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

GORDON IVERSON,

Plaintiff,

v.

LINDA MCMAHON,
Acting Commissioner of Social Security,

Defendant.[1]

REPORT AND
RECOMMENDATION

06-C-339-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). Plaintiff Gordon Iverson seeks reversal of the commissioner's decision that plaintiff is not disabled and therefore is ineligible for either Disability Insurance Benefits or Supplemental Security Income under the Social Security Act, codified at 42 U.S.C. §§ 416(I), 423(d) and 1382c (3)(A).

Before the court for report and recommendation is plaintiff's motion for summary judgment. Plaintiff contends that the decision of the administrative law judge who denied his claim at the hearing level contains errors of law and is not supported by substantial evidence. For the reasons set forth below, I am recommending that the court reject plaintiff's contentions, deny plaintiff's motion for summary judgment and affirm the administrative law judge's decision.

---

[1] Linda McMahon became Acting Commissioner of Social Security on January 22, 2007. The case caption has been changed to reflect the new defendant.

LEGAL AND STATUTORY FRAMEWORK

To be entitled to either disability insurance benefits or supplemental security income payments under the Social Security Act, a claimant must establish that he is under a disability. The Act defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3)(A). A physical or mental impairment is "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 1382c(a)(3)(c).

The commissioner has promulgated regulations setting forth the following five-step sequential inquiry to determine whether a claimant is disabled:

(1) Is the claimant currently employed?

(2) Does the claimant have a severe impairment?

(3) Does the claimant's impairment meet or equal one of the impairments listed by the SSA?

(4) Can the claimant perform her past work? and

(5) Is the claimant is capable of performing work in the national economy?

See 20 C.F.R. §§ 404.1520, 416.920.

The inquiry at steps four and five requires assessment of the claimant's "residual functional capacity," which the commissioner defines as "an assessment of an individual's ability

to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis." Social Security Ruling 96-8p. "A 'regular and continuing basis' means 8 hours a day, for 5 days a week, or an equivalent work schedule." *Id*.

In seeking benefits, the initial burden is on the claimant to prove that a severe impairment prevents him from performing past relevant work. If he can show this, then the burden shifts to the commissioner to show that the claimant was able to perform other work in the national economy despite the severe impairment. *See Stevenson v. Chater*, 105 F.3d 1151, 1154 (7th Cir. 1997); *Brewer v. Chater*, 103 F.3d 1384, 1391 (7th Cir. 1997).

FACTS

I. Procedural History

Plaintiff filed applications for Social Security Disability Insurance Benefits and Supplemental Security Income on September 12, 2003. After the local disability agency denied his applications initially and upon reconsideration, plaintiff requested a hearing before an administrative law judge. That hearing was held on July 26, 2005 before Administrative Law Judge ("ALJ") Mary Kunz. The ALJ heard testimony from plaintiff, neutral medical expert Dr. Andrew Steiner and neutral vocational expert Sidney Bauer.

On November 23, 2005, the ALJ issued a decision finding plaintiff not disabled. On March 7, 2006, this decision became the final decision of the commissioner when the Appeals Council denied plaintiff's request for review.

II. Background and Medical Evidence

Plaintiff was 43 years old on the date of his administrative hearing, making him a "younger individual" for the purposes of his applications for disability benefits. 20 C.F.R. §§ 404.1563, 416.963. Plaintiff received his GED in 1992. His past work experience includes laborer, shift manager and machine operator.

In 1999, plaintiff was employed at a lumber yard as a rip-saw operator. In August of that year he injured his back at work when he slipped and fell, landing hard on his buttocks. Plaintiff was examined by his family physician, Dr. Gary Peterson, who diagnosed a sacroiliac ligament sprain and referred plaintiff to physical therapy. An MRI revealed degenerative changes in plaintiff's lumbar spine at L4-5 and L5-S1 but no evidence of compression on the associated nerve roots or thecal sac. Plaintiff continued to see Dr. Peterson until November 9, 1999, when Dr. Peterson referred plaintiff to a back specialist, Dr. Manz. AR 162-164.

Plaintiff saw Dr. Manz on January 7, 2000. After conducting a thorough physical examination and reviewing plaintiff's MRI scan, Dr. Manz diagnosed plaintiff with mechanical low back pain that was discogenic in nature. AR 345. He ordered a myelogram and CT scan, and referred plaintiff to Dr. Donald Bodeau, an occupational health physician.

On January 26, 2000, Dr. Bodeau examined plaintiff and reviewed his medical records. Dr. Bodeau noted that the CT scan revealed degenerative changes at L4-L5 and L5-S1, including bulging and some extension into the left L5 neural foramen. Dr. Bodeau assigned plaintiff a temporary work restriction of four hours per day, lifting no more than 20 pounds. AR 340-341.

Dr. Manz referred plaintiff to Dr. Mark Schlimgen at the Luther Hospital pain clinic for selective epidural steroid injections and possibly facet injections. On March 24, 2000, Dr. Manz noted that plaintiff had received no relief from his first epidural steroid injection. Accordingly, Dr. Manz recommended that plaintiff proceed with the facet injections. Dr. Schlimgen administered facet injections to plaintiff in March and June, 2000. AR 315-316.

On August 1, 2000, Dr. Manz noted that the injections had significantly diminished plaintiff's pain. In addition, plaintiff had quit working, which he felt was contributing to his symptoms. Dr. Manz suggested that in the future, plaintiff might consider repeating the facet injections or perhaps try a facet rhizotomy. He indicated that plaintiff could be seen on an as-needed basis.

On March 6, 2001, plaintiff returned to Dr. Manz, reporting that his pain was slowly returning. Dr. Manz referred plaintiff back to the pain clinic for more facet injections. On March 16 and April 6, 2001, Dr. Schlimgen administered steroid injections bilaterally at plaintiff's L5-S1 facet joints. AR 313-314. Following his second injection, plaintiff saw Dr. Bodeau, reporting that overall he was doing well and he had obtained three weeks' relief from the first facet injection. Plaintiff reported that he had begun some home-based employment performing light woodworking in his garage that allowed him to modify his activities and schedule as needed. AR 329. On May 25, however, plaintiff told Dr. Bodeau that the benefits from the injections had worn off, he was still very limited in his daily activities, was having significant daily pain and was seriously considering surgery. AR 326.

