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

JOHN BERGER,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

REPORT AND
RECOMMENDATION

06-C-0256-C

REPORT

Plaintiff John Berger brings this civil action for judicial review of an adverse decision of the Commissioner of Social Security. Plaintiff, who suffers from a back impairment, contends that the adverse decision of the administrative law judge is riddled with factual errors and omissions that compromise the commissioner's decision warrant a remand for unbiased reconsideration. Plaintiff is correct that the ALJ wrote a one-sided opinion that fails in many instances to convey the facts accurately and completely. Even so, the ALJ's errors are not so egregious that they undermine the reliability of his ultimate findings, which are supported by substantial evidence. Notwithstanding the court's bemusement and displeasure with the manner in which the ALJ approached plaintiff's case, I am recommending that this court affirm the commissioner's decision.

From the administrative record, I find the following facts.

FACTS

I. Background and Medical Evidence

Plaintiff is a 46-year old carpenter/construction worker who has the equivalent of a high school education. In January 1999, plaintiff began experiencing left leg, left foot and back pain after a fall at work. On August 23, 1999, plaintiff saw Dr. Ahmad Haffar, a neurologist. An MRI of plaintiff's lumbar spine revealed a probable herniated disc at L4-5 with impingement on the nerve root and narrowed discs at L1-L4. AR 329. Plaintiff received an epidural steroid injection but it did little to reduce his pain. Dr. Haffar referred plaintiff to Dr. K.S. Paul, a neurosurgeon. AR 303.

On November 8, 1999, plaintiff saw Dr. Paul. Plaintiff reported having nearly constant lower back and leg pain as well as numbness and tingling in his left leg and foot. Plaintiff said the pain was present even if he was not active but that it worsened with any physical activity, forward bending, lifting or carrying. On examination, Dr. Paul observed that plaintiff walked with a limp on the left. Back movements were restricted and painful and straight leg raising was positive at about 30 degrees on the left and 60 on the right. Plaintiff had normal strength and tone in his extremities with no atrophy. AR 299-302.

On November 17, 1999, plaintiff began seeing Dr. Christal Sakrison after sustaining his second injury at work. Dr. Sakrison prescribed Vicodin and Soma, a muscle relaxer. On December 10, 1999, she indicated that plaintiff should remain off work pending physical therapy and a work fitness evaluation. AR 370. On December 31, 1999, plaintiff

participated in a functional capacity evaluation which indicated that plaintiff could meet the exertional demands of light work. AR 161-164. Plaintiff regularly saw Dr. Sakrison while awaiting resolution of his worker's compensation claim.

On January 3, 2000, plaintiff saw Dr. Paul again. Plaintiff reported increased back and lower extremity pain after hurting his back at work in November while attempting to lift a wall frame to set it into place. A myelogram and computed tomography scan conducted on December 29, 1999 confirmed that plaintiff had a herniated disc at L4-L5 that was compressing the nerve roots. Dr. Paul recommended that plaintiff undergo back surgery. AR 298. However, plaintiff was unable to undergo surgery because his worker's compensation carrier denied the claim. AR 296.

On January 12, 2000, plaintiff saw Dr. Stephen Weiss, an orthopedic surgeon, for an independent medical examination related to plaintiff's claim for worker's compensation. Plaintiff reported constant low back and leg pain running down his foot that was exacerbated by bending, lifting, twisting, prolonged sitting, standing or walking. Dr. Weiss observed that plaintiff had a normal gait and could walk on his toes but he had difficulty walking on his heels. Dr. Weiss detected moderate muscle spasms and tenderness in the lumbar region. Straight leg raising was mildly to moderately positive on the left side and plaintiff had restricted range of motion in the lumbar spine. Dr. Weiss indicated that plaintiff should not perform work that required him to lift anything from below mid-thigh level or more than 20 pounds occasionally or more than 10 pounds repetitively. AR 412-418.

On February 23, 2000, Dr. Sakrison noted that plaintiff faced a dilemma: he was cleared for light duty work but his employer did not have such work available. Plaintiff told Dr. Sakrison that his employer would not let him return to work until he had the back surgery, but plaintiff needed to work in order to afford the surgery. AR 364.

On June 2, 2000, plaintiff told Dr. Sakrison that he was caught up with his bills and was doing some work doing vinyl siding, metal bending and running the crew that did not involve a lot of physical labor. Plaintiff reported that he had applied for a job that he hoped would be supervisory and which would provide him with insurance. AR 362. Dr. Sakrison refilled plaintiff's prescriptions for Vicodin and Soma, noting that plaintiff was abiding by the guidelines on his medication and was awaiting surgery.

