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

SANDRA LEMBKE,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

REPORT AND
RECOMMENDATION

06-C-0306-C

REPORT

This is an action for judicial review of an adverse decision of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). On January 9, 2003, plaintiff Sandra Lembke filed applications 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). Plaintiff, who was 49 years old at the time, alleged that she was unable to work because of depression, panic attacks, emphysema and a peptic ulcer. After obtaining and reviewing plaintiff's medical records, including the results of a consultative mental health examination paid for by the agency, the local disability determination service determined that plaintiff was not disabled. Plaintiff then exercised her right to an administrative hearing, which was held on September 1, 2004. Plaintiff appeared with counsel and testified. Plaintiff's mother and a vocational expert also testified.

On December 14, 2004, the administrative law judge issued a decision finding plaintiff not disabled. Recognizing that plaintiff's mental impairments limited her ability to perform certain work-related tasks, the ALJ nonetheless concluded that plaintiff could perform jobs requiring only incidental contact with coworkers or the public, the completion of tasks requiring only one or two steps and no quotas. Relying on the testimony of the vocational expert, the ALJ found that plaintiff was not disabled because even with these limitations, she could perform the jobs of mail clerk and kitchen helper. The ALJ's decision became the final decision of the commissioner when the Appeals Council denied plaintiff's request for review.

Plaintiff asks this court to reverse the commissioner's decision and order an award of benefits, or in the alternative to remand this case to the commissioner for further proceedings. Plaintiff argues that the ALJ's mental residual functional capacity assessment and corresponding hypothetical to the vocational expert failed to account for all of plaintiff's mental limitations. In addition, she contends that the ALJ made an improper credibility determination and relied on unfounded vocational evidence when he found that plaintiff can perform the jobs of mail clerk and kitchen helper.

Because the ALJ's decision fails adequately to explain how he accounted for the limitations found by the state agency consulting psychologists when he fashioned his residual functional capacity assessment, I am recommending that this court reverse the commissioner's decision and remand the case for further proceedings to address that issue.

I am also recommending that on remand, the ALJ be directed to reconsider the report from a consulting psychologist, Dr. Cummings, whose findings the ALJ misstated in his decision. Plaintiff's remaining challenges to the ALJ's credibility determination and his reliance on the vocational expert's testimony do not provide a basis for remanding the case.

From the administrative record ("AR"), I find the following facts:

FACTS

I. Background and Medical Evidence

Plaintiff was 51 years old on the date the ALJ issued his decision. She has the equivalent of a high school education and past work experience as a waitress, cook, assistant manager, manager and food service operator.

Plaintiff has a long history of alcohol abuse, depression and anxiety, with associated suicide attempts. Plaintiff hit her low point in the late 1990s when she was treated at various Milwaukee County facilities for suicide attempts in June 1995, December 1995, August 1996, March 1996, December 1996, April 1998, November 1998 and March 1999. AR 126, 128, 134, 141, 144, 149, 153, 157, 164. On these occasions, plaintiff was drinking heavily and attempted to hurt herself with knives, ropes and pills. *Id*.

On April 9, 1998, John Pankiewicz, M.D., evaluated plaintiff to determine her competency to stand trial for drunk driving. AR 123. Dr. Pankiewicz noted plaintiff's history of suicide attempts, depression, problems with alcohol and associated hospitalizations. He noted that plaintiff was seeing a counselor but was not taking any

medications. Plaintiff told Dr. Pankiewicz that she had tried medications in the past but had been allergic to some and some were not helpful. Dr. Pankiewicz determined that plaintiff was competent to stand trial. However, he noted that plaintiff's mental problems "certainly cause her a great deal of difficulty with anxiety and mood disorder." AR 124. He noted that plaintiff was not receiving proper medical treatment for her conditions, opining that medications would be "of great benefit" to her. AR 124-125.

The only medical record from 1998-2003 is from the Wild Rose Community Memorial Hospital on December 30, 2001, indicating that plaintiff was seen in the emergency room for an anxiety attack. AR 165-66. Plaintiff reported that she had been on Zoloft for anxiety but stopped taking it when she moved to the area. Plaintiff was diagnosed with depression and an anxiety attack. She was given refills of Zoloft and advised to restart the medication, initiate psychiatric care and quit drinking. AR 165.

Plaintiff filed applications for disability insurance benefits and supplemental security income benefits on January 9, 2003, alleging that she had been disabled since August 11, 2002 due to depression, panic attacks, emphysema and peptic ulcer disease. Plaintiff reported that she was unable to work because she was afraid to leave the house or drive, and could not handle the mental and physical pressure of her job as a waitress. AR 81-82.

At the request of the social security administration, plaintiff was scheduled to see Randall L. Daut, Ph.D. on March 3, 2003, for a mental status evaluation. AR 193. Plaintiff appeared at the evaluation with her boyfriend, Michael Schaefer. Plaintiff refused to be

seen by Daut without Schaefer present. Daut talked to Schaefer first. When he went out to the waiting room to tell plaintiff that he would allow Schaefer to be present during the mental status evaluation, plaintiff yelled at Daut and told him she "didn't like him" and wanted to be evaluated by a female. Plaintiff then left and got in her car. AR 194.

On April 5, 2003, plaintiff was seen by L. Beth Cummings, Psy.D., for the rescheduled consultative mental status exam. Plaintiff told Cummings that her chief complaint was that she got panic attacks and then she "got out of line." AR 195. Plaintiff said that during an attack, her heart raced, her thoughts raced, she felt as if everyone was looking at her and she wanted to run away. Plaintiff said she had had the condition for a long time, but that it kept getting worse and that she was no longer able to work. Plaintiff said that from the age of 30, she had attempted suicide 15 times by cutting her wrist or overdosing on medication. She had 15 or 20 counselors in the past; the longest she had been counseled by any of them was one year. Plaintiff reported that she had not done well on antidepressants, stating that she had made a major suicide attempt while taking Prozac and that Paxil made her feel on edge. Although she did not trust psychiatrists, plaintiff said she would be willing to go to therapy if she could afford it.

