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

DIANE L. NELSON,

Petitioner,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Respondent.

REPORT AND
RECOMMENDATION

06-C-249-C

REPORT

Plaintiff Diane L. Nelson seeks judicial review of an adverse decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). On October 6, 2003, plaintiff applied for disability insurance benefits and supplemental security income under sections 216(I) and 223 and 1614(a)(3)(A) of the Social Security Act, codified at 42 U.S.C. §§ 416(I), 423(d) and 1382c (3)(A). She alleged that she was disabled since June 10, 2003 from scoliosis; pinched nerves; herniated, rotated discs; and knees and hips that were out of alignment. After the local disability agency denied her claims initially and on reconsideration, plaintiff obtained a hearing before an administrative law judge on October 11, 2005. On November 15, 2005, the administrative law judge found that plaintiff was not eligible for social security disability benefits because there were a significant number of jobs in the national economy that plaintiff could perform despite the limitations posed by her impairments. The Appeals Council denied plaintiff's request for review, making the ALJ's decision the final decision of the commissioner.

Plaintiff asks the court to reverse the commissioner's final decision and remand the case to the commissioner for further proceedings. She contends that remand is required because: 1) the ALJ failed to evaluate plaintiff's obesity in accordance with Social Security Ruling 02-1p; 2) the transcript of the hearing is incomplete because several portions of the hearing tape were inaudible; and 3) the ALJ's hypothetical to the vocational expert failed to define what the ALJ meant when he said that plaintiff could not perform jobs that had "unusual stress." Having considered plaintiff's arguments in light of the record, I am recommending that the court affirm the commissioner's decision. Although plaintiff's criticisms of the ALJ's decision have some merit, none of the ALJ's missteps had a measurable effect on his determination that plaintiff is not disabled. Accordingly, I am recommending that the court affirm the decision of the commissioner.

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

FACTS

I. Background and Medical Evidence

Plaintiff was born August 30, 1964, making her 41 years old on the date of the ALJ's decision. She has past work experience as a factory worker, personal care attendant, cashier and housekeeper.

Medical records gathered in support of plaintiff's applications show that she has scoliosis, with x-rays showing a 36-degree curve to the right in the thoracic portion of plaintiff's spine. In April 2000, plaintiff saw her primary physician, Dr. John Bordwell, with

complaints of back and knee pain. AR 171. Upon examination, Dr. Bordwell noted that plaintiff was obese and had marked scoliosis. Plaintiff had no pain on palpation of the back and had almost full range of motion. Dr. Bordwell's examination of plaintiff's knee detected no fluid or restriction of motion; x-rays of the knee were normal.

On June 11, 2001, plaintiff saw Dr. Bordwell because of continued back pain and cracking of her knees and ankles with movement. Plaintiff reported that she had regained weight lost on a Weight Watchers diet. Dr. Bordwell examined plaintiff and noted that plaintiff had normal reflexes and could bend forward so that her fingers were mid-tibia. Dr. Bordwell diagnosed scoliosis and obesity.

In August 2001, plaintiff told Dr. Bordwell that she had been swimming and biking. Her back and neck ached, although plaintiff slept fairly well and had no radicular pain. Plaintiff was tender over the left trapezius muscle and mid thoracic muscles in the back, and could bend forward only to where her fingers were just above her knees. Plaintiff had normal range of motion in the neck. Dr. Bordwell diagnosed a cervical thoracic strain and recommended that plaintiff exercise, watch her posture and lose weight. He prescribed Flexeril, a muscle relaxer, for plaintiff to use when the pain was bad.

Plaintiff did not seek any treatment for back or neck pain for the next two years. On October 13, 2003, plaintiff saw Dr. Bordwell, reporting that she was applying for social security disability because she believed her scoliosis was causing her significant pain that prevented her from working and she was worried about becoming crippled. Plaintiff

reported periodic left neck and shoulder pain, flank pain with rotations, and intermittent left forearm and hand pain. Physical examination revealed mild pain to palpation of the trapezius muscle but no other abnormalities. Dr. Bordwell diagnosed cervical spasm and tendinitis of the forearm. He advised weight loss, exercise and proper neck posture. He refilled plaintiff's prescription for Flexeril.