On July 7, 2000, plaintiff told Dr. Sakrison that his conditioned had worsened. He could not work, mow his lawn or lean over his car. Plaintiff admitted that he had been obtaining hydrocodone from another doctor because he was desperate for pain relief. AR 361. On July 28, 2000, plaintiff received a second epidural steroid injection, but it had no long term effect on his pain.

On August 28, 2000, Dr. Sakrison added Duragesic patches to plaintiff's medication regimen.[1] At a follow-up a month later, plaintiff reported feeling better since wearing the patches. He was working 2 to 2 ½ days a week for a contractor. Plaintiff said he was careful

[1] According to the *Physician's Desk Reference*, Duragesic contains a high concentration of a potent Schedule II opioid agonist, fentanyl and is indicated for management of persistent, moderate to severe chronic pain in patients with a high tolerance for opioids. 2006 WL 384463 (PDR).

about what jobs he could do, offering as an example that he could tolerate shingling if someone handed him the shingles, but he could not rip old roofing off. AR 359. However, in November 2000, plaintiff told Dr. Sakrison that his condition had worsened so that he had been able to work only two days in the past two weeks. Plaintiff reported that he needed to work because he needed money. He was still awaiting surgery. AR 358. In February 2001, plaintiff reported that he was working as a self-employed carpenter siding a house. AR 356.

Plaintiff continued to receive medications from Dr. Sakrison while awaiting resolution of his worker's compensation claim and waiting to undergo the surgery recommended by Dr. Paul. Plaintiff eventually settled his claim and returned to see Dr. Paul on October 17, 2001. Dr. Paul recommended a repeat MRI to determine if plaintiff's condition had worsened. AR 295. The MRI showed that the herniated disc at L4-L5 had actually improved so that it was now only "bulging" and causing mild narrowing of the spinal canal. Similar degenerative changes were noted at L3-L4 and a small annular tear was detected at L2-L3. A post-MRI CT scan revealed a condition known as a "pars defect" at L5-S1. AR 318-319.

Based on the new MRI findings, Dr. Paul recommended epidural steroid injections at L4-L5. AR 295. After this proved unsuccessful, plaintiff underwent a discogram, during which plaintiff reported excruciating pain at L2-L3 but less pain at L3-L4 and L4-L5. AR 294. In March 2002, Dr. Paul suggested that plaintiff have a spinal fusion at L4-L5, but he referred plaintiff to Dr. Steven Weinshel for a second opinion. AR 293.

On April 12, 2002, Dr. Weinshel examined plaintiff. Plaintiff's extremities exhibited good strength, normal reflexes and no sensory deficits. Plaintiff had positive straight leg raising on the left but not on the right. His back was slightly tender to palpation and his gait was normal. After reviewing the diagnostic studies, Dr. Weinshel concluded that a spinal fusion at L4-L5 might cause instability to L5-S1 because of the pars defect noted at that level and eventually could lead to another fusion at that level. Also, he noted that the results of the discogram suggested that the source of plaintiff's pain was the disc at L2-L3, in which case a fusion at L4-L5 would not be warranted. AR 250-251. After reviewing Dr. Weinshel's report, Dr. Paul recommended that plaintiff be treated conservatively at either a chronic pain management program or with a spinal cord stimulator. AR 292.

On September 26, 2002, plaintiff underwent pre-evaluation screening for entry into a pain treatment program. However, plaintiff later cancelled the actual evaluation because he had no money and no health insurance. AR 257-58.

Plaintiff did not return to see Dr. Paul until April 23, 2003. On that date, Dr. Paul reviewed plaintiff's condition and his treatment options. Dr. Paul explained that the pars defect at L5-S1 was a congenital abnormality that typically is asymptomatic unless there are slipping bones or pinching nerves, neither of which was evident in plaintiff. However, because the pars defect was a "weak spot," plaintiff faced a high probability that problems could arise there later if plaintiff underwent fusion surgery of the vertebrae just above it, L4-L5, the most degenerated of the disks. Dr. Paul noted that the disc at L3-L4 also was

degenerated, presenting the specter that a fusion at L4-L5 could cause a chain reaction along the spine and lead to a three-level fusion.

