

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

JANE E. HERNANDEZ,

Plaintiff,

v.

LINDA McMAHON,
Acting Commissioner of Social Security,

Defendant.¹

REPORT AND
RECOMMENDATION

06-C-344-C

REPORT

This is an appeal from an adverse decision of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). Plaintiff Jane E. Hernandez challenges the commissioner's determination that she is not disabled and therefore not eligible for either Disability Insurance Benefits or Supplemental Security Income under sections 216(I) and 223 and 1614(a)(3)(A) of the Social Security Act. She has filed a motion for summary judgment in which she contends that the commissioner's decision is not supported by substantial evidence because the administrative law judge ("ALJ") failed to account for the impact of her obesity on her other impairments and improperly rejected evidence from one of her treating physicians. Plaintiff also contends that the ALJ failed to explore discrepancies between the vocational expert's testimony concerning plaintiff's ability to perform her past

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

work or other jobs with the descriptions of those jobs contained in the *Dictionary of Occupational Titles*. For the reasons explained below, I am recommending that the court deny plaintiff's motion for summary judgment and affirm the decision of the commissioner.

The following facts are drawn from the Administrative Record ("AR"):

FACTS

I. Evidence Before the ALJ

Plaintiff was born on March 3, 1958, making her 47 years old on the date of the ALJ's decision. She has a high school education and past work experience in a variety of jobs including housekeeper, cheese worker, inspector, sorter and packager.

Plaintiff filed her applications for disability benefits on September 19, 2001, alleging that she was disabled from asthma and high blood pressure. Medical records obtained by the agency in connection with plaintiff's claim show that plaintiff has a history of asthma and chronic sinus infections dating back to 1984-1985. Pulmonary function studies performed at the Monroe Clinic in March 1998 and October 2001 revealed mild to moderate obstructive dysfunction. On October 29, 2001, Dr. Michael Netzel, plaintiff's pulmonologist, completed a report indicating that plaintiff was able to sit and stand but was "not able to move around much [due to] asthma." He also said plaintiff should not carry or lift frequently. Dr. Netzel noted that plaintiff also had morbid obesity, hypertension and chronic sinusitis status post nasal surgery. AR 238.

On November 9, 2001, state agency consulting physician George Andrews reviewed the record and concluded that plaintiff retained the residual functional capacity for medium work that did not involve concentrated exposure to fumes, odors, dusts or gases. AR 243-250. Dr. Andrews's opinion was seconded on March 4, 2002, by state agency consulting physician Victoria Dow. AR 243.

On March 2, 2002, Dr. Frederic Kullberg, a physician at the Swedish-American Hospital in Rockford, Illinois, diagnosed plaintiff with chronic obstructive pulmonary disease. AR 70.

Plaintiff was hospitalized from August 31 to September 2, 2002 for an acute exacerbation of her pulmonary disease. On September 19, 2002, she began seeing Dr. John Paulson at the Rice Medical Center in Stevens Point. Plaintiff reported that she had not had a cigarette in three weeks. On examination, plaintiff's lungs were clear without abnormal breath sounds such as rales, rhonchi or wheezes and her breath was unlabored. Dr. Paulson diagnosed stable chronic obstructive pulmonary disease, hypertensive heart disease and obesity. He referred plaintiff to a pulmonary rehabilitation program.

On November 22, 2002, Dr. Paulson noted that plaintiff was doing well in pulmonary rehab and her chronic obstructive pulmonary disease had improved significantly. However, plaintiff reported that she was gaining weight in spite of exercising and dieting. Laboratory testing revealed hypothyroidism. AR 258-59. Dr. Paulson prescribed levothyroxine replacement therapy. AR 122.

From October to December 2002, plaintiff participated in the pulmonary rehabilitation program at the Saint Michael's Medical Center in Stevens Point. She completed 19 sessions and established a home exercise program consisting of 30 minutes of stationary biking. At the conclusion of the program, plaintiff said she felt her shortness of breath was better controlled and was only mild when she exercised. AR 134-35.

After the local disability agency denied her applications for benefits initially and on reconsideration, plaintiff requested an administrative hearing. A hearing was held on January 16, 2003, at which plaintiff appeared without counsel. On February 24, 2003, the ALJ issued a decision finding plaintiff not disabled.

Plaintiff retained a lawyer, who asked the Appeals Council to review the ALJ's decision. In support of her request for review, plaintiff submitted a Pulmonary Residual Functional Capacity Questionnaire that Dr. Paulson completed on April 24, 2003. Dr. Paulson indicated that plaintiff could sit for no more than one hour at a time and stand for no more than 20 minutes at a time. He indicated that, based on the results of a shuttle walking test administered to plaintiff at the completion of her pulmonary rehabilitation, plaintiff could walk at most 230 meters before needing to rest. He opined that plaintiff could stand or walk less than 2 hours total in an 8-hour work day and sit about two hours in an 8-hour day. He indicated that in a competitive work situation, plaintiff could only occasionally lift and carry less than 10 pounds and that she should avoid all exposure to extreme cold, extreme heat and fumes, odors, dusts and gases. He indicated that at most, plaintiff could work 2-3 hours a day and 2-3 days a week. AR 71-75.

On August 26, 2004, the Appeals Council granted plaintiff's request for review, and remanded the case to the ALJ for consideration of Dr. Paulson's questionnaire. Also, the Appeals Council thought the ALJ had not adequately addressed Dr. Netzel's 2001 report on the effects of plaintiff's obesity on plaintiff's functioning. AR 44-45.

Evidence admitted following remand included additional medical records, which showed that on November 20, 2003, plaintiff saw Dr. Michael Schneeberger at the Rice Medical Center. Plaintiff admitted to Dr. Schneeberger that she had started smoking again after having stopped for a year. She reported chronic shortness of breath that prevented her from working. She said she got short of breath if she was on her feet for more than 10 minutes and could not even stand long enough to do dishes. On exam, plaintiff's lungs were clear. Pulmonary function testing revealed mild obstructive change with normal diffusion and insignificant response to bronchodilators. AR 114, 116-117.

At a June 5, 2004 follow up with Dr. Schneeberger, plaintiff reported that she was feeling reasonably well, with occasional wheezing but no cough or difficulty breathing. Dr. Schneeberger noted that plaintiff's lungs had a few fine wheezes but no rhonchi or rales. He described plaintiff's COPD/asthma as moderate, persistent and reasonably well controlled. He encouraged her to stop smoking and to lose weight. AR 109-100.

On July 20, 2004, Dr. Schneeberger told plaintiff that, based on her recent pulmonary function studies, he was unable to grant plaintiff's request for a letter stating that she was unable to work because of her asthma. AR 107.

On April 1, 2005, plaintiff was examined by Dr. David Johnson at the Monroe Clinic. Plaintiff reported that she recently had moved from Stevens Point back to the Monroe area. Plaintiff said that she was out of her theophylline but was “doing pretty well as far as her breathing goes.” AR 144. Pulmonary function studies performed on May 3, 2005 showed little change from 2001. Plaintiff reported some shortness of breath. Dr. Johnson diagnosed mild obstruction with no response to bronchodilators and recommended that plaintiff add Singulair to her daily medication regimen. AR 142.

SSA convened a second administrative hearing for plaintiff on August 17, 2005. Plaintiff appeared with counsel. She testified that she was 5'4" tall and weighed 218 lbs. Plaintiff testified that her breathing condition made any exertion difficult. She had last in July 2001 on a packaging line for a beef stick manufacturer. According to plaintiff, she lost her job because she was missing about four or five days of work each month because she was unable to move around and get ready for work and unable to stand for an entire shift. Plaintiff testified that she became short of breath from walking even a block and could walk at most two or two and a half blocks before having to stop. She said she could stand for no more than 10 minutes at a time and sit for about 30 minutes at a time. Plaintiff said she could lift a gallon of milk, but if she had to lift it repeatedly, she would have to stop and rest awhile “to let my legs and arms, and my lungs rebuild.” AR 314. She said she would be unable to perform consistently a full-time job that required her to walk or stand intermittently for a total of two hours a day.

The ALJ called Michele Albers to testify as a vocational expert (VE). The ALJ presented Albers with a hypothetical question in which he asked her to assume an individual of plaintiff's age, education and work experience who could lift 20 pounds occasionally, 10 pounds frequently, sit for 6 out of 8 hours, stand for 2 out of 8 hours, could perform no continuous climbing and who could not be exposed to heavy concentrations of chemicals, gases, fumes or odors. Albers testified that such an individual could perform plaintiff's past relevant work as a produce sorter. Alternatively, plaintiff would be able to make a vocational adjustment to other jobs existing in the regional economy, including courier or messenger, of which there were approximately 3,091 jobs in Wisconsin; parking lot or dining room cashier (8,000 jobs); or general office clerk (1,213 jobs).

In a second hypothetical the ALJ asked Albers to assume that the individual could lift 10 pounds only occasionally and 5 pounds frequently. Albers testified that the lifting limitation would not affect the jobs identified except that it would reduce the number of courier jobs in half. Albers explained that cashier and general office clerk were both classified in the *Dictionary of Occupational Titles* (DOT) as light jobs, "but as they're performed in the general economy, I do believe they would be appropriate within those limitations." AR 328.

On cross-examination, Albers acknowledged that under the DOT, the job of produce sorter was classified as light; therefore, if the DOT description was used, then that job would exceed the standing limitation in the hypothetical posed by the ALJ. However, Albers explained that her testimony that plaintiff could return to her produce sorter job was not

based upon the DOT's description of how such jobs were generally performed in the national economy but rather on plaintiff's description of the job as she actually had performed it, which included the ability to sit or stand. AR 329.

II. Legal Framework and the ALJ's Decision

To be entitled to either disability insurance benefits or supplemental security income payments under the Social Security Act, a claimant must establish that she 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 a 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.

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.*

A claimant seeking benefits bears the initial burden to prove that a severe impairment prevents her from performing her past relevant work. If she 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).

On December 22, 2005, the ALJ issued a decision again finding plaintiff not disabled. Applying the five-step analysis, the ALJ found at step one that plaintiff had not engaged in substantial gainful activity after her alleged onset date. At step two, he found that plaintiff has the following severe impairments: asthma, pulmonary disease and a history of essential hypertension without any cardiac or other end organ damage. He noted that although plaintiff was overweight at 204 pounds on a 64-65 inch frame, "this is not such a significant degree of obesity as to constitute a 'severe' medically determinable impairment, nor is there any reference in the medical records to any specific limitations caused by obesity." AR 26.

At step three, the ALJ found that plaintiff's severe impairments did not meet or equal the requirement of any listed impairment.

As part of his step four analysis, the ALJ determined plaintiff's residual functional capacity. He concluded that plaintiff retained the ability to perform light work that did not require lifting more than 20 pounds or 10 pounds frequently. He found that plaintiff could sit for up to six hours and stand for up to two hours during an 8-hour work day. In addition, he concluded that plaintiff should not be exposed to chemicals, gases, fumes or strong odors. The ALJ rejected the much more restrictive functional capacity proposed by Dr. Paulson, finding that it was not supported by the medical evidence. The ALJ noted that the reports on which Dr. Paulson's opinion were purportedly based showed only a slight to mild lung disease that had not worsened since 2001; a normal diffusing capacity; no rhonchi or rales; and only a very fine wheezing. In addition, the ALJ noted that plaintiff was able to use a stationary exercise bicycle for 30 minutes a day, go to casinos where smoking was prevalent and had failed to stop her own smoking. Also, the ALJ noted that Dr. Paulson's report was contradicted Dr. Schneeberger's opinion that plaintiff's lung condition would not prevent her from working. For these same reasons, the ALJ rejected Dr. Netzel's statement that plaintiff could not move around much because of her asthma.

Relying on the vocational expert's testimony, the ALJ concluded that plaintiff's residual functional capacity would not prevent her from performing her past relevant work as a potato sorter, which allowed her to alternate between sitting and standing. Accordingly, he determined that plaintiff was not disabled.

ANALYSIS

Plaintiff raises three challenges to the ALJ's decision. First, she contends that the ALJ's conclusion that she can perform her past work as a potato sorter is not supported by substantial evidence because the vocational expert's testimony conflicts with the *Dictionary of Occupational Titles*. Second, she contends that the ALJ failed to afford proper weight to the opinion of Dr. Paulson. Third, she contends that the ALJ failed adequately to account for the effect of her obesity on her other impairments. I will address these arguments in the order in which they arise during the five-step evaluation process.

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). 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, he must build a logical and accurate bridge from the evidence to his conclusion. *Zurawski v. Halter*, 245 F.3d 881, 887 (7th Cir. 2001).

II. Dr. Paulson's Report

Plaintiff contends that the ALJ improperly rejected the opinion of Dr. Paulson. Primarily, she contends that in finding Dr. Paulson's report to be unsupported by the clinical evidence, the ALJ overlooked the results of the shuttle walk test that plaintiff performed both before and after completing her pulmonary rehabilitation program. According to plaintiff,

the test is "a tool used by pulmonary physicians to assess COPD and asthma, especially when those conditions are exacerbated by exercise or exertion. Dr. Paulson's opinion is based on her failed improvement with pulmonary rehab and the lack of improvement as evidenced by the walking or shuttle test.

Plt.'s Mem. in Supp., dkt. 8, at 63.

In her reply brief, plaintiff suggests that the shuttle walk test is akin to a functional capacities evaluation used to determine capacity for work.

Plaintiff's reliance on the shuttle walk test is misplaced. Plaintiff's own submissions regarding the test show that the test is not a tool used to diagnose the severity of a cardiopulmonary condition or to assess an individual's ability to work. *See*, dkt. 8, App. A

and C. It is an exercise test, akin to the 6-minute walk test, used mostly by physical therapists to prescribe and assess the effects of exercise training. The test measures fitness depending on the number of “shuttles” (10-meter lengths) a person completes at ever-increasing walking speeds. The test ends when the patient is exhausted or too breathless to continue or when the person cannot finish the 10-meter distance within the time specified.

Contrary to plaintiff’s contention, her ability to complete only 23 shuttles, or 230 meters, after completing the rehabilitation program does not amount to clinical support for the severe work restrictions imposed by Dr. Paulson. The shuttle walk test is an incremental exercise test *designed* to tax a person’s endurance. It is not a work capacity test. Walking 10 meter shuttles at ever-increasing rates of speed bears little correlation to the ability to walk or stand sporadically at one’s own pace in the employment setting. Because the test offered only limited information about plaintiff’s ability to work, it added nothing to the strength of Dr. Paulson’s otherwise poorly-supported opinion.

Apart from overstating the significance of the test, plaintiff is incorrect about what it showed. Contrary to plaintiff’s assertion, the test showed that her condition *did* improve as a result of the pulmonary rehabilitation program. Before she began the program, plaintiff was able to complete only 12 shuttles. Three months later, she completed 23 shuttles.

Plaintiff also suggests that the ALJ should have afforded more weight to Dr. Paulson’s opinion than to Dr. Schneeberger’s because Dr. Paulson is a pulmonary specialist and Dr. Schneeberger is a general internist. However, documents submitted by plaintiff show that

both Dr. Schneeberger *and* Dr. Paulson are general internists affiliated with the Rice Clinic. *See* Br. in Supp. of Motion for Summ. Judg., dkt. #8, App. B., at 2.

Plaintiff incorrectly asserts that Dr. Paulson treated her 19 times. Plaintiff attended 19 sessions of pulmonary rehabilitation, but there is no indication that Dr. Paulson saw her on each of these occasions. It appears that Dr. Paulson saw plaintiff only four times.

Finally, plaintiff is incorrect that the ALJ placed undue emphasis on the failure of Dr. Paulson to detect any rhonchi, rales or wheezing when he listened to plaintiff's breathing. Rhonchi, rales and wheezing are the three most common abnormal breath sounds and can indicate blocked or narrowed airways. *See* <http://www.nlm.nih.gov/medlineplus/ency/article/003323.htm>. The absence of evidence that plaintiff's breath made these sounds, considered in conjunction with the results of pulmonary function studies showing only slight to mild lung disease and a normal diffusing capacity, with plaintiff's ability to ride an exercise bike up to 30 minutes a day and with Dr. Schneeberger's contrary opinion, provided good reasons for the ALJ to reject Dr. Paulson's extreme limitations. 20 C.F.R. §§ 404.1527(d), 416.927(d) (degree of clinical support and consistency with evidence as a whole are factors ALJ considers in deciding weight to give medical source's opinion).

III. Obesity

Plaintiff contends that the ALJ failed to evaluate properly the evidence in the record concerning plaintiff's obesity, as required by Social Security Ruling 02-1p: *Policy Interpretation Ruling Titles II and XVI: Evaluation of Obesity*, 67 Fed. Reg. 57859 (2002). An

SSR is an interpretive rule intended to guide agency adjudicators. *Lauer v. Bowen*, 818 F.2d 636, 639-40 (7th Cir. 1987). “While they do not have the force of law or properly promulgated notice and comment regulations, the agency makes SSRs ‘binding on all components of the Social Security Administration.’” *Lauer v. Apfel*, 169 F.3d 489, 492 (7th Cir. 1999) (citing 20 C.F.R. § 402.35(b)(1)).

SSR 02-1p explains that although the commissioner has deleted the listing for obesity, obesity still is a medically determinable impairment that can cause or contribute to impairments in other body systems, such as the musculoskeletal, respiratory and cardiovascular systems. *Id.* The commissioner is to consider obesity at several points in the five-step sequential evaluation process, including when deciding whether a claimant meets or medically equals a listed impairment, and when assessing a claimant’s residual functional capacity. *Id.*

This is the ALJ’s discussion of plaintiff’s obesity:

The Appeals Council’s remand order noted that the effects of obesity had not been taken into consideration. The newer medical records reflect that the claimant has a height of 64 to 65 inches and continues to weigh about 204 pounds. Although the claimant may be described as overweight, this is not such a significant degree of obesity as to constitute a “severe” medically determinable impairment, nor is there any reference in the medical record to any specific limitations caused by obesity.

AR 26. Plaintiff suggests that because plaintiff’s doctors diagnosed her with obesity, the ALJ erred in not accepting that diagnosis and in not finding that plaintiff’s obesity was a severe impairment.

I agree with plaintiff that the ALJ's suggestion that plaintiff was not "obese enough" does not provide a proper basis for his conclusion that plaintiff's obesity is not a severe impairment. SSR 02-1p provides that "[t]here is no specific level of weight or BMI that equates with a "severe" or a "not severe" impairment . . . Rather, we will do an individualized assessment of the impact of obesity on an individual's functioning when deciding whether the impairment is severe." In concluding that plaintiff was simply not heavy enough to be "severely" impaired by obesity, the ALJ violated the ruling and substituted his own opinion for the medical evidence.

Apart from that unfounded conclusion, however, the ALJ also pointed out that the record contained no references to any specific limitations on plaintiff caused by her obesity. Plaintiff does not attempt to refute this finding with references to the medical record that *do* show obesity-related limitations. Instead, she insists that the ALJ failed to conduct the functional analysis of plaintiff's obesity required by SSR 02-1p. However, plaintiff fails to explain, much less support with citations to the record, how her obesity impairs her ability to work. My own review of the record reveals no evidence suggesting that the ALJ erred in concluding that plaintiff's obesity was not a limiting condition. Although several physicians characterized plaintiff as obese, only Dr. Schneeberger encouraged her to lose weight, and even Dr. Schneeberger deemed plaintiff capable of working. This view was shared by the state agency consulting physicians, who thought plaintiff capable of performing medium work despite medical records documenting her obesity and asthma. In light of this evidence,

along with plaintiff's failure to cite any evidence suggesting that her obesity significantly aggravates her physical impairments or contributes to her physical limitations, the ALJ's admittedly perfunctory evaluation of plaintiff's obesity was sufficient. *Accord Prochaska v. Barnhart*, 454 F. 3d 731, 736 (7th Cir. 2006) (failure to comply with SSR 02-1p may be harmless).

IV. Step Four Determination

Plaintiff's primary argument on appeal is that the ALJ erred in concluding that plaintiff could return to her past work as a produce sorter. Plaintiff argues that the VE's testimony that plaintiff could return to that job does not provide substantial evidence for the ALJ's conclusion because the VE's testimony conflicts with the description of the job as set forth in the *Dictionary of Occupational Titles*. *Prochaska*, 454 F.3d at 735 (Social Security Ruling 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 points out that according to the DOT, the job of produce sorter is a "light" job, meaning that it requires the ability to stand or walk for up to six hours a day. This description conflicts with the VE's testimony, argues plaintiff, because that testimony was based upon a hypothetical person who was able to stand or walk for only two hours a day, a limitation that corresponds to sedentary work. *See* 20 C.F.R. §§ 404.1567, 404.967 (describing physical exertion requirements of light and sedentary work). Plaintiff argues that

because the ALJ did not comply with his mandatory duty to explore the reasons for the discrepancy, remand is necessary.

Plaintiff is incorrect. Whatever the DOT might have to say about the job of produce sorter, it is simply irrelevant in this case. As the commissioner notes, the VE acknowledged that her opinion concerning plaintiff's ability to return to her past work as a produce sorter was *not* based on the requirements of that job as described in the DOT but rather as described by plaintiff herself on a Work History Report submitted in connection with her disability applications. The commissioner's regulations make clear that an individual will be found not disabled when she retains the residual functional capacity to perform either: 1) the actual functional demands and job duties of a particular past job; or, 2) the functional demands and job duties of the occupation as generally required by employers throughout the national economy. SSR 82-61: *Titles II and XVI: Past Relevant Work -- The Particular Job or the Occupation as Generally Performed*, http://www.ssa.gov/OP_Home/rulings/di/02/SSR82-61-di-02.html. See also 20 C.F.R. §§ 404.1560(b)(2), 416.960(b)(2) (explaining that "past relevant work" considers demands of plaintiff's past work either as claimant actually performed it or as generally performed in national economy).

The DOT is a source of information only for this latter, broader category of jobs. SSR 00-4p: *Titles II and XVI: Use of Vocational Expert and Vocational Specialist Evidence, and Other Reliable Occupational Information in Disability Decisions*, http://www.ssa.gov/OP_Home/rulings/di/02/SSR2000-04-di-02.html (explaining that commissioner relies primarily on the

DOT “for information about the requirements of work in the national economy”). Where, as here, the issue is whether the claimant retains the ability to perform the demands of her past work *as she actually performed it*, the claimant is the primary source for vocational documentation. SSR 82-62: *Titles II and XVI: A Disability Claimant’s Capacity To Do Past Relevant Work, In General*, http://www.ssa.gov/OP_Home/rulings/di/02/SSR82-62-di-02.html. Because the VE’s testimony regarding plaintiff’s ability to perform her past work was derived from information provided by plaintiff regarding how she actually performed that job and not from the DOT’s description of how such jobs are generally performed in the national economy, the VE’s testimony provides substantial support for the ALJ’s step four determination notwithstanding any conflict with the DOT.

Plaintiff has not raised any valid challenges to the VE’s determination that plaintiff’s residual functional capacity did not preclude her from returning to her past relevant work as actually performed. Although plaintiff suggests that the Work History Report was simply too “minimal” to constitute substantial evidence, the commissioner’s rulings indicate otherwise. Most importantly, plaintiff has not pointed to any information on that form that conflicts with the VE’s conclusion that, assuming plaintiff has the limitations found by the ALJ, she still could meet the demands of her past job as a produce sorter. In the end, all of plaintiff’s arguments against the ALJ’s step four determination circle back to her erroneous contention that the DOT mattered. It didn’t.

Accordingly, the court should affirm the ALJ's conclusion that plaintiff is capable of performing her past relevant job as a produce sorter as she actually performed that job. Further, because substantial evidence supports the ALJ's step four conclusion, it is unnecessary to address plaintiff's arguments related to the ALJ's alternative step five conclusion regarding plaintiff's ability to perform other jobs existing in the national economy.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that plaintiff's motion for summary judgment be DENIED and the decision of the Commissioner to deny plaintiff's applications for Disability Insurance Benefits and Supplemental Security Income be AFFIRMED.

Entered this 6th day of February, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

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Re: ___Hernandez v. McMahon
Case No. 06-C-344-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 27, 2007, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by February 27, 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