On January 16, 2004, Dr. Eric Carlsen examined plaintiff at the request of the local Disability Determination Bureau. Plaintiff reported being diagnosed with scoliosis as a teenager and having had intermittent back and neck pain throughout most of her adult years. Plaintiff said the pain had become worse in the last couple of years. According to plaintiff, she had mid and low back pain intermittently that was worse with standing, bending, twisting or lifting. Plaintiff also reported chronic neck pain, stating that she was getting a "hump" in the back of her neck. Plaintiff rated her average pain as between 4 and 7 on a 10-point scale, although she said on some days it flared up to a 9. Plaintiff reported that to alleviate the pain, she changed positions, walked, took pain medication, showered and used heating pads. At the time of the examination, plaintiff was taking aspirin and using Ben-Gay ointment for her pain. She reported that she lived with her boyfriend who did the heavier housework, although plaintiff did do some housework and shopping. Plaintiff last worked in Fall 2003 at a seasonal housekeeping job at a resort.

Dr. Carlsen's characterized plaintiff as pleasant and cooperative. She was obese, weighing 257 pounds and standing 5' 3 ½" tall. Her gait was within normal limits and she

was able to heel and toe walk. She could dress and undress herself independently, climb on and off the examination table and go from prone to supine position without any pain behaviors. She had good range of motion in her back and neck, normal strength and sensation and normal reflexes. Dr. Carlsen diagnosed scoliosis and intermittent mechanical neck and low back pain. He reported that plaintiff would have some difficulty performing jobs requiring heavy lifting or frequent bending or twisting, but that she had no gross deficits in her ability to walk, see, speak, hear or use her upper limbs. AR 135-138,

On February 23, 2004, Dr. Pat Chan, a consulting physician for the Disability Determination Bureau, reviewed the medical record and determined that plaintiff had scoliosis and neck pain. In Dr. Chan's opinion, plaintiff retained the capacity to perform the exertional requirements of light work (meaning that she could occasionally lift 20 pounds, frequently lift 10 pounds, stand or walk about six hours in a work day, and sit up to six hours in a work day) that required only occasional stooping, crouching or crawling. AR 127-134. On May 4, 2004, Dr. Michael Baumblatt, another state agency physician, reviewed the record and determined that plaintiff could perform the full range of work at the medium exertional level. AR 143-150.

II. Hearing Testimony

The administrative hearing was held on October 11, 2005. Plaintiff and her lawyer appeared telephonically. Plaintiff was living in Daytona Beach, Florida, having moved there

after the resort season ended in northern Wisconsin. Plaintiff testified that she had worked as a housekeeper at the Deer Foot Resort one day a week for the past three resort seasons, which ran from approximately May to September. From May 2004 until January 2005, plaintiff also had worked 25 hours a week at Grand Pines resort.

Plaintiff testified that in Wisconsin, she lived in a trailer with her significant other. Plaintiff grocery shopped, did laundry, washed dishes, made the bed, vacuumed, swept and used an electric blower to clean the deck. During the summer, she swam 20 minutes a day and spent about 20 hours per week on her pontoon boat, fishing or sightseeing with friends. Plaintiff said that her only pain medication was Flexeril but she was not taking any at the time of the hearing because she had run out.

Plaintiff testified that she has pain in her neck, back and knees attributed to scoliosis, an old neck fracture and rotated and herniated discs in her lower back. She estimated she could sit continuously for 20 minutes, stand continuously for 20 minutes, walk about two to three blocks and lift 10 pounds.