During the interview, plaintiff was somewhat fidgety and wore sunglasses, stating that she wore them to "hide from people." When asked to remove them, plaintiff did so, stating she was comfortable with Cummings. During the mental status portion of the interview, plaintiff became quite anxious, eventually becoming tearful and running out of the room.

Schaefer, who accompanied plaintiff, corroborated plaintiff's statements about her functioning level. He said that plaintiff had a panic attack 2-5 times a month and was often afraid to leave the house alone.

In her summary, Cummings indicated that plaintiff "appears depressed, describes sad and irritable mood, difficulty sleeping, low energy, poor concentration, negative thinking, and a sense of hopelessness." AR 198. Cummings also noted that plaintiff "describes and exhibits somewhat disabling panic attacks with fear of going out in public." According to Cummings, these attacks were "not simple panic as it is accompanied often by drama, anger, even aggression and hostility." *Id*. Dr. Cummings also noted that plaintiff's panic combined with her interpersonal difficulties, such as inability to trust most people, multiple suicide gestures, "short fuse", and transient paranoia "suggest that she has a personality disorder in addition to her depression and panic." *Id*.

Dr. Cummings diagnosed plaintiff with panic disorder with agoraphobia, dysthymic disorder, alcohol abuse in sustained partial remission and a borderline personality disorder. She estimated that plaintiff's score on the Global Assessment of Functioning (GAF) Scale was 48, indicating serious symptoms or serious impairment in social or occupational functioning.[1] Dr. Cummings opined that plaintiff's prognosis was guarded because of personality factors that "complicate clinical syndromes." She noted, however, that plaintiff's

[1] *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 34 (4th ed. Text Revision 2000) (DSM-IV-TR).

prognosis was better if she was willing to participate actively in individual therapy. Dr. Cummings concluded that plaintiff would have "considerable difficulty working effectively as a waitress due to her panic, her dysthymia, and her poor impulse control." Dr. Cummings noted that plaintiff had difficulty maintaining concentration and very poor frustration tolerance and that her behavior could be "quite unpredictable" when stressed. Nonetheless, Dr. Cummings thought plaintiff "may be able to work in a non-stressful, unchallenging job which does not involve contact with strangers and is tolerant of probable outbursts." *Id*. Dr. Cummings noted that plaintiff had been able to perform such functions in the past, and might be able to do so in the future if she obtained effective treatment. AR 199.

On May 12, 2003, plaintiff's former employer, Bill Johnson, submitted information in response to a request for information from the social security administration. Johnson indicated that plaintiff worked 35 hours a week as a waitress at the Kings Table restaurant until August 2002. Johnson stated that plaintiff's performance was satisfactory, that he had no problems with her and that plaintiff seemed to interact well with her customers. He noted that plaintiff became very defensive whenever there was a change in the schedule or a change in anything. As far as Johnson could tell, however, she was not disabled. According to Johnson, plaintiff's reason for termination was "quit--moved." AR 103-104.

Jean Warrior, Ph.D., a consulting psychologist for the state disability agency, completed a Psychiatric Review Technique Form and mental residual functional capacity assessment of plaintiff on May 15, 2003. Dr. Warrior concluded that plaintiff suffered from

a dysthymic disorder, an anxiety disorder characterized by panic and agoraphobia, a borderline personality disorder and a substance addiction disorder. Evaluating the paragraph "B" criteria for listed mental impairments on the Psychiatric Review Technique form, Dr. Warrior found that plaintiff had "moderate" restriction of daily activities, "marked" difficulties in maintaining social functioning, "moderate" difficulties in maintaining concentration, persistence or pace, and no episodes of decompensation. AR 213-225.[2]

On the "summary conclusions" portion of the Mental Residual Functional Capacity assessment form, Dr. Warrior found that plaintiff was "markedly limited" in her ability to interact appropriately with the general public and that she was "moderately limited" in several other areas. The areas in which Dr. Warrior found plaintiff to be moderately limited were the ability to:

> -understand, remember and carry out detailed instructions;
>
> -maintain attention and concentration for extended periods;
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> -perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances;

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[2] The paragraph "B" criteria on the Psychiatric Review Technique Form correspond to the four broad categories of functional limitations that the commissioner uses to evaluate the severity of a mental impairment. 20 C.F.R. § 416.920a(d); 20 C.F.R., Pt. 404, Subpt. P, App. 1, 12.00 (the listings for mental disorders). In general, claimants who have "marked" functional loss in two or more categories will meet the criteria for a listed impairment. If the claimant has a severe mental impairment that does not meet the listings, then the psychological consultant will proceed to rate the claimant's ability to perform 20 specific work-related functions itemized on the "Mental Residual Functional Capacity Assessment" form (SSA-4734-F4-SUP). That form provides a checklist of various work-related abilities and asks the consultant to rate whether the claimant's ability in each area is "not significantly limited", "moderately limited," or "markedly limited." After completing that section of the form, the consultant is then supposed to elaborate on those findings by describing the claimant's residual functional capacity in narrative form.

-work in coordination with or proximity to others without being distracted by them;

-complete a normal workday and workweek without interruptions from psychologically based symptoms;

-ask simple questions or request assistance;

-maintain socially appropriate behavior and adhere to basic standards of neatness and cleanliness;

-respond appropriately to changes in work setting;

-travel in unfamiliar places; and

-set realistic goals or make plans independently of others.