Plaintiff asked about restrictions; Dr. Paul replied that he had imposed any restrictions because he did "not know what he can do or what he cannot do." Dr. Paul indicated that plaintiff would need to undergo a functional capacity evaluation in order for that determination to be made. AR 291. Dr. Paul completed a lumbar spine questionnaire on which he reiterated that he was unable to estimate plaintiff's exertional abilities. However, Dr. Paul indicated that plaintiff likely would be absent from work more than three times a month due to his condition. AR 283-289.

On July 29, 2003, Dr. Dar Muceno, a consulting physician for the Disability Determination Service, reviewed the medical records and determined that plaintiff retained the residual functional capacity for no more than sedentary work requiring no stooping, crouching or crawling and only occasional kneeling or use of ladders or scaffolds. AR 399. Plaintiff continued to see Dr. Sakrison on a regular basis for medication management.

On July 23, 2004, Dr. Sakrison completed a lumbar spine impairment questionnaire for plaintiff. Dr. Sakrison did not estimate how much plaintiff could lift or carry or how long plaintiff could sit, stand or walk during an eight-hour day, although she opined that plaintiff should not sit or stand continuously and should be able to get up and move around as needed. Also, she indicated that plaintiff would need to take breaks up to several times an hour for up to half an hour at a time and that he likely would be absent more than three times a month because of his condition. AR 403-409.

In a letter to plaintiff's attorney dated the same day, Dr. Sakrison stated that most of her visits with plaintiff after October 15, 1999 were to evaluate and monitor his pain medications. She did not have documentation of plaintiff's functional work capacity or specific work limitations, noting that plaintiff was now working as an independent contractor for other carpenters and did not need work restrictions for an employer. She stated, however, that she did have documentation that plaintiff "has repeatedly attempted to practice his line of work, and cannot maintain this level of activity for more than a few days without suffering the consequences of increased pain and decreased mobility." AR 410-411.

II. Administrative Proceedings

On January 15, 2002, plaintiff filed an application for disability insurance benefits alleging that he had been disabled since November 1, 1999 from a back impairment. On October 4, 2004, SSA held an administrative hearing on plaintiff's application. Plaintiff had a lawyer. Plaintiff testified that before his injury in 1999, he had been earning about $15 an hour and worked full time as a rough carpenter. After his injury he had picked up odd jobs for other carpenters. He testified that he could use a skill saw and air nailers and could climb scaffolding, but he was unable to perform such work on a daily basis for more than a few days at a time. Plaintiff acknowledged that he frequently was paid in cash and that he had not reported all of his earnings to the IRS.

Plaintiff testified that he had back and leg spasms and a constant, deep, aching pain in his lower back and legs and occasionally in his feet that worsened with activity. He estimated that he could stand continuously for approximately an hour and a half, sit for a half hour to an hour, walk three blocks and lift about 20 pounds so long as he did not have to lift that weight from floor level. He testified that he was living in his parents' home where he helped mow the lawn, tend to the garden and clean the garage. Plaintiff said he was able to drive four hours to visit his girlfriend but had to stop periodically to get out and stretch his back. Plaintiff reported that about once a month his back "went out" for one to three days depending on his activity level. During these times, plaintiff was unable to walk.

Plaintiff said that in addition to his medications, he used a vibrating heating pad twice a day for pain relief and had to lie down four times a day for up to half an hour.

Edward Utities testified as a vocational expert (VE). The administrative law judge (ALJ) asked the VE whether there were any jobs in the regional or national economy that could be performed by a person of plaintiff's age, education and work experience who had the residual functional capacity to perform sedentary work requiring no ropes, ladders or scaffolds, no stooping, crouching or crawling and no more than occasional kneeling. The VE testified that such an individual could perform bench assembly work, of which there were 5,100 jobs in Wisconsin, and surveillance system monitor, of which there were more than 500 jobs in Wisconsin. According to the VE these jobs would not be precluded even if the worker needed to stand up once an hour for up to 10 minutes at a time. However, he

indicated that such jobs would be precluded if the individual needed to lie down during the day more frequently or for longer than allowed by normal break periods.

