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

LINDA K. LEONARD,

Petitioner,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Respondent.

REPORT AND
RECOMMENDATION

06-C-0207-C

REPORT

Plaintiff Linda K. Leonard is a 57-year old woman who suffers from obesity, osteoarthritis, fibromyalgia and depression. Plaintiff contends that the pain and debilitating effects of her impairments preclude her from performing even light duty work, which entitles her to federal disability benefits under the Social Security Act, codified at 42 U.S.C. §§ 416(I) & 423(d). Initially, the Commissioner of Social Security denied plaintiff's claim. After a full hearing at which plaintiff was represented by counsel, an administrative law judge ("ALJ") also found that plaintiff did not suffer from a disability as defined by the Act. The Appeals Council denied plaintiff's request for review, making the ALJ's decision the final decision of the commissioner.

Before the court is plaintiff's appeal of this decision. Plaintiff contends that the ALJ committed several errors that require reversal, such as failing properly to assess plaintiff's

credibility in accordance with SSR 96-7p, and improperly rejecting evidence indicating that plaintiff's fibromyalgia and depression were "severe" impairments imposing more than minimal limitations on plaintiff's ability to work.

I conclude that the ALJ failed to build an accurate and logical bridge between the evidence and his determination that plaintiff's subjective complaints lacked credibility. Because that credibility determination was pivotal to the ALJ's denial of plaintiff's claim, I am recommending that this court reverse the commissioner's determination and remand this case to the commissioner for further proceedings.

The following facts are drawn from the administrative record ("AR"):

FACTS

A. Background

Plaintiff was born October 17, 1947, making her 53 years old at the time of onset and 57 years old ("advanced age," in social security parlance) at the time of her hearing. AR 48, 430. She stands 5'7" and weighs approximately 260 pounds. AR 430-431. She has a high school education and a bachelor's degree in business. AR 431. Plaintiff worked 32 years at a Goodyear factory that manufactures air conditioning and brake hoses. AR 433-434. She worked several different jobs at Goodyear, the most recent in quality control as a statistical process coordinator. AR 434-435, 436. Plaintiff retired from Goodyear in January 2001. (According to plaintiff, she retired because she was missing too much work due to physical

problems, AR 436, although other evidence in the record suggests that the plant closed. AR 212.) In 2002, plaintiff worked part-time for approximately six months as a retail clerk at a fabric store at a fabric store as a retail clerk for and for three days as a data entry clerk, but quit both jobs due to physical difficulties. AR 72; 78-79; 431-432.

B. Medical Evidence

On August 6, 2001, plaintiff was seen by orthopedic surgeon Richard Lemon, M.D.,. AR 269. His examination of plaintiff's knees showed medial joint line tenderness, crepitus and pain with range of motion in both knees. X-rays showed early degenerative joint disease. Dr. Lemon opined that it would be "many years" before plaintiff would need total knee replacement surgery. *Id*.[1]

On August 7, 2002, plaintiff saw rheumatologist John Juozevicius, M.D., regarding her complaints of longstanding joint pain primarily in her hands, feet and knees, with intermittent swelling. Dr. Juozevicius detected some swelling in plaintiff's hands and right knee. X-rays revealed scoliosis in the lumbar spine, degenerative changes in the knees and mild degenerative joint disease in the hands and feet. AR 217. Noting that plaintiff symptoms suggested inflammatory arthropathy involving the hands and a component of osteoarthritis on the x-rays, Dr. Juozevicius ordered lab tests to determine if plaintiff's

[1] Plaintiff had a history of other impairments, including supraventricular tachycardia, hypertension and persistent menstrual bleeding and postmenopausal symptoms. She does not challenge the ALJ's conclusion that none of these impairments pose significant limitations on her ability to work.

arthritis had an inflammatory component. At a follow-up visit on August 21, 2002, Dr. Juozevicius noted that the lab tests had come back normal. On examination, plaintiff had multiple tender points consistent with fibromyalgia. AR 214. Dr. Juozevicius reported his impression that plaintiff suffered from osteoarthritis and fibromyalgia. AR 215.

Dr. Juozevicius saw plaintiff for follow up visits on September 23, 2002, November 25, 2002, February 3, 2003, and May 3, 2003. AR 204-209, 212-218. Upon each examination, Dr. Juozevicius found multiple tender points that he deemed consistent with fibromyalgia. AR 204, 207, 208, 214. He also diagnosed plaintiff with osteoarthritis of the knees. AR 215. Dr. Juozevicius referred plaintiff to physical therapy. In response to plaintiff's report of increasing depression, he also referred her to Dr. Gretchen Byfield, a psychologist.

Plaintiff saw physical therapist Judy Smith from August through mid-November of 2002 for physical therapy. AR 147. Smith's notes indicate that she worked with plaintiff on relaxation techniques, problem-solving for home activities, and home exercises. Smith encouraged plaintiff to begin a water exercise class. AR 153-157.