On May 30, 2001, Dr. Bodeau wrote a letter to plaintiff's attorney opining that as of August 1, 2000, plaintiff was able to work on a full-time basis. Dr. Bodeau stated that in the near future, he would assess whether plaintiff had any permanent disability from his 1999 work injury. AR 325.

On June 12, 2001, Dr. Mark Schlimgen performed a rhizotomy, a procedure in which the nerves to the facet joints are deadened at the L5-S1 levels with a heated electrode. AR 158-159. *See* http://www.spineuniverse.com/displayarticle.php/article200.html.

At a visit with Dr. Bodeau six days later, plaintiff reported that he had not noticed any improvement from the procedure. Dr. Bodeau noted that plaintiff's gait and station were normal, plaintiff sat without visible discomfort, rose without assistance, and his reflexes were normal and symmetric. Plaintiff's range of motion in the lumbar spine was limited to flexion at 30°, extension at 10°, lateral flexion on both sides at 15° and right and left rotation at 15°. Straight leg raising was negative at 90° degrees bilaterally. Dr. Bodeau opined that plaintiff had reached a plateau of healing and had sustained a five percent permanent disability of the person as a whole based on loss of motion, strength and moderate chronic pain. AR 324. Dr. Bodeau assigned plaintiff a permanent work restriction at the sedentary physical demand level, with only occasional bending, squatting, twisting, climbing, reaching above shoulder level or reaching below knee level. Dr. Bodeau indicated that plaintiff was able to stand or walk and sit on a frequent basis. AR 323-324.

In July 2001, plaintiff saw Dr. Bodeau, complaining of pain in the back of his right thigh and calf and into the sole of his foot. Dr. Bodeau diagnosed significant radiculopathic pain and wondered if it might be a complication from the rhizotomy. Dr. Bodeau discussed with plaintiff

diagnostic studies and treatment he could pursue. Plaintiff declined to pursue these options, citing financial constraints. Dr. Bodeau responded that they would pursue a course of "watchful waiting." He prescribed Darvocet for pain control and indicated that plaintiff remained available for work within the restrictions previously identified. AR 406. Plaintiff obtained refills of his Darvocet in September and October 2001.

Plaintiff did not seek further medical care until more than two years later. On January 2003, plaintiff returned to see Dr. Peterson, his family physician. AR 402. Plaintiff reported that the rhizotomy performed by Dr. Schlimgen had helped him for quite a long time but he was having more lower back pain again. Plaintiff reported that he and a friend were trying to start up a small custom building business and that his pain sometimes increased significantly while he worked. Plaintiff reported that he tended not to take appropriate breaks while working or driving. He tried to walk for exercise every other day. Plaintiff also reported problems with his left foot unrelated to his other symptoms.

Dr. Peterson noted that plaintiff's gait and balance appeared normal. On physical examination, plaintiff's back was not tender consistently at any one side. Range of motion was normal, although plaintiff was stiff. Straight leg raising test was negative and plaintiff's reflexes were diminished but symmetrical. Plaintiff was able to rise up on his toes and support himself without significant discomfort. Dr. Peterson told plaintiff that his pain was a lifetime issue that he would have to deal with. Dr. Peterson recommended gentle stretching exercises and physical therapy. He also prescribed Vioxx and Wygesic, which he later replaced with Darvocet. AR 162.

At a follow up on February 13, 2003, Dr. Peterson suggested that plaintiff return to the pain clinic for more injections or another rhizotomy. Plaintiff responded that he could not afford this. Plaintiff reported that he was obtaining satisfactory relief from his medications and was "okay with staying on this program for now." Dr. Peterson observed that plaintiff moved comfortably and did not appear to be in acute discomfort. AR 161.

On November 19, 2003, plaintiff was examined by Dr. Neil Johnson at the request of the Social Security Administration. Plaintiff's chief complaints were pain in the back, neck, right shoulder and hand. He reported that he used a Velcro back support and a cane in the morning. Plaintiff reported that he tried to walk a quarter mile a day, could stand 30 minutes and could sit 60 minutes. He avoided lifting and estimated he could lift at most 10 pounds. Plaintiff reported that as a result of his pain, he had to give up many activities, including carpentry, working on his cars and bow hunting.

Dr. Johnson noted that plaintiff had mild difficulty getting on and off the examination table, severe difficulty heel and toe walking and severe difficulty squatting. Plaintiff was extremely sensitive to palpation of the musculature across the low back and moderately tender in the neck. Straight leg raising produced pain at 60° degrees bilaterally. Motor strength and reflexes were symmetrical. Lumbar range of motion was within normal limits except for flexion, which was about 50% of normal, and extension, which was about 80%. Cervical range of motion was about 80% of normal for flexion and extension and about 50% for rotation. Dr. Johnson noted some loss of motion in the right shoulder with pain. He opined that plaintiff likely had degenerative disc disease of the neck, noting that plaintiff had moderate tenderness,

loss of motion with pain and decreased pinch and grip strength in the right hand compared to the left. Dr. Johnson noted that plaintiff's ability to lift heavy objects would be impaired. AR 165-169.

On December 7, 2003, J.P. McDermott, M.D., a consulting physician for the social security agency completed a Residual Physical Functional Capacity Assessment of plaintiff. Dr. McDermott concluded that plaintiff retained the residual functional capacity for light work with only occasional climbing, stooping, crouching, overhead reaching and lifting activities. AR 185-192.

On April 27, 2004, plaintiff saw psychologist Marcus Desmonde for a mental status evaluation. Desmonde diagnosed plaintiff with an adjustment disorder with depressed mood and noted that plaintiff had moderate psychosocial stressors resulting from the severity of his pain and the financial stress of not working. Desmonde concluded that plaintiff appeared capable of understanding simple instructions, would "work best" in an environment where he had limited contact with co-workers, supervisors and the general public and "may have difficulty tolerating the stress and pressure of full time, competitive employment at this time." AR 184.