Donna Mancini, a vocational expert, testified at the hearing. After Mancini testified about the skill level and exertional requirements of plaintiff's past jobs, the ALJ asked whether plaintiff could perform any of those jobs if she was limited to light work; needed to avoid ladders and unprotected heights; needed to avoid the operation of heavy, moving machinery; needed to avoid "unusual stress;" could only occasionally bend, stoop, crawl, kneel or crouch; and required the ability to change position from sitting to standing (known

as a "sit/stand option") every 30 minutes.[1] Mancini testified that under those restrictions, plaintiff could not perform any of her past relevant work, either as those jobs were described in the *Dictionary of Occupational Titles* (DOT) or as plaintiff actually performed them. The ALJ then asked Mancini whether, given plaintiff's age, education, lack of transferable skills and the limitations previously described, there were any entry-level jobs that plaintiff could perform. Mancini responded that plaintiff could perform the following unskilled jobs that existed in significant numbers in the regional and national economy: toll collector, mail clerk, food and beverage order clerk and call-out operator.

III. The ALJ's Decision

In his written decision, the ALJ applied the familiar five-step sequential process for evaluating disability claims. 20 C.F.R. § 404.1520. At step one, the ALJ found that although plaintiff had worked after her alleged onset date, her earnings from that work did not reach the substantial gainful level. At steps two and three, the ALJ found that plaintiff's scoliosis constituted a severe medically-determinable impairment but that it was not severe enough to meet the listing for disorders of the spine. The ALJ also noted that although plaintiff might have an affective disorder, that disorder was not "severe" because it would at best minimally interfere with her ability to perform basic work activities.

[1] The hearing transcript indicates that the tape was inaudible at the end of the ALJ's hypothetical question, so the transcript does not reflect that the ALJ specified that the sit/stand option should be for 30 minute periods. However, the ALJ indicated in his decision that the sit/stand option was for 30-minute intervals and plaintiff has not alleged that the ALJ's hypothetical at the hearing did not include this time specification. Accordingly, I have inferred that the ALJ asked the vocational expert to include a 30-minute sit/stand option.

As part of his step four consideration whether plaintiff could perform her past relevant work, the ALJ assessed plaintiff's residual functional capacity. After noting that the state agency consultants had determined that plaintiff could perform medium or light work and that Dr. Carlsen found that plaintiff only would have problems performing jobs involving heavy lifting or requiring frequent bending or twisting, the ALJ determined that plaintiff retained a residual functional capacity for either light or sedentary work that required only occasional bending, kneeling, stooping, crouching, squatting or crawling and no ladder climbing; that allowed plaintiff to change position from sitting to standing every 30 minutes; and that presented "no unusual stress." In reaching this determination, the ALJ considered plaintiff's assertions of disabling limitations and found that they "far exceed the medical evidence of record." He found that the only alleged impairment corroborated by the medical record was scoliosis, noting the absence of medical support for plaintiff's allegations of a pinched nerve, herniated discs or knees and hips out of alignment. He also noted that plaintiff's treating doctor, Dr. Bordwell, had advised her to exercise and had not indicated that she had restrictions.

The ALJ also noted that plaintiff had failed to lose weight although Dr. Bordwell had advised her to do so. The ALJ reasoned that "the claimant's excessive weight likely affects her comfort level for exertional activities" and that plaintiff's failure to put forth some effort to lose weight tended to suggest that her discomfort was not as severe as she alleged. AR 16. In addition, he noted that plaintiff's part-time work activity, daily swimming and regular

boating were activities that were consistent with a residual functional capacity for a significant range of light or sedentary work. The ALJ found that although plaintiff's scoliosis likely would result in some pain and limitation, the objective findings indicated that these limitations would not prevent her from performing work within the residual functional capacity assessed by the ALJ.

Relying on the testimony of the vocational expert, the ALJ determined at step four that plaintiff could not perform any of her past relevant work. However, he determined at step five that an individual of plaintiff's age, education and residual functional capacity could perform the following jobs existing in significant numbers in the national economy: toll collector, mail clerk, food and beverage order clerk and call out operator. Accordingly, he concluded that plaintiff was not disabled under the Social Security Act.

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. Where conflicting evidence allows reasonable minds to differ as to whether a claimant is disabled, it is the province of the commissioner to make that decision. *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).