AR 227-28. Both the PRTF and the mental RFC were reviewed and affirmed by a second state agency psychologist, Keith Bauer, Ph.D., on August 25, 2003. Neither Dr. Warrior nor Dr. Bauer described plaintiff's residual functional capacity in narrative form.[3]

On April 21, 2004, plaintiff was seen by Kathleen Rasmussen, a counselor at Green Lake County social services, for an initial intake interview. AR 35-42. According to Rasmussen's report, plaintiff was referred for counseling in lieu of AODA treatment for a 7-year old drunk driving charge. Plaintiff refused to sign any releases to allow Rasmussen to

[3] On the portion of the mental RFC assessment form that asked the medical consultants to describe plaintiff's residual functional capacity in narrative form, Dr. Warrior or Dr. Bauer wrote "please see MCR notes-EWS." I infer from the note and my familiarity with the administrative records in other social security disability cases that the writer was referring to an electronic case development worksheet used by the disability adjudication team on which the medical consultants often provide a narrative description of the claimant's residual functional capacity. Although those notes are often included in the administrative record, in this case they are not.

obtain her previous records, stating that she had no faith in counselors, did not want to discuss the past and had spent over $200,000 on counseling. Rasmussen reported that plaintiff's problems were moderate anxiety and moderate mania, both of which were chronic in duration. Plaintiff told Rasmussen that she thought her difficulties were the result of a hormonal imbalance brought on by menopause. After conducting a mental status evaluation, Rasmussen determined that plaintiff suffered from a bipolar affective disorder of the manic moderate type. She noted that plaintiff's previous experience with mental health professionals, refusal to sign releases and her disorder would make it difficult to establish a therapeutic relationship and treatment plan. She also noted that plaintiff was refusing medication management services at the time.

On August 17, 2004, Rasmussen completed a mental impairment questionnaire at the request of plaintiff's attorney. Rasmussen indicated that she had seen plaintiff for one hour sessions every two weeks. She indicated that plaintiff's current GAF score and highest GAF in the past year was 65, indicating that plaintiff had some mild symptoms but generally was functioning pretty well. Assessing plaintiff's functional limitations, Rasmussen indicated that plaintiff had "moderate" restriction of activities of daily living; "marked" difficulties in maintaining social functioning; "marked" deficiencies of concentration, persistence or pace, and three episodes of decompensation within a 12-month period, each of at least two weeks duration. AR 33. With respect to plaintiff's ability to perform the mental demands of unskilled work, Rasmussen indicated that plaintiff was "unable to meet competitive

standards" in several areas, including the ability to deal with normal work stress, get along with coworkers, accept instruction and respond appropriately to criticism from supervisors, and complete a normal workday or workweek without interruptions from psychologically based symptoms.

Rasmussen explained that plaintiff's bipolar disorder caused her moods and behaviors to fluctuate dramatically and "grossly impaired her ability to maintain employment for any length of time." According to Rasmussen, medications had been tried previously with "devastating" results, noting that plaintiff had used the medications in suicide attempts. Rasmussen also wrote that plaintiff has "paranoid personality characteristics that interfere with her daily functioning." Rasmussen estimated that plaintiff's impairments would cause her to be absent from work approximately four days a month. *Id*.

In a follow up letter dated August 25, 2004, Rasmussen indicated that although plaintiff's highest GAF score in the past year was 65, "[a]n additional request to provide the lowest GAF score in the past year would provide valuable information in having a total picture of Sandy's mental illness." AR 43. Rasmussen explained that plaintiff had been very guarded and evasive in sharing information. According to Rasmussen, plaintiff "has experienced periods of decompensation that would warrant a GAF score of 20." Rasmussen explained that plaintiff had attempted suicide during times of depression and had experienced times of violent behavior during manic phases. However, Rasmussen explained,

> Due to the fact she is living in a rural area and has not been employed outside the home, her symptoms have lessened and

> been less prevalent. Sandy has recently attempted employment, which resulted in her beginning to decompensate once again. It has been extremely difficult for Sandy to accept her mental health diagnosis as well as the realization she can not maintain employment on a consistent basis.

AR 43.

II. Hearing Testimony

At the hearing, plaintiff testified that her condition fluctuated between "up" and "down" days. On "down" days, said plaintiff, she would spend most of the day in bed except to get up and take care of her dogs. On "up" days, plaintiff cleaned her house, did laundry, worked in the yard, helped her mom and caught up on everything that she did not do during her down days. Plaintiff said she sometimes stayed up for 48 hours continuously during her up phases. Plaintiff said that most of her days were "down" days with only a few up days in between.

Plaintiff stated that there were two reasons she was not taking medication: 1) she could not afford it; and 2) she didn't trust herself with them and was afraid she might use them in another suicide attempt. Plaintiff added that she had side effects from a lot of the medications she had tried in the past. AR 285-86. Plaintiff said she drank alcohol on occasion, about once every three months.

Plaintiff testified that she had attempted to return to work as a bar manager and bartender in June 2004. Plaintiff said that she had problems dealing with people when she was tending bar. She said that she experienced times when dealing with a group of people

when her head started buzzing, her mind began racing, she started shaking and feeling panicky and couldn't speak. She said there were times when she felt so agitated and defensive around customers that she had to just leave the restaurant. Plaintiff said that she "can tell off people" although she did not tell anyone off at that job. AR 292.

Plaintiff's mother testified and corroborated plaintiff's testimony about her good and bad days. In addition, she said that plaintiff had a history of lashing out at people at restaurants and could frighten people with her verbal behavior.

The ALJ posed a hypothetical question to Julian Winfrey, the vocational expert, describing someone of plaintiff's age, education, and past work experience, who was restricted to jobs that allowed for incidental contact with the general public and co-workers but no regular or routine servicing or waiting on the public such as a waitress would. In addition, the ALJ specified that although the individual could work in the general area of co-workers, the individual could not perform work in a team or in tandem with co-workers. Further, the individual could only do work that entailed simple, one-and two-step tasks and that was task-oriented as opposed to production or quota-driven. AR 303-04. The VE testified that such an individual could perform jobs such as the unskilled light exertional job of mail clerk (Dictionary of Occupational Title (DOT) # 209.687-026), which numbered 900 in the state of Wisconsin and 54,000 in the national economy, and the unskilled medium exertional job of kitchen helper (DOT # 318.687-010), which numbered approximately 2,700 in Wisconsin and 120,000 in the national economy. AR 304-05. The

ALJ asked the VE if his testimony was consistent with the information contained in the DOT; the VE responded that it was. AR 305.