On June 14, 2005, the ALJ issued a written decision. Applying the familiar five-step sequential evaluation process, *see* 20 C.F.R. § 404.1520, the ALJ found that plaintiff had not engaged in substantial gainful activity after his onset date (step one); plaintiff's degenerative disc disease and congenital pars defect at L-5 constituted a severe impairment (step two)[2]; plaintiff's back impairment did not meet or equal the SSA listings (step three); plaintiff was unable to perform his past relevant work as a construction worker and carpenter (step four); and SSA had met its burden of demonstrating that plaintiff was capable of performing work in the national economy (step five). *See Knight v. Chater*, 55 F.3d 309, 313 (7th Cir. 1995). In making these findings, the ALJ concluded that plaintiff retained the residual functional capacity for sedentary work, lifting no more than 10 pounds occasionally; sitting six hours in an eight hour work day; standing or walking two hours in an eight hour work day; no use of ropes, ladders or scaffolds; no stooping, crouching or crawling; and only occasional kneeling. The ALJ rejected the opinions of Dr. Paul and Dr. Sakrison that plaintiff would miss more than three days a work and found plaintiff's subjective complaints to be not fully credible.

[2] The ALJ determined that although there was some evidence in the record indicating that plaintiff might have depression, any mental impairment was not severe. Plaintiff does not challenge this decision.

The Appeals Council denied plaintiff's request for review, making the ALJ's decision the final decision of the commissioner.

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, it merely reviews the commissioner's final decision. 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). 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).

Plaintiff contends that his case falls into this last category, arguing that the ALJ's decision cannot stand because the ALJ committed serious mistakes and omissions in his evaluation of the evidence.

II. Objective Medical Evidence

First, plaintiff attacks the manner in which the ALJ evaluated the objective medical evidence at page 3 of the ALJ's decision. Plaintiff argues that the ALJ discussed the record selectively, failed to mention clinical findings that supported plaintiff and mischaracterized the evidence in order to downplay the severity of plaintiff's impairment, and, in turn, to deny his application for disability benefits. Plt.'s Mem., dkt. 9, at 40-55. With one exception, plaintiff's objections to this part of the ALJ's decision amount to nitpicking. Although it is true than an ALJ may not ignore evidence that contradicts the commissioner's position, *Godbey v. Apfel*, 238 F.3d 803, 808 (7th Cir. 2000), the ALJ did not do that in this

case. He noted findings favorable to plaintiff (for example, findings of positive straight leg raising in November 1999 and January 2000) as well as those that were not. Moreover, it is apparent that to the extent the ALJ was selective, he merely was disregarding findings irrelevant to the issue that the ALJ was considering at page 3 of his decision, which was whether plaintiff's condition satisfied the listings. AR 22 ("This evidence does not support an impairment of listing level severity."). According to the listing for disorders of the spine, 20 C.F.R., Pt. 404, Subpt. P. App. 1, 101.04, for a claimant to be presumed to be disabled from such a disorder, he must provide evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight-leg raising test (sitting and supine). Those are the findings on which the ALJ focused in his analysis.[3]

Plaintiff attacks the ALJ for stating that the October 2001 MRI showed that plaintiff's herniated disc had "resolved" and that plaintiff had only "mild" stenosis at L3-L4 and L4-L5. Plaintiff argues that these findings demonstrate a "lack of knowledge on back injuries" insofar as the ALJ appears to have found that such abnormalities were not severe or could not produce the symptoms reported by plaintiff. However, the ALJ found explicitly that despite the herniated disk resolution plaintiff still had degenerative changes in the spine

[3] Plaintiff does not challenge the ALJ's conclusion that plaintiff's condition does not satisfy the listings.

as well as the asymptomatic pars defect as shown on the January 2002 CT scan and that these impairments would interfere significantly with plaintiff's ability to perform basic work activities. AR 21.

That said, I agree with plaintiff that the ALJ either misunderstood or mischaracterized the reason plaintiff no longer was considered a surgical candidate following the results of his January 2001 MRI and discogram. The ALJ wrote:

> [Plaintiff] was initially being considered for surgery, but after his herniated disc resolved, he was no longer considered a surgical candidate, particularly in light of discogram findings which reportedly showed 10/10 pain at L2-L3, a normal disc level.

AR 24-25.This statement suggests that plaintiff was no longer a surgical candidate because he no longer had a surgically repairable condition. However, the report by Dr. Weinshel and the follow-up notes by Dr. Paul make clear that fusion surgery *was* still an option to repair plaintiff's degenerative disc disease at L4-L5; however, Dr. Paul and Dr. Weinshel recommended against that surgery because it would place stress on the already-degenerated or misformed adjoining joints and likely would lead to more surgery. In other words, plaintiff still was a candidate for surgery, he just was not a *good* candidate because of other spinal defects revealed by imaging studies. Contrary to the ALJ's suggestion, plaintiff's condition never "resolved" to the point that surgery was unnecessary.

This error lends credence to plaintiff's contention that the ALJ misunderstood the severity of plaintiff's back impairment. Nonetheless, the ALJ did find expressly that plaintiff

had a severe back impairment; by inference, he also found that plaintiff's back impairment was capable of producing the symptoms reported by plaintiff. *See* SSR 96-7p (ALJ need not analyze credibility of claimant's subjective complaints unless claimant suffers from an impairment that reasonably could be expected to produce claimant's pain and other symptoms). Plaintiff does not contend that the ALJ erred by determining that plaintiff's condition did not satisfy the listings. Thus, the question is whether the ALJ's failure accurately to comprehend plaintiff's surgical situation had a material effect on his assessment of plaintiff's residual functional capacity, which informed the basis for the ALJs findings at steps four and five of the sequential evaluation. As explained in the following section, I conclude that the answer to that question is "no."

III. Residual Functional Capacity

I am not concerned about the ALJ's apparent misunderstanding of the severity of plaintiff's condition because the ALJ, in finding that plaintiff retained the functional capacity for a limited range of sedentary work, adopted the July 2003 opinion of Dr. Munceno, one of the consulting physicians for the disability determination service. In reaching her conclusion that plaintiff could perform sedentary work requiring no bending, crouching or crawling and only occasional kneeling or climbing ladders or scaffolds, Dr. Munceno evaluated the record, including Dr. Weinshel's report of his consultative exam of plaintiff. Even if the ALJ might have failed to recognize the reasons why plaintiff was no longer a surgical condition or the severity of plaintiff's condition, it is fair to presume that Dr.

Munceno, a physician with expertise in the Social Security disability programs, did not. So long as it was proper for the ALJ to adopt Dr. Munceno's opinion and to reject evidence to the contrary, the ALJ's misunderstanding of some of the medical evidence had no material impact on his assessment of plaintiff's residual functional capacity.

A. Medical Opinions

Plaintiff contends that in adopting Dr. Munceno's opinion, the ALJ failed to apply properly 20 C.F.R. § 404.1527, which explains how the commissioner is to weigh medical opinions. Plaintiff argues that under that regulation, the ALJ should have accorded "controlling weight" to the opinions of Dr. Paul and Dr. Sakrison that plaintiff would miss more than 3 days of work per month. However, the regulations provide that an opinion of a treating physician is entitled to controlling weight only if it is "well supported by medically accepted clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence" in the record. 20 C.F.R. § 404.1527(d)(2). In rejecting the reports from Dr. Paul and Dr. Sakrison, the ALJ found that: 1) neither report was supported by the longitudinal treatment records and 2) both doctors included significant disclaimers. Dr. Paul noted that his responses were not based upon any recent examination of plaintiff but on a "discussion" with him. Dr. Sakrison noted that she never personally had ordered any imaging studies or tests and did not have documentation of plaintiff's residual functional capacity or specific work limitations.

Plaintiff argues that neither of the ALJ's reasons are supported by the record. First, he contends that the longitudinal treatment records *do* support the doctors' opinions, pointing out that plaintiff's most recent MRI showed extensive degenerative disc disease of plaintiff's lumbar spine, including spinal stenosis; plaintiff was noted repeatedly to have limited range of motion, radicular pain and difficulty with gait; and plaintiff had tried epidural steroid injections with no relief. As the ALJ pointed out, however, other records showed that plaintiff had a normal gait, no difficulty moving around the examining room, good strength and good reflexes. In particular, the most recent examination of plaintiff's back by Dr. Weinshel on April 12, 2002 found that although plaintiff had positive straight leg raising on the left and some tenderness to palpation in the back, plaintiff had a normal gait, good strength, normal reflexes and no sensory deficits in the extremities.

With respect to Dr. Sakrison, the ALJ noted that plaintiff saw Dr. Sakrison primarily for medication management and that the doctor's treatment notes did not document significant findings related to plaintiff's back, apart from occasional references to decreased range of motion and tenderness of the spine, with some spasm and an occasional limping gait. The ALJ pointed out that Dr. Sakrison had reported on various occasions that plaintiff was working as a carpenter or construction worker and that he was in no acute distress, moved around the room well and was animated.