II. Obesity

Plaintiff contends the ALJ failed to properly evaluate the evidence in the record that she was obese, as required by Social Security Ruling 02-1p: *Policy Interpretation Ruling Titles II and XVI: Evaluation of Obesity*, 67 Fed. Reg. 57859 (2002). SSRs are interpretive rules intended to offer guidance to agency adjudicators. *Lauer v. Bowen*, 818 F.2d 636, 639-40 (7th Cir. 1987). "While they do not have the force of law or properly promulgated notice and comment regulations, the agency makes SSRs 'binding on all components of the Social Security Administration.'" *Lauer v. Apfel*, 169 F.3d 489, 492 (7th Cir. 1999) (citing 20 C.F.R. § 402.35(b)(1)).

There is no dispute that plaintiff is obese: at 63.5 inches and 257 pounds, plaintiff has a Body Mass Index of 36, placing her in the Level II category of obesity. SSR 02-1p, 67 Fed. Reg. at 57860 (citing *Clinical Guidelines on the Identification, Evaluation, and Treatment of Overweight and Obesity in Adults* (NIH Publication No. 98-4083, September 1998)). SSR 02-1p explains that although the commissioner has deleted the listing for obesity, obesity is still a medically determinable impairment that can cause or contribute to impairments in other body systems, such as the musculoskeletal, respiratory and cardiovascular systems. *Id*. The commissioner is to consider obesity at several points in the five-step sequential evaluation process, including when deciding whether a claimant meets or medically equals a listed impairment, and when assessing a claimant's residual functional capacity. *Id*. Plaintiff contends that the ALJ's failure to do this in her case is an error meriting remand. *Clifford v. Apfel*, 227 F.3d 863, 873 (7th Cir. 2000) (ALJ should have considered effect of plaintiff's weight on her overall condition where record contained numerous references to plaintiff's weight problem but claimant did not claim obesity as impairment on her Disability Report).

The commissioner argues that the ALJ complied with the ruling because he noted plaintiff's weight and obesity at least twice in his decision. However, SSR 02-1p requires more than acknowledgment of a claimant's obesity; the ALJ is supposed to *evaluate* the effects of a claimant's obesity at the various steps in the sequential process. The commissioner's suggestion that the ALJ actually conducted this evaluation in this case is untenable: nowhere in his decision does the ALJ cite SSR 02-1p, consider plaintiff's obesity

as an aggravating condition, or give any other indication that he complied with the regulation.

Nonetheless, the Court of Appeals for the Seventh Circuit has held that "a failure to explicitly consider the effects of obesity may be harmless error." *Prochaska v. Barnhart*, 454 F. 3d 731, 736 (7th Cir. 2006). In *Prochaska*, 454 F.3d at 736, the court found that because the ALJ's decision was predicated upon the opinions of physicians who discussed the plaintiff's weight, and because plaintiff had not pointed to any evidence suggesting that her obesity significantly aggravated her physical impairments or contributed to her physical limitations, the ALJ's failure to comply with SSR 02-1p was harmless. The court reached the same conclusion in *Skarbek v. Barnhart*, 390 F.3d 500, 504 (7th Cir. 2004), explaining:

> [A]ny remand for explicit consideration of Skarbek's obesity would not affect the outcome of this case. *See Keys v. Barnhart*, 347 F.3d 990, 994-95 (7th Cir. 2003) (applying harmless error review to ALJ's determination). Notably, Skarbek does not specify how his obesity further impaired his ability to work, but speculates merely that his weight makes it more difficult to stand and walk. Additionally, the ALJ adopted the limitations suggested by the specialists and reviewing doctors, who were aware of Skarbek's obesity. Thus, although the ALJ did not explicitly consider Skarbek's obesity, it was factored indirectly into the ALJ's decision as part of the doctor's opinions.