The VE testified that if everything that plaintiff and her mother said was 100 percent credible, plaintiff would be unable to be employed competitively because of her lack of persistence, lack of reliability, variability in response to coworkers, supervisors and others and inability to follow work rules and expected social norms. AR 305.

III. The ALJ's Decision

On December 14, 2004, the ALJ issued a decision finding plaintiff not disabled. Applying the familiar five-step process for evaluating disability claims, the ALJ found that plaintiff had not engaged in substantial gainful activity after her onset date (step one); that plaintiff suffered from an anxiety disorder and a bipolar disorder and that both impairments were "severe" (step two); that neither impairment resulted in functional limitations so severe as to be presumptively disabling (step three); that plaintiff could not return to her past relevant work (step four); but that in light of her age, education, and residual functional capacity, plaintiff could perform certain types of unskilled jobs existing in significant numbers in the national economy, namely, mail clerk and kitchen helper (step five).

In his decision, the ALJ reviewed the medical evidence from Dr. Cummings, Rasmussen and the state agency physicians, the report from plaintiff's past employer and plaintiff's testimony. The ALJ accepted plaintiff's claim that she experienced some

limitations due to anxiety disorder and bipolar disorder; however, he found that plaintiff's claim that her symptoms were totally disabling to be not credible. The ALJ concluded that plaintiff had "moderate" limitations in her ability to:

> -understand, remember, and carry out detailed instructions;
>
> -maintain attention and concentration for an extended period;
>
> -interact appropriately with the public;
>
> -complete a normal workday and workweek without interruptions from psychologically based symptoms; and
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> -perform at a consistent pace without an unreasonable number and length of rest periods.

The ALJ determined that these limitations resulted in a residual functional capacity to perform work where interpersonal contact with the general public or co-workers is only incidental to the work performed; complexity of tasks is simple, with 1-2 step tasks; and the work performed is task-oriented, not quota-driven. The ALJ noted that in arriving at his RFC finding, he had "considered and essentially concur[red]" with the opinions of the state agency consultants who provided assessments at the initial and reconsideration levels, noting that those opinions also supported a finding of "not disabled." Relying on the testimony of the vocational expert, the ALJ found that although plaintiff's limitations precluded her from returning to her former work as a waitress, there were other jobs existing in significant numbers in the national economy that she could perform, namely, mail clerk and kitchen helper.

ANALYSIS

I. Standard of Review

The standard by which a federal court reviews a final decision by the commissioner is well-settled: the commissioner's findings of fact are "conclusive" so long as they are supported by "substantial evidence." 42 U.S.C. § 405(g). 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).

Although the ALJ's reasonable resolution of evidentiary inconsistencies is not subject to review, *see Brewer v. Chater*, 103 F.3d 1384, 1390 (7th Cir. 1997), and the ALJ's written opinion need not evaluate every piece of testimony and evidence submitted, the ALJ "must at least minimally discuss a claimant's evidence that contradicts the Commissioner's position." *Godbey v. Apfel*, 238 F.3d 803, 808 (7th Cir. 2001). The ALJ's opinion must adequately articulate how the evidence was weighed so that this court may trace the path of his or her reasoning. *Id*. For example, ignoring an entire line of evidence would fail this

standard. *Diaz v. Chater*, 55 F.3d 300, 307 (7th Cir. 1995). However, like any fact finder, the ALJ is entitled to choose between competing opinions. *Luna v. Shalala*, 22 F.3d 687, 690 (7th Cir. 1994). Most importantly, "the ALJ must build an accurate and logical bridge from the evidence to his conclusion." *Clifford v. Apfel*, 227 F.3d 863, 872 (7th Cir. 2000).

II. Residual Functional Capacity Assessment and the Corresponding Hypothetical

Plaintiff contends the ALJ committed a number of errors in arriving at his conclusion that plaintiff retained the residual functional capacity to perform work where interpersonal contact with the general public or co-workers is only incidental to the work performed; complexity of tasks is limited to one or two-step tasks; and the work performed is task-oriented, not quota-driven. I address each of these alleged errors in turn.

A. The Limitations Found by the State Agency Consulting Psychologists

First, plaintiff contends that the ALJ's RFC finding fails to comply with SSR 96-8p, which requires the ALJ to conduct a "function-by-function" assessment of a claimant's ability to do work-related activities. Plaintiff argues that what the ALJ professes to be a RFC assessment is actually a vocational conclusion.

Plaintiff does not explain clearly what such a "function-by-function" assessment ought to look like. To the extent that plaintiff is suggesting that the ALJ was required to incorporate verbatim each of the marked and moderate limitations identified by the state

agency doctors on the "Summary Conclusions" portion of the mental RFC form, she is barking up the wrong tree. *Huichan v. Barnhart*, 05-C-0268-C, Rep. and Rec., March 20, 2006, dkt. 16, at 26-29. In *Huichan*, this court summarized its position:

> [H]owever symmetrically pleasing it might be for ALJs to phrase their mental RFC assessments so as to track either the commissioner's mental RFC form or the paragraph "B" criteria, [the] argument [that ALJs are required to do so] is completely devoid of legal merit.

Id., at 29 (citing *Seamon v. Barnhart*, 05-C-0013-C, Rep. & Rec., July 29, 2005, dkt. 11, at 34). This court has also rejected the corresponding argument that a mental RFC assessment phrased in terms of types of work is an improper vocational conclusion. *Seamon,* at 34 ("an administrative law judge is free to formulate his mental residual functional capacity assessment in terms such as 'able to perform simple routine, repetitive work' so long as the record adequately supports that conclusion") (quoting *Kusilek v. Barnhart*, 2005 WL 567816, *4 (W.D. Wis. March 2, 2005).