In fact, noted the ALJ, Dr. Sakrison acknowledged that she never had evaluated plaintiff for neurological deficits, plaintiff had an abnormal gait only at times and plaintiff

had not had a recent functional capacity evaluation. This evidence provides substantial support for the ALJ's conclusion that Dr. Sakrison's treatment notes failed to support her conclusion that plaintiff would have significant exacerbations of back pain requiring him to miss work more than three days a month if plaintiff worked at the sedentary level.

Moreover, the ALJ properly discounted the doctors' opinions on the ground that they were qualified by significant disclaimers. Notably, both doctors indicated that they really did not know what plaintiff could and could not do, and Dr. Paul indicated that he had not examined plaintiff recently before completing his report. In fact, it appears that the only time Dr. Paul actually examined plaintiff was during his first visit with plaintiff in November 1999. Other visits were spent reviewing diagnostic studies and treatment options. Contrary to plaintiff's contention, it was not unreasonable for the ALJ to discount Dr. Paul's opinion concerning how often plaintiff would be likely to miss work when that opinion appears to have been based merely on a discussion with plaintiff and not on any recent examination.

Plaintiff argues that the absence of a recent examination by Dr. Paul is irrelevant because Dr. Paul had examined plaintiff in 1999-2000 and "the important finding was Dr. Paul's opinion of Berger's condition at onset." Plt.'s Mem., dkt. 9, at 74. However, it is undisputed that at the time Dr. Paul completed the functional capacity questionnaire in April 2003, plaintiff's clinical situation was different than it had been in 1999-2000 insofar as the herniated disc initially found had regressed. Although it is true that in April 2003, Dr. Paul had before him the results of the various diagnostic evaluations and Dr. Weinshel's assessment, none of those reports contained findings that might explain why Dr. Paul

thought plaintiff would have three or more absences per month. Moreover, the ALJ found that plaintiff was limited to sedentary work, which required far less exertion than the carpentry and construction work that plaintiff performed periodically during the time period he was being treated by Dr. Sakrison and Dr. Paul.

Finally, plaintiff argues that the ALJ failed to consider all of the relevant factors identified in 20 C.F.R. § 404.1527 for weighing medical opinions (such as the length of the treatment relationship, specialization, *etc*.) Bu the ALJ noted that Dr. Paul was a neurosurgeon and Dr. Sakrison was a family physician, and that plaintiff had been seeing Dr. Sakrison on a regular basis since October 1999. Having acknowledged these factors as part of the opinion-weighing process, the ALJ was not required to accord them more weight than he accorded to factors unfavorable to plaintiff, such as the opinions' inconsistency with the treatment notes and other evidence in the record. "The weight properly to be given to testimony or other evidence of a treating physician depends on circumstances." *Hofslien v. Barnhart*, 439 F.3d 375, 377 (7th Cir. 2006). Under the circumstances present here, the ALJ could choose to give greater weight to Dr. Munceno's opinion as to plaintiff's residual functional capacity than to the opinions of Dr. Paul and Dr. Sakrison.

B. Credibility

In reaching his conclusion that plaintiff could perform the types of sedentary work identified by Dr. Munceno, the ALJ rejected plaintiff's complaints of disabling limitations,

finding them to be inconsistent with other evidence in the record, including: the results of the December 1999 Functional Capacity Evaluation and the independent medical evaluation conducted by Dr. Weiss, which concluded that plaintiff could perform light work; plaintiff's receipt of unemployment benefits during part of the time period he said he was disabled; plaintiff's ability to work periodically as a carpenter; evidence indicating that plaintiff occasionally had taken more pain medication than prescribed, which suggested narcotics abuse; plaintiff's failure to pursue pain clinic treatment, a spinal cord stimulator, or an updated functional capacity evaluation, as recommended by Dr. Paul; plaintiff's failure to seek physical therapy after 1999, participate in any formal exercise or rehabilitation program or seek emergency room care for reports of extreme pain; plaintiff's daily activities; plaintiff's failure to seek work lighter than carpentry or vocational services; plaintiff's "history of dishonesty" in reporting earnings from self-employment; and plaintiff's "minimal treatment with conservative measures."

