, 42 U.S.C. §§ 1382, 1382c. Plaintiff contends that the decision of the administrative law judge who denied his claim at the administrative level is not supported by substantial evidence because it failed adequately to account for all of his limitations and because it rests on a faulty credibility determination. He asks this court to reverse the decision and remand the case to the commissioner for further proceedings under sentence four of § 405(g).

As explained below, I am recommending that this court affirm the commissioner. Substantial evidence in the record supports the ALJ's determination that plaintiff's impairments did not prevent him from performing a limited range of light work and that plaintiff's complaints to the contrary were not credible.

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)(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 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 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 him from performing past relevant work. If he 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

I. Procedural History

On September 27, 2001, plaintiff applied for Supplemental Security Income alleging that he had been disabled since April 1, 2000, as a result of chronic pain, herniated discs, glaucoma and hepatitis C. After the local disability denied his application initially and on reconsideration, plaintiff requested a hearing before an administrative law judge. This hearing was held on July 20, 2004 and plaintiff appeared with counsel. Plaintiff, a medical expert and a vocational expert testified. On October 1, 2004, the ALJ issued a decision finding that plaintiff retained the residual functional capacity to perform a limited range of simple, routine repetitive light work and that a significant number of jobs existed in the

regional economy that fit this profile; therefore, plaintiff was not disabled as defined in the Social Security Act. On September 30, 2005, the ALJ's decision became the final decision of the commissioner when the Appeals Council denied plaintiff's request for review.

II. Background and Medical Evidence

Plaintiff was born on June 30, 1961, making him 43 years old on the date of the ALJ's decision. He has a high school equivalency certificate and past work experience as a dietary aide, janitor and seasonal groundskeeper.

Medical records show that plaintiff has a history of back pain.[1] From 1994 to 1997, plaintiff was seen by various doctors at the St. Luke's Medical Center in Milwaukee for back pain concentrated in the lower thoracic and upper lumbar regions. Evaluation revealed diffuse disk bulging at the L4-L5 region but few abnormalities on clinical exam apart from some tenderness and spasming. Plaintiff was treated conservatively with physical therapy, epidural injections, chiropractor adjustments, a TENS unit and various medications, including Vicodin. Plaintiff reported that nothing helped except Vicodin, but his doctors responded that narcotics were not the long term solution for his back pain. AR 177, 180, 195, 206. Over time, plaintiff's doctors began to suspect that plaintiff's ongoing complaints were a means to obtain more of the drug. AR 177-206.

[1] In his application for disability benefits, plaintiff also alleged that he suffered from gastrointestinal problems, namely, frequent nausea and vomiting. In his decision, the ALJ found insufficient evidence that plaintiff suffered from any severe gastrointestinal impairment. Plaintiff does not challenge that finding in this appeal.

On October 10, 2000, plaintiff saw Dr. James Bearden for his back pain. Plaintiff reported that he had been having back problems for 13 years but things had worsened recently. Plaintiff said that he had been off of work since April 2000 when he was terminated from his building maintenance job. Plaintiff reported that for 1½ years prior to that, he had gone through a rehabilitation program but when he attempted to return to work, he had increased pain. AR 402. In addition to his back pain, plaintiff reported pain in his legs and intermittent numbness in his toes. AR 403.

An MRI scan on October 17, 2000 revealed central herniated disks at L4-L5 and L5-S1. AR 394. After examining plaintiff and reviewing the MRI, a neurologic surgeon determined that plaintiff should be treated non-surgically. AR 393. Plaintiff was diagnosed with discogenic low back pain and radiculopathy and was prescribed another course of physical therapy and epidural steroid injections. AR 381. Dr. Bearden prescribed Vicodin for only two months, explaining to plaintiff on December 15, 2000 that he needed to be switched to a less potent painkiller. AR 384. He prescribed Tylenol #3 but eventually that medication was discontinued as well. On March 16, 2001, a week after his third epidural injection, plaintiff reported that he no longer had any leg pain or numbness in his feet, and his physical examination was largely normal. Dr. Bearden discharged plaintiff from further care and indicated that he would complete a form for job training. AR 377.