Plaintiff's attorneys are well aware of the decisions in both *Huichan* and *Seamon* because they represented the plaintiffs in those cases. Indeed, in *Huichan*, this court expressed its frustration with plaintiff's attorneys having failed to acknowledge the contrary authority generated by this court in their previous cases and threatened to sanction them if they engaged in such conduct in the future. Plaintiff's attorneys were instructed that, if they wanted to raise the symmetrical RFC issue in future cases for purposes of appeal, they could

raise the issue "*tersely* while acknowledging the contrary holdings of this court on this point." *Huichan*, at 29.

Plaintiff in this case has not mentioned *Huichan* or *Seamon* or indicated that she is seeking to preserve the previously-litigated RFC issue for appeal. Presumably, plaintiff's attorneys are not willingly courting a contempt certification, so I infer from plaintiff's failure to mention these cases that she is *not* contending that the ALJ's mental RFC was faulty because it did not mirror the findings of the state agency physicians. Rather, what plaintiff appears to be arguing is that this court cannot sustain the ALJ's RFC finding because it is unclear from the ALJ's decision whether that finding adequately accounts for all of plaintiff's limitations as found by the state agency physicians.

On *this* point, plaintiff is correct. Plaintiff notes that the state agency consulting psychologists found that plaintiff had a "marked" limitation in her ability deal with the general public and "moderate" limitations in 11 other categories. The ALJ, however, found that plaintiff had only "moderate" limitations in her ability to deal with the general public and in four other categories without mentioning the various other moderate limitations found by the state agency psychologists or explaining why he deviated from their conclusion that plaintiff's limitations in dealing with the public were "marked." The ALJ did not mention that the state agency psychologists also determined that plaintiff had moderate limitations in her ability to perform activities within a schedule, maintain regular attendance and be punctual with customary tolerances; work in proximity to others without being

distracted by them; ask simple questions or request assistance; maintain socially appropriate behavior; travel in unfamiliar places; and set realistic goals or make plans independently of others. Plaintiff argues that, with the exception of traveling in unfamiliar places, these work abilities are essential to the performance of any job.[4]

The commissioner responds that "[n]othing required the ALJ to adopt each and every rating of severity made by the state agency reviewing psychologists" and that the ALJ's conclusion that plaintiff had only certain "moderate" limitations was based on the record as a whole. Mem. in Supp. of Comm.'s Dec., dkt. #9, at 10. The commissioner's response is irrefutable as far as it goes, but it is no answer to plaintiff's assertion that the ALJ was obliged to *explain* why he was rejecting the evidence favoring plaintiff. *Zurawski v. Halter*, 245 F.3d 881, 887 (7th Cir. 2001) (ALJ must build accurate and logical bridge from evidence to conclusion). No clear explanation is discernible from the ALJ's decision.

Although the commissioner insists that the ALJ accommodated all of plaintiff's limitations in his RFC assessment, it is unclear from the ALJ's decision that he did so. The ALJ stated that he had considered and "essentially" concurred with the findings of the state

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[4] As support for this contention, plaintiff submits the transcript from another hearing at which a vocational expert testified that, in general, five "moderates" amounts to an inability to perform competitive employment. Plaintiff's attempt to introduce this extrinsic evidence into the record is improper. This court's review of the ALJ's decision is limited to the evidence that was before the ALJ. At plaintiff's administrative hearing, the vocational expert was never presented with a hypothetical that incorporated each of the moderate limitations identified by the state agency physicians. There is simply no vocational evidence in *this* record that establishes conclusively that an individual possessing the various moderate limitations identified by the state agency physicians would be unable to perform even the limited range of work identified by the ALJ. Conversely, however, there is no evidence from which to conclude that such an individual *could* perform such work.

agency physicians. Does this mean that the ALJ agreed with the physicians only with respect to those specific moderate limitations the ALJ mentioned in his decision? Or did he mean that he accepted the additional moderate limitations found by the state agency physicians, but determined that they did not warrant a further reduction in plaintiff's residual functional capacity? If the former, then the ALJ provided no explanation for rejecting the limitations found by the state agency physicians. If the latter, then the ALJ failed to explain how he accounted for those limitations in his RFC assessment.

Absent a clearer explanation, I am unable to determine whether a rational basis exists for the ALJ's determination that plaintiff is capable of performing work where interpersonal contact with the general public or co-workers is only incidental to the work performed; complexity of tasks is simple, with 1-2 step tasks; and the work performed is task-oriented, not quota-driven. For example, if one interprets the term "moderate" to mean between one-third and two-thirds of the time, then it is questionable how someone with a "moderate" inability to maintain socially appropriate behavior could remain competitively employed even in the rote, relatively non-stressful jobs identified by the vocational expert. The same goes for the ability to perform activities within a schedule to maintain regular attendance, to ask simple questions and to work in proximity to others without becoming distracted.

The state agency psychologists in this case did not translate their worksheet observations into a narrative RFC assessment, which might have supplied the missing bridge between the evidence and the ALJ's conclusion. *See, e.g., Johansen v. Barnhart*, 314 F.3d 283,

289 (7th Cir. 2002) (ALJ's finding that plaintiff could perform repetitive, low-stress work was proper despite consulting psychologists' conclusion that plaintiff had "moderate" limitations in 3-5 abilities listed summarily on mental RFC worksheet, because one consultant "went further and translated those findings into a specific RFC assessment, concluding that Johansen could still perform low-stress, repetitive work"). Contrary to the commissioner's contention, the determination by the state agency physicians at the initial and reconsideration stages that plaintiff was "not disabled" does not supply this bridge.[5] The ultimate determination by a state agency consultant about whether a plaintiff is disabled is not "evidence" at the administrative law judge and Appeals Council levels. 20 C.F.R. § 1512(b)(6). Although the ultimate non-disability determination by the state agency consultants suggests that they determined that plaintiff retained the residual functional capacity to perform some types of work, without knowing what that residual functional capacity was this court has no way to tell whether the manner in which the ALJ distilled plaintiff's limitations squares with the findings of the state agency consultants.

Because plaintiff established that she was unable to perform her past work, the burden shifted to the commissioner to establish that she could make a vocational adjustment to

[5] Proof that the agency consultants concluded that plaintiff was not disabled can be found on the disability determination and transmittal forms denying plaintiff's claim in initially and on reconsideration. AR 44-45. Although plaintiff is correct that the determination whether a claimant is disabled is an issue reserved for the ALJ, this is true only at the administrative level; at the initial and reconsideration levels, medical and psychological consultants are part of the adjudication team that determines disability. SSR 96-5p ("Medical and psychological consultants in the State agencies are adjudicators at the initial and reconsideration determination levels"). By signing the transmittal forms, the state agency consultants expressed their opinion that plaintiff was not disabled.

other types of work. At this fifth step of the sequential evaluation process, "the entire finding of disability or no disability hinge[s] on the validity of the hypothetical question." *Young v. Barnhart*, 362 F.3d 995, 1004 (7th Cir. 2004).

Ordinarily, a hypothetical question to the vocational expert must include all limitations supported by medical evidence in the record. *Steele v. Barnhart*, 290 F.3d 936, 942 (7th Cir. 2004). The vocational expert in this case never was presented with a hypothetical question that included all of the marked and moderate limitations found by the state agency psychologists but was presented only with a hypothetical based entirely on the ALJ's RFC assessment. The ALJ's RFC assessment accounted for plaintiff's social difficulties by limiting her interactions with others, accommodated her concentration problems by limiting her to unskilled work that was rote in nature and accommodated her problems dealing with stress by providing that she was unable to perform production work. It is unclear, however, whether or how the ALJ accounted for plaintiff's other limitations, including her ability to maintain a schedule, to behave in a socially appropriate manner, to ask simple questions and to request assistance and work in proximity to others.

I am not suggesting that the ALJ was required to include, verbatim, each of the moderate and marked limitations in his residual functional capacity assessment. However, he *was* required to explain how he accommodated those limitations in his RFC assessment, or if he disagreed with the findings of the state agency physicians, to explain why. In sum, because the ALJ's decision fails to build an adequate bridge between the findings of the state

agency physicians and the limitations set forth in his residual functional capacity assessment and corresponding hypothetical to the vocational expert, this case should be remanded to the commissioner so that the ALJ can either: (1) explain more clearly how he reconciled the findings of the state agency physicians with his determination of plaintiff's RFC; or (2) hold a new hearing at which the vocational expert is presented with all of the moderate and marked limitations found by the state agency consulting psychologists.[6]

B. Rasmussen's RFC Assessment

Plaintiff contends that the ALJ erred by rejecting the August 2004 mental RFC assessment provided by plaintiff's counselor, Rasmussen, on which she indicated that plaintiff had numerous extreme mental limitations. As an initial matter, Rasmussen was not a physician, so plaintiff's contention that she was a treating physician whose opinion was

[6] It is not surprising that the ALJ did not include in his RFC determination each of the moderate or marked limitations found by the state agency consulting psychologists: the commissioner has specifically instructed her adjudicators not to do so. The agency's Program Operations Manual System (POMS) provides that the purpose of having state agency consultants complete "Summary Conclusion" portion of SSA-4734-SUP is "chiefly to have a worksheet to ensure that the psychiatrist or psychologist has considered each of these pertinent mental activities and the claimant's or beneficiary's degree of limitation for sustaining these activities over a normal workday and workweek on an ongoing, appropriate, and independent basis." POMS DI 25020.010B.1.

Although the manual indicates that these summary conclusions relate the basic mental demands of work, it goes on to instruct adjudicators that they should not use these summary conclusions as the RFC assessment but rather should use the narrative RFC assessment written by the consultant As demonstrated by this case, however, state agency consultants do not always complete the narrative section of the form, and even if they do, they often do not explain how they arrived at their RFC determination. Are the goals sought to be achieved by having state agency consultants complete the "Summary Conclusions" checklist worth the amount of litigation these checklists generate? One might hope that the commissioner is considering better alternatives for evaluating mental RFC.

entitled to special consideration is incorrect. *See* 20 C.F.R. § 404.1527(a) (explaining that medical opinions are "statements from physicians and psychologists or other acceptable medical sources"); 20 C.F.R. § 404.1513 (indicating that counselor is not an "acceptable medical source" but can be an "other source" of evidence). Nonetheless, apparently recognizing that Rasmussen was a valid source of information about plaintiff's ability to work, the ALJ considered Rasmussen's opinion but found that it was not supported by actual records of mental health treatment and was inconsistent with the record as a whole.

These were both valid reasons for rejecting Rasmussen's opinion. The ALJ noted that although Rasmussen reported that she had seen plaintiff for 1-hour sessions every two weeks, the record contained only the report from Rasmussen's initial intake session with plaintiff on April 21, 2004. Contrary to plaintiff's contention, the ALJ had no obligation to attempt to locate the missing records. SSR 96-5p[7], the ruling cited by plaintiff to support her position, applies only to "acceptable medical sources." Moreover, as the commissioner points out, at no time has plaintiff submitted any additional records from Rasmussen even though plaintiff has had representation at the administrative hearing, before the Appeals Council and before this court. Although it was the ALJ's duty to prove that plaintiff can perform a limited range of work, it was plaintiff's duty to "bring to the ALJ's attention everything that shows that [she] is disabled." *Luna v. Shalala*, 22 F.3d 687, 693 (7th Cir. 1994). Because plaintiff was represented by counsel, the ALJ was entitled to assume that she

[7] I infer that plaintiff's reference to "SSR 96-7p" on page 17 of her brief is a typographical error.

was making her "strongest case" for benefits. *Glenn v. Secretary of Health and Human Services*, 814 F.2d 387, 391 (7th Cir. 1987). This assumption, which carries over into this judicial review, leads to the inference that no contemporaneous notes from Rasmussen exist. *Binion v. Shalala*, 13 F.3d 243, 246 (7th Cir. 1994)("Mere conjecture or speculation that additional evidence might have been obtained in the case is insufficient to warrant a remand").

Substantial evidence in the record supports the ALJ's determination that Rasmussen's restrictive RFC assessment was inconsistent with the record as a whole. As the ALJ pointed out, when Rasmussen first saw plaintiff in April 2004, plaintiff reported only moderate symptoms of anxiety, displayed no significant mental limitations during the mental status examination and, according to the relatively high GAF score Rasmussen assigned based on plaintiff's "stable" presentation and self-report, generally was functioning well.[8] The ALJ also noted that plaintiff's former employer reported that plaintiff had seemed to interact well with the customers and did not demonstrate any problems at work. In addition, the ALJ relied on the opinions of the state agency physicians, who concluded that plaintiff's impairments imposed less severe restrictions than Rasmussen had found.

Plaintiff argues that the evidence cited by the ALJ is not necessarily inconsistent with Rasmussen's opinion because it reflects plaintiff's highest level of functioning and fails to

[8] Contrary to plaintiff's contention at page 24 of her brief, the ALJ did not err in his interpretation of this GAF score. According to the *DSM-IV*, a GAF score between 61 and 70 indicates "some mild symptoms (e.g., depressed mood and mild insomnia) OR some difficulty in social, occupational, or school functioning (e.g., occasional truancy, or theft within the household), but generally functioning pretty well, has some meaningful interpersonal relationships." *DSM-IV-TR*, at 34. The ALJ quoted this language nearly verbatim.

account for the episodic and fluctuating nature of plaintiff's bipolar disorder. Plaintiff maintains that the ALJ ignored Rasmussen's statements that plaintiff's unstable moods and affect had impaired her ability to maintain employment; that in the past year plaintiff had experienced three episodes of decompensation, each of two weeks' duration; and that plaintiff's GAF score during these episodes of decompensation could be as low as 20, indicating that plaintiff was in some danger of hurting herself or others. It would have been helpful for the ALJ to have discussed these aspects of Rasmussen's opinion, but his failure to do so is not fatal to his conclusion. The ALJ reasonably could reject Rasmussen's opinion concerning plaintiff's purported episodes of decompensation in the absence of any contemporaneous records documenting those episodes.

In her reply brief, plaintiff claims that Rasmussen's opinion concerning plaintiff's episodes of decompensation were based on personal observation, but Rasmussen's reports do not support this assertion. To the contrary, it appears that Rasmussen was not limiting her opinion regarding plaintiff's episodes of decompensation to the five-month period during which she was seeing plaintiff and might have been referring to plaintiff's tumultuous period during the late 1990s, well before plaintiff's alleged onset of disability. Absent some clinical foundation for Rasmussen's opinion, the ALJ did not err in failing to discuss it.

C. Dr. Cummings's Report

Next, plaintiff argues that the ALJ committed several errors in his evaluation of Dr. Cummings's report that led him to underestimate the severity of plaintiff's symptoms. As plaintiff points out, the ALJ misstated Dr. Cummings's opinion on page 4 of his decision when he found that Dr. Cummings concluded that plaintiff "would likely" be able to work in a non-stressful, unchallenging job that did not involve contact with strangers.[9] In her report, Dr. Cummings actually stated only that plaintiff "may" be able to perform such work. Dr. Cummings added that the job should be one that "is tolerant of probable outbursts"; the ALJ did not mention this qualifier. Finally, although the ALJ appeared to rely on Dr. Cummings having assigned plaintiff a GAF score of 48 as evidence of non-disability, this score actually indicates serious symptoms and supports plaintiff's claim.

Any of these errors alone might not undermine confidence in the ALJ's decision, but taken together they present an unfairly skewed picture of Dr. Cummings's findings and overstate her prediction of plaintiff's capacity for work. The objective medical evidence in this case is sparse, consisting only of Dr. Cummings's report, the findings of the state agency physicians and Rasmussen's two reports. Dr. Cummings's report, which documented serious limitations, provided substantial support for plaintiff's claim. True, Dr. Cummings left open the possibility that plaintiff could perform some jobs under the right conditions,

[9] When the ALJ first mentioned Dr. Cummings's report at page 3 of his decision, however, he properly observed that Dr. Cummings had stated that plaintiff "possibly" would be able to perform certain, non-stressful jobs.

and the ALJ did assign plaintiff a very restrictive residual functional capacity that limited her to incidental contact with coworkers or the public and to simple, 1-2 step jobs with no production demands. Accordingly, my misgivings over the ALJ's inaccurate and incomplete portrayal of Dr. Cummings's report are not acute. However, if the district judge accepts my recommendation to remand this case for further proceedings, then I recommend that the court also direct the ALJ to reconsider Dr. Cummings's report.

III. The Credibility Assessment

Plaintiff next attacks the ALJ's conclusion that her allegations of disabling symptoms were not entirely credible. She argues principally that the ALJ erred in drawing an adverse inference from plaintiff's failure to take medication, without considering plaintiff's explanation that she could not afford medication and that she was afraid that she might use the medications in another suicide attempt. *See* SSR 96-7p (providing that before drawing adverse inference from claimant's failure to seek or pursue treatment, adjudicator must consider all explanations, including inability to afford treatment). The ALJ did mention that plaintiff stated that she was not taking medication because she could not afford it and because she was scared of adverse side effects. However, the ALJ never explained whether he found these explanations satisfactory. Absent more articulation by the ALJ, I agree with plaintiff that, to the extent the ALJ relied on plaintiff's failure to take medication as a reason to find her not credible, that finding was improper under SSR 96-7p.

Even without considering plaintiff's failure to take medication, however, substantial evidence remains to support the ALJ's credibility determination. As the commissioner points out, the ALJ reasonably concluded that plaintiff's allegations of debilitating symptoms were inconsistent with Rasmussen's report from her initial intake session with plaintiff on which she indicated that plaintiff's symptoms were moderate and she was functioning rather well as indicated by her GAF score of 65. In addition, the ALJ cited the report from plaintiff's employer which indicated that plaintiff quit her past job as a waitress because she moved, not because of mental limitations. Although plaintiff insists that her condition has worsened since she last worked as a waitress in August 2002 and that her GAF score of 65 reflects her highest, not her lowest functioning level, the sparse objective evidence does not corroborate plaintiff's assertion. Plaintiff relies primarily on Rasmussen's report for this evidence, but as previously noted, the ALJ had good reasons to question the reliability of that information.

Finally, the ALJ noted that plaintiff had refused to sign medical releases so that her counselor could obtain her medical history, and had begun seeing a counselor only to satisfy AODA treatment requirements from an old drunk driving conviction. Although plaintiff's reluctance to seek mental health treatment likely is a product of her mental condition, it was not unreasonable for the ALJ to infer that if plaintiff's symptoms were as debilitating as she claimed, she would have tried harder to overcome her distrust of counselors and sought mental health treatment.

In light of the considerable deference due to an ALJ's credibility determination, I cannot find that the ALJ's credibility finding is patently wrong. *Prochaska v. Barnhart*, 454 F.3d 731, 738 (7th Cir. 2006) (court will reverse credibility finding only if it is "patently wrong") (citation omitted); *Herron v. Shalala*, 19 F.3d 329, 336 (7th Cir. 1994) (court can affirm ALJ's credibility finding if some but not all reasons cited by ALJ are supported by record); *Edwards v. Sullivan*, 985 F.2d 334, 338 (7th Cir. 1993) ("[D]eterminations of credibility often involve intangible and unarticulable elements which impress the ALJ, that, unfortunately leave no trace that can be discerned in this or any other transcript.") (quotations and citations omitted).

IV. Step Five Determination

Finally, plaintiff challenges the ALJ's conclusion at step five that plaintiff can perform the jobs of mail clerk and kitchen helper and that these jobs exist in significant numbers in the regional economy. Plaintiff contends that notwithstanding the VE's assertion at the hearing that his testimony did not conflict with the *Dictionary of Occupational Titles* (DOT), "both real and potential" conflicts exist between the vocational expert's testimony and the description of the jobs set forth in the DOT. Specifically, plaintiff argues that the jobs of mail clerk and kitchen helper require taking instructions and helping others, tasks which exceed the RFC because they require plaintiff to have more than incidental contact with

coworkers. As for the VE's testimony concerning the numbers of each job that exist in the economy, plaintiff accuses the VE of conjuring the numbers out of "whole cloth."

In *Prochaska*, 454 F.3d 731, the Court of Appeals for the Seventh Circuit held that ALJs must comply with SSR 00-4p, which provides as follows:

> When a VE or VS provides evidence about the requirements of a job or occupation, the adjudicator has an affirmative responsibility to ask about any possible conflict between that VE or VS evidence and information provided in the DOT. In these situations, the adjudicator will:
>
> Ask the VE or VS if the evidence he or she has provided conflicts with information provided in the DOT; and
>
> If the VE's or VS's evidence appears to conflict with the DOT, the adjudicator will obtain a reasonable explanation for the apparent conflict.

SSR 00-4p.

Although plaintiff appears to suggest that the ALJ did not comply with this ruling, the ALJ asked the VE if his testimony was consistent with the information contained in the DOT and the VE responded that it was. Plaintiff also concedes that her attorney did not cross-examine the VE on this issue or ask him to explain the job requirements in more detail. Plaintiff appears to argue that reversal is warranted any time a plaintiff identifies a potential conflict with the DOT, even if the ALJ complies with his duty under SSR 00-4p and even if plaintiff does not identify a conflict until after the hearing.

This argument cannot prevail. According to the VE's resumé, he had personal knowledge of the information contained in the DOT as well as of the numbers of light and

sedentary jobs in the economy. AR 63. The ALJ complied with his duty and asked the VE whether his testimony concerning the types of jobs that a hypothetical person of plaintiff's age, education and residual functional capacity could perform was consistent with the DOT. Hearing the VE's affirmative response, the ALJ had no obligation under SSR 00-4p to inquire further. He was entitled to conclude from the VE's qualifications and his testimony that the VE's testimony was reliable. *See Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002) ("an expert is fee to give a bottom line, provided that the underlying data and reasoning are available on demand").

Although the ALJ was required under SSR 00-4p to explore whether there was a conflict, plaintiff cites no authority to support her contention that he was required to go further and challenge the VE's testimony that there was not. If plaintiff was not satisfied with the VE's assertion that his testimony did not conflict with the DOT, then she should have cross-examined him. Because the ALJ complied with his duty under SSR 00-4p and the record before the ALJ did not reveal any shortcomings in the VE's data, the ALJ was entitled to rely on the VE's testimony in reaching his conclusion at step five. This goes for the VE's testimony regarding the types of jobs plaintiff could perform as well as his testimony concerning the numbers of those jobs existing in the economy. Moreover, plaintiff has not produced any vocational evidence to support her suggestion that the numbers of jobs identified by the VE do not exist.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that the decision of the commissioner denying plaintiff Sandra Lembke's applications for disability insurance benefits and supplemental security income be reversed and remanded under sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this report.

Entered this 29th day of December, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
120 N. Henry Street, Rm. 540
Post Office Box 591
Madison, Wisconsin 53701

Chambers of
STEPHEN L. CROCKER
U.S. Magistrate Judge

Telephone
(608) 264-5153

December 29, 2006

Frederick J. Daley
Daley, Debofsky & Bryant
55 W. Monroe St., Ste. 2440
Chicago, IL 60603

Richard Humphrey
Assistant United States Attorney
660 West Washington Avenue
Madison, WI 53703

Re: Lembke v. Barnhart
Case No. 06-C-306-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 January 19, 2007, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by January 19, 2007, 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