Plaintiff attacks each of these findings, arguing that the ALJ either misstated the facts, drew illogical inferences from the facts or made unfounded medical opinions. Although plaintiff's argument regarding credibility is set forth at pages 80-90 of his brief, I also have considered the various arguments he makes at pages 56-72. Indeed, argues plaintiff, the ALJ's "obvious efforts" to deny plaintiff's claim establish that the ALJ was biased.[4]

[4] Although plaintiff accuses the ALJ of being biased, plaintiff has not clearly articulated a due process argument or pointed to any evidence apart from the ALJ's decision showing that the ALJ had a "deep-seated and unequivocal antagonism that would render fair judgment impossible." *Liteky v. United*

Several of plaintiff's complaints have merit. For example, although the ALJ criticized plaintiff for failing to pursue Dr. Paul's recommendation to attend a pain clinic, try a spinal cord stimulator, or seek a functional capacity evaluation, the record indicates that plaintiff did seek pain clinic treatment but stopped attending because he lacked insurance coverage. It is reasonable to infer that plaintiff did not pursue a spinal cord stimulator or a functional capacity evaluation for the same reason. Unfortunately, the record is not clear on this point because the ALJ never asked. Before drawing an adverse inference from plaintiff's failure to pursue Dr. Paul's recommendations, the ALJ should have asked plaintiff to explain why he did not pursue the recommended treatment. SSR 96-7p (ALJ must not draw adverse inferences about claimant's credibility from failure to seek or pursue medical treatment without first considering any evidence that might explain failure to seek medical treatment).

The same goes for plaintiff's failure to seek emergency room treatment for extreme exacerbations of pain. (That said, I question whether a failure to seek emergency room treatment for pain ever is a valid basis on which to rest a credibility determination.)

The ALJ criticized plaintiff for failing to attend physical therapy after 1999 or a rehabilitation program, but neither Dr. Paul nor Dr. Sakrison recommended such treatment. Moreover, the ALJ did not account for the fact that plaintiff was in a treatment "holding

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States, 510 U.S. 540, 556 (1994). Accordingly, I have considered his arguments only in the context of whether the ALJ's decision is supported by substantial evidence.

pattern" for much of the relevant time period while he awaited settlement of his worker's compensation claim pending surgery that was expected to relieve his pain.

At the same time he criticized plaintiff for not doing enough in the way of treatment, the ALJ short-changed the invasive procedures to which plaintiff *did* agree in an effort to diagnose and treat his pain, including three epidural steroid injections (the ALJ mentioned only one) and a discogram, a painful procedure whereby a needle is inserted into the center of the disc and dye is injected into it in order to determine whether a degenerated disc is the source of the patient's pain. *See*, *e.g.*, http://www.spine-health.com/Topics/diag/diag08.html. Although the ALJ acknowledged the discogram, he did so in a manner suggesting that he thought plaintiff was exaggerating his symptoms, twice noting that plaintiff had 10/10 pain during the discogram at L2-L3, which was shown on the MRI to be, according to the ALJ, a "normal" disc. Yet plaintiff's doctors never questioned the validity of plaintiff's pain complaints or accused him of malingering; moreover, in describing the disc at L2-L3 as "normal," the ALJ failed to mention that the MRI detected a subtle tear in the outer covering of the disc (an annular tear).

In a similar vein, the ALJ saw fit to mention that the evaluator during the December 1999 FCE had noted that plaintiff had demonstrated voluntary submaximal effort and had scored high on a test designed to identify potential malingerers, AR 23, but the ALJ did not mention that the evaluator indicated that plaintiff's questionable effort on the testing could be attributed to increased back pain or a post-myelogram headache. AR 161,164.

Considered individually, none of the errors is significant enough to warrant reversal. In the aggregate, however, they leave the impression that the ALJ might have gone out of his way to deny plaintiff's claim. This is troubling. Nonetheless, after careful, neutral consideration of the record, I am satisfied that the ALJ's mistakes and omissions are not so serious as to call the reliability of his other findings into question.

If this court sets aside the questionable findings and inferences just discussed, the record still contains substantial support for the ALJ's credibility determination and his conclusion that plaintiff is not disabled. First, as the ALJ noted, plaintiff's allegations were inconsistent with the functional capacity testing of plaintiff in December 1999 and the IME conducted by Dr. Weiss in January 2000, both of which indicated that plaintiff could perform light work. Plaintiff argues that the December 1999 FCE showed that plaintiff could work only at the sedentary level for only four hours a day, but he is incorrect. *See* AR 161 ("Results [of the FCE] indicate that Mr. Berger is able to work today at the light physical demand level for an 8 hour day.") As for Dr. Weiss's report, this court has already rejected plaintiff's argument that ALJs must give "heightened scrutiny" to "adverse" independent medical examinations. *Crites v. Barnhart*, 05-C-648-C, Op. and Order, Aug. 28, 2006, dkt. 16, at 6 (doctor's employment by plaintiff's employer's insurance carrier "does not make a doctor's testimony incredible in and of itself."). The ALJ was entitled to consider Dr. Weiss's report as evidence that undermined plaintiff's claim of total disability.

Moreover, the ALJ reasonably concluded that plaintiff's allegations of disabling pain and limitations were inconsistent with his sporadic carpentry and construction work (which sometimes included use of air nailers, skill saws and scaffold-climbing). Although plaintiff asserted that he could only work a few days at a time before having to take time off to rest his back, the ALJ aptly observed that plaintiff's claim of total disability was undermined by his failure to seek lighter work or vocational services. The ALJ also noted other pieces of evidence that tended to call plaintiff's honesty into question, including plaintiff's failure to report earnings from self-employment, his receipt of unemployment compensation benefits during part of the period he claimed to be disabled, and his receipt for three months of narcotic medications from two different practitioners.

Significantly, plaintiff's own testimony suggested that he is able to perform a limited range of sedentary work. He estimated that he could stand continuously for approximately an hour and a half, sit for a half hour to an hour, walk three blocks and lift about 20 pounds so long as he did not have to lift that weight from floor level. He also testified that he was able to complete a four-hour drive with short breaks to stretch his back. At various times during his testimony, plaintiff testified that the severity of his pain "depended on what he was doing;" he also testified that he regularly engaged in activities above a sedentary level including cleaning out the garage, helping in the garden and performing occasional carpentry work. This testimony indicates that if plaintiff was limited to primarily sedentary tasks, he would avoid severe exacerbations of pain and could work on a full time basis.

In sum, although several of the "inconsistencies" on which the ALJ based his determination did not exist, others are supported by the record. *See Herron v. Shalala*, 19 F.3d 329, 336 (7th Cir. 1994) (indicating that court may sustain credibility finding if some, but not all, of ALJ's reasons for that finding are supported by record). Moreover, this is not a case, as plaintiff suggests, like *Rohan v. Chater*, 98 F.3d 966, 971 (7th Cir. 1996), or *Wilder v. Chater*, 64 F.3d 335, 337 (7th Cir. 1995), in which the ALJ disregarded the objective medical evidence and reports to reach his own determination regarding the degree of plaintiff's impairments. To the contrary, the ALJ reviewed all of the medical evidence, including the opinions from plaintiff's treating physicians, and gave supportable reasons why he was giving more weight to the consulting physician's opinion about plaintiff's ability to work on a sustained basis. In addition, the ALJ accounted substantially for plaintiff's allegations concerning his limitations by assigning plaintiff a very restrictive functional capacity. Overall, I am satisfied that in spite of his errors, the ALJ fairly evaluated the evidence and reached a decision that is supported by substantial evidence.

The record strongly suggests that plaintiff's disability claim (and the supporting opinions of his treating doctors) arises from his inability regularly to meet the physical demands of his chosen field of carpentry/construction. This is an unfortunate situation for plaintiff, but to be entitled to disability benefits under the Social Security Act, plaintiff not only must be unable to perform his past relevant work, he must be unable to perform *all* jobs

existing in significant numbers in the regional economy. Substantial evidence in the record[5] supports the commissioner's conclusion that plaintiff retains the ability to perform a substantial number of sedentary jobs despite his limitations and the severity of his back condition. In light of this evidence, I am convinced not only that the ALJ's decision is supported by substantial evidence, but that no reasonable finder of fact could have reached a different conclusion. Accordingly, in spite of the troubling omissions and misstatements in the ALJ's decision, I am recommending that this court affirm the commissioner's decision to deny benefits.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that the decision of the Commissioner denying plaintiff John Berger's application for disability insurance benefits be affirmed.

Entered this 7th day of November, 2006.

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

[5] the opinions of Dr. Munceno and Dr. Weiss, the 1999 FCE report, the failure of plaintiff's treating physicians to provide any specific exertional limitations, plaintiff's continued work as a carpenter and his ability to perform other activities requiring a fair amount of exertion, plaintiff's failure to seek lighter work or vocational services and plaintiff's own testimony,

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
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U.S. Magistrate Judge

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November 7, 2006

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Re: Berger v. Barnhart
Case No. 06-C-256-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 1, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by December 1, 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