As in *Skarbek* and *Prochaska*, the ALJ's failure in this case explicitly to consider plaintiff's obesity at the various steps of the sequential evaluation process is harmless error. It is clear from the ALJ's decision that he was aware of plaintiff's obesity. *See* AR 13 (discussing plaintiff's weight) and AR 16 (noting that plaintiff's excessive weight likely was

stressing her joints and decreasing her energy). Although plaintiff suggests that the ALJ should have considered whether her obesity combined with her scoliosis was severe enough to meet or equal a listed impairment, plaintiff does not indicate what listing she thinks she satisfies, nor does she point to any medical evidence in the record that would support a finding that the combination of her impairments is of listing-level severity. Neither of the medical consultants who reviewed the record– and who presumably were aware of plaintiff's obesity–determined that plaintiff's condition met or equaled the listings. Absent medical evidence to the contrary, the ALJ's failure to address plaintiff's obesity at step three of the sequential evaluation process was harmless. *See Scheck v. Barnhart*, 357 F.3d 697, 800 (7th Cir. 2004) (Disability Determination and Transmittal forms conclusively establish that physician designated by commissioner has considered whether plaintiff's impairment met or equaled listing; ALJ's failure specifically to articulate reason for accepting opinions of consulting physicians not error where plaintiff did not present any substantial evidence to contradict agency's position on medical equivalency).

Similarly, although plaintiff argues that the ALJ should have considered the impact of her obesity on her residual functional capacity, she does not point to any evidence in the record apart from her weight to suggest that she would be unable to perform light or sedentary work with the postural restrictions set forth by the ALJ. SSR 02-1p, 67 Fed. Reg. at 57862 ("[W]e will not make assumptions about the severity or functional effects of obesity combined with other impairments"). Moreover, the ALJ did consider plaintiff's

obesity indirectly by relying on the reports of Dr. Carlsen and the state agency physicians who found that plaintiff could perform at least light work with some postural restrictions. As the ALJ noted, Dr. Carlsen, who described plaintiff as "obese" and noted that she weighed 257 pounds, observed during his consultative examination that plaintiff had a normal gait, could walk on her heels and toes, had full forward flexion and extension up to 20 degrees and had no problems getting on and off the examining table, changing positions from prone to supine or dressing and undressing herself. Based on his examination, Dr. Carlsen concluded that plaintiff's only job-related limitations were to avoid heavy lifting and frequent bending or twisting. By relying in part on Dr. Carlsen's report in assessing plaintiff's residual functional capacity, the ALJ indirectly accounted for plaintiff's obesity. As such, it would be pointless to remand this case for explicit consideration of plaintiff's obesity. *Gentle v. Barnhart*, 430 F.3d 865, 868 (7th Cir. 2005) ("[O]nce [obesity's] causal efficacy is determined, it drops out of the picture.").

Taking a different tack, plaintiff takes issue with the ALJ's reliance on plaintiff's lack of effort to lose weight as a basis for denying her benefits. Plaintiff's argument is not clear, but she seems to contend that the ALJ could not draw any adverse inferences from plaintiff's failure to lose weight without first finding that plaintiff was disabled from obesity, that a treating source had prescribed treatment that would restore plaintiff's ability to work, and that plaintiff did not have a good reason for failing to follow the prescribed treatment. *See* SSR 02-1p, 67 Fed. Reg. at 57864 (explaining what findings ALJ must make before failure

to follow prescribed treatment for obesity can become issue in a case, citing SSR 82-59, "Titles II and XVI: Failure to Follow Prescribed Treatment"); *see also* 20 C.F.R. §§ 404.1530, 416.930. The commissioner responds that it was unnecessary for the ALJ to make these findings because he did not deny plaintiff's application on the basis of her failure to comply with treatment. Rather, argues the commissioner, the ALJ merely considered plaintiff's failure to comply with her doctor's recommendation as one of several factors suggesting that plaintiff's complaints of disabling pain were not entirely credible, since one would expect a person disabled by pain to "make a greater effort to comply with recommended medical treatment." Mem. in Supp. of Comm.'s Dec., dkt. #9, at 9.

The commissioner is correct that this technically was not a case of "failure-to-follow-prescribed-treatment": the ALJ did not find that plaintiff was disabled but for her failure to lose weight. *See* SSR 82-59 (claim may be denied where claimant unjustifiably fails to comply with prescribed treatment that would restore ability to work).[2] Further, the commissioner's contention that the ALJ could properly consider evidence of noncompliance as a factor bearing on credibility is supported by SSR 96-7p:

> [An] individual's statements may be less credible if . . . records show that the individual is not following the treatment as prescribed and there are no good reasons for this failure. However, the adjudicator must not draw any inferences about an individual's symptoms and their functional effects from a failure to seek or pursue regular medical treatment without first considering any explanations that the individual may provide, or other information in the case record, that may explain

[2] *See* http://www.ssa.gov/OP_Home/rulings/di/02/SSR82-59-di-02.html

> infrequent or irregular medical visits or failure to seek medical treatment.

61 Fed. Reg. 34483-01 (1996).

Still, the Court of Appeals for the Seventh Circuit has cautioned that disability adjudicators should be chary about drawing adverse inferences from an individual's failure to alter behaviors viewed by many as merely bad habits, namely, smoking and obesity. In *Shramek v. Apfel*, 226 F.3d 809, 812 (7th Cir. 2000), the court rejected an ALJ's credibility determination that was based on the plaintiff's failure to quit smoking where there was no evidence that plaintiff could work if she stopped smoking or that smoking contributed to plaintiff's pain, swelling or other symptoms related to her phlebitis. Similarly, in *Rousey v. Heckler*, 771 F.2d 1065, 1069 (7th Cir. 1985), the court found that in the absence of medical evidence in the record linking the plaintiff's chest pain "directly" to her smoking, the ALJ erred by relying on the plaintiff's failure to stop smoking as a reason to discredit her subjective complaints of chest pain. And in *Barrett v. Barnhart*, 355 F.3d 1065, 1068 (7th Cir. 2004), the court rejected the ALJ's suggestion that the plaintiff's arthritis would be less severe if she lost weight, noting that the plaintiff's obesity was not remediable but was caused by hypothyroidism. So, either when applying the non-compliance regulation directly, or when making a credibility determination, the ALJ must ground in the record any adverse conclusion he draws from the effects of and reasons for a claimant's failure to comply with recommended treatment.

Plaintiff suggests that both SSR 02-1p and the court's decision in *Barrett* indicate that an individual's failure to lose weight as recommended by her doctor *never* may be considered as a factor tending to undermine her credibility. Reply, dkt. 10, at 11. This is incorrect. Although SSR 02-1p states that the commissioner rarely will use "failure to follow prescribed treatment" for obesity to deny benefits, "rarely" ≠ "never." As the court stated in *Barrett*,"if an applicant's obesity is *in fact* remediable, then it is no more a basis for an award of benefits than any other remediable condition would be . . .". 355 F.3d at 1068 (emphasis in original). Moreover, SSR 02-1p governs when benefits may be denied under the noncompliance regulation; it is called into play only after a predicate finding that plaintiff was disabled by obesity. The ALJ never found that plaintiff would qualify for benefits but for her failure to lose weight, so the noncompliance regulation is inapplicable to this case.

The ALJ relied on plaintiff's failure to lose weight as one circumstance in the totality that he considered when assessing the credibility of her subjective complaints. Plaintiff has not attacked the evidentiary foundation for the ALJ's conclusion concerning plaintiff's failure to lose weight or argued that the ALJ failed to comply with SSR 96-7p. For example, plaintiff has not disputed that her doctor recommended that she lose weight or that her excess weight places strain on her joints, nor has she asserted that she has good reasons for her failure to lose weight. Her challenge to the ALJ's consideration of her failure to lose weight is limited to her unsuccessful argument that the ALJ failed to comply with SSR 02-1p. Accordingly, plaintiff has waived any challenge to the ALJ's credibility determination.

Harper v. Vigilant Ins. Co., 433 F.3d 521, 528 (7th Cir. 2005) (failure properly to present an issue during summary judgment briefing constitutes waiver).[3]

In sum, although the ALJ failed to consider explicitly plaintiff's obesity at the various steps in the sequential evaluation process, it is plain that the ALJ accounted for plaintiff's obesity indirectly. Plaintiff has not pointed to any evidence in the record suggesting that her obesity imposes more severe limitations than found by the ALJ. Accordingly, the ALJ's failure to comply explicitly with SSR 02-1p is harmless error. Moreover, the ALJ was not required to make the specific findings regarding the non-compliance portion of SSR 02-1p because he did not deny plaintiff benefits to which she would otherwise be entitled had she complied with treatment and attempted more diligently to lose weight.

III. Adequacy of Hearing Transcript

Plaintiff contends that remand is required because several portions of the hearing tape were inaudible, including what plaintiff describes as "key" testimony from the vocational expert regarding plaintiff's past relevant work and the availability of other work in the national economy. Recognizing that transcription errors sometimes are harmless, the Seventh Circuit has held that

[3] The Commissioner's response noted the ALJ's use of plaintiff's obesity as a factor in determining credibility, *see* dkt. 9 at 8-9, but even this did not provoke a challenge (although a challenge in the reply would have come too late, *see Harper,* 433 F.3d at 528).

> [a] litigant who seeks reversal on the ground of a denial of due process that is due to an inaccurate or incomplete transcript is therefore required to make the best feasible showing he can that a complete and accurate transcript would have changed the outcome of the case.

Ortiz-Salas v. I.N.S., 992 F.2d 105, 106 (7th Cir. 1993). In *Ortiz-Salas*, 992 F.2d at 107, the court noted that although the transcript of the hearing contained 292 "inaudible" notations, reversal was not required where the plaintiff made no effort to show that the testimony that was not transcribed was material.

The same is true here. Apart from asserting that some of the "inaudibles" were portions of "key" testimony by the vocational expert, plaintiff has not attempted to demonstrate that the omitted testimony was material to her claim. For example, although she is represented in this appeal by a lawyer different from the lawyer who represented her during the administrative hearing, she could have contacted that lawyer and obtained an affidavit from him based on his own recollections of what was said at the hearing, or she could have submitted her own affidavit.

In any event, having reviewed the transcript myself, I find that much of what was said during the inaudible portions of the vocational expert's testimony either is immaterial or can be inferred from context. Much of the inaudible testimony concerning plaintiff's past relevant work is immaterial because the vocational expert found that plaintiff cannot perform her past relevant work. What is material to plaintiff's case is how the ALJ phrased his hypothetical question at step five, and the vocational expert's response to that question.

These portions of the hearing are adequately transcribed. Accordingly, remand is not required.[4]

IV. Adequacy of RFC and Corresponding Hypothetical

Finally, plaintiff attacks the ALJ's determination at step five that plaintiff can make a vocational adjustment to other types of work. Plaintiff contends that this finding is not supported by substantial evidence because the hypothetical on which the finding was based was vague insofar as it limited plaintiff to work with "no unusual stress." Plaintiff argues that without a more precise definition, the term "no unusual stress" fails to describe in any meaningful way a work-related function. Therefore, posits plaintiff, the foundation is shaky for the vocational expert's testimony as to the jobs plaintiff still could perform.

In *Lancellotta v. Sec'y of Health and Human Services*, 806 F.2d 284 (1st Cir. 1986), the court overturned the ALJ's conclusion that the plaintiff, who suffered from a severe anxiety disorder, was capable of performing "low stress" jobs. The court explained that "stress is not a characteristic of a job, but instead reflects an individual's subjective response to a particular situation." *Id.*, 806 F.2d at 285. The court held that because the plaintiff had a severe mental disorder that prevented him from performing his past relevant work, the ALJ should have complied with SSR 85-15 by assessing plaintiff's ability to perform the basic mental

[4] Plaintiff also contends that remand is required because the record fails to reflect that the Appeals Council complied with its internal procedures concerning partly inaudible transcripts. Mem. in Supp. of Mot. for Summary Judgment, dkt. 8, at 31 (citing HALLEX I-4-1-25). However, the HALLEX manual is not binding on the agency and has no legal force. *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981); *Parker for Lamon v. Sullivan*, 891 F.2d 185, 190 (7th Cir. 1989).

demands of unskilled work: the ability to understand, carry out, and remember simple instructions; to respond appropriately to supervision, coworkers, and usual work situations; and to deal with changes in a routine work setting. *Id*. at 286. *See also id.* at 287 ("Ruling 85-15 recognizes the Secretary's obligation to undertake at least some subjective, individualized inquiry into what job attributes are likely to produce disabling stress in the claimant, and what, if any, jobs exist in the economy that do not possess these attributes.") (Campbell, J., concurring). Because the ALJ never made any findings concerning plaintiff's ability to perform these work-related activities nor identified the situations that were likely to cause disabling stress in the plaintiff, the vocational expert's testimony based on a hypothetical that assumed that plaintiff could perform "low stress" jobs was inadequate to support a finding of not disabled. *Id*.

But there is a crucial difference between plaintiff's situation and Lancellotta's: plaintiff does not have a severe mental impairment. Although the ALJ gave plaintiff "the benefit of the doubt" and found that she had an affective disorder, he explicitly determined that this impairment was not severe because it would have "no more than a minimal effect" on plaintiff's ability to understand, remember and carry out simple instructions; use judgment; respond appropriately to supervisors, co-workers and usual work situations; and deal with changes in a routine work setting. AR 14. *See* 20 C.F.R. § 404.1521 (explaining what is meant by a "non-severe" impairment). In *Lancellotta*, the concurring judge explained that an ALJ needs to conduct an"individualized" assessment of a claimant's stress reactions

only if the claimant is unable to perform her past relevant work *and* "has a stress condition that significantly affects his ability to perform the full range of jobs consistent with any exertional or other limitations." *Lancellotta*, 806 F.2d at 287 (Campbell, J., concurring) (citations omitted). *See also Felver v. Barnhart*, 243 F. Supp. 2d 895, 906 (N.D. Ind. 2003) (applying *Lancellotta* in case involving severe mental impairment).

Plaintiff has not challenged the ALJ's conclusion that she does not suffer from any severe mental impairment. Moreover, she does not identify a single piece of evidence in the record to suggest that she has any mental impairment, much less a stress condition, that would have more than a minimal effect on her ability to perform the mental demands of unskilled work. Accordingly, *Lancellotta* is inapposite.

The court will sustain a hypothetical that an ALJ poses to a VE so long as it includes all limitations supported by medical evidence in the record. *Young v. Barnhart*, 362 F.3d 995, 1003 (7th Cir. 2004); *Steele v. Barnhart*, 290 F.3d 936, 942 (7th Cir. 2002). By using the term "no unusual stress," the ALJ appears to have been attempting to indicate that plaintiff was capable of handling the "usual" stressors attendant to unskilled work. This distinction adds nothing useful to the hypothetical; it only roils the record as plaintiff's challenge demonstrates. But although I agree that the term "no unusual stress" is vague, vagueness alone is not a ground for reversal absent some showing by plaintiff that the term failed to describe mental limitations supported by the record. Plaintiff has not pointed to any evidence to suggest that she has any mental limitations, much less limitations that affect her ability to deal with stress. *Cf. Young*, 362 F.3d at 1004 (finding RFC that limited plaintiff

to "simple, routine, repetitive, low stress work with limited contact with coworkers and limited contact with the public" deficient because it failed to account for substantial evidence in record indicated that plaintiff had problems responding appropriately to criticism from supervisors). Reversal is not warranted for what appears to have been an overly-generous RFC finding by the ALJ.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that this court affirm the commissioner's decision to deny plaintiff Diane Nelson's applications for disability insurance benefits and supplemental security income be AFFIRMED.

Entered this 24th day of October, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

October 24, 2006

Dana W. Duncan
Schmidt, Grace & Duncan
P.O. Box 994
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Richard D. Humphrey
Assistant U.S. Attorney
P.O. Box 1585
Madison, WI 53701-1585

Re: Nelson v. Barnhart
Case No. 06-C-249-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 November 14, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by November 14, 2006, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge