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

DANIEL WALL,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

REPORT AND
RECOMMENDATION

06-C-103-C

REPORT

Daniel Wall brings this action for judicial review of an adverse decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). Plaintiff filed applications for disability insurance benefits and supplemental security income in September 2004, alleging that as of March 26, 2004 he was disabled by a back impairment. On September 20, 2005, after a hearing at which plaintiff, a medical expert and a vocational expert testified, an administrative law judge issued a decision finding plaintiff not disabled. That decision became the final decision of the commissioner when the Appeals Council denied plaintiff's request for review. Plaintiff has filed a motion for summary judgment, contending that the ALJ's decision was based upon a number of factual inaccuracies and upon speculation about plaintiff's future medical condition. In addition, plaintiff contends the

ALJ failed to afford proper weight to the opinion of plaintiff's back surgeon, Dr. McDonnell, and concluded erroneously that plaintiff's subjective complaints were not entirely credible.[1]

The only of these arguments that is persuasive is plaintiff's contention that the ALJ's decision is not supported by substantial evidence because it rest on speculative testimony from the non-examining medical expert concerning when plaintiff would recover fully from his surgery. As explained below, this issue presents a close call because plaintiff has not presented any evidence to refute the ALJ's conclusion that plaintiff would be released to full time work by September 2005. In the end, I recommend making this call in favor of plaintiff and remanding the case to the Social Security Administration for the limited purpose of developing the record on this point. In all other respects, the ALJ's decision is supported by substantial evidence in the record and reflects a proper application of the relevant regulations.

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[1] As is his practice, plaintiff's attorney has submitted prodigious briefs: 77 pages for the opening brief and 29 pages for the reply. This extraordinary page-length results in large part from counsel's use of above-average large font size, wider page margins and lengthy block-quotes from the ALJ's decision, various regulations and rulings.

Briefs of this nature are unwieldy and unhelpful to the court. This court has no specific rules or procedures governing the length or format of submissions, but it can invoke the rule of reason. In future cases, Attorney Duncan must reformat his briefs to incorporate double-spacing (except for block quotes), one-inch margins and a typeface not exceeding 12-point font. Counsel should avoid quoting at length from the ALJ's decision or the commissioner's regulations, which are easily accessible to the court. It is sufficient (and preferrable) to paraphrase the source or simply cite to it.

Finally, counsel should proofread his briefs more carefully. *See*, *e.g.*, Br. in Supp. of Mot. for Sum. Judg., dkt. 9, at n.1 (largely duplicating text at 15-16); Plt.'s Reply Mem., dkt. 12, at 1 (contending that ALJ made "sentimental" errors of fact) and 5 (stating that "the justification for remand because patient").

The following facts are drawn from the administrative record:

FACTS

I. Background and Medical Evidence

Plaintiff was 48 years old on the date of the ALJ's decision. He has a high school education and past work experience as a route driver, customer service representative, and building maintenance worker.

In March 2004 plaintiff injured his back at work while working as a route driver for a vending company. Plaintiff reported to the emergency room, complaining of pain in the left lower back and shooting down the left leg past the knee. Plaintiff was tender over the left sciatic notch but showed no motor weakness. X-rays revealed a Grade 1 spondylolisthesis at L5-S1 with associated disc space narrowing consistent with degenerative disc disease.[2] The emergency room physician diagnosed lumbar strain with radicular symptoms but no motor weakness. He recommended that plaintiff perform back exercises and stay off work for a few days until he could be evaluated by his primary care physician. He also prescribed ibuprofen and Vicodin. AR 134-35.

Three days later, plaintiff saw Steve A. Bowman, D.O., an occupational health specialist. Plaintiff reported that he had pain in his left low back radiating into his buttock

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[2] Spondylolisthesis is a condition where the vertebra slips out of place and slides forward, backwards or to the side. If too much slippage occurs, the bones can press on the nerves and spinal cord. *See* http://dukehealth1.org/surgery/spondylolisthesis.asp.

and the back of his left leg. Plaintiff said the pain was making it difficult for him to stand, sit or lie down. During his physical examination of plaintiff, Dr. Bowman detected some spasms in plaintiff's back and plaintiff reported pain with certain movements. Otherwise, examination was essentially normal, with plaintiff demonstrating normal muscle strength and reflexes. Dr. Bowman assessed low back strain. He noted that plaintiff's x-ray results were of some concern and that he intended to watch plaintiff for neurological deficits. AR 221. He prescribed a muscle relaxer and referred plaintiff to physical therapy. AR 222.

On March 31, 2004, Dr. Bowman saw plaintiff again. Plaintiff reported that he was still in pain and that to alleviate it, he needed to alternate his activities continually. Dr. Bowman noted that plaintiff had "fairly significant" evidence of muscle spasm with certain motion and that plaintiff was limited greatly in his range of motion because of stiffness and fear of pain. Dr. Bowman still thought plaintiff's injury was muscular in nature with no neural impingement. However, because plaintiff was in so much pain despite medication, Dr. Bowman recommended an MRI. AR 217.

On April 7, 2004 Dr. Bowman reviewed the MRI results with plaintiff. Although the MRI showed some "broad-based" bulges at L5-S1 and L4-5 and a fair amount of degenerative disease, Dr. Bowman found no evidence of any neural impingement and continued to suspect that plaintiff's pain was the result of a muscular injury. Dr. Bowman indicated that plaintiff could return to work on a light-duty basis and that plaintiff's employer had such work available for him. However, plaintiff resisted the idea of returning

to work. Dr. Bowman noted his suspicion that plaintiff was having problems with his employer and that those problems were "significantly feeding" into plaintiff's continued reports of pain. Dr. Bowman indicated that he was "very uncomfortable" with plaintiff's behavior and that a referral to psychiatry or psychology might be appropriate. AR 211-12.

A week later, Dr. Bowman reported that he had seen plaintiff and that plaintiff had been "very disgruntled" during the visit. Plaintiff accused Dr. Bowman of conspiring with the insurance company or plaintiff's employer to make him work despite his pain. Dr. Bowman noted that individuals with "much stronger physical findings of true low back injury" were able to return to work and that plaintiff could return to light duty without exacerbating his pain if he followed the restrictions set out by Dr. Bowman. Dr. Bowman noted that during a previous visit, plaintiff had indicated that he was able to clean out his shed at home without aggravating his pain too much. Dr. Bowman and plaintiff agreed that plaintiff should seek a second opinion. AR 208-09.

On April 26, 2004 Plaintiff saw Dr. Mark Brumm. Plaintiff reported that he had attempted to return to light duty work putting sandwich meat in buns but even that limited activity caused pain. AR 142. After examination, Dr. Brumm assessed low back pain with radicular component and recommended an EMG evaluation to confirm left leg radiculopathy. AR 143-44.

On April 29, 2004, plaintiff saw Sylvia G. Mustonen, D.O. AR 178-80. Plaintiff explained that he had received two contradictory opinions concerning surgery: Dr. Stevens

told him he had a surgically correctable problem but Dr. Bowman told him that surgery was not indicated. On examination, plaintiff appeared uncomfortable, especially while sitting. Plaintiff had normal range of motion in his extremities, but very limited range of motion in his spine. Dr. Mustonen referred plaintiff to a Dr. McDonnell, neurosurgeon.

On May 11, 2004, plaintiff saw Matthew Zimmerman, Dr. McDonnell's assistant. After reviewing the MRI, examining plaintiff and conferring with Dr. McDonnell, Zimmerman indicated that plaintiff might benefit from a laminectomy with posterior fusion at L4, L5-S1. Plaintiff said he would prefer to pursue more conservative options before undergoing surgery, so Zimmerman recommended physical therapy and pain relievers. Zimmerman indicated that plaintiff could return to work but should avoid lifting more than 10-15 pounds, bending or twisting, and should change position frequently. AR 178.

On May 14, 2004, plaintiff was seen by Robyn Barclay, a physician's assistant who specialized in physical medicine and rehabilitation. Plaintiff told Barclay that he had tried to return to work but that his employer had not honored his restrictions, in that the light duty work he was given still involved twisting and bending and sitting for long periods of time on a bar stool that was at the wrong height. AR 175. Barclay recommended that plaintiff attempt to obtain relief for his pain through an epidural injection, noting that his prior attempts at pain relief through medications failed because of side effects. Barclay continued plaintiff's light duty restriction, noting that he should be allowed to alternate

tasks and change positions as needed. She restricted plaintiff to working only 4-6 hours a day until he saw Barclay again in two weeks. AR 176.

At his June 21, 2004 follow up visit with Barclay, plaintiff reported that he had not returned to work out of concern that his employer would not honor his work restrictions. Plaintiff continued to complain of pain in the low back and down the left leg, with some numbness in the left foot. Plaintiff had had two epidural injections but neither had provided any long-lasting pain relief. Plaintiff had been to physical therapy only four times but was pursuing pool therapy on his own. According to Barclay's notes, the physical therapist reported that plaintiff had a very exaggerated response to activity and that all mechanical testing of plaintiff had produced pain and increased symptoms. On physical examination, plaintiff was able to rise from a seated position and heel and toe walk without difficulty. At times, he walked favoring his left leg but at other times he did not. Back range of motion was restricted. AR 169. Barclay felt that plaintiff had no frank weakness. Reflexes were positive and equal. Barclay continued the work restrictions she had issued previously and prescribed neurontin. AR 170.

At a July 30, 2004 visit with Dr. Nelson, plaintiff reported continued pain. Plaintiff had not returned to work and had not tried the neurontin. Plaintiff indicated that he did not want to pursue medications or neuropsychology, but wanted a second opinion regarding surgery. Dr. Nelson indicated that plaintiff could return to light work that allowed him to

alternate tasks and change positions as needed and that required no bending or frequent twisting. AR 168.

On August 6, 2004, Julie Stansfield called plaintiff's doctor's office on behalf of plaintiff's employer. Stansfield informed nurse Judith Schmitz that even though plaintiff's employer had made every effort to accommodate plaintiff's work restrictions, plaintiff had raised various complaints and ultimately failed to show up for work. Stansfield said the company had sent plaintiff certified letters notifying him that they had work available for him and asking him to come back; however, plaintiff never responded to these letters or returned his employer's phone calls. Also, he failed to show up twice for scheduled independent medical examinations. Stansfield reported that as a result of plaintiff's noncompliance, the company had suspended plaintiff's workers compensation benefits. AR 167.

On August 27, 2004, plaintiff saw Dr. McDonnell, the neurosurgeon. Dr. McDonnell noted that plaintiff's gait was normal and he was "basically intact neurologically." AR 165. Dr. McDonnell recommended back surgery to correct plaintiff's spondylolisthesis, annular tear and degenerative disc disease. AR 166.

In November 2004, plaintiff saw Stephen E. Barron, M.D., for an independent medical examination in connection with his worker's compensation claim. AR 227-34. On examination, plaintiff demonstrated reduced range of back motion while standing but was able to sit on the examining table with his back at ninety degrees to his legs. Sensory

examination of both legs was normal with excellent strength and positive and equal reflexes. Dr. Barron detected no areas of acute tenderness or evidence of spasm. Dr. Barron reviewed the x-rays and determined that plaintiff had a pre-existing grade 1 spondylolisthesis at L5-S1 that he had temporarily aggravated when he fell at work. Dr. Barron gave the opinion that plaintiff's fall caused at most a soft tissue sprain that should have resolved in three months and which did not alter permanently his pre-injury condition. Dr. Barron expressed his view that plaintiff had developed subjective pain and symptom magnification and that he was capable of working without any restrictions. In a supplemental report, Dr. Barron offered the opinion that, until June 26, 2004, plaintiff could have performed work requiring him to lift five pounds continuously and ten pounds frequently. AR 235. The doctor further opined that, because of the lack of objective findings, plaintiff's restrictions could have been lifted as of June 26, 2004, three months after plaintiff's fall at work. AR 236.

On January 13, 2005, Dr. McDonnell performed a fusion and laminectomy of plaintiff's spine at L4-S1. Plaintiff continued to report pain and numbness after the surgery. Approximately six months after the surgery, in June 2005, plaintiff told Dr. McDonnell that his pain was worse than it had been before the surgery. AR 191. Plaintiff reported that he was not able to perform his usual activities and was having a hard time maintaining his tree farm, although he was able to do some gardening. Dr. McDonnell determined from his examination of plaintiff that plaintiff had good strength throughout and his gait was normal. X-rays showed that the fusion construct was aligned properly and in "excellent position."

Dr. McDonnell noted that, because plaintiff continued to complain of back pain five months after the surgery, he was likely to remain symptomatic. Dr. McDonnell advised plaintiff that he should change careers and pursue any recommendations made by the vocational rehabilitation consultant. AR 192. He referred plaintiff to physical therapy.

On June 17, 2005, Dr. McDonnell reported to plaintiff's employer that plaintiff was totally disabled as a result of severe pain. Dr. McDonnell indicated that plaintiff was to follow up with him on August 29, 2005 and attend physical therapy. AR 241.

On June 28, 2005, plaintiff had an initial physical therapy evaluation. Plaintiff told the therapist that plaintiff could "mow lawns some" and walk a half-mile to a mile a day, depending on how he felt. Plaintiff was unable to tolerate most of the physical therapy evaluation because of pain. AR 204.

On June 30, 2005, Dr. McDonnell completed a form for the Department of Vocational Resources indicating that plaintiff was able to return to part time (4 hours a day) light work with restrictions on repetitive bending and twisting. Dr. McDonnell explained that in spite of the January 2005 surgery, plaintiff continued to have back spasms, low back pain, and occasional leg pain. AR 237. Dr. McDonnell indicated that plaintiff was to continue physical therapy and avoid repetitive bending or lifting. He indicated that plaintiff's restrictions were temporary until "further recovery." AR 240.

II. Hearing Testimony

On August 22, 2005 the ALJ held an administrative hearing. Plaintiff testified that he was unable to work because of constant pain in his back that traveled down his left leg and foot. AR 261. Plaintiff reported that he continually changed positions to alleviate the pain. He estimated that he could sit at most 15 minutes or stand at most 20 minutes before he would have to change positions. He could walk for about fifteen minutes at a time. Plaintiff doubted that he could lift up to 10 pounds, at least not on a repetitive basis. He denied being able to perform even a job that accommodated his physical limitations because of constant pain, tiredness and side effects from medication, which made him groggy and resulted in increased bowel movements. AR 265-67.

Plaintiff testified that he was living with a female friend who helped him with things like bathing and tying shoes. He testified that his daily activities consisted of simple tasks like watering flowers or washing an occasional dish or two. He said he did very little in terms of housework or cooking. He went out alone for walks occasionally. Plaintiff said he wore an elastic back brace and sometimes a hard brace.

Plaintiff testified that he had attended physical therapy but it had made his symptoms worse. According to plaintiff, the physical therapist referred him back to Dr. McDonnell, who told plaintiff to stop attending physical therapy. Plaintiff said he had a follow-up appointment with Dr. McDonnell scheduled for a week after the hearing.

Andrew Steiner, M.D., a specialist in physical medicine, testified as a medical expert AR 281-88. Dr. Steiner stated that his review of the record led him to conclude that plaintiff had degenerative disk disease at two levels in the spine that did not impinge on any nerves. According to Dr. Steiner, the fusion was performed to correct the disk disease and, based on medical examinations, had been "technically" successful in that the hardware was in good position and plaintiff had good strength in his lower extremities and normal gait.

Dr. Steiner testified that the typical recovery period from fusion surgery was around six to nine months. In Dr. Steiner's opinion, plaintiff would be unable to perform even sedentary work during this recovery period. Except for that recovery period, however, Dr. Steiner concluded that plaintiff would be able to perform work at the sedentary exertional level that involved no more than occasional bending, twisting, stooping, kneeling, crawling, crouching or stair climbing and that allowed plaintiff to change positions for brief periods on an hourly basis.

Addressing Dr. McDonnell's June 30 report, Dr. Steiner testified that although he agreed that plaintiff might only have been able to work four hours a day in June, "generally one would expect that that would expand to full-time within a year of the surgery." AR 285. Later, Dr. Steiner clarified this statement, explaining that he would expect plaintiff to be able to perform full-time, sedentary work by September 2005. AR 287.

Richard Wallette testified as a vocational expert. AR 288-93. The ALJ posed a hypothetical question, asking him to assume an individual of the same age, education, and

past work experience as plaintiff; who could perform sedentary work with an opportunity to change positions every hour; who could only occasionally bend, twist, stoop, kneel, crouch, crawl, climb, or perform overhead work; and who was limited to unskilled work. Wallette testified that although such an individual would be unable to perform plaintiff's past relevant work, he could perform the jobs of non-public service security guard (1,400 regional jobs); office helper (6,400 regional jobs); and information clerk (1,000 regional jobs). AR 291-92.

III. The ALJ's Decision

On September 20, 2005, the ALJ issued a decision finding that plaintiff was not disabled. Applying the commissioner's five-step process for evaluation disability claims, *see* 20 C.F.R. § 404.1520, the ALJ first determined that plaintiff had not engaged in substantial gainful activity after his alleged onset date. At step two, the ALJ found that plaintiff had severe impairments: degenerative disc disease of the lumbar spine with spondylolysis with fusion and laminectomy in January 2005. At step three, the ALJ found that plaintiff's impairments were not severe enough to meet or medically equal one of the impairments presumed to be disabling at Appendix 1, Subpart P, Regulations No. 4 (the Listings).

Before addressing step four, the ALJ determined plaintiff's residual functional capacity. She found that plaintiff retained the capacity for unskilled sedentary exertional level work with a change of position for a brief period of time after 60 minutes, and only

occasional bending, twisting, stooping, kneeling, crouching, crawling, climbing and overhead work. AR 18. In reaching this conclusion, the ALJ considered plaintiff's reports of disabling pain and other symptoms, reciting portions of his testimony in her decision. She found that although plaintiff's impairments could reasonably be expected to produce the kinds of symptoms plaintiff reported, his statements "concerning the intensity, duration and limiting effects of these symptoms are not entirely credible." AR 19.

The ALJ first discussed evidence related to the time period from plaintiff's alleged onset date in March 2004 until his surgery. Reviewing the medical evidence, she noted that plaintiff had been treated conservatively with medication, physical therapy and epidural injections; Dr. Bowman had indicated that plaintiff could tolerate light duty work and had noted that plaintiff had been able to clean out his shed; and Dr. Barron had detected few abnormalities when he examined plaintiff, opined that plaintiff could perform light work and attributed his continuing pain to symptom magnification. The ALJ indicated that she was giving significant weight to Dr. Barron's opinion and to that of Dr. Steiner regarding plaintiff's residual functional capacity "because they are supported by physical examinations in the record and diagnostic test results and give some degree of credit to the claimant's reports of ongoing pain and limited mobility;" moreover, Dr. Steiner was a specialist in physical medicine and had reviewed the entire record and heard plaintiff testify.

The ALJ then summarized the medical notes from plaintiff's treatment with Dr. McDonnell. She discussed plaintiff's post-operative treatment, including Dr. McDonnell's

June 2005 opinion that plaintiff was able to work only 4 hours per day until he fully recovered. The ALJ wrote:

> The undersigned requested Dr. Andrew Steiner to review Dr. McDonnell's opinion regarding a limit to part time work. Dr. Steiner testified that the treating physician's opinion was applicable for the first 6-9 months after surgery. The medical reports from Dr. McDonnell reflect that the claimant continued to show good progress in recovering from the January 2005 surgery with increased functional abilities and improved findings of strength and flexibility with stable radiological and physical examination results. Considering the totality of the record and the convincing and persuasive testimony of Dr. Steiner, the record reflects that there is no 12 month period when the claimant was unable to sustain substantial gainful activity, which is required under the regulations. The undersigned gives greater weight to the opinion of Dr. Steiner in reaching the residual functional capacity and less weight to Dr. McDonnell, because Dr. Andrew Steiner has medical expertise in Physical Medicine and Rehabilitation and knowledge of the Social Security disability program and because he had the opportunity to review all of the medical evidence and hear the claimant's testimony.

AR 21-22.

The ALJ then addressed other evidence in the record bearing on the credibility of plaintiff's allegation that he was disabled. She found that the report from plaintiff's employer indicating that plaintiff had failed to work even though the employer had offered him work within the restrictions that his doctors were providing at that time suggested that plaintiff was not motivated to return to work. Along these same lines, the ALJ noted that plaintiff's anticipated receipt of worker's compensation benefits and the support he was receiving from his friend "may provide a disincentive for the claimant to seek gainful work." AR 22. Also, the ALJ found that plaintiff participated in a "wide range" of daily activities

that were inconsistent with disability, noting that plaintiff was able to prepare simple meals, wash dishes and go out for daily walks, exercise and drive, water his flowers, read, watch television, maintain his tree farm and work occasionally in the garden.

Finally, the ALJ noted that plaintiff's post-surgery treatment had been conservative and that there were "inconsistencies" between plaintiff's testimony and the medical reports. The ALJ pointed out that although plaintiff indicated at the hearing that he took oxycodone for pain, the medical record indicated that he was allergic to that medication. In addition, while plaintiff reported that he took ibuprofen, Tylenol and aspirin as needed for pain relief and Ambien to help with sleep, Dr. McDonnell reported in June 2005 that plaintiff was off all analgesics and sleep medications. In the end, the ALJ was persuaded that plaintiff was able to perform a limited range of unskilled sedentary work "because the record reflects that he has healed from his back surgery without complications and there are no neurological deficits and the radiological evidence and physical examinations reflects that the surgery was successful." AR 23.

Next, the ALJ considered whether plaintiff could perform any of his past relevant work. Relying on the vocational expert's testimony that all of plaintiff's past work required skills or exertional abilities that exceeded plaintiff's present functional capacity, the ALJ found that plaintiff was unable to perform his past relevant work. At step five, the ALJ again relied on the vocational expert's testimony and found that given his age, education, past work experience and residual functional capacity, plaintiff could perform numerous jobs in

the national economy including security guard/monitor, office helper and information clerk. Accordingly, the ALJ found that plaintiff did not meet the statutory criteria for a finding of disability.

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).

Plaintiff presents four arguments in support of his claim that the ALJ's decision in this case is not supported by substantial evidence: 1) the ALJ's decision is based upon "fundamental errors of fact;" 2) the ALJ improperly gave more weight to Dr. Steiner's opinion than to Dr. McDonnell's; 3) the ALJ's credibility determination fails to comply with the commissioner's ruling governing credibility determinations, SSR 96-7p; and 4) the ALJ's conclusion that plaintiff would be recovered fully from his back surgery within 9 months after the surgery was based on speculative testimony from Dr. Steiner. In addition, plaintiff contends in the course of his second argument that the ALJ erred in crediting the opinion of Dr. Barron, a medical examiner employed by plaintiff's worker's compensation insurance carrier. These four arguments actually can be condensed into three: 1) whether the ALJ properly relied on Dr. Steiner's opinion concerning plaintiff's residual functional capacity; 2) whether Dr. Barron's report warranted special scrutiny; and 3) whether the ALJ made a proper credibility determination. I will consider plaintiff's contentions that the ALJ committed fundamental factual errors and made a decision based upon speculation in the course of analyzing these other arguments.

II. Dr. Steiner vs. Dr. McDonnell

Plaintiff contends that the ALJ erred by giving more weight to the opinion of the consulting, non-examining physician, Dr. Steiner, than to plaintiff's treating physician, Dr. McDonnell, concerning plaintiff's residual functional capacity. Plaintiff argues that the ALJ violated 20 C.F.R. § 404.1527(d)(2), which provides that a treating source's opinion must be given controlling weight if it is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record."

At the outset, I note that although the ALJ made a single determination that plaintiff was not disabled, plaintiff's claim for benefits actually consists of three time periods: 1) from the alleged onset date until surgery; 2) recovery from surgery; and 3) post-recovery. Although the ALJ did not state expressly in her decision that she was breaking plaintiff's claim down in this fashion, it is clear from her questioning of Dr. Steiner and the manner in which she analyzed the evidence that she did so. With respect to the second period, the ALJ accepted Dr. Steiner's conclusion that plaintiff was unable to perform even sedentary work for approximately 6-9 months after his surgery. However, to be entitled to benefits, plaintiff had to establish that he was unable to work for a period of at least 12 continuous months. 42 U.S.C. § 1382c(a)(3)(A). The ALJ found that plaintiff had not made this showing because he was able to perform a limited range of sedentary work both before the surgery and after the 6-9 month recovery period.

Although plaintiff's brief is not entirely clear, I assume that plaintiff's objections to the ALJ's weighing of Dr. McDonnell's opinion go solely to the doctor's opinion concerning plaintiff's limitations after surgery. Although Dr. McDonnell saw plaintiff a few times before the surgery, he did not offer any opinion of plaintiff's residual functional capacity during the pre-surgery period. I assume further that in arguing that the ALJ should have accepted Dr. McDonnell's assessment of plaintiff's limitations after surgery, plaintiff is referring to Dr. McDonnell's statement on June 30, 2005 that plaintiff was capable of working only four-hours a day. I make this assumption because in all other respects, Dr. McDonnell's determination that plaintiff had exertional abilities consistent with light work was actually *less* restrictive than Dr. Steiner's determination that plaintiff could perform only sedentary work. (Although Dr. McDonnell completed a physician's status report on June 17, 2005 in which he indicated that plaintiff could not work at all, plaintiff's failure to make any arguments based on this form amounts to an implicit acknowledgment that the ALJ was not required to accept this report in light of the contrary June 30, 2005 report.)

Plaintiff appears to suggest that Dr. McDonnell opined that plaintiff was totally and permanently disabled when the doctor stated on June 17, 2005 that plaintiff was "likely to remain symptomatic." *See* AR 192. But "symptomatic" does not mean "unable to work." In fact, just 2 weeks later, Dr. McDonnell completed the form indicating that plaintiff was able to perform light work on a part-time basis. Moreover, although plaintiff argues that the ALJ erred in failing to address the June 17 statement by Dr. McDonnell, the ALJ found that

plaintiff "remained symptomatic" insofar as she found that plaintiff had "ongoing pain and limited mobility." AR 20. The ALJ did not err with respect to Dr. McDonnell's June 17 clinic note.

Further, contrary to plaintiff's assertion, there is no conflict between Dr. McDonnell's June 30, 2005 opinion that plaintiff could work only part-time and Dr. Steiner's opinion that the part-time restriction would remain in place until September 2005 at the latest. Dr. McDonnell's report stated that the restrictions he identified were "temporary, until further recovery." AR 240. When asked at the hearing to comment on Dr. McDonnell's part-time restriction, Dr. Steiner indicated that although a part-time work restriction was perhaps appropriate in June 2005, "generally one would expect that that would expand to full-time within a year of the surgery." AR 285. Later, Dr. Steiner clarified this statement, explaining that he would expect plaintiff to be able to perform full-time, sedentary work by September 2005.

In other words, Dr. Steiner gave his opinion concerning how long it would take for plaintiff to make the "further recovery" awaited by Dr. McDonnell; he did not contradict Dr. McDonnell's opinion that a part-time work restriction was appropriate in June 2005. Therefore, when the ALJ stated that she was assigning more weight to Dr. Steiner's opinion than to Dr. McDonnell's concerning plaintiff's residual functional capacity after surgery, the ALJ only could have been referring to the doctors' different opinions regarding plaintiff's exertional abilities. The ALJ accepted the opinion more favorable to the plaintiff.

Absent any conflict between the opinions of Dr. Steiner and Dr. McDonnell concerning the appropriateness of a part-time restriction in June 2005, plaintiff's attack on the manner in which the ALJ weighed those opinions–including his contention that the ALJ made a "fundamental error of fact" when she referred to Dr. McDonnell as a neurologist instead of a neurosurgeon–is misguided and need not be addressed.[3]

More worthy of scrutiny is plaintiff's contention that Dr. Steiner was speculating when he opined that plaintiff's limitation to part-time work should last about 12 months. According to plaintiff, the ALJ erred in accepting Dr. Steiner's opinion that plaintiff would be ready for full time work in September because this opinion was based merely on the "typical" surgical patient and not on actual facts in the record. Plaintiff argues that the ALJ was obliged to recontact Dr. McDonnell to determine whether plaintiff actually had recovered to the extent predicted by Dr. Steiner. At the least, plaintiff argues, this court should remand his case so the commissioner can make this inquiry and clarify this gap in the record.

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[3] If, however, the ALJ meant to suggest that, *assuming* Dr. McDonnell's restrictions were permanent, she would accept Dr. Steiner's opinion over that of Dr. McDonnell, then her reasoning does not withstand scrutiny. The ALJ provided three reasons why Dr. Steiner's opinion was more persuasive: 1) he was a specialist in physical medicine; 2) he had reviewed the entire record; and 3) he had heard plaintiff testify. However, it is difficult to ascertain how Dr. Steiner's specialty in physical medicine would make him more qualified to offer an opinion regarding plaintiff's expected recovery from surgery than the neurosurgeon who actually performed the operation. Moreover, the fact that Dr. Steiner reviewed the entire record and heard plaintiff testify is irrelevant: nothing suggests that Dr. Steiner's opinion as to plaintiff's expected recovery period derived from facts he learned from the record review or attending the hearing that were different from the facts known to Dr. McDonnell from other sources.

In response, the commissioner argues that if documentation exists to contradict the ALJ's conclusion that plaintiff would recover sufficiently to resume full time work in September 2005, then it was plaintiff's burden, not the commissioner's, to provide it. The commissioner points out that plaintiff testified that he had a follow up visit scheduled with Dr. McDonnell on August 29, 2005, a week after the hearing, yet plaintiff did not request that the record be kept open and he did not submit documentation from that visit to the ALJ or to the Appeals Council.

The Seventh Circuit's opinion in *Luna v. Shalala*, 22 F.3d 687 (7th Cir. 1994), provides some support for the commissioner's position. The claimant in *Luna* argued that the ALJ had erred by failing to obtain claimant's company physicians' records, which would have provided more recent evidence than the records reviewed by the ALJ, the latest of which was dated eight months before the hearing. After reviewing the regulations concerning the commissioner's obligations to obtain evidence, the court determined that the ALJ's failure to obtain the company physicians' records was not reversible error. The court found that the ALJ had probed into all the relevant areas and properly resolved conflicts in the existing evidence. Noting that "how much evidence to gather is a subject on which [the courts] generally respect the Secretary's reasoned judgment" and that "a significant omission is usually required" before the court will find that the ALJ failed to assist the claimant in developing the record fully and fairly, *id*. at 692, the court found that the ALJ had no

obligation to update objective medical evidence to the time of the hearing. *Id*. at 693. The court explained:

> [A]lthough the Secretary has the burden of proving Luna's capability to perform sedentary work, it was Luna's duty, under 20 C.F.R. § 404.1512(a), to bring to the ALJ's attention everything that shows that he is disabled. This means that Luna must furnish medical and other evidence that the ALJ can use to reach conclusions about his medical impairment and its effect on his ability to work on a sustained basis.

Id. at 693.

In a footnote, the court suggested that rather than "stak[ing] his all on persuading th[e] court to reverse the denial of disability benefits on the ground that the ALJ had an affirmative duty to procure the evidence," Luna could have attempted to persuade the court to review the evidence by seeking a remand under sentence six of § 405(g) or petitioned the Social Security Administration to reopen his case in light of newly discovered evidence. *Id*. at 692 n.5.

As in *Luna*, the ALJ in this case probed into all the relevant areas, asking plaintiff about his pain, medication and daily activities. She obtained and reviewed all of plaintiff's medical records, which covered the time period from roughly March 2004 to June 2005. She obtained a medical expert to review the medical records and offer an opinion concerning the severity of plaintiff's impairment and any resulting work-related limitations. Moreover, unlike Luna, plaintiff was represented by an attorney during the administrative proceedings. *See Glenn v. Secretary of Health and Human Services*, 814 F.2d 387, 391 (7th Cir. 1987)

(commissioner entitled to assume that applicant represented by lawyer "is making his strongest case for benefits").

Plaintiff suggests that the record contains a significant omission because it lacks an updated opinion from Dr. McDonnell, but plaintiff has never adduced any evidence from Dr. McDonnell to contradict Dr. Steiner's prediction that plaintiff would be ready to return to full time work by September 2005. If a post-hearing report exists from Dr. McDonnell indicating that he had not cleared plaintiff to return to full time work, then plaintiff could have attempted to submit it to the ALJ and/or the Appeals Council; he could also have submitted it to this court and sought a remand under sentence six of § 405(g). *See Perkins v. Chater*, 107 F.3d 1290, 1296 (7th Cir. 1997) (under sixth sentence of § 405(g), evidence is "material" if there is "reasonable probability" that commissioner would have reached different conclusion had evidence been considered and is "new" if it was not in existence or available to claimant at time of administrative hearing). On the basis of plaintiff's burden to adduce evidence of disability, his representation throughout these proceedings by counsel and his failure to show that there is new evidence that might make a difference on remand, this court could probably affirm the commissioner.

On the other hand, *Luna* did not involve the question of the claimant's future condition, the pivotal issue in this case. In reaching her conclusion that plaintiff retained the residual functional capacity for full time work except for a period of at most nine months following his back surgery, the ALJ relied upon Dr. Steiner's opinion concerning how long

the "temporary" part time restriction imposed by Dr. McDonnell would remain in place. But Dr. Steiner's testimony about how long it would take for the "until further recovery" condition specified by Dr. McDonnell to vest was only a prediction. Plaintiff's hearing took place before expiration of the 9-month recovery window that Dr. Steiner opined was appropriate. In other words, Dr. Steiner's testimony, based merely on his review of the records and not on any examination of plaintiff or interview with Dr. McDonnell, cannot be "evidence" of plaintiff's actual condition in September 2005. Although Dr. Steiner reasonably might have concluded from the solidity of the fusion and the largely normal post-surgery examinations of plaintiff that plaintiff was *likely* to recover fully by September 2005, his testimony seems too speculative to constitute substantial evidence to support the ALJ's conclusion.

It is worth noting that the ALJ did not issue her decision until September 20, 2005. Perhaps she was waiting for an update from plaintiff; perhaps, having heard nothing from plaintiff to suggest that Dr. Steiner's prediction had been incorrect, the ALJ assumed that Dr. McDonnell had indeed cleared plaintiff for full time work and that Dr. Steiner's prediction had become a fact. But this is mere conjecture. All the ALJ actually said was that "Dr. Steiner testified that the treating physician's opinion [limiting plaintiff to part-time work] was applicable for the first 6-9 months after surgery," adding that the medical reports from Dr. McDonnell showed that plaintiff had continued to show good progress recovering from surgery.

In light of the relevant case law, the regulations, the ALJ's decision and the parties' relative burdens, this finding does not seem to be enough, without more, to support the commissioner's decision. Therefore, I am recommending that this court reverse the commissioner's determination and remand the case for further development of the record on this point. I am troubled by plaintiff's failure to adduce additional evidence that plaintiff's restriction to part-time work continued past September 2005; but the fact remains that the commissioner's determination that plaintiff is not disabled rests upon speculation unsupported by substantial evidence in the existing record.

The ALJ could have nailed the point down before issuing her decision either by holding the record open and instructing plaintiff to submit a record of his visit with Dr. McDonnell on August 29, 2005, or by re-contacting Dr. McDonnell to obtain his current opinion. *See* 20 C.F.R. §§ 404.1512(e) & 404.1527(c)(3) (if ALJ is unable to weigh record evidence and determine whether the claimant is disabled based on that evidence, then she must try to obtain additional evidence by requesting additional existing records, re-contacting claimant's treating sources or any other examining sources or asking claimant for more information or to undergo consultative examination). *Id*. On remand, the commissioner should obtain updated evidence from Dr. McDonnell concerning his opinion whether plaintiff has recovered fully from his back surgery and if so, his estimate of plaintiff's residual functional capacity.

III. Dr. Barron

Plaintiff attacks the ALJ's decision to credit the report of Dr. Barron, the doctor who performed an independent medical evaluation of plaintiff in connection with plaintiff's claim for worker's compensation. Plaintiff argues that because Dr. Barron was employed by the worker's compensation insurance carrier, his report was "adversarial" and as such, the ALJ had a "heightened duty to examine the opinion, step-by-step, to ensure that it is directly related to the evidence in the record." Plt.'s Br., dkt. 9, at 55-56.[4]

As plaintiff concedes, the commissioner has not promulgated any regulation or ruling stating that the opinion of a doctor employed by a claimant's adversary in a legal proceeding must be reviewed with more scrutiny than any other medical opinion. As Judge Crabb explained in a recent order, a doctor's employment by a plaintiff's employer's insurance carrier "does not make a doctor's testimony incredible in and of itself." *Crites v. Barnhart*, 05-C-648-C, Op. and Order, Aug. 28, 2006, dkt. 16, at 6. The ALJ was entitled to weigh Dr. Barron's report in the same way that she weighed other medical opinions, considering the relevant factors such as whether Dr. Barron examined or treated plaintiff, the doctor's specialization, the degree of support for the opinion, its consistency with other evidence in the record and "other factors." 20 C.F.R. § 404.1527(d) (explaining how commissioner

[4] Although plaintiff's arguments related to Dr. Barron's opinion are set forth in the section of his brief that attacks the manner in which the ALJ weighed Dr. McDonnell's opinion, plaintiff fails to explain how Dr. Barron's opinion relates to Dr. McDonnell's. As noted previously, Dr. McDonnell's opinion relates to plaintiff's post-surgery condition; Dr. Barron's relates to his pre-surgery condition.

weighs medical opinions). The ALJ explained that she was assigning significant weight to Dr. Barron's opinion because it was supported by physical examinations in the record and diagnostic test results. Moreover, she noted that Dr. Barron's conclusion that plaintiff was limited to sedentary work prior to his surgery was consistent with Dr. Steiner's assessment of plaintiff's abilities during that time period. The ALJ adequately explained why she was crediting Dr. Barron's report and relied on facts in the record. She committed no error.

Plaintiff contends in his reply brief that the commissioner conceded error by failing in her brief to address the "citations given within Wall's brief as to the lesser weight that should be given Dr. Barron." However, plaintiff did not provide any "citations" that support his contention that an ALJ must give "special consideration" to an insurance company doctor's opinion. That said, the commissioner did not address plaintiff's attacks on Dr. Barron's report at all because she misread plaintiff's argument as being directed at the opinion of Dr. Bowman. Def.'s Mem. in Supp. of Comm.'s Decision, dkt. 11, at 18. In any event, plaintiff's attack on Dr. Barron's report is a nonstarter. Even without that report, the ALJ's determination that plaintiff was capable of performing a limited range of sedentary work prior to his surgery is supported by substantial evidence, namely, the opinion of Dr. Steiner, the diagnostic test results and the reports and examinations by Dr. Bowman.

IV. Credibility

Plaintiff contends that the ALJ improperly determined that his subjective complaints were not credible to the extent that plaintiff alleged a total inability to work. At the outset, I note that plaintiff makes inconsistent statements in his briefs concerning the nature of his objections to the ALJ's credibility determination. In his opening brief, he concedes that the ALJ found that plaintiff had a condition that could reasonably be expected to cause his pain and other symptoms and that she went on to evaluate his complaints under the second step of the two-step procedure set out in 96-7p. *See* SSR 96-7p (providing that if ALJ finds that plaintiff suffers from underlying medically determinable physical or mental impairment that could reasonably be expected to produce pain or other symptoms, then ALJ must proceed to evaluate "intensity, persistence, and limiting effects of the individual's symptoms to determine the extent to which the symptoms limit the individual's ability to do basic work activities"). In his reply brief, however, plaintiff asserts that the ALJ failed to proceed to step two and "failed to conduct any pain analysis."

Plaintiff's assertion in his reply brief is patently incorrect: the ALJ found that plaintiff's impairment "could reasonably be expected to produce the alleged symptoms." AR 19. However, the ALJ determined that plaintiff's statements "concerning the intensity, duration and limiting effects of these symptoms are not entirely credible," explaining summarily that plaintiff's complaints were inconsistent with the objective medical evidence and treatment record, medical opinions, plaintiff's daily activities, work record and other

factors. She then went on to explain each of these inconsistencies. Any suggestion by plaintiff that the ALJ did not fulfill her legal obligation to evaluate his credibility in accordance with SSR 96-7p is without foundation.

Plaintiff's real beef with the ALJ's credibility determination is the manner in which the ALJ weighed the various pieces of evidence. First, he accuses the ALJ of overlooking an "entire line of evidence," asserting that the ALJ ignored certain medical reports from Dr. McDonnell that support plaintiff's claim. Although plaintiff concedes that the ALJ discussed various notes from Dr. McDonnell in her decision, plaintiff asserts that the ALJ ignored various pre-surgery and post-surgery notes that "support his case." Plt.'s Br., dkt. 9, at 62-63. However, plaintiff fails to develop any argument explaining *why* these various notes support his claim of total disability, either before or after the surgery. In light of plaintiff's failure to adequately develop this argument, I decline to address it. *See Kramer v. Banc of Am. Sec., LLC*, 355 F.3d 961, 964 n.1 (7th Cir. 2004) (perfunctory and undeveloped arguments are waived).

Next, plaintiff contends that the ALJ erred in drawing an adverse inference from the notes in the medical records indicating that plaintiff had been noncompliant at work despite his employer's efforts to accommodate his work restrictions. Plaintiff asserts that the ALJ's conclusion ignores other evidence in the record that supports his contention that his employer was the noncompliant party. First, plaintiff points to an August 17, 2004, Care Management Note by nurse Judith Schmitz stating that "Employer did not comply with

restrictions as stated here or previously." AR 166. However, a complete recitation of that record actually hurts plaintiff's claim. It reads:

> [Plaintiff's] [e]mployer sent me a copy of the status report that the patient had sent them via certified letter. Written in the comments section was "Employer did not comply with restrictions as stated here or previously." I did request a copy of the original and this was not written on it. I sent Dr. Nelson copies of both the status reports.

This record suggests that plaintiff's medical providers suspected plaintiff of altering a status report completed by Dr. Nelson. This does not bolster plaintiff's credibility.

Plaintiff points out that on August 27, 2004, Dr. McDonnell indicated that plaintiff was disabled from work because "he could not perform the tasks with restrictions given." AR 164. However, it is clear that Dr. McDonnell's opinion was not a medical opinion of disability but was derived from plaintiff's statements that his employer had not complied with the restrictions and that plaintiff had been unable to perform the work because of pain in his back and legs. AR 165. In any event, the note from Dr. McDonnell establishes at most that there was a conflict in the evidence between plaintiff's reports that his employer had not honored his work restrictions and other reports indicating that it had. As noted previously, however, it is the ALJ's responsibility, not this court's, to resolve conflicts in the evidence. *See, e.g., Powers v. Apfel*, 207 F.3d 431, 434 (7th Cir. 2000). The ALJ's resolution against plaintiff is not grounds for reversal. What is more, the evidence relied upon by the ALJ indicates that plaintiff took a stool from an employee in a different department, left work on two occasions without notifying his supervisor and did not respond to certified

letters from his employer asking him to return to work. Putting aside whether plaintiff's employer accommodated his restrictions, the ALJ committed no error by concluding that these facts suggested that plaintiff was not motivated to return to work.

Plaintiff challenges the ALJ's determination that plaintiff participated in a "wide range" of daily activities that were inconsistent with his claim of disability. He argues that his ability to prepare simple meals, wash dishes, perform exercises, drive, maintain his tree farm, garden on occasion, read, watch television and go for walks does not equate with an ability to perform substantial gainful activity on a competitive basis. On this point, I agree with plaintiff that the ALJ's logic is questionable. Although the commissioner argues that the ALJ relied on plaintiff's daily activities only as evidence that plaintiff was not as disabled as he claimed to be and not as "proof" that he could work, the ALJ's discussion of plaintiff's activities does not point out discrepancies between plaintiff's activities and specific portions of plaintiff's testimony but merely asserts that the activities are "inconsistent with disability."

It is well-settled that when an ALJ bases her credibility determination on inconsistencies between the claimant's daily activities and his subjective complaints, she must explain why the evidence is inconsistent. *Zurawski v. Halter*, 245 F.3d 881, 887 (7th Cir. 2001); *Clifford v. Apfel*, 227 F.3d 863, 872 (7th Cir. 2000); SSR 96-7p. In this case, although plaintiff's testimony indicates that he was able to accomplish small tasks throughout the day, his activities were fairly restricted. The only possible exception is

plaintiff's continued maintenance of his tree farm, but the record is silent as to what this entailed. Plaintiff testified at the hearing that he had not planted trees since his injury and had not made a profit from the tree farm since his injury, and he told Dr. McDonnell after his surgery that he was having trouble maintaining the farm. So, it appears that whatever "maintenance" he was doing at the time of the hearing was minimal. Absent more development of the record on this point, plaintiff's ability to "maintain" his tree farm, like his other activities, is not necessarily inconsistent with his claim of disability.

That said, the ALJ's failure more clearly to articulate her reasoning with respect to plaintiff's daily activities is not fatal to her credibility determination because she cited other reasons for her determination that are supported by the record. *Cf. Herron v. Shalala*, 19 F.3d 329, 336 (7th Cir. 1994) (remanding case to ALJ for new credibility finding where court found no inconsistency in plaintiff's statements and "ALJ has not provided us with any other reason for rejecting Herron's testimony"). In addition to the evidence showing plaintiff's contentious behavior at work, the ALJ relied upon the objective medical evidence that failed to document any neural impingement or significant injury, and upon medical records that contradicted plaintiff's statements concerning his medications and their side effects. She also found that plaintiff's anticipated receipt of worker's compensation benefits and the assistance he received from his friend were disincentives to seek gainful work.

Having reviewed each of these findings in light of the record, I conclude that the ALJ's findings are supported by the record, and that she drew reasonable inferences from them.

With respect to the objective medical evidence, the ALJ pointed out that before the surgery, plaintiff had largely normal examinations and was thought to have sustained only a back strain from his fall at work. The ALJ acknowledged that an MRI detected spondylolisthesis at L5-S1, but there was no impingement on the spinal cord or peripheral nerves. She pointed out that Dr. Bowman had felt that plaintiff was able to return to light duty work and that Dr. Barron had found after examining plaintiff that he was capable of performing sedentary work. In addition, the ALJ found that plaintiff had been treated conservatively with medication, physical therapy and epidural injections.

Plaintiff challenges this last finding, arguing that the ALJ's description of his treatment as "conservative" was fundamentally flawed in that it gave short shrift to the invasive back surgery that plaintiff underwent in an attempt to relieve his pain.[5] I agree that it is difficult to characterize fusion and laminectomy surgery as "conservative." However, there is no doubt that the ALJ was aware of plaintiff's surgery: she discussed it in her decision and the topic was addressed at the hearing. Having carefully reviewed the ALJ's decision, I am persuaded that the commissioner is correct when she asserts that in describing plaintiff's treatment as conservative, the ALJ was referring to plaintiff's March 2004 low back strain, not the simultaneously-discovered degenerative disc disease for which plaintiff

[5] Plaintiff argues that the ALJ committed another "fundamental error" when she found that the May 2004 epidural reduced plaintiff's pain. Even assuming plaintiff is correct that the epidural was not beneficial, the ALJ's finding on this point was not critical to her credibility determination. Accordingly, even if the ALJ erred, the error's impact on the overall credibility determination was *de minimis*.

underwent surgery. Notably, commenting later in her decision on plaintiff's post-surgery treatment, the ALJ stated: "Since the claimant's surgery in January 2005, the claimant's medical treatment has been conservative . . .". AR 23. This statement indicates that the ALJ recognized that plaintiff's surgical treatment was not conservative.

Even so, argues plaintiff, the ALJ still erred by failing to recognize that plaintiff's willingness to undergo surgery tended to support his complaints of debilitating pain. (Although plaintiff does not say so expressly, I presume that he is referring to his pain complaints *prior* to the surgery. I do not see how plaintiff's willingness to undergo surgery supports his complaints of *post*-surgery, debilitating pain.) While it is true that this is one factor that weighed in plaintiff's favor, the ALJ's failure to make an express finding in this regard is not a basis for remand. A person's willingness to undergo surgery to alleviate pain does not establish *de facto* that he or she was unable to work before the surgery; a person may be in pain but still able to work. Indeed, the ALJ accepted plaintiff's assertion that he experienced pain and limited mobility; what she did not accept was that he was in so much pain or so immobile that he was unable to perform any job. Although the ALJ could have done a better job explaining the role that plaintiff's surgery played in her overall credibility determination, the objective medical evidence, including the reports of the doctors who examined plaintiff after he injured his back and Dr. Steiner's testimony concerning the evidence and plaintiff's pre-surgery limitations, provide adequate support for her conclusion that plaintiff's complaints were disproportionate to the medical findings.

In sum, having carefully reviewed the ALJ's credibility determination in light of the record, I conclude that it reflects that she properly evaluated plaintiff's subjective complaints by considering not only the objective medical evidence but other relevant evidence, including the medical opinions of record, plaintiff's work record, use of pain medications, daily activities, and precipitating and aggravating factors. *Luna*, 22 F.3d at 691 (explaining factors ALJ should consider when allegations of pain inconsistent with objective medical evidence). Although this court does not agree 100% with the ALJ's reasoning, overall her credibility determination is supported by the evidence and rests on reasonable inferences from that evidence. Because plaintiff has not shown that the ALJ's credibility determination was patently wrong, this court should not overturn it. *Powers*, 207 F.3d at 435.

V. Conclusion

For the reasons explained above, I am recommending that this court reject all of plaintiff's arguments and claims except one. Plaintiff's only viable claim is that the ALJ's decision is not supported by substantial evidence because it rests on speculative testimony from Dr. Steiner concerning how long it would take plaintiff to recover fully from his back surgery so as to be able to work full time. If the district court agrees with this assessment, then I recommend that it reverse the ALJ's decision on this basis and remand it for proceedings limited to obtaining updated medical evidence from Dr. McDonnell concerning plaintiff's condition and to obtain an updated opinion from Dr. McDonnell concerning

plaintiff's work-related limitations. If Dr. McDonnell is of the opinion that plaintiff was not able to perform full time employment within one year of his surgery, then the commissioner must determine what weight to give that opinion and must explain the reasons for that determination.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I respectfully recommend that the decision of the commissioner denying plaintiff Daniel Wall's applications for disability insurance benefits and supplemental security income be REVERSED AND REMANDED for further proceedings consistent with this report.

Entered this 13th day of September, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

September 13, 2006

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Re: Wall v. Barnhart
Case No. 06-C-103-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 October 4, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by October 4, 2006, 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