On March 21, 2003, psychologist Linda Ingison, Ph.D., performed a consultative examination of plaintiff. On mental status evaluation, plaintiff was pleasant and cooperative; showed clear and logical thinking; had good short-term and long-term memory; was able to perform serial 7's; followed three-step commands; and demonstrated good judgment and insight. Dr. Ingison noted that plaintiff's reported difficulties, including low

mood, fatigue, low motivation, increased irritability and gaps in concentration–which plaintiff described as "fibro fog"–appeared to stem from plaintiff's increasing medical problems. Dr. Ingison diagnosed plaintiff with: an adjustment disorder with depressed and anxious features with likely major depressive episode superimposed; a non-specified anxiety disorder; and "psychological factors affecting physical functioning." AR 126-130. Noting that plaintiff's "difficulties appear related to her physical illnesses which in themselves seem rather chronic," Ingison concluded that plaintiff's prognosis was guarded. Dr. Ingison concluded that plaintiff would be able to understand, remember and carry out instructions and relate appropriately to supervisors and others, although she opined that plaintiff's concentration and attention "may vary" and her ability to respond to stress, change and pacing demands would be "somewhat impaired." AR 130.

On April 14, 2003, Rolfe B. Finn, M.D., a non-treating, non-examining physician for the DDS, completed a Psychiatric Review Technique Form ("PRTF") for plaintiff. AR 131-143.) Dr. Finn diagnosed plaintiff with a "major depression disorder" and an "anxiety disorder, NOS." AR 134, 136. He stated that Leonard had mild restrictions of activities of daily living; mild difficulties in maintaining concentration, persistence or pace; no difficulties maintaining social functioning; and no episodes of decompensation. AR 141. Dr. Finn concluded that Leonard

> has been resistant to seeking specialized mental health treatment on an outpatient basis while her depression appears to be of major depression disorder population rather than being an adjustment disorder, and she does experience anxiety

> intermittently, from the available medical evidence her psychiatric impairment is non severe. . . . Restrictions in ADLs appear related to her musculoskeletal rather than mental health allegations." AR 143

In May 2003, Dr. Juozevicius referred plaintiff to Margaret G. Byfield, Ph.D., for psychological evaluation and treatment in relation to plaintiff's chronic pain, depression, and coping difficulties. AR 150-152. Dr. Byfield conducted an initial evaluation of plaintiff on May 19, 2003. Although plaintiff presented with a variety of psychological symptoms, mental status exam was normal, with plaintiff showing no significant affective distress or impaired thinking. Plaintiff saw Dr. Byfield on two subsequent occasions, once to complete psychometric testing and another time for discussion and supportive therapy. AR 148-149. Plaintiff was unable to identify specific goals that she wished to address in therapy and expressed concern about obtaining social security benefits.

On September 11, 2003, Dr. Byfield completed a Medical Assessment of Ability to do Work Related Activities form. AR 176-178. Dr. Byfield reported that plaintiff would have a good ability to perform most work-related mental tasks except for dealing with the public, dealing with work stresses and maintaining attention and concentration, which Dr. Byfield rated as falling between "fair" to "poor or none." AR 176. With respect to concentration, Dr. Byfield noted that although no formal cognitive testing had been completed, plaintiff had reported being distracted easily when multi-tasking. Dr. Byfield noted that plaintiff's reliability would be an issue, insofar as it was "affected by pain, sleep

and not generally feeling good," and that plaintiff reported experiencing "fibro fog," which plaintiff described as a "state of confusion, forgetfulness, and absentmindedness." AR 178.

On various dates between February and August 2003, after plaintiff filed her application for disability benefits and again after plaintiff requested reconsideration of the agency's initial decision to deny her application, the state disability determination service sent plaintiff's file to various consulting physicians for review. With respect to physical impairments, the DDS physicians, two of whom were rheumatologists, concluded that plaintiff's osteoarthritis of the knees and obesity were severe impairments, but that her fibromyalgia was not. AR 117-124; 170. They determined that plaintiff retained the residual functional capacity for light work with only occasional climbing of ramps/stairs, balancing, stooping, kneeling, crouching and crawling; and never climbing of ladders, ropes or scaffolds. With respect to mental impairments, the DDS physicians found that although plaintiff experienced depression and anxiety, her mental impairments were not severe and her limitations were due to her physical impairments. AR 131-143; 172.

In December 2003, Dr. Juozevicius referred plaintiff to Nathan J. Rudin, M.D., Assistant Professor of Orthopedics & Rehabilitation at the UW Pain Treatment and Research Center. AR 198-201. X-rays of the AP and lateral cervical spine showed degenerative changes of the intervertebral disc level from L4-5 through C6-7, manifested by diminished intervertebral disc space and anterior and posterior osteophyte formation. AR 282. X-rays of both knees showed mild degenerative joint disease bilaterally, with

diminished joint space in the medial compartments. AR 283. X-rays of the lateral and obliques of the lumbar spine showed minimal Grade 1 spondylolisthesis of L5 over S1 with marked facet degenerative changes from L3-4 through L4-5. AR. 284.

Dr. Rudin's examination revealed "tenderness to very light touch over the fibromyalgia points," "exquisite tenderness over the lumbar region posteriorly," and cervical spine tenderness. AR 200. Dr. Rudin diagnosed plaintiff with fibromyalgia, bilateral osteoarthritis of the knees, pes planu, obesity, depressive disorder, anxiety disorder, and suspected degenerative disease of the low back and neck. *Id*. Dr. Rudin proposed a program of comprehensive interdisciplinary care including psychotherapy, physical therapy and medication changes. *Id*.

Dr. Rudin referred plaintiff to Janet Kunz, a nurse practitioner at the UW Pain and Treatment Center. AR 333. A February 5, 2004 examination by Kunz showed tender palpation of the neck and shoulders, limited range of motion on all planes, diffuse lumbosacral tenderness, and "palpation of the fibromyalgia tender points . . . largely positive." *Id*. Subsequent examinations on May 30, 2004 and December 10, 2004, continued to show tenderness to palpation at fibromyalgia tender points. AR 355; 368.

Dr. Rudin referred plaintiff to physical therapy and psychotherapy. Although plaintiff initially participated in both, she did not complete the entire course recommended by Dr. Rudin. In June 2004, she told Dr. Rudin that she had not been compliant with home exercises, reporting that she had recently sold her condominium, an event that had involved

a lot of physical activity that caused her a lot of pain. AR 358. She had also terminated her therapy with psychotherapist Steven Krause, citing as reasons both finances and her inability to develop a good relationship with him. AR 351, 359. Dr. Rudin administered steroid injections into Leonard's knees. AR 358-359. He instructed plaintiff to resume her home exercises and swim as often as possible, explaining that she would not improve if she did not continue to exercise. AR 359.

In November 2004, plaintiff told Dr. Rudin that she had not been back to physical therapy and was not certain she wanted to go back because it didn't seem to help. She said that her pain increased with activity and improved with rest. She also reported having difficulty maintaining mental focus and could concentrate on only one thing at a time. Dr. Rudin questioned plaintiff's further motivation for rehabilitation, noting that in addition to her limited adherence to physical therapy, plaintiff had not pursued psychotherapy with anyone after she had stopped seeing Dr. Krause. Noting that plaintiff was on multiple medications that could be causing plaintiff's problems with mental clarity, he recommended that plaintiff begin seeing a psychiatrist for re-evaluation and adjustment of her medication regimen. He also recommended that plaintiff pursue psychotherapy. AR 362-63.

The following month, plaintiff again reported to Kunz that her activity was very limited and that she had not been doing any home exercise program or water therapy and had not followed through on the referral to a psychiatrist. Kunz encouraged plaintiff to walk for exercise and participate in warm water therapy. AR 369. In January 2005, plaintiff

reported to a physician's assistant that although she had followed through with her psychiatry referral, she still was not exercising, stating that the arthritis in her knees had been very bad recently. Plaintiff was again told that her pain would not improve if she did not exercise. She was re-referred to physical therapy for warm water therapy. AR 371-373.

On March 9, 2005, plaintiff reported that she was still seeing the psychiatrist, Dr. Crawford, and had attended warm water therapy on at least two occasions. AR 379-380.

On April 14, 2005, Dr. Rudin completed an RFC Questionnaire for plaintiff. AR 384-387. He noted that plaintiff's diagnoses were fibromyalgia; arthritis and pain in both knees; lumbar and cervical degenerative disease; depression; obesity; and a non-specific anxiety disorder. He reported plaintiff's symptoms as "back, neck, shoulder and knee pain; aching in legs; numb/tingling hands/feet; generalized weakness; anxiety and depression" and her symptoms were supported by objective findings of reduced range of motion in the neck, back and hips; tenderness; muscle weakness; and impaired sleep. Dr. Rudin opined that plaintiff was not a malingerer and that her prognosis was fair to poor. With respect to limitations, Dr. Rudin reported that plaintiff could sit continuously for one hour for a total of four hours a day; stand continuously for 10 minutes for a total of less than two hours a day; walk one block; lift 10 pounds; could not bend or twist at the waist; would need to lie down for about one hour per 8-hour day; and would miss work more than twice a month.

On April 19, 2005, Dr. Crawford completed a Mental Impairment Questionnaire for plaintiff. AR 398-402. He diagnosed Leonard with "major depression, recurrent, moderate,"

indicated by clinical findings of "moderate depression, flat affect, depressive posture, moderate anxiety-irritability," with a prognosis of "guarded to poor for further significant improvement of depression." Dr. Crawford reported these functional restrictions for plaintiff: marked restriction of activities of daily living; moderate difficulties in social functioning; marked deficiencies of concentration, persistence or pace; and 4 or more repeated episodes of decompensation within the past 12 months. He indicated that plaintiff had a limited but satisfactory ability to perform most work-related mental tasks but that she would be unable to maintain attention for 2 hour segments, maintain regular attendance and punctuality, complete a normal workday and workweek without interruptions from psychological symptoms, perform at a consistent pace without an unreasonable number or length of rest periods or deal with normal work stress.

Plaintiff takes numerous medications for pain, depression and sleep, including baclofen, Paxil, tramadol, nortriptyline and trazodone.

C. Plaintiff's Testimony

At her administrative hearing, plaintiff testified that she had worked at Goodyear for 32 years performing various jobs. Her final assignment had been as a statistical process coordinator in quality control, which required fine manipulation of small hoses, use of measuring tools and calipers, prolonged standing followed by prolonged sitting performing calculations and data entry at a computer. AR 434, 437, 442. She retired early because she

could not meet the physical demands of her job due to pain and cramping in her fingers, stress, and pain in her knees, feet, back and shoulders. AR 436-438. Plaintiff tried working as a part-time retail clerk at a fabric store in 2002, but had to quit after six months because she could meet the physical demands of carrying 25 pound fabric bolts, and bending to cut fabric. AR 431-433.

Plaintiff testified that Dr. Juozevicius diagnosed her with fibromyalgia and osteoarthritis in 2002. AR 440. She stated that Dr. Juozevicius sent her to physical therapy for fibromyalgia and she took an 8 week relaxation class for pain management. *Id*. She said she also had been diagnosed and treated for depression for at least 5 years. AR 442-443. Plaintiff testified that she does not like to leave her house, does not like to drive but does so for doctors' appointments and physical therapy, does not like to be in crowds, does not like loud noise, and is distracted easily. AR 443. Plaintiff reported days when she does not get out of bed, does not shower and feels "drugged" or in a "fog." AR 449. She explained this can go on for a week or a week-and-a-half. *Id*.

Plaintiff estimated that she could walk two blocks until her knees hurt, cannot lift a gallon of milk, has difficulty standing after sitting for 10-15 minutes and cannot stand in one place for more than 10 minutes. AR453; 459-460. She testified that in a typical day, she takes her medicine, fixes breakfast, reads the newspaper or reads the news online and lies down to do relaxation tapes. She does some household chores like laundry but it takes a long time. AR 444, 446, 456-457.

D. Medical Expert's Testimony

Psychologist Allen L. Hauer, Ph.D., testified as a medical expert at the hearing. AR 47, 460. Dr. Hauer assessed plaintiff under Listing 12.04 for affective disorders, determining that she had a "low to mid-grade depressive disorder characterized by irritable mood, pessimism, tension, and worry, lack of energy, lack of ambition." AR 462. He testified that plaintiff has mild restrictions of activities of daily living; mild impairment of social functioning; mild difficulties in maintaining concentration, persistence or pace; and a preoccupation with her health. AR 462-463. Dr. Hauer explained that in spite of plaintiff's complaints of forgetfulness and difficulty concentrating at home, she had no difficulty answering questions during the hearing. In Dr. Hauer's opinion, plaintiff's reported lack of concentration had to do with the absence of external demands or external things to focus on. AR 464.

E. Vocational Expert's Testimony

The vocation expert, Leslie Goldsmith, testified that the several jobs Leonard had performed at Goodyear were light to medium exertion and unskilled to semi-skilled; specifically, the statistical process coordinator job was light and semiskilled. AR 469. He testified that the retail clerk job at the fabric store was also light and semi-skilled. AR 470. The VE also testified that Leonard had transferable skills, namely her ability to use measuring devices and to use of a computer for data entry. *Id.*

The ALJ posed a hypothetical to the VE, asking him to assume an individual with plaintiff's age, education and work experience with the ability to do light work. AR 470. The VE responded that such an individual would be able to perform plaintiff's former jobs of retail clerk, statistical process coordinator and other "light" factory jobs. *Id*. The VE further stated that such an individual would be able to perform jobs in the national economy including general production jobs (25,000 in Wisconsin), visual inspector jobs (15,000 in Wisconsin), and security positions (11,000 in Wisconsin). AR 471.

In a second hypothetical, the ALJ asked the VE whether the same hypothetical individual with the added restriction to simple, routine, repetitive, and low-stress work would be qualified to perform plaintiff's past relevant work or other work in the economy. AR 471. The VE responded that such an individual would not be able to perform plaintiff's past statistical process coordinator job, but could perform her previous "lower skilled" factory jobs, as well as the general production jobs, visual inspector jobs, and security position jobs, which were also "lower skilled" jobs. *Id*. In response to a third hypothetical, the VE testified that no work in the economy existed for an individual of plaintiff's age, education and work experience who was limited to lifting 10 pounds occasionally and 5 pounds frequently; could sit and stand for no more than 10 minutes at a time for a total of six hours a day; who required up to two hours of time lying down; and who had limited repetitive use of the hands, fine finger manipulations, bending and stooping. AR 471-472.

F. ALJ's Decision

On August 26, 2005, the ALJ issued a decision finding plaintiff not disabled. Applying the familiar process for evaluating disability claims, the ALJ found that plaintiff had not engaged in substantial gainful activity since her alleged onset of disability on February 1, 2001 (step one); plaintiff suffered from the "severe" impairments of obesity and minimal to early arthritic changes of the knees (step two); whether considered individually or in combination, plaintiff's impairments did not meet or medically equal the severity of any listed impairment (step three); and plaintiff was capable of returning to her past relevant work as a retail clerk or light factory worker (step four).

The ALJ found that although plaintiff had been diagnosed with fibromyalgia and mental impairments, neither condition constituted a severe impairment. With regard to plaintiff's fibromyalgia, the ALJ found that the doctors who had diagnosed her with that condition were, for the most part, "relying upon her statements that she had previously been diagnosed with that condition;" that physical examinations were "not very helpful" because they showed only give-way weakness but normal sensation and deep tendon reflexes; that "tenderness points are difficult to obtain as the claimant says that something hurts no matter what area of the body is explored"; and that there was "little" from Dr. Juozevicius (who first diagnosed fibromyalgia) "save for a consultative examination he had requested regarding diffuse musculoskeletal pain." AR 15. The ALJ noted that although Dr. Rudin had indicated that plaintiff was "profoundly impaired," Dr. Rudin's notes "suggest that this was

more a matter of deconditioning than impairment" and that plaintiff appeared to be more focused on qualifying for disability than on improving. In addition, the ALJ found that

> [t]he reports of fibromyalgia are based essentially on the claimant's complaints of pain without much corroborative detail. Meriter Hospital records state that she simply displayed pain no matter what part of the body was used. This makes definition to tender areas or trigger points extremely difficult.

AR 16.

The ALJ rejected the significant physical and mental limitations noted on the questionnaires completed by Dr. Rudin and Dr. Crawford, respectively, finding it "clear" from the treatment notes that "such limitations were not based upon clinical testing but on the claimant's self-representations" and therefore were "no more reliable than the claimant herself." AR 16. The ALJ then found that "the claimant's subjective complaints lack a reasonable medical basis and that she cannot be considered a credible witness." AR 16.

The ALJ adopted the conclusions of the state agency physicians that, although plaintiff was limited to light work as a result of her severe obesity with early arthritis of the knees, neither plaintiff's fibromyalgia nor depression constituted "severe" impairments that would impose any additional limitations on her ability to work. Relying on the vocational expert's answer to the hypothetical question specifying a residual functional capacity for light work, the ALJ found that plaintiff could return to her past work either as a light factory worker or retail clerk.

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" and if no error of law occurred. *Sims v. Barnhart*, 309 F.3d 424, 428 (7th Cir. 2002). 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 v. Apfel*, 227 F.3d 863, 869 (7th Cir. 2000). 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). Finally, "[w]hen the decision of [the first-line] tribunal on

matters of fact is unreliable because of serious mistakes or omissions, the reviewing court must reverse unless satisfied that no reasonable trier of fact could have come to a different conclusion, in which event a remand would be pointless." *Sarchet v. Chater*, 78 F.3d 305, 309 (7th Cir. 1996).

II. Credibility/Impairment Severity

Plaintiff first contends the ALJ committed an error of law by failing properly to assess her credibility in accordance with Social Security Ruling 96-7p. That ruling sets forth a two-step process that the ALJ must follow when evaluating an individual's own description of his or her impairments. First, the ALJ must determine whether there is

> an underlying medically determinable physical or mental impairment(s) – i.e., an impairment(s) that can be shown by medically acceptable clinical and laboratory diagnostic techniques – that could reasonably be expected to produce the individual's pain or other symptoms.

Soc. Sec. Ruling 96-7p, 1996 WL 374186, *1 (1996). If the record does not allow the ALJ to make such a finding, then that ends the inquiry, for a finding of disability cannot be made solely on the basis of symptoms, even if they appear genuine. *Id*.

If, however, the medical evidence shows the existence of an underlying impairment that could be reasonably expected to produce the claimant's pain or other symptoms, the ALJ must evaluate the "intensity, persistence, and limiting effects of the individual's symptoms to determine the extent to which the symptoms limit the individual's ability to do basic work

activities." *Id*. This determination is relevant at step 2 in determining whether the claimant's impairment or combination of impairments is "severe," and as necessary at each subsequent step of the process. *Id*.; *see also* 20 C.F.R. § 404.1521(a) (defining "non-severe" impairment as one that does not significantly limit ability to perform work activities).

When making a credibility determination, the ALJ may not reject the claimant's statements regarding her symptoms solely on the ground that the statements are not substantiated by objective medical evidence. *Luna v. Shalala*, 22 F.3d 687, 691 (7th Cir. 1994). Instead, the ALJ must consider, in addition to the objective medical evidence, the entire case record to determine whether the individual's statements are credible. Relevant factors the ALJ must consider are the individual's daily activities; the location, duration, frequency, and intensity of the individual's pain or other symptoms; factors that precipitate and aggravate the symptoms; the type, dosage, effectiveness, and side effects of any medication the individual takes or has taken to alleviate pain or other symptoms; other treatment or measures taken for relief of pain; and any other factors concerning the individual's functional limitations and restrictions. *Id*.; 20 C.F.R. § 404.1529(c). *See also Zurawski v. Halter*, 245 F.3d 881, 887 (7th Cir. 2001).

Finally, the ALJ's determination or decision regarding claimant credibility

> must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight.

Zurawski, 245 F.3d at 887 (quoting SSR 96-7p).

The ALJ's assessment of plaintiff's credibility in this case falls below the mark. First, the ALJ's decision contains inconsistencies that make it impossible to discern precisely why he rejected the credibility of plaintiff's statements. Several aspects of the ALJ's decision suggest that the ALJ rejected plaintiff's complaints at step one of the credibility analysis. Notably, the ALJ led off his evaluation of the evidence by observing:

> If an impairment were documented which would be expected to impose significant pain, it would be appropriate to evaluate the claimant's allegations of pain under the criteria of Social Security Ruling 96-7p. However, there is very little evidence of treatment for the claimant's alleged fibromyalgia and arthritis until well after her alleged onset of disability.

AR 15. In addition, at the two other places in his decision where he explicitly addressed plaintiff's credibility (page 3 and paragraph 4 in the "Findings" section), the ALJ linked his credibility finding only to the medical evidence, stating that "claimant's subjective complaints lack a reasonable medical basis and are not credible." Finally, nowhere in his decision does the ALJ discuss plaintiff's testimony regarding her pain and limitations; her daily activities; pain medications; or course of medical treatment, nor does his decision contain any paragraph that purports to be the "pain" analysis required by step two of SSR 96-7p. These statements and omissions suggest strongly that the ALJ never got to "step two" of the SSR 96-7p credibility analysis, having determined at step one that plaintiff's complaints lacked a reasonable medical basis.

If this is the basis on which the ALJ dismissed plaintiff's subjective complaints, it is not supported by substantial evidence in the record. As plaintiff points out, the record

shows that plaintiff was diagnosed by Dr. Juozevicius, a rheumatologist, as having fibromyalgia, a rheumatological condition. The clinical indicators of fibromyalgia are all-over body pain lasting at least three months and tenderness in at least 11 of 18 fixed locations throughout the body.[2] Dr. Juozevicius examined plaintiff on several occasions and noted that he detected "multiple tender points consistent with fibromyalgia." AR 204, 207, 208, 214. Dr. Juozevicius referred plaintiff to a pain specialist, Dr. Rudin, who also noted "tenderness to very light touch over the fibromyalgia points," adding that "fibromyalgia control points are negative." AR 200. Like Dr. Juozevicius, Dr. Rudin diagnosed fibromyalgia as one of plaintiff's impairments.

None of the ALJ's cited reasons for his obvious skepticism of the fibromyalgia diagnosis is supported by the record. Contrary to the ALJ's findings, the evidence from Dr. Juozevicius consisted of more than just a request for a consultative examination: the evidence included his notes of several office visits with plaintiff in which he documented his findings leading to his diagnosis of fibromyalgia. The ALJ was also incorrect when he suggested that Dr. Rudin's diagnosis was based mostly upon plaintiff's statements that she had previously been diagnosed with fibromyalgia; as just noted, Dr. Rudin conducted his own detailed physical examination and concluded that plaintiff suffered from fibromyalgia. The fact that physical examinations showed only give-way weakness but normal sensation and deep

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[2] *The American College of Rheumatology 1990 Criteria for the Classification of Fibromyalgia: Report of the Multicenter Criteria Committee*, 33 Arthritis & Rheumatism 160 (1990).

tendon reflexes is irrelevant because, apart from tenderness in the hallmark trigger points, fibromyalgia's symptoms are entirely subjective. *Sarchet*, 78 F.3d at 306.

Finally, the ALJ's assertion that "tenderness points are difficult to obtain as the claimant says that something hurts no matter what area of the body is explored" is a classic case of the ALJ "playing doctor" and drawing his own conclusions from the medical record. *See Blakes ex rel. Wolfe v. Barnhart*, 331 F.3d 565, 570 (7th Cir. 2003) (ALJ improperly "play[s] doctor" when he draws medical conclusions without expert evidence). No physician suggested that tender points were "difficult to obtain" or suggested that plaintiff's pain in other areas undermined the fibromyalgia diagnosis. Indeed, "pain all over" is one of the symptoms of the disease.

The presence of tenderness at the trigger points, combined with plaintiff's reports of all-over pain and fatigue, provided clinically demonstrable evidence that plaintiff suffers from fibromyalgia, which in turn, reasonably could be expected to produce the pain, fatigue and concentration difficulties reported by plaintiff. *Sarchet*, 78 F.3d at 306; SSR 99-2p: Policy Interpretation Ruling Titles II and XVI: Evaluating Cases Involving Chronic Fatigue Syndrome (CFS), April 30, 1999, at n.3 (indicating that individuals who meet American College of Rheumatology criteria for Fibromyalgia Syndrome will have a medically-determinable impairment). As a result, the ALJ was obliged to proceed to evaluate the intensity and persistence of plaintiff's symptoms by considering the factors enumerated in SSR 96-7p *before* concluding that plaintiff's impairment was not severe. *See* SSR 99-2p; SSR 96-7p.

The ALJ did not do this. Although the ALJ purported to accept the fibromyalgia diagnosis, the only basis he cited for his conclusion that the impairment was not "severe" was the absence of evidence of "any related loss of functional ability," as noted by the state agency physician. AR 16. However, plaintiff's own testimony regarding her condition as well as the restrictive functional capacity questionnaire completed by Dr. Rudin–neither of which was available to the state agency physician–provided substantial evidence of "loss of functional ability." If what the ALJ found wanting was "objective evidence" of functional loss, then the ALJ again displayed a lack of understanding of fibromyalgia. *Sarchet*, 78 F.3d at 306 (noting absence of laboratory tests for presence *or severity* of fibromyalgia).

Culling the ALJ's decision for pyrite, the commissioner points out that the ALJ noted in his discussion of the medical evidence that plaintiff had failed on various occasions to comply with her doctor's treatment recommendations, had made statements to various sources indicating her strong interest in obtaining disability benefits and had alleged an onset date that predated any treatment for arthritis and fibromyalgia. The commissioner argues that these findings can be packaged into a credibility determination that is not patently wrong. As noted previously, however, it is not clear that the ALJ actually relied on these findings when assessing credibility: all the ALJ said in connection with plaintiff's credibility was that her complaints "lacked a reasonable medical basis."

In any event, even if this court were to endorse the broad reading urged by the commissioner and were to find that the ALJ conducted the credibility analysis required by

step two of SSR 96-7p, I still would recommend remand. Admittedly, there is evidence suggesting that plaintiff was more motivated to obtain disability payments than to engage in therapy that had the potential to restore her ability to work.[3] Absent a more detailed analysis by the ALJ, however, I find this evidence insufficient to support the credibility determination. Not only did the ALJ fail to comply with SSR 96-7p and explore whether plaintiff had "good reasons" for her reluctance to follow treatment recommendations, *see* SSR 96-7p, but he failed to mention the significant evidence in the record showing that despite her reluctance, plaintiff underwent rather extensive treatment including physical therapy, epidural steroid injections, psychotherapy and a host of medications. *Bauzo v. Bowen*, 803 F.2d 917, 923 (7th Cir.1986) (citations omitted) ("Both the evidence favoring the claimant as well as the evidence favoring the claim's rejection must be *examined*, since review of the substantiality of evidence takes into account whatever in the record fairly detracts from its weight") (emphasis added).

As for the discrepancy between the medical record and onset date, again, the ALJ should have asked plaintiff to explain the discrepancy before counting that evidence against her. *See* SSR 83-20 (when medical or work evidence is not consistent with claimant's allegation concerning onset, "additional development may be needed to reconcile the

[3] In defending the ALJ's credibility determination and his decision as a whole, the commissioner cites to various pieces of evidence that the ALJ did not mention, including plaintiff's daily activities and her relatively conservative course of treatment. However, even though the "record as a whole" may support the ALJ's conclusion, "principles of administrative law require the ALJ to rationally articulate the grounds for her decision and confine our review to the reasons supplied by the ALJ." *Steele v. Barnhart*, 290 F.3d 936, 941 (7th Cir. 2002).

discrepancy"). Moreover, the date on which a disability begins is the date on which the limitations from a particular condition first became disabling, not the date on which the claimant's doctors attached a diagnosis to the condition.

All this being true, this appeal could have swung the other way: if the ALJ properly had evaluated the medical evidence and clearly had articulated a credibility determination in accordance with the dictates of SSR 96-7p, then such findings might have been sufficient to sustain both the ALJ's credibility determination and his determination that plaintiff's fibromyalgia is not severe. However, where, as here, the ALJ commits serious errors in his evaluation of the medical evidence and also demonstrates a fundamental misunderstanding of the nature of the plaintiff's impairment so as to call into question the reliability of his decision, the case must be remanded to the commissioner for another look.

Step two of the sequential evaluation process is "a de minimis screening device [used] to dispose of groundless claims," and an impairment may be found "not severe only if the evidence establishes a slight abnormality that has no more than a minimal effect on an individual's ability to work." *Webb v. Barnhart*, 433 F.3d 683, 686-87 (9th Cir. 2005) (quoting *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996)). Contrary to the commissioner's contention, the ALJ's flawed credibility determination was not harmless error because it was central both to his finding that plaintiff's fibromyalgia was not "severe" and to his rejection of the limitations endorsed by Dr. Rudin. The ALJ's residual functional capacity assessment accounts only for those limitations imposed by the impairments the ALJ

found were severe, namely, plaintiff's arthritic knees and obesity. Had the ALJ properly credited the evidence indicating that plaintiff suffers from fibromyalgia and conducted the proper pain analysis, he may very well have found additional physical and mental work-related limitations that further reduced plaintiff's residual functional capacity. Accordingly, because the ALJ's determination that plaintiff is capable of performing her past relevant work is predicated on a residual functional capacity assessment that is marred by significant errors, the decision cannot stand.

On remand, the commissioner also should take another look at the evidence regarding plaintiff's alleged mental impairment. As with Dr. Rudin's physical residual functional capacity assessment, the ALJ's determination that Dr. Crawford's mental RFC assessment was entitled to little weight was driven by the ALJ's determination that none of plaintiff's subjective complaints was credible. Moreover, the ALJ failed to explain what weight, if any, he gave to the reports by Dr. Ingison and Dr. Byfield, both of whom indicated that plaintiff had at least some mental limitations that would affect her ability to work. All the ALJ said about these two reports is that plaintiff told both Dr. Ingison and Dr. Byfield that she suffered from memory and concentration lapses due to "fibro-fog," a "diagnosis" for which the ALJ could find no support in the record.

This was an inadequate basis on which to reject these opinions. First, there nothing to suggest that the mental limitations endorsed by Drs. Ingison and Byfield were based *solely* on plaintiff's reported bouts of "fibro fog." Second, "fibro fog" is not a diagnosable

condition but rather is a term coined by fibromyalgia sufferers to describe symptoms of unclear thinking and forgetfulness, which apparently are common symptoms of the disorder.[4] As with his analysis of plaintiff's physical limitations, the ALJ's insistence that there be clinical evidence to support plaintiff's complaint of "fibro fog" is another example of the ALJ playing doctor. Finally, I note that even if substantial evidence in the record supported the ALJ's determination that plaintiff has no severe mental condition, the ALJ still must consider plaintiff's impairments in combination and must determine whether plaintiff can work in light of her medical situation as a whole. 20 C.F.R. § 404.1523; *Barrett v. Barnhart*, 355 F.3d 1065, 1068 (7th Cir. 2004) (citing cases).

In sum, although an ALJ may reject the report of a treating or consulting physician if the report is based upon the claimant's statements that the ALJ finds incredible, *Diaz v. Chater*, 55 F.3d 300, 307 (7th Cir. 1995), that decision cannot stand if the predicate credibility determination was improper. In this case, the ALJ's credibility determination is based upon unfounded assumptions about the medical evidence, fails to make clear that the ALJ considered the record as a whole, and fails to build a rational bridge from the evidence to the finding that plaintiff is not disabled. Accordingly, I am recommending that this case be reversed and remanded to the commissioner.

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[4] A Google search of the term "fibro fog" turned up roughly 19,000 hits, including a website sponsored by the Arthritis Foundation. *See* http://www.arthritis.org/conditions/diseasecenter/fibromyalgia/fibro_fog. Dr. Juocevicius's notes from his visit with plaintiff on August 21, 2002 indicate that he provided plaintiff with fibromyalgia information from the Arthritis Foundation. AR 215.

III. Step Four Determination

For the sake of completeness, I note that in the event the district judge disagrees with my recommendation and affirms the ALJ's assessment of plaintiff's residual functional capacity, then I recommend that the court should also affirm the ALJ's finding that plaintiff is capable of returning to her past relevant work as a light factory worker. Apart from her contention that the ALJ's step four determination is improper because it was based upon a hypothetical that failed to include all of plaintiff's limitations, plaintiff's only other objection to the ALJ's step four determination is that the ALJ failed to ask the vocational expert if his testimony regarding the requirements of various occupations that plaintiff was capable of performing was consistent with the *Dictionary of Occupational Titles*. *Prochaska v. Barnhart*, 454 F.3d 731, 735-36 (7th Cir. 2006) (ALJ's failure to inquire if VE's testimony was consistent with *DOT* not harmless where *DOT*'s description of job requirements arguably exceeded limitations included in ALJ's residual functional capacity assessment).

However, at the hearing the ALJ asked the vocational expert before he testified to be sure to point out any discrepancies between his testimony and the *DOT*; the VE identified none. AR 469. Although plaintiff asserts in her reply brief that there were inconsistencies, she has waived such arguments by failing to present them in her opening brief. *United States v. Kelley*, 446 F.3d 688, 692 (7th Cir. 2006) (arguments raised for first time in reply brief are waived). Finally, the VE indicated that his testimony that plaintiff could return to her past job as a statistical process coordinator was based upon plaintiff's description of the job

as she actually performed it, AR 469, not as the job is generally performed in the national economy; therefore, any inconsistencies with the *DOT*'s description of this job are irrelevant. *See* SSR 82-61 (claimant will be found not disabled when she retains RFC to perform actual functional demands and job duties of a particular past relevant job).

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that the decision of the commissioner denying plaintiff Linda Leonard's application for disability insurance benefits be REVERSED AND REMANDED pursuant to sentence four of 42 U.S.C. § 405(g).

Entered this 4th day of December, 2006.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge

December 5, 2006

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Re: Leonard v. Barnhart
Case No. 06-C-207-C

Dear Counsel:

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

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

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before December 22, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by December 22, 2006, the court will proceed to consider the magistrate judge's Report and Recommendation.

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

Enclosures
cc: Honorable Barbara B. Crabb, District Judge