On January 21, 2004, Nicole Schweitzer, an occupational therapist, administered a Physical Work Performance Evaluation to plaintiff. Schweitzer concluded from plaintiff's performance during the dynamic strength and mobility portions of the evaluation that he had the ability to meet the requirements of light work. However, she concluded from plaintiff's performance during the endurance portion of the testing that he was incapable of sustaining work for an eight-hour day. During the evaluation, Schweitzer observed that plaintiff needed to be moving continuously to perform various activities. She also noted that plaintiff

complained of progressing back pain and increased numbness on the bottom of his foot. Associated with these complaints, Schweitzer noted gait abnormalities, namely an increased foot drop and decreased stride length. AR 173-175.

On February 4, 2004, Schweitzer completed a Physical Residual Functional Capacity Questionnaire for plaintiff on which she indicated that plaintiff could sit about 2 hours a day; stand or walk about 2 hours a day; would need to take unscheduled breaks for 15-30 minutes every two hours; and was likely to miss about three days of work per month. Schweitzer noted that although the evaluation was typically completed in 3.5 hours in a single day, it took plaintiff three sessions of 1-1.5 hours each to complete the evaluation due to plaintiff's limited activity tolerance. Dr. Peterson also signed the form, adding that plaintiff had a poor stress tolerance and was capable of "low stress"jobs. AR 176-179.

Plaintiff apparently sought no further treatment for over 16 months until he saw Dr. Peterson on June 28, 2005. Plaintiff reported increasing pain that shot down into his leg and foot if he walked too far. He also reported having difficulty sleeping because of his pain. Dr. Peterson prescribed a trial of Remeron. In addition, Dr. Peterson noted that plaintiff should consider a repeat rhizotomy and a visit to the spine surgeon. Plaintiff indicated that he was hoping to return to see Dr. Manz but was waiting for approval from Medical Assistance. AR 409. On July 14, 2005, plaintiff reported that he was able to get five hours of sound sleep by taking a half tablet of Remeron. AR 408.

III. Hearing Testimony

A. Plaintiff's Testimony

On July 26, 2005, plaintiff had his hearing before the ALJ. Early in the hearing, plaintiff's attorney amended plaintiff's onset date to January 21, 2004, the date of the most recent functional capacity evaluation. Plaintiff testified that he was unable to perform even a sit down job after that date because of pain in his back, legs, butt and shoulder. Plaintiff said his back pain is nearly constant, although medication temporarily relieved the "sharpness" of it. Besides taking medication, plaintiff tried to relieve his pain by walking around his house, stretching and lying down about once an hour. Plaintiff testified that he could walk for about 10 minutes, stand for 15-30 minutes, and sit for 30-45 minutes. Plaintiff said he could lift about 10 pounds, although he had problems with his right shoulder so that he could not reach over his head or hold weight at shoulder level. Plaintiff testified that after a while, "it doesn't matter what position, my hand goes numb." According to plaintiff, his right hand goes numb 6 to 10 times a day for about 30-45 minutes after squeezing or manipulating objects, moving objects around, or writing. Plaintiff said he still could use his right hand, but sometimes he drops objects. Plaintiff drives short distances. He has no problems feeding himself. As for his mental condition, plaintiff testified that he had difficulty remembering things and that it bothered him that he was unable to do things he wanted to do. He said he took an antidepressant, Remeron, which helped him sleep.

Plaintiff testified that on a typical day, he awoke at 4:30 a.m., had coffee and chatted with his wife before she left for work, roused his two teenage children for school, then laid down

for up to an hour. He made himself a sandwich for lunch, loaded dishes in the dishwasher and swept. On occasion, he drove to the store to buy groceries. He performed household maintenance on his mobile home, including changing light bulbs, outlets, switches and breakers. Sometimes he changed the oil in his car, mowed the yard with a riding mower, hunted and fished. Plaintiff said he could fish from a boat for up to an hour if the boat had good seats, but he was able to fish more comfortably from the shore while sitting in a chair. Once he managed to fish all day, but now he was "lucky if I can be out there on the bank for three hours." Plaintiff also has gone ice fishing, but someone else has to pull the shanty onto the ice and drill the hole. AR 436-458.

Plaintiff said he had attempted to retrain in mechanical design and had attended classes in La Crosse. However, he said he did not complete the course because the one-hour drive each way from his house to La Crosse was causing him to have too much pain in his back and shoulder. AR 457.

B. Dr. Steiner's Testimony

Dr. Andrew Steiner testified as a neutral medical expert at the hearing. After asking Dr. Steiner for an overview of plaintiff's impairments, the ALJ asked his opinion whether plaintiff had any impairment or combination of impairments that met or medically equaled any listed impairment. Dr. Steiner replied that plaintiff "did not reach a listings level of documentation" because of the absence of any radicular or neurological loss associated with plaintiff's back condition. AR 461. In Dr. Steiner's opinion, plaintiff's primary condition was pain, centered mostly in his back and right shoulder. According to Dr. Steiner, the clinical record suggested

that plaintiff would be able to perform work in the light range with no right-sided overhead work, no more than occasional extended reaching with the right, and no more than occasional bending, twisting, stooping, crawling, crouching, balancing or climbing. AR 462.

On cross-examination, Dr. Steiner acknowledged that in 2001, Dr. Bodeau had issued work restrictions limiting plaintiff to work at the sedentary level. However, Dr. Steiner noted that since then, the consulting examiner for the social security agency and the January 2004 functional capacity evaluation indicated that plaintiff had enough lifting ability to perform work at the light exertional level. AR 463. Plaintiff's attorney did not cross-examine Dr. Steiner regarding his opinion that plaintiff's condition did not meet or equal a listing.

C. Vocational Expert Testimony

The ALJ asked the vocational expert, Bauer, to consider a person of plaintiff's age and education who was limited to unskilled work that required lifting up to 20 pounds occasionally, 10 pounds frequently, 6 hours of walking or standing and 2 hours of sitting in an 8 hour work day, with no overhead work and no more than occasional extended reaching on the right and no more than occasional bending, twisting, stooping, crouching, crawling, balancing or climbing. AR 467-68. When asked whether this person could perform any of plaintiff's past work, Bauer replied that he could not. However, such an individual could perform the jobs of bench line assembler, locker room attendant and parking lot attendant. Bauer testified that thousands of such jobs existed in the state of Wisconsin with many more in the national economy. In response to the ALJ's inquiry, Bauer testified that his information concerning the various jobs

was consistent with the way the jobs are described in the *Dictionary of Occupational Titles*. Plaintiff's attorney did not challenge this testimony. AR 470.

IV. The ALJ's Decision

In reaching her conclusion that plaintiff was not disabled, the ALJ performed the required five-step sequential analysis. *See* 20 C.F.R. §§ 404.1520, 416.920. The ALJ found at step one that plaintiff had not engaged in substantial gainful employment since his alleged onset date, and at step two that plaintiff had the following severe, medically-determinable impairments: degenerative disc disease of the lumbar and cervical spine; right shoulder injury with shoulder weakness and decreased grip; and affective disorder with depressed mood and anxiety. With respect to plaintiff's mental impairment, the ALJ explained that although there was scant evidence that plaintiff was limited in his mental functioning, she was giving plaintiff "the benefit of any reasonable doubt by combining a degree of pain, decreased memory, and decreased alertness which is a side-effect of his medication" and deeming him to have a severe mental impairment. At step three, the ALJ found that plaintiff did not have an impairment or combination of impairments that met or medically equaled any impairment listed in 20 C.F.R. 404, Subpart P, Appendix 1, Regulation No. 4.

Next, the ALJ assessed plaintiff's residual functional capacity, taking into account plaintiff's subjective complaints regarding his symptoms and limitations, as well as the various medical opinions in the record. The ALJ determined that plaintiff retained the residual functional capacity for unskilled light exertional work with the following limitations: lifting no more than 20 pounds occasionally and 10 pounds frequently; standing or walking no more than

6 out of 8 hours per day; sitting 2 out of 8 hours per day; no overhead work on the right; no more than occasional extended reaching on the right; no more than occasional extended reaching on the right; and no more than occasional balancing, bending, climbing crouching, crawling, stooping or twisting. In reaching her conclusion, the ALJ placed great weight on the opinion of Dr. Steiner and no weight on either Schweitzer's opinion that plaintiff was incapable of performing full time work or Dr. Peterson's apparent adoption of that opinion.

Relying on the testimony of the vocational expert, the ALJ found at step four that plaintiff lacked the residual functional capacity to perform his past relevant work. However, she found that the vocational expert's testimony was sufficient to satisfy the commissioner's burden at step five to show that there other jobs existed in significant numbers that plaintiff could perform, namely bench assembler, locker room attendant and parking lot attendant.

ANALYSIS

Plaintiff contends that the ALJ's decision is not supported by substantial evidence and that it is procedurally flawed. Specifically, plaintiff contends that:

> 1) the ALJ ignored evidence supporting plaintiff's claim when she found that plaintiff's condition did not satisfy a listing;
>
> 2) the ALJ made an improper credibility finding;
>
> 3) the ALJ failed to properly weigh the various medical opinions and determine plaintiff's mental and physical abilities; and
>
> 4) the ALJ did not make a proper step five determination.

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), the court cannot reconsider facts, reweigh the evidence, decide questions of credibility, or otherwise substitute its own judgment for that of the ALJ regarding what the outcome should be. *Clifford v. Apfel*, 227 F.3d 863, 869 (7th Cir. 2000). Thus, where conflicting evidence allows reasonable minds to differ as to whether a claimant is disabled, the responsibility for that decision falls on the commissioner. *Edwards v. Sullivan*, 985 F.2d 334, 336 (7th Cir. 1993). Nevertheless, the court must conduct a "critical review of the evidence" before affirming the commissioner's decision, *id.*, and the decision cannot stand if it lacks evidentiary support or "is so poorly articulated as to prevent meaningful review." *Steele v. Barnhart*, 290 F.3d 936, 940 (7th Cir. 2002). When the ALJ denies benefits, she must build a logical and accurate bridge from the evidence to his conclusion. *Zurawski v. Halter*, 245 F.3d 881, 887 (7th Cir. 2001).

II. Listing of Impairments

Plaintiff contends that the ALJ failed to analyze the medical record sufficiently when concluding that plaintiff's condition did not meet or equal the criteria of a listed impairment. This is the ALJ's discussion of this issue:

> To assist in the assessment of the physical impairments in this claim, the undersigned arranged for the presence and testimony of a neutral medical expert, Andrew Steiner, M.D., who is board-certified in Physical Medicine and Rehabilitation. After thoroughly reviewing the entire record, Dr. Steiner opined none of the claimant's physical impairments alone or in combination meet or medically equaled a Listing. In particular, Dr. Steiner testified there were no radicular or neurological losses, which are required by the listings. In addition, the claimant usually was observed with normal gait, balance, and range of motion.
>
> The undersigned reviewed the functional limitations from the claimant's mental impairments and finds the impairments do not manifest itself with the degree of severity required to meet or medically equal a Listing. Further, the overall medical evidence of record reflects that the claimant's mental and physical impairments, individually or in combination, do not meet or equal a listed impairment.

AR 23.

Citing *Ribaudo v. Barnhart*, 458 F.3d 580, 584 (7th Cir. 2006), plaintiff argues that the case must be remanded because the ALJ did not cite the specific listing she was considering and conducted only a "perfunctory analysis," precluding meaningful review. Plaintiff is incorrect.

At the outset, I note with alarm that plaintiff supports his step three argument with assertions that are patently false. First, he asserts that "the ALJ failed to consider whether Plaintiff's combination of impairments equal a Listing." As is plain from the excerpt quoted above, the ALJ explicitly undertook that consideration in her decision, finding that the overall medical record failed to show that the combination of plaintiff's impairments met or medically equaled a listing. Second, plaintiff contends that the ALJ failed to ask Dr. Steiner whether plaintiff's condition equaled a listing. This is false: the ALJ specifically asked Dr. Steiner to

opine whether plaintiff was "subject to any impairment or combination of impairments which would *either meet or medically equal* any of the listings." AR 461 (emphasis added).[2]

The ALJ's enlistment of a medical expert to offer an opinion at step three of the sequential analysis likely is enough by itself to distinguish this case from *Ribaudo* and other similar cases that the court of appeals has remanded for a more in-depth analysis of the listings consideration. *Ribaudo*, 458 F.3d at 582 (ALJ based Step 3 finding on Disability Determination and Transmittal forms filled out by SSA's non-examining experts); *Barnett v. Barnhart*, 381 F.3d 664, 670-71 (7th Cir. 2004) (ALJ failed to consult medical expert regarding medical equivalency); *Brindisi ex rel. Brindisi v. Barnhart*, 315 F.3d 783 (7th Cir. 2003) (childhood disability case with no indication that expert testified at hearing); *Scott v. Barnhart*, 297 F.3d 589 (7th Cir. 2002) (same).

Even if it is not, I am satisfied that remand is unnecessary. Notably, plaintiff recasts his argument in his reply brief claiming only that he "closely meets" the most applicable listing, 1.04 Disorders of the Spine. Pltf.'s Reply, dkt. 10, at 4.[3] His argument for remand is based upon his

---

[2] It is improper to misrepresent the facts of a case to the court. *American Internal Adjustment Co. V. Galvin*, 86 F.3d 1455, 1461 (7th Cir. 1996). Such conduct is sanctionable because misrepresentations needlessly waste the resources of the appellee's and the court. *Stookey v. Teller Training Distr., Inc.*, 9 F.3d 631, 638 (7th Cir. 1993). I will address sanctions in more detail in a different section.

[3] This is another example of plaintiff misleading the court. Plaintiff asserted in his opening brief that the ALJ erred at Step 3 by finding that plaintiff's severe impairments did not meet or equal any listing "when, in fact, they meet Listing 1.04" *** "When this evidence is taken into account and evaluated under the proper Listing, Plaintiff's condition clearly meets Listing 1.04A." Pltf.'s Mem. dkt. 8, at 14, 17.

Plaintiff's assertion required the commissioner to point out that the facts did not support a finding that plaintiff actually met Listing 1.04. *See* dkt. 9 at 11-12.

In reply, plaintiff pivoted past the commissioner's factual argument to claim that the evidence showed that he "equals Listing 1.04." Pltf.'s Reply, dkt. 10, at 2, emphasis in original. This is a fair argument for plaintiff to make, but it is the *only* fair argument for him to make on the facts in the record.

contention that he has a condition or a combination of impairments that *equal* a listing. However, to establish that he medically equals a listing, a claimant must present medical evidence that shows that he has symptoms from a combination of impairments or a non-listed impairment that are "at least equal in severity and duration to the listed findings." 20 C.F.R. §§ 404.1526(a), 416.926(a).

Plaintiff has not made this showing. Plaintiff's contention that he comes "close" to meeting all the requirements of the listing for Disorders of the Spine, 1.04, is not enough to establish medical equivalence. For a claimant to show that he has an impairment or combination of impairments "equivalent" to a listed impairment, "he must present medical findings equal in severity to *all* the criteria for the one most similar listed impairment." *Sullivan v. Zebley*, 493 U.S. 521, 531 (1990) (citing 20 C.F.R. § 416.926(a)). Plaintiff has not explained adequately how any of the various medical findings he cites in his briefs establish this requisite severity. Plaintiff appears to rely on isolated reports indicating that he had an abnormal gait, loss of motion in the spine and on records from Dr. Bodeau in 1996 that indicated a 50% loss of function in the right arm and hand. However, it is clear from the ALJ's decision that she evaluated this evidence, insofar as she noted in her step three analysis that plaintiff "*usually* was observed with normal gait, balance, and range of motion." (emphasis added). As for the evidence from Dr. Bodeau, the ALJ found it to be contradicted by an earlier report indicating that plaintiff could work at the light level and by Dr. Johnson's physical examination which found only some loss of motion and grip strength of 65 pounds.

It was improper for plaintiff to argue that he clearly met Listing 1.04 when he clearly did not.

Although plaintiff has cited a smattering of other evidence, he fails adequately to explain how any of this evidence shows findings that are at least of equal medical significance to the required criteria of any listed impairment. Moreover, much of the evidence plaintiff cites, including the functional capacity questionnaire completed by Dr. Peterson, was discussed and properly rejected by the ALJ (for reasons explained below). Because plaintiff has not come forth with substantial evidence that the ALJ failed to consider that shows that he medically equals a listing, remanding this case for a more thorough step three analysis (if one even is required) would be a pointless exercise. *Accord Scheck v. Barnhart*, 357 F.3d 697, 700-01 (7th Cir. 2004) (remand for more detailed examination of medical evidence not required where plaintiff did not present substantial evidence to contract agency's position on issue of medical equivalency).

III. Credibility Determination

In reaching her conclusion at step four as to plaintiff's residual functional capacity, the ALJ considered plaintiff's statements about his symptoms. The ALJ noted that plaintiff alleged that he was unable to work because he could sit for only 30-45 minutes, stand for 15-30 minutes and walk 10 minutes at a time and because of numbness in his hands that occurred 6-10 times daily. The ALJ found that plaintiff's medically determinable impairments could be expected to produce the symptoms of which plaintiff complained and that his statements were generally credible. However, the ALJ found that plaintiff's reported symptoms "do not reach the severity level required for a finding of disability." AR 23. As support for this finding, the ALJ cited plaintiff's various activities, including hunting, fishing, gardening and household tasks; his work

history, which the ALJ found reflected a history of low earnings; plaintiff's failure, post-injury, to complete mechanical design training or seek other employment within his limitations; the effectiveness of pain medication in controlling plaintiff's pain; the absence of evidence indicating that plaintiff's doctors had recommended surgery; and the objective medical evidence.

Plaintiff contends the ALJ made an improper credibility determination when she concluded that plaintiff's statements concerning the intensity, duration and limiting effects of his symptoms were not fully credible. First, plaintiff asserts that the ALJ's credibility determination did not comport with the requirements of Social Security Ruling 96-7p, which explains how ALJs are to evaluate the credibility of a claimant's subjective complaints. *Brindisi*, 315 F.3d at 787 (ALJs must comply with SSR 96-7p). *See also* 20 C.F.R. §§ 404.1529, 416.929. However, plaintiff never provides any backup for her assertion that the ALJ did not comply with that ruling.

Indeed, a review of the ALJ's credibility analysis shows that the ALJ followed the ruling to a "T": first she considered whether plaintiff's impairments reasonably could be expected to produce the symptoms of which he complained, then she evaluated the extent to which plaintiff's complaints concerning the nature, duration and frequency of his pain were consistent with the record as a whole. SSR 96-7p (setting out two-step process for evaluating credibility of subjective complaints). In conducting this analysis, the ALJ considered not only the objective medical evidence but the other relevant SSR 96-7p factors, including plaintiff's daily activities; the location, duration, frequency, and intensity of his pain or other symptoms; factors that

precipitate and aggravate the symptoms; the type, dosage, effectiveness, and side effects of medication; other treatment or measures taken for relief of pain; and work history.

Plaintiff appears to suggest that the ALJ was required to find plaintiff disabled so long as his allegations concerning his symptoms and limitations were "reasonably related" to his impairments. Pltf.'s Mem. dkt. 8, at 23-25. There is no doubt that plaintiff has received significant treatment over a 10-year period for various injuries, some of which left permanent residual symptoms, including pain. However, plaintiff's sweeping proposition that the causal relationship between his impairments and his reported symptoms compels a finding of disability is unsupported by SSR 96-7p or *Indoranto v. Barnhart*, 374 F.3d 470 (7th Cir. 2004), the case cited by plaintiff.

In *Indoranto*, the ALJ determined that plaintiff's testimony that she lay down and took up to three hots baths a day to alleviate pain was unworthy of belief because there was no "clinical support" for such a limitation. Reversing, the court found that the ALJ's rationale was not supported by substantial evidence, insofar as plaintiff never testified that her doctors told her to lie down or take baths but said merely that these home remedies helped her feel better. Moreover, the record showed that plaintiff's physical therapist had suggested 30-minute hot baths for pain relief. *Id*. at 474-475. The court pointed out that the ALJ's adverse credibility finding was puzzling because the ALJ had accepted that plaintiff's impairments caused significant pain and discomfort. *Id*. at 475. The court did *not* hold that the ALJ was *required* to find plaintiff disabled because her reported limitations were "reasonably related" to her medical

impairments. The court simply remanded the case because the ALJ's credibility determination was "premised on flawed logic." *Id*.

In this case, plaintiff's objections to the ALJ's credibility determination boil down to an attack on the soundness of each of the various reasons the ALJ cited as support for her credibility determination. At most, plaintiff shows that the evidence was capable of supporting two competing inferences. For example, plaintiff argues that the ALJ should not have held plaintiff's failure to pursue work within his limitations against him without inquiring why plaintiff was unable to complete the mechanical design course work or whether he attempted to obtain jobs other than self-employment. But even if there were legitimate reasons for plaintiff's failure to complete his mechanical design training, it still was not unreasonable for the ALJ to question the legitimacy of plaintiff's claim of total disability in light of his sporadic work history and his apparent failure to seek work other than his self-employment efforts.

Likewise, even though the record indicates that plaintiff claimed that he had no money and no insurance to return to the pain clinic when his pain re-emerged in 2003, the ALJ was not obliged to credit this explanation where nothing in the record indicated that plaintiff's doctors refused to treat him because of an inability to pay. *See Osborne v. Barnhart*, 316 F.3d 809, 812 (8th Cir. 2003) (absence of evidence that claimant sought low-cost or free care may warrant discrediting excuse that he could not afford treatment). Moreover, as the ALJ noted, plaintiff told Dr. Peterson that he was satisfied with the relief he was getting from medication and Dr. Peterson's notes indicated that plaintiff was getting along fairly well on Darvocet. Reasonable

minds viewing this evidence could think it adequate to support the ALJ's determination that plaintiff's pain was controlled adequately with medication.

Finally, plaintiff argues that the ALJ erred by concluding that plaintiff's ability to fish weekly for up to three hours demonstrates that he is not disabled. If this actually was the ALJ's finding, then I would agree with plaintiff. But it wasn't. Yet again, plaintiff has misstated the record.

True, the ALJ devoted more discussion to plaintiff's fishing than to his other daily activities, but she did so to point out the discrepancy between this evidence and plaintiff's inability to complete the 3-hour functional capacity evaluation. However, in finding that plaintiff's daily activities were consistent with an ability to perform a limited range of light work, the ALJ noted that in addition to fishing, plaintiff also regularly hunted, gardened, read, shopped, attended church, played cards, visited with friends and neighbors, performed small repairs and chores around the home, changed the oil in his car and mowed the lawn. These are not the sorts of minimal or sporadic activities that courts have found inadequate to support a finding of non-disability. *Compare Scott v. Sullivan*, 898 F.2d 519, 524 (7th Cir. 1990) (claimant's testimony that he could help out around the house, carry groceries, set the table, ride a bike, and go hunting and fishing supported ALJ's finding that claimant was not limited to sedentary work) *with Clifford*, 227 F.3d at 872 (performing some household chores, cooking simple meals, and occasional grocery shopping are "minimal" activities).

In sum, plaintiff has not demonstrated that this is one of those rare occasions on which the court should disturb the ALJ's credibility finding. The ALJ built an accurate and logical

bridge between the evidence and her conclusion that plaintiff's allegations of disabling symptoms were not fully credible. It is possible that a different fact finder might have reached a different conclusion, but this possibility is not a basis for setting aside the ALJ's credibility determination. Where, as here, the ALJ's credibility determination is not patently wrong, this court must uphold it. *Prochaska v. Barnhart*, 454 F.3d 731, 738 (7th Cir. 2006) (citation omitted); *Sims v. Barnhart*, 442 F.3d 536, 538 (7th Cir. 2006).

IV. Residual Functional Capacity Assessment and Corresponding Hypothetical

Plaintiff contends that the ALJ improperly evaluated the medical evidence when preparing her residual functional capacity assessment. First, plaintiff contends that the ALJ failed to give "good reasons" for rejecting the residual functional capacity questionnaire signed by Dr. Peterson, who appeared to endorse the occupational therapist's opinion that plaintiff was incapable of full time work. *See* SSR 96-2p and 20 C.F.R. § 404.1527 (ALJ must give good reasons for rejecting opinion of treating physician).

A treating physician's opinion regarding the nature and severity of a medical condition is entitled to controlling weight only if it is well-supported by medical evidence and not inconsistent with other substantial evidence in the record. *Clifford*, 227 F.3d at 870; 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2). The ALJ explained that she was placing no weight on Dr. Peterson's opinion that plaintiff could not work full time because it was not supported by his treatment notes. The ALJ pointed out that although Dr. Peterson treated plaintiff on and off since 1999, he never had imposed any work restrictions; in fact, he had made statements

suggesting that plaintiff was capable of some types of full time work. In addition, noted the ALJ, Dr. Peterson's opinion was not supported by a contemporaneous physical examination. The ALJ noted that Dr. Peterson last had examined plaintiff more than 11 months before Dr. Peterson signed the residual functional capacity assessment. Further, when he saw plaintiff a year and a half later, he did not examine plaintiff.

Plaintiff argues that Dr. Peterson's failure to opine in his treatment notes that plaintiff was incapable of full time work is irrelevant because Dr. Peterson never was asked prior to completing the RFC questionnaire to assess plaintiff's ability to work. As the ALJ observed, however, in 1999 Dr. Peterson suggested that plaintiff "needs to begin to consider something other than physical labor given the amount of difficulty he has been having." In 2003, when plaintiff returned to see Dr. Peterson after a long hiatus, Dr. Peterson noted that plaintiff tended not to take "appropriate breaks" when working or driving. Although it may be true that Dr. Peterson was not asked to provide specific work restrictions, it was not unreasonable for the ALJ to conclude that the doctor's just-cited statements suggested that plaintiff was able to work at least some jobs full time. Further, the ALJ properly placed little weight on Dr. Peterson's opinion where he had not examined plaintiff for 11 months and his physical examination at that time did not indicate severe abnormalities. Because these were good reasons for rejecting Dr. Peterson's opinion, this court should not disturb this aspect of the ALJ's opinion.

Plaintiff notes that Dr. Peterson's opinion was directly supported by the results of the physical capacity testing administered by Schweitzer, the occupational therapist, who concluded that plaintiff lacked the endurance to work eight hours a day. According to plaintiff, the ALJ

erred by rejecting Schweitzer's report on the ground that it was based upon plaintiff's subjective complaints of fatigue and low endurance. Plaintiff points out that Schweitzer's opinion was also based her own observations as well as objective measures such as plaintiff's heart rate. *See Barrett v. Barnhart*, 355 F.3d 1065, 1067 (7th Cir. 2004) (where physical therapist's assessment of plaintiff's ability to work was based partly on physical tests and observation, ALJ's decision to give no weight to assessment on ground that plaintiff had exaggerated condition to therapist was "arbitrary").

As the commissioner points out, however, the ALJ did not reject Schweitzer's report merely because it was based in part on plaintiff's subjective complaints of fatigue. Rather, the ALJ observed that plaintiff's inability to complete more than an hour's worth of physical capacity testing was at odds with his reported ability to fish from shore regularly for up to three hours, an activity that involved many of the same activities tested during the physical capacity evaluation. In other words, the ALJ did not question Schweitzer's observations, she questioned whether those observations accurately captured plaintiff's actual abilities. Confronted with this conflicting evidence, the ALJ reasonably resolved the conflict by deciding to give little weight to Schweitzer's assessment of plaintiff's ability to sustain full time employment.

Next, plaintiff contends that the ALJ's residual functional capacity assessment was erroneous because it included no limitations from plaintiff's affective disorder with depressed mood and anxiety. Plaintiff argues that because the ALJ found plaintiff's affective disorder to be a severe impairment, she was required to account for this impairment in some fashion when arriving at her residual functional capacity assessment. 20 C.F.R. §§ 404.1521, 416.921 (for

impairment to be severe, it must significantly limit ability to perform physical or mental ability to do basic work activities).

As the ALJ explained, however, she accounted for plaintiff's mental impairment by finding that plaintiff was limited to unskilled work. This was a significant reduction in plaintiff's residual functional capacity because, by virtue of his high school education, plaintiff otherwise had the ability to perform at least semi-skilled work. 20 C.F.R. §§ 404.1564(b)(4), 404.964(b)(4) (explaining that commissioner generally considers person with high school education to have ability to perform at least semi-skilled work).

Plaintiff argues that in addition to the limitation to unskilled work, the ALJ should have included the limitations identified by psychologist Marcus Desmonde, who recommended that plaintiff have limited contact with coworkers, supervisors and the general public, and who opined that plaintiff might have difficulty tolerating the stress and pressure of full time employment. The ALJ explained that she placed no weight on these suggestions because they were inconsistent with Desmonde's notes from the evaluation, which did not mention any interpersonal difficulties, anxious behavior or trouble concentrating. The ALJ also noted that Desmonde appeared to have derived his predictions about plaintiff's ability to work from plaintiff's subjective complaints of pain as opposed to Desmonde's own observations and testing. The ALJ further noted that additional limitations beyond unskilled work were not warranted in the absence of evidence that plaintiff had sought or had been recommended to seek mental health treatment. Finally, the ALJ noted the state agency psychologists' opinions that plaintiff had no mental limitations.

Therefore, contrary to plaintiff's assertion that the ALJ "ignored" Desmonde's report in favor of her own lay opinion, the ALJ explicitly considered it and explained why she was not adopting the mental limitations he suggested. Because each of the reasons cited by the ALJ reflect logical conclusions grounded solidly in the evidence, this court ought to affirm the ALJ's assessment of plaintiff's mental limitations.

Finally, plaintiff suggests that the ALJ's residual functional capacity assessment failed to account for limitations assigned to plaintiff by Dr. Bodeau in 1996. At that time, as a result of physical capacity testing following plaintiff's treatment for a right shoulder injury and bilateral carpal tunnel syndrome, Dr. Bodeau issued permanent work restrictions limiting plaintiff to light work with no more than occasional overhead reaching with the right arm. In addition, he indicated that plaintiff should avoid operating power and vibrating tools, repetitive grasping of the hand, and repetitive wrist motions. AR 354. However, a month later, Dr. Bodeau wrote that plaintiff had an approximate 50 percent loss of function in the right arm that prevented him from using a regular bow for hunting. AR 352.

Plaintiff suggests that the ALJ should have adopted Dr. Bodeau's limitations on the use of power tools, repetitive grasping and loss of function in the right arm. As the ALJ noted, however, Dr. Bodeau's assessment that plaintiff was limited to only 50 percent of the use of the right arm was inconsistent with the physical capacity testing, which showed that plaintiff could lift at the light level. Dr. Bodeau's report also was inconsistent with the November 2003 findings of Dr. Johnson, who noted only some loss of motion in the right shoulder and administered grip strength testing which showed that plaintiff still could lift 65 pounds in spite

of his right arm weakness and diminished grip strength. Because Dr. Bodeau's 1996 assessment of plaintiff's limitations was internally inconsistent and were inconsistent with more recent evidence of record, the ALJ did not err in rejecting Dr. Bodeau's suggested limitations.

Although the ALJ did not explicitly discuss Dr. Bodeau's limitations concerning grasping or the use of power tools, this omission is immaterial. An ALJ need not mention every piece of evidence in the record. *Indoranto*, 374 F.3d at 474. The record shows that in 1999, about three years after Dr. Bodeau issued these restrictions, plaintiff was employed full time as a laborer and rip saw operator and thereafter used a jigsaw, radial saw, skill saw and table saw to make wood craft projects in his home wood shop. AR 148. In June 2001, after treating plaintiff for his back injury, Dr. Bodeau issued new restrictions for plaintiff that did not include any limitations on operating power tools, wrist motions, or grasping. AR 323. Because the record indicates that plaintiff's right arm problems improved, Dr. Bodeau's 1996 work restrictions were irrelevant to plaintiff's condition at the time of his administrative hearing in 2005.

As for Dr. Bodeau's 2001 restrictions, the ALJ gave good reasons why she was not adopting Dr. Bodeau's conclusion that plaintiff was limited to sedentary work. The ALJ pointed out that plaintiff's lumbar range of motion in 2001 was far more restricted than it was in January 1, 2003, at which time it was essentially normal. The ALJ also pointed out that during the most recent functional capacity testing, plaintiff demonstrated that he was capable of meeting the lifting requirements of light work. Finally, the ALJ adopted the testimony of Dr. Steiner and that of the state agency physicians, who all concluded that plaintiff was capable of

performing work at the light exertional level. In light of this evidence, the ALJ was not required to adopt Dr. Bodeau's sedentary work restriction.

V. Step Five Determination

Although plaintiff devotes a significant portion of his brief to challenging the ALJ's step five determination, most of those challenges rest on his contention that the hypothetical question to the vocational expert was flawed because it did not include the various limitations discussed in the preceding section. Because I have concluded that the ALJ did not err by omitting those limitations from her residual functional capacity assessment, it follows that the ALJ did not err by omitting them from her hypothetical question to the vocational expert. *Herron*, 19 F.3d at 337 (hypothetical question posed by ALJ to vocational expert proper if it fully sets forth claimant's impairments to extent they are supported by medical evidence).

This leaves plaintiff's contention that the ALJ failed to comply with her mandatory duty under SSR 00-4p to ask the vocational expert about any possible conflicts between his testimony and the Dictionary of Occupational Titles (DOT). *Prochaska*, 454 F.3d at 735(SSR 00-4p imposes affirmative responsibility upon ALJ to ask VE about any possible conflict between VE's testimony and DOT and to elicit reasonable explanation for any discrepancy). Plaintiff appears to suggest that the ALJ did not comply with this ruling.

But the ALJ specifically asked the VE if his testimony was consistent with the information contained in the DOT and the VE responded that it was. *See* AR 470. Plaintiff's attorney did not cross-examine the VE on this issue, did not ask him to explain the job

requirements in more detail and did not ask the ALJ to keep the record so that he could cross-check the jobs identified by the VE with the DOT. 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 her duty under SSR 00-4p and even if plaintiff does not identify a conflict until after the hearing.

This position is untenable. The ALJ complied with her 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. She 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"). Neither *Prochaska* nor SSR 00-4p lend any support to plaintiff's suggestion that more was required.

CONCLUSION

As often is the case in challenges to the commissioner's denial of disability benefits, there is evidence in this case that might have allowed the commissioner to award benefits to plaintiff. But she did not, and I have concluded that this decision is not reversible upon appeal.

It is not surprising that plaintiff presented a zealous attack on the commissioner's decision, as is his prerogative. In this case, however, there are clear instances of plaintiff–or more

accurately, plaintiff's attorney–hitting below the belt. As specifically noted in the report, counsel misstated material facts and played a shell game with his step three argument. Regardless whether this is carelessness or recklessness, it was improper and this court will not tolerate it. Judicial reviews of social security disability appeals are time-consuming enough without the court having to double-check every factual assertion and every legal argument by counsel because the court cannot trust the accuracy and honesty of counsel's work. This is where we have arrived with the Daley, DeBofsky & Bryant law firm.

I am not imposing any sanctions in this case and I am not recommending that the district judge impose any. I am alerting counsel, however, that if the court finds in any submission prepared by the Daley law firm after January 29, 2007 a misstatement of any material fact in the record, or an argument premised on a misstatement of a material fact, then the court will deem the entire submission untrustworthy and shall not consider it for any purpose in deciding the appeal. Counsel should act accordingly.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I respectfully recommend that the motion of Gordon Iverson for summary judgment be DENIED and the decision of the Commissioner denying plaintiff's application for disability insurance benefits and supplemental security income be AFFIRMED.

Entered this 29th day of January, 2007.

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

January 29, 2007

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

Richard D. Humphrey
Assistant U.S. Attorney
P.O. Box 1585
Madison, WI 53701-1585

Re: Iverson v. McMahon
Case No. 06-C-339-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 newly-updated 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 February 20, 2007, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by February 20, 2007, 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