Plaintiff moved from Milwaukee to the Adams-Friendship area. On September 27, 2001, he saw Dr. Robert Buss and reported that his long-standing low back and buttock pain

recently had increased. Plaintiff rated his pain as a 5 out of 5 but Dr. Buss noted that he "appeared somewhat comfortable." AR 485. Plaintiff had a normal gait and was able to walk on his toes and heels and get onto the examining table without difficulty. Straight leg raising was "minimally positive" in the left and plaintiff had somewhat decreased range of motion with forward flexion at the lumbar spine; otherwise, Dr. Buss detected no abnormalities. Dr. Buss prescribed Celebrex, Klonopin and Flexeril. AR 485.

At a follow up visit on October 4, 2001, plaintiff reported persistent mid-back pain with occasional twitching in the muscles in his left thigh. He also reported tiredness and difficulty sleeping at night. Examination was notable only for some tenderness to palpation in the thoracic spine muscles. Dr. Buss diagnosed a mid-thoracic and paraspinous muscle strain and recommended heat or a hot water bottle, plus continuation of plaintiff's medications. Dr. Buss also diagnosed depression, for which he prescribed trazodone. AR 484. On November 1, 2001, plaintiff continued to complain of "pain all over," but again Dr. Buss noted few abnormalities and was able to discern no discogenic features to plaintiff's pain. Dr. Buss referred plaintiff to physical therapy. He gave plaintiff a non-refillable Vicodin prescription but urged him to continue with his other medications. Dr. Buss noted that it was "[u]nclear as to whether patient will require Vicodin long-term, as this appears to be more of a musculoskeletal-type pain versus a neural neuropathic." AR 483.

Plaintiff participated in Division of Vocational Rehabilitation services from November 2001 to June 2002. From November 26, 2001 to January 3, 2002, he

participated in a situational work assessment. Plaintiff was supposed to work three days per week but the most he actually worked during any week was two days. Plaintiff had car trouble once and the rest of the time he called in sick. When he made it to work, plaintiff worked in the bindery and packaging areas. His employment manager observed that plaintiff learned jobs quickly, produced quality work, remembered steps from day to day, interacted pleasantly with coworkers and supervisors and was able to concentrate. However, she questioned plaintiff's motivation to work, noting that he had poor attendance and seemed to be looking for excuses to stay home. She observed that plaintiff erected "roadblocks" to employment such as limited job interests, lack of flexibility and no plans for childcare. She reported that plaintiff took little responsibility for his own behavior, noting that on one occasion plaintiff left early due to a stomachache that was caused by his failure to take one of his medications with food. AR 425-27.

On January 30 and February 19, 2002, Michael Nelson, Ph.D., performed a psychological examination of plaintiff at DVR's request. AR 275-280. Intelligence testing showed plaintiff's Verbal IQ as "Average" and his Performance IQ as "Low Average." Overall, plaintiff's cognitive functioning was in the low average range, although plaintiff had a learning disability in math and spelling and a borderline learning disability in reading. Plaintiff's responses to the Minnesota Multiphase Personality Inventory-2 were consistent with persons with a heightened level of anxiety, tension and depression, who tended to present dramatically and expressively, and to manifest emotional distress through physical

complaints for which medical etiology was uncertain. Nelson concluded that plaintiff suffered from dysthymia in addition to learning disabilities. Nelson indicated that plaintiff's medical limitations were his greatest impediment to employment, and that plaintiff "would likely be able to work adequately in an assembly line type position which does not require excessive lifting, standing, or bending." AR 280.

At a March 28, 2002 exam, Dr. Buss noted that plaintiff had quit physical therapy after two sessions. Physical examination was largely normal except for some positive straight leg raising on the left from a supine position. Dr. Buss noted that plaintiff's "[i]nconsistent exam concerns me, as does [his] refusal to comply with physical therapy." AR 258.

In June 2002 DVR closed plaintiff's file because he would not commit to looking for work. AR 127-28.

On July 25, 2002, Dr. Buss noted that plaintiff exhibited numerous pressure points that were tender to palpation, suggestive of fibromyalgia. Otherwise, plaintiff had normal range of motion and no spasm. Dr. Buss prescribed Celebrex, Prozac, nortriptyline, Klonopin and Vicodin. Again he referred plaintiff to physical therapy. Thereafter, plaintiff saw Dr. Buss every two to six months for check ups and prescription refills. Dr. Buss's diagnoses included fibromyalgia and depression. Despite cautioning plaintiff that "Vicodin is not usually part of the regimen for treating chronic pain," AR 531, Dr. Buss continued to prescribe it. AR 513-531.

On February 26, 2002 and September 30, 2002, state agency consulting psychologists reviewed plaintiff's file and concluded that although plaintiff suffered from an affective disorder, his condition was not "severe" as defined in the regulations. On September 25, 2002, a state agency consulting physician concluded from his review of the record that plaintiff was capable of performing work in the medium exertional category that required only occasional stooping. AR 466-469.

On February 16, 2004, Thomas Charles, a social worker, completed a mental impairment questionnaire on behalf of plaintiff. Charles indicated that plaintiff suffered from a major depressive disorder, recurrent, and alcohol dependence in early full remission. Charles indicated that he saw plaintiff once a month for an hour, although no records of such visits were provided. Charles opined that plaintiff had severe limitations in his ability to perform mental work-related tasks as a result of his depression and estimated that he would miss work more than three times a month. AR 492-97.

On February 18 and 20, 2004 plaintiff underwent a Functional Capacities Evaluation. AR 507-512. The evaluation showed that plaintiff was capable of sitting or standing for a total of eight hours a day, could sit continuously and stand for 30 and 15 minutes. Plaintiff could lift and carry 15 pounds frequently and 25 pounds occasionally. He could bend forward from a standing position only rarely and could bend from a sitting position occasionally (up to one third of the work day). The report stated that the bending limitations resulted from plaintiff's complaints of pain in his legs and back when performing

those activities. The report noted that plaintiff attempted to self-limit at times, and that plaintiff's pain complaints "appeared to be exaggerated at times and not always consistent with musculoskeletal exam." AR 507. Nonetheless, the evaluation was thought to be a valid indicator of plaintiff's work abilities.

On April 12, 2004, Dr. Buss completed a work ability questionnaire. AR 498-506. Dr. Buss noted that plaintiff suffered from an "ill-defined" myofascial pain syndrome for which there were little, if any, objective findings, either on exam or with imaging. Plaintiff's symptoms appeared most consistent with a "fibromyalgia-like" syndrome and depression because plaintiff was tender to palpation over the classic fibromyalgia pressure points and suffered from fatigue, insomnia and depression.

Dr. Buss did not answer either "yes" or "no" to the question whether plaintiff was a malingerer, noting that although he did not believe so, previous examiners did and malingering was very hard to document in a clinical setting. Dr. Buss declined to estimate plaintiff's work-related abilities, indicating that such questions could be answered by reference to the Functional Capacities Evaluation conducted in February 2004.

III. Hearing Testimony

At his July 20, 2004 hearing, plaintiff claimed to suffer daily pain often as intense as an 8 on a 10-point scale. He indicated that his daily activities consisted of chores around the house including laundry, mowing the lawn, sweeping and mopping, although he said had

to take 30 to 60 minute breaks to complete these activities. He testified that he was depressed, often remaining sleepless for three days followed by nearly constant sleep for two days. Plaintiff indicated that the April 2004 functional capacities evaluation was a fairly accurate estimate of his physical abilities, although he did not believe he had the stamina to work on a full time basis. He did not think he could hold a job because he lived in small town where the police knew "who to watch for" and he was afraid of being arrested for driving under the influence of narcotics. AR 566.

Dr. James Armentrout testified as a medical expert. From his review of the records and plaintiff's testimony, Dr. Armentrout opined that plaintiff suffered from an affective disorder. With respect to the "B" criteria of the listings for mental disorders, *see generally* 20 C.F.R., Pt. 404, Subpt. P, App. 1, 112.00 (describing commissioner's procedure for determining whether mental disorder meets listing), Dr. Armentrout opined that plaintiff's mental condition imposed a moderate degree of limitation on his activities of daily living, mild limitation on his social functioning, moderate limitation on his concentration, persistence and pace and no episodes of decompensation. He indicated that plaintiff would be able to comprehend and remember simple job instructions and work in proximity to others, although he plaintiff probably was unable to interact with the public except on a superficial level. Overall, Dr. Armentrout found plaintiff capable of performing simple, routine, low stress jobs. When asked by the ALJ whether there was evidence of malingering, Dr. Armentrout responded:

> That would be very difficult to say. Malingering is a rather negative accusatory label to give and I think it can affect the quality of care one receives after that. I think symptom magnification might well have been, might well have been present, certainly some secondary gain I think was referred to in the questions about his motivation for work, I think what you quoted from the ODC record. But I did not find any repeated statement of malingering, although again I think secondary gain and some magnification of symptoms in order to reduce responsibilities might well be there. But it would not be something that I would identify as a specific factor because I think one needs to be pretty sure about that. Needs to have pretty good evidence to make that type of accusatory diagnosis. But I think some exaggeration might well have been present and maybe I'm attempting to split some fine hairs there, I'm not sure.

Tr. 571-572.

Karl Botterbusch testified as a vocational expert. The ALJ posed a hypothetical in which he asked Botterbusch to assume an individual of claimant's age and education, who occasionally could lift 20 pounds and frequently lift 10 pounds, stand or sit about six hours each in an 8-hour workday, had to change positions from sitting to standing every 30 minutes and could perform only simple, routine, repetitive work that required only occasional interaction with the public and no team activities with coworkers. Botterbusch testified that such limitations would prevent an individual from performing plaintiff's past relevant work but that such an individual could perform the jobs of photocopy machine operator, electronics worker and light and small product assembly. When asked what effect an additional limitation of no forward bending from a standing position would have on those jobs, Botterbusch testified that such a limitation would eliminate the photocopy machine

operator jobs and would substantially reduce the electronics and assembly jobs. He also testified that if plaintiff had no effective ability to maintain attendance and punctuality or deal with normal work stresses, he could not perform any job.

IV. The ALJ's Decision

In his written decision, the ALJ followed the commissioner's five-step process for evaluating disability claims. At step one, he found that plaintiff had not engaged in substantial gainful activity after his alleged onset date. At step two, the ALJ questioned whether the evidence was sufficient to demonstrate the existence of any severe impairment, pointing to the dearth of objective medical findings and to various records, including the DVR records, Dr. Armentrout's testimony and the FCE report, suggesting that plaintiff's subjective complaints were exaggerated and motivated by secondary gain or a desire to obtain narcotics. In spite of his skepticism, however, the ALJ found that plaintiff had the following "severe" impairments: a back impairment with myofascial pain, depression and a possible learning disorder. At step three, he found that none of plaintiff's impairments, either singly or in combination, were severe enough to meet or medically equal the criteria of any "listed" impairment.

At step four, the ALJ assessed plaintiff's residual functional capacity and determined that he retained the capacity for simple, routine, repetitive light work if he could change positions every 30 minutes and limit his interaction with the public and coworkers. The ALJ rejected plaintiff's complaints of severe pain and fatigue, finding that plaintiff was "not a

credible witness." AR 22. In so finding, the ALJ noted that plaintiff's complaints were not supported by the objective findings, that plaintiff had "frequently failed physical therapy" and that he had "admitted to a history of repeated jail placement." *Id*.

At step four, the ALJ found that plaintiff was unable to meet the exertional demands of his past work. On the basis of the vocational expert's testimony, however, the ALJ found at step five that a significant number of jobs existed within plaintiff's residual functional capacity that he could perform, namely, over 20,000 assembly jobs in the immediate contiguous area. As a result, the ALJ declined to award benefits to plaintiff.

The ALJ's decision became the final decision of the commissioner when the Appeals Council declined to review plaintiff's claim.

ANALYSIS

I. Standard of Review

In a social security appeal brought under 42 U.S.C. § 405(g), this court does not re-evaluate 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 an 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).

As for credibility determinations, an ALJ is best positioned to determine a witness's truthfulness, and courts may not overturn an ALJ's credibility determination unless it is "patently wrong." *Briscoe ex rel. Taylor v. Barnhart*, 425 F.3d 345, 354 (7th Cir. 2004). A court should affirm an ALJ's credibility finding if the ALJ gives specific reasons for the finding that are supported by the record. *Brindisi ex rel. Brindisi v. Barnhart*, 315 F.3d 783, 787 (7th Cir. 2003).

II. Fibromyalgia/Credibility

Plaintiff first contends that the ALJ ignored significant evidence and committed reversible error when he failed to include fibromyalgia as one of plaintiff's impairments. According to plaintiff, in fibromyalgia cases, an ALJ is required to give "special consideration" to plaintiff's subjective complaints and may not discredit them merely because of a lack of objectively discernible clinical findings. Plaintiff argues that the ALJ violated this rule when he rejected plaintiff's subjective complaints on the ground that they were not supported by the objective medical evidence.

It is true that because fibromyalgia is a disease for which there are no purely objective diagnostic tests, *see Sarchet v. Chater*, 78 F.3d 305, 307 (7th Cir. 1996), an ALJ may not reject a disability application in which fibromyalgia is the claimed impairment on the ground that the claimant failed to produce objective evidence of a medically determinable impairment. Memorandum, *Fibromyalgia, Chronic Fatigue Syndrome, and Objective Medical Evidence Requirements for Disability Adjudication*, May 11, 1998, attached to Pltf.'s Brief, dkt. 7. This rule also applies to other conditions for which there are no objective diagnostic tests, such as chronic fatigue syndrome, migraine headaches and mental illnesses. *See Carradine v. Barnhart*, 360 F.3d 751, 753 (7th Cir. 2004) ("Pain, fatigue and other subjective, unverifiable complaints are in some cases the only symptoms of a serious medical condition.") (quoting *Cooper v. Casey*, 97 F.3d 914, 917 (7th Cir. 1996)). Even so, the ALJ is permitted to consider a discrepancy between the medical evidence and a plaintiff's subjective complaints as a factor tending to undermine

the plaintiff's credibility. It just can't be the *only* factor. *See, e.g., Powers v. Apfel*, 207 F.3d 431, 435 (7th Cir. 2000) (upholding ALJ's determination in fibromyalgia case that plaintiff's credibility was undermined by discrepancy between degree of pain claimed and that suggested by medical evidence).

The ALJ in the instant case did not violate this rule. As an initial matter, it is unclear whether plaintiff actually has fibromyalgia. Although some of Dr. Buss's records suggest that he diagnosed plaintiff with fibromyalgia, his work ability questionnaire described plaintiff's condition as an "ill-defined" myofascial pain syndrome that was "fibromyalgia-like." AR 498. This supports the ALJ's conclusion that plaintiff has myofascial pain syndrome and not fibromyalgia. Although the term "myofascial pain syndrome" often is used interchangeably with fibromyalgia, Dr. Buss's description of plaintiff's condition as "fibromyalgia-like" suggests that he did not intend to use the terms synonymously. *See* http://www.merck.com/mmhe/index.html (search term: "Fibromyalgia").

But let's assume, *arguendo*, that myofascial pain syndrome is a medically determinable impairment for which there are no objective tests to verify the claimant's symptoms and that therefore, the ALJ was required to consider other factors when evaluating plaintiff's credibility. The ALJ did this. Although the lack of objective abnormalities that might explain plaintiff's allegedly debilitating pain and fatigue clearly played a role in the ALJ's decision, the absence of such evidence was only one of several factors upon which the ALJ relied to conclude that plaintiff was unbelievable. The ALJ also relied upon records from the Division of Vocational

Rehabilitation reporting that plaintiff was not motivated by work, by reports from plaintiff's past physicians that his pain complaints might be focused on getting narcotics, by results of the MMPI-2 indicating that plaintiff fit the profile of a person who tended to overstate physical complaints, by notations on the FCE that plaintiff tended to self-limit and exaggerate pain, by Dr. Armentrout's testimony that plaintiff appeared to magnify his symptoms, by plaintiff's failure to complete physical therapy, and by plaintiff's repeated jail placement.

Plaintiff argues that some of the ALJ's findings mischaracterize the record while others depend on faulty inferences. Plaintiff posits that: Dr. Armentrout actually was *reluctant* to label him a malingerer; his doctors continued to prescribe narcotics for him even *after* noting their suspicions that he was trolling for drugs; the FCE was thought to be a valid measure of his abilities notwithstanding notations indicating that he might have exaggerated his complaints; and, the record does not support the conclusions that he "frequently" failed physical therapy or that he was "repeatedly" incarcerated. In addition, plaintiff argues that the ALJ should have inferred that the attendance problems that led DVR to question his motivation to work were a function of his depression and that the results of the MMPI-2 actually supported his claim of a disabling condition.

Having considered each of these arguments in light of the record as a whole, and given the deference that this court must accord to the ALJ's credibility findings, I conclude that the ALJ's credibility determination is not based upon any significant error of fact or logic. For the most part, plaintiff is challenging the manner in which the ALJ weighed and interpreted the

evidence. But this sort of a challenge isn't enough to overturn the ALJ's decision. Pursuant to the substantial evidence test, this court must defer to the ALJ's choice among the competing inferences so long as that choice was reasonable. Here, the record contained red flags that would alert any reviewer to approach skeptically plaintiff's claim of disability. First, the DVR records questioned plaintiff's motivation to work and documented his abysmal attendance record. Also, medical records suggested that plaintiff's complaints might be a disguised attempt to obtain drugs.[2] Although plaintiff's explanations for the damaging evidence are plausible, after seeing and hearing plaintiff testify, the ALJ determined that the staff and counselors at DVR and plaintiff's doctors had accurately assessed plaintiff's motives and character. This was the ALJ's prerogative. Because the ALJ observed plaintiff testify, cited evidence from the record in support of his credibility finding, and drew supportable inferences therefrom, this court must affirm the credibility determination.

Plaintiff argues that the ALJ's credibility determination cannot stand because it does not discuss each of the credibility factors outlined in Social Security Ruling 96-7p, which provides that an ALJ must consider the claimant's daily activities, treatment record, efforts to alleviate pain, pain medications and other factors. True, the Seventh Circuit has held that "an ALJ must comply with the requirements of Social Security Ruling 96-7p" insofar as the ALJ must make clear his reasons for finding a claimant's subjective complaints not credible and

[2] Also noteworthy is plaintiff's abysmal adult work history, which consisted of a six-year stint as a worker in a VA Hospital cafeteria, sporadic seasonal work in the state park system and one year performing building maintenance as a part of a state welfare-sponsored rehabilitation program.

must link that finding to relevant evidence in the record, *see Brindisi*, 315 F.3d at 787, however SSR 96-7p contains no requirement that the ALJ must *discuss* all of the factors in his decision. It is well-settled that an ALJ need not provide a written evaluation of every piece of evidence in the record. *Clifford v. Apfel*, 227 F.3d 863, 872 (7th Cir. 2000). *See also Jens v. Barnhart*, 347 F.3d 209, 213 (7th Cir. 2003) (mere omissions in credibility determination did not warrant remand where record provided adequate support for credibility determination).

At the same time, however, the ALJ may not "select and discuss only that evidence that favors his ultimate conclusion." *Id*. at 871. Plaintiff accuses the ALJ of violating this rule, because the ALJ never considered that plaintiff consistently sought treatment for back pain and underwent various types of treatment, including trigger point injections, use of a TENS unit and physical therapy, not to mention that his doctors prescribed various medications including narcotics. Often omissions like these would result in remand to the commissioner for another look. *See, e.g., Carradine*, 360 F.3d at 755 (plaintiff's history of exhaustive and extensive treatment tended to support his pain complaints). In this case, however, the ALJ did not err by failing to discuss more thoroughly plaintiff's treatment history because the ALJ reasonably determined that plaintiff's complaints of pain were unbelievable based on positive evidence in the record suggesting that plaintiff's efforts to obtain treatment were motivated by secondary gain and his complaints of pain were exaggerated. *See, e.g., Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993) (ALJ need not make specific findings in support of credibility finding if there is evidence affirmatively suggesting that claimant was malingering).

In sum, although the ALJ relied in part on the absence of significant objective abnormalities as a basis for rejecting plaintiff's claim, his decision reveals that he did not rely exclusively on that factor, but instead properly considering whether plaintiff's complaints of disabling pain nonetheless were credible. In concluding that they were not, the ALJ properly relied on evidence indicating that plaintiff's pursuit of medical treatment and social security benefits likely was motivated by his desire to avoid work and/or to obtain drugs. Although this is not the only conclusion the ALJ could have drawn, it was not unreasonable. Moreover, it is worth noting that the ALJ did not reject plaintiff's complaints wholesale; to the contrary, he assigned plaintiff a rather restrictive residual functional capacity by concluding that he could perform only simple, routine, repetitive light work allowing for a sit-stand option.

V. Plaintiff's Residual Functional Capacity and the Resulting Hypothetical

Plaintiff's remaining contentions all go to the adequacy of the ALJ's assessment of his residual functional capacity and the corresponding hypothetical question to the vocational expert. It is well-settled that a vocational expert's conclusion that a claimant can adjust to other work cannot stand unless the expert is presented with a hypothetical that includes all of the limitations that are supported by the record. *Young v. Barnhart*, 362 F.3d 995, 1005 (7th Cir. 2004).

First, plaintiff contends that the ALJ's RFC assessment should have included a limitation on his ability to bend, which is synonymous with stooping. Plaintiff points out that

the FCE indicated that plaintiff only occasionally could bend while sitting, and could seldom bend while standing. Plaintiff argues that such limitations would compromise his ability to perform the assembly jobs identified by the vocational expert. Plaintiff also argues that the ALJ was required to give "controlling weight" to all of the findings on the FCE because they were adopted by Dr. Buss, his treating physician. *See* 20 C.F.R. § 416.927(d)(2) (commissioner will give controlling weight to findings of treating physician if they are well-supported and not inconsistent with other substantial evidence in record). According to plaintiff, it is not clear from the ALJ's decision that he considered the limitations on the FCE at all, much less why he rejected the report's finding (and Dr. Buss's endorsement) that plaintiff is limited in his ability to bend.

I disagree. Although the ALJ's decision is not a paradigm of clarity, it is sufficiently clear that he considered the FCE and accepted it insofar as it indicated that plaintiff generally could perform work in the light to medium range. Moreover, I agree with the commissioner that it is reasonable to infer that the ALJ did not adopt the report's more restrictive limitations because they were based on plaintiff's subjective complaints, which the ALJ rejected. Notably, the therapist who administered the FCE reported that plaintiff's ability to bend while seated or standing was limited by complaints of pain and "pulling" in his back. Given the ALJ's reference to the note on the report that plaintiff's pain complaints sometimes were out of line with the musculoskeletal exam, and given the other indicators that plaintiff tended to exaggerate his symptoms, the ALJ had a reasonable basis to conclude that plaintiff was not limited in his ability to stoop.

Moreover, plaintiff has adduced no evidence showing that an occasional limitation on his ability to bend would prevent him from performing the electronics assembly or small products assembly jobs identified by the vocational expert. According to one authoritative source, stooping is not required in these occupations. *Dictionary of Occupational Titles* (Fourth Ed. 1991) 706.684-022. *Accord* SSR 83-10 ("The lifting requirement for the majority of light jobs can be accomplished with occasional, rather than frequent, stooping."). Although the vocational expert's testimony appears to diverge from the *DOT* to the extent he testified that some bending was required, he was asked only to assume that plaintiff was limited to bending no more than five percent a day; he was never asked what effect a limitation to "occasional" bending would have on the relevant job base. Given the *DOT*'s description of the physical requirements of the jobs identified by the vocational expert and plaintiff's failure to adduce evidence showing that a restriction to occasional bending would preclude him from performing those jobs, remand is not warranted.

Next, plaintiff complains that the ALJ erred in rejecting the report from his therapist, Thomas Charles, which indicated that plaintiff had several marked limitations in his ability to perform work-related mental tasks. The ALJ dismissed Charles's report, noting simply that there seemed "little to sustain this layperson's opinion." AR 21. Plaintiff argues that although it might have been proper for the ALJ to reject Charles's diagnosis and assessment of the severity of plaintiff's mental condition on the ground that Charles was not a medical source, Charles was qualified to offer an opinion of plaintiff's mental residual functional

capacity. *See* 20 C.F.R. § 416.913(d) (explaining that therapist is not acceptable medical source to establish impairment, but can provide information showing effects of impairment).

Even accepting plaintiff's contention that the ALJ could not dismiss Charles's report simply because he was not a "medical source," a fair reading of the ALJ's opinion indicates that he did not disregard it solely for this reason. The ALJ noted that there was "little" to support Charles's assessment, contrasting it with Dr. Nelson's report, which found that plaintiff had dysthymia (a mild form of depression) and a possible learning disorder, and with the opinion of the agency consulting psychologist, who concluded that plaintiff did not have any severe mental impairment. As the commissioner observes, Dr. Nelson, a licensed psychologist, concluded that despite his mental limitations plaintiff could perform jobs such as assembly work. In light of the other substantial evidence indicating that plaintiff's mental limitations were much less severe than reported by Charles, as well as the lack of any contemporaneous notes or documentation to support Charles's opinion, the ALJ was justified in rejecting his report.

Plaintiff notes that Dr. Nelson reported that "[s]peed of performance is likely to be a limiting factor, as are concentration and attention to detail," then argues that it was improper for the ALJ to credit Dr. Nelson's report without also accounting for this finding. However, in the next line of his report, Dr. Nelson opines that plaintiff could perform assembly work; this indicates that plaintiff's limitations in speed and concentration were not so severe as to preclude him from such jobs. Perforce, Dr. Nelson's report does not

undermine the ALJ's ultimate conclusion that plaintiff was capable of performing a substantial number of assembly jobs.

Finally, plaintiff argues that the ALJ's limitation in the RFC and hypothetical to "simple, routine, repetitive work" was not sufficient to capture the ALJ's finding when assessing plaintiff's impairment severity that plaintiff had mild-to-moderate limitations in concentration, persistence and pace. As the commissioner points out, however, the ALJ's conclusion is supported by the testimony of Dr. Armentrout, who testified that plaintiff could perform simple, routine work even though he was "moderately" limited in the functional category of concentration, persistence and pace. When a medical expert translates his findings on the "B" criteria of the listings to a specific residual functional capacity assessment, as Dr. Armentrout did here, the ALJ may reasonably rely on that opinion in formulating his hypothetical question. *Johansen v. Barnhart*, 314 F.3d 283, 288 (7th Cir. 2002).

CONCLUSION

Having reviewed the administrative record and having considered all of plaintiff's challenges to the commissioner's decision, I find no reason to change the outcome. There were no factual or procedural errors that would militate toward reversal or remand.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that this court affirm the decision of the commissioner denying plaintiff Kenneth Matzke's application for Supplemental Security Income.

Entered this 23rd day of May, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

May 23, 2006

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Re: Matzke v. Barnhart
Case No. 05-C-606-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 June 13, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by June 13, 2006, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge