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

TERESA A. BEGOLKE,

Plaintiff, OPINION AND ORDER

v. 06-C-445-C

MICHAEL ASTRUE,
Commissioner of Social Security,

Defendant.

This is a civil action for judicial review of an adverse decision of the Commissioner of Social Security. Plaintiff Teresa Begolke, who suffers from asthma, a back impairment and a host of other minor conditions, challenges the commissioner's determination that she is not disabled and therefore ineligible for Disability Insurance Benefits or Supplemental Security Income under sections 216(i) and 223 and 1614(a)(3)(A) of the Social Security Act, codified at 42 U.S.C. §§ 416(i), 423(d) and 1382c (3)(A). Plaintiff alleges that the commissioner's decision is not supported by substantial evidence and that the administrative law judge who denied her application at the hearing stage: 1) erroneously rejected the opinion of plaintiff's treating physician; 2) failed to consider all of plaintiff's impairments; 3) made an erroneous credibility determination; and 4) improperly concluded that plaintiff could perform a significant number of jobs in the national economy in spite of her impairments. Because I agree that the administrative law judge failed to cite accurate and

logical reasons for rejecting plaintiff's credibility about her asthma symptoms and for dismissing the opinion of plaintiff's long-term treating physician, I will reverse the decision of the commissioner and remand this case pursuant to sentence four of 42 U.S.C. § 405(g).

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

FACTS

A. Procedural History

Plaintiff filed concurrent applications for disability insurance benefits and supplemental security income on July 29, 2003, alleging disability resulting from asthma and back problems since June 25, 2003, her last day of work. (Although the record is not entirely clear, it appears that plaintiff was awarded disability benefits in 1994 on the basis of her asthma. Apparently, those benefits were discontinued in 2000, either because plaintiff's health improved or she returned to work.) Plaintiff's application was denied on initial consideration and again upon reconsideration. Plaintiff then filed a request for a hearing, which was held on July 29, 2003, before Administrative Law Judge John H. Pleuss. Plaintiff testified and was represented by a lawyer at the hearing. Additional testimony was presented by a vocational expert. In a decision dated July 28, 2005, the administrative law judge denied plaintiff's applications, finding her not disabled. The Appeals Council denied plaintiff's request for review on April 14, 2006, making the administrative law judge's decision the final decision of the commissioner.

B. Background and Hearing Testimony

Plaintiff was 44 years old on the date of the hearing. She has a 10th grade education. She is 5' 4" tall and weighs 208 pounds. Her past work experience includes employment as a cashier at various retail stores, a foundry worker and a cafeteria attendant. Plaintiff was last employed as a cashier and assistant manager for a Dollar Store in Beloit, Wisconsin. She left this job on June 24, 2003 because of a severe exacerbation of her asthma.

Plaintiff was diagnosed with asthma when she was 10 years old. Her asthma is severe, requiring treatment with numerous medications including prednisone. On a daily basis, plaintiff also takes Singulair, Zyrtec, Volmax, Guaifenex, Theo-Dur (for asthma and congestion), Zoloft (for depression), Prevacid (for stomach acid), potassium chloride (to counter steroid-related potassium depletion), triamterene hydrochlorothiazide (to counter water retention and hypertension) and the inhaled medications Advair and Flovent. According to plaintiff, her prednisone dosage waxes and waxes in tandem with her symptoms, ranging from a minimum dose of 10 milligrams to a maximum dose of 60 milligrams or more. Plaintiff testified that she experiences side effects from the prednisone, including weight gain, water retention, restless sleep and daytime tiredness. (A bone scan in August 2003 revealed that plaintiff has early signs of osteoporosis, another likely side effect of her chronic corticosteroid use. See http://www.mayoclinic.com/health/steroids/HQ01431 (last visited June 5, 2007.)) When plaintiff is at a dosage of 60 milligrams or more, she does not drive because of the

medication's side effects. Plaintiff estimated that her doctor had prescribed a prednisone dose of 60 milligrams or more at least two dozen times over the course of the two years preceding the hearing.

Plaintiff also uses an albuterol inhaler and an albuterol nebulizer (a breathing machine that changes asthma medication from a liquid to a mist) on an as-needed basis, but just how often that occurs is not entirely clear from the record. Plaintiff testified about her nebulizer use as follows:

> ATTORNEY: Can you tell me what is the lowest level of usage from [approximately September 2003] until now as far as how often that you would use it in whatever time period you want to tell me about? What's the lowest level use of the nebulizer?
>
> PLAINTIFF: Maybe twice a day.
>
> ATTORNEY: What's the highest level?
>
> PLAINTIFF: From 12, 12 times up to more.
>
> ATTORNEY: Per what?
>
> PLAINTIFF: Per month.
>
> ATTORNEY: Okay. In a day what's the most you've used it in the time from three months after the hospitalization until now?
>
> PLAINTIFF: I use it up to about four times a day.

AR 300. Plaintiff said her nebulizer treatments take about 15 minutes.

Plaintiff testified that when her prednisone dosage is low, she has pain in her back and legs. Plaintiff attributed the pain to the residual effects of a 1998 back surgery. During

these periods of increased back and leg pain, her pain is so severe that she cannot sit or stand in one place for long periods of time, she has trouble stooping to pick up even light objects and can walk only about half a block.

Plaintiff testified that because of her asthma, she has difficulty breathing if she goes outside when the weather is hot and humid. On days when the dew point is above 60, she stays in her house where it is air-conditioned.

Plaintiff testified that she sleeps approximately two hours a night no matter how high her dosage of prednisone. When her dosage is high, the medication keeps her up at night; when the dosage is low, she cannot sleep because of the back and leg pain. Plaintiff lies down approximately three or four times during the day.

Plaintiff testified that on a typical day, she awakes with her husband at 4 a.m. and talks with him for awhile before he goes to work. Then she goes back to bed for about an hour before getting up for the day. After showering, plaintiff either crochets or sews and does some back exercises. One of her daughters usually comes over, sometimes with plaintiff's 10-year old granddaughter. Plaintiff is able to cook. Her husband does the laundry and plaintiff's daughters do the housecleaning.

The administrative law judge asked the vocational expert whether there were any occupations in Wisconsin that could be performed by an individual of plaintiff's age, education and work history who was limited to sedentary work with the following restrictions: no climbing, crawling or kneeling; no more than occasional stooping, bending

or crouching; no exposure to concentrated dust, fumes, smoke, chemicals or noxious gases; and no work around temperature or humidity extremes. The expert testified that such an individual could perform the jobs of office clerk, of which there were approximately 1,200 jobs in Wisconsin; information clerk (2,100 jobs); production inspector (370 jobs); and interviewer (700 jobs). The vocational expert testified that his information was consistent with the information in the *Dictionary of Occupational Titles*.

Plaintiff's lawyer asked the expert whether any jobs existed for an individual who, 12 days per year, would have to use a nebulizer machine in the work place three or four times a day. The following exchange occurred:

> VE: In my estimation, that would, if I'm understanding you correctly, let me again ask for clarification. So you're saying that in addition to the regular breaks these would be unscheduled.
>
> ATTORNEY: Well, she would have to have the machine with her in the workplace.
>
> VE: And it would be ten to 15 minutes?
>
> ATTORNEY: At a time, yes.
>
> VE: At a time.
>
> ATTORNEY: I mean she'd have to have a workplace that would allow her to bring this machine to work, plug it in and go use it.
>
> VE: In my professional opinion, that would preclude employment.

AR 325.

The vocational expert also testified that employment would be precluded if plaintiff was to miss more than five days of work over the course of the summer season as a result of having to stay home when the humidity or temperature was too high. AR 326-27.

C. Medical Evidence

1. Asthma

Plaintiff receives treatment for her asthma from her primary physician, Dr. Ronald Kodras of the Beloit Clinic, and an allergy specialist, Dr. Brent Kooistra, at the Dean Medical Center. During the time period under consideration, plaintiff saw Dr. Kooistra on a periodic basis for medication adjustments; in addition, he sometimes prescribed adjustments to plaintiff's medication over the phone.

The medical records show that in general, plaintiff's asthma was fairly stable from October 2002 until May 2003, with the exception of an acute exacerbation on February 6, 2003, for which plaintiff sought treatment at the emergency room. On April 10, 2003, Dr. Kooistra noted that although plaintiff had had flareups associated with respiratory infections in February and April 2003, overall she was doing fairly well and was still working at least 30 hours a week.

When Dr. Kooistra saw plaintiff in May 2003, he noted that she was having a fair amount of difficulty with her asthma. It was difficult for plaintiff to perform spirometry testing and results showed moderate obstruction. Dr. Kooistra adjusted plaintiff's

medications. On June 25, 2003, plaintiff reported to the emergency room with an acute exacerbation of her asthma, reporting that she had been wheezing and coughing and was short of breath even at rest. After plaintiff's symptoms failed to improve significantly in the emergency room, she was admitted to the hospital and treated overnight.

Plaintiff returned to Dr. Kooistra in July 2003. Plaintiff reported having daily asthma symptoms and being off work since her hospitalization because of chest tightness and shortness of breath. Chest x-rays were normal with no signs of infection. Although plaintiff had moderate obstruction on spirometry testing, her small airway measurements were normal and her breath had no wheezes or rales. Dr. Kooistra adjusted plaintiff's medications. He wrote a note for plaintiff to remain off work for at least another week and noted that he might need to fill out disability forms as well.

Dr. Kooistra saw plaintiff on August 6, 2003. He noted that he had been in touch with plaintiff regularly over the past month for plaintiff's continuing difficulties with her asthma and that plaintiff was still off work because of her daily symptoms. However, plaintiff's asthma was doing better at that time. Dr. Kooistra wrote a note indicating that plaintiff could return to work in ten days. According to Dr. Kooistra, if plaintiff could not remain at her particular job location, she would "go back on disability." Dr. Kooistra remarked that he would be happy to fill out forms for plaintiff "if needed for continuing disability." AR 189.

Plaintiff saw Dr. Kooistra in December 2003 for follow-up of her asthma. He noted that plaintiff had had a "rough time this fall with repeated asthma" that had required a prednisone increase in October. AR 258. At the time of the visit, plaintiff was in the midst of another flareup, which Dr. Kooistra attributed to a recent viral infection. Spirometry testing showed mild obstruction. Dr. Kooistra again increased plaintiff's prednisone. Dr. Kooistra indicated that plaintiff was an ideal candidate for Xolair therapy, a new antibody treatment for asthma. He recommended that plaintiff initiate the therapy in the winter or spring.

On March 18, 2004, Dr. Kooistra noted that plaintiff had had ongoing asthma problems over the winter that had required increased prednisone at times. He reported that plaintiff was continuing to take all of her other daily medications and that she used an albuterol inhaler or albuterol by nebulizer at least 1-2 times a day. Spirometry testing administered during the visit was fairly normal and plaintiff's chest was clear with no wheezes. Dr. Kooistra planned to start plaintiff on Xolair injection therapy, noting that Medical Assistance should cover the cost of the treatment.

In a letter dated March 18, 2004, Dr. Kooistra expressed his opinion that plaintiff was incapable of holding a job because of her chronic severe asthma. Dr. Kooistra explained that plaintiff had "daily exercise limitations," was often awake at night, took a multitude of daily medications and oral steroids and often required "extra asthma treatments" through the day and night. AR 275.

Dr. Kooistra saw plaintiff in August 2004 to begin Xolair therapy. Dr. Kooistra noted that plaintiff had done fairly well over the summer with the exception of a flareup in July. Plaintiff completed an asthma control test on which she scored a 0, indicating poor control of her symptoms. Dr. Kooistra noted that plaintiff continued to have daily and nightly asthma symptoms despite her numerous medications, although spirometry testing was fairly normal.

In November 2004, Dr. Kooistra noted that plaintiff had received Xolair injections in August and September. Plaintiff reported sleeping fairly well at night. Spirometry testing remained fairly normal and plaintiff's chest was clear without wheezes. Plaintiff was given her Xolair injection.

On April 6, 2005, Dr. Kooistra reported that plaintiff's Xolair therapy had been terminated because of plaintiff's inadequate health insurance. In addition, plaintiff had not been able to purchase many of her daily medications because of the high cost of the co-payment. He noted that plantiff continued to use her albuterol inhaler two times a day plus take albuterol by nebulizer as needed. Dr. Kooistra adjusted plaintiff's medications, gave her some medication samples and indicated that he would begin seeing her for a minimal fee.

In a letter dated June 10, 2005, Dr. Kooistra reiterated his opinion that plaintiff was not a candidate for a consistent full-time job, noting that over the previous, plaintiff had continued to have "significant asthma with daily cough and wheeze." Dr. Kooistra reported

that plaintiff often required extra albuterol treatments, either by inhaler or nebulizer, on a daily basis. AR 274.

2. Other impairments

Plaintiff had laminectomy surgery in 1998 or 1999. In February 2003, she was seen in the emergency room after her left leg gave out, causing her to fall down the stairs and strike her back. X-rays showed only an old thoracic spine fracture and mild degenerative changes. At a visit with Dr. Kodras on February 13, 2003, plaintiff reported that her back pain was improved but that she now was feeling more pain that began in her left buttock and ran down to her foot, along with tingling and numbness in her feet. Dr. Kodras diagnosed lumbar radiculopathy consistent with a protruding disc. He indicated that plaintiff could return to work in a week so long as she avoided heavy lifting and bending.

By March 6, 2003, plaintiff reported that her back and sciatic pain had improved and that she was back at work. Dr. Kodras indicated that plaintiff should continue to avoid heavy lifting and bending but should start walking more.

On September 29, 2003, plaintiff saw Dr. Robert Huizenga with complaints of pain, numbness and tingling in her right wrist. Dr. Huizenga noted that during the previous November, plaintiff had been diagnosed with bilateral carpal tunnel syndrome, for which she had received an injection. Plaintiff reported that she had had good relief from the injection until 10 days before her visit. Dr. Huizenga noted that plaintiff was no longer employed

regularly and "helped her mother clean homes perhaps two or three times weekly." AR 233. After an examination, Dr. Huizenga diagnosed bilateral carpal tunnel syndrome. He reinjected the right carpal tunnel.

On March 24, 2004, plaintiff saw Dr. Kodras, reporting that she had had pain down her left leg for the past couple of months with tingling in her left foot and occasional leg weakness. She was taking Tylenol #3, which she also took for low back pain. Dr. Kodras noted pain in the left buttock but no focal weakness in the left leg. Plaintiff had a slightly decreased response to pinprick sensation in the side of her left foot and diminished reflexes in the ankle and knee. Dr. Kodras diagnosed a history of recurrent lumbar radiculopathy and ordered a MRI scan and x-ray, noting that plaintiff had a history of osteopenia.

The MRI scan showed a tear in the outer fiber of the disc but no disc bulge on the left side, causing Dr. Kodras to question what was causing plaintiff's symptoms. He noted that plaintiff had evidence of recent surgery and some scarring around the S1 root on the right side, but plaintiff was "having no symptoms there." AR 265. Lumbar spine x-ray showed mild scolioisis, degenerative disc disease and osteoarthritis.

On August 26, 2004, plaintiff told Dr. Kodras that she was having pain in her knees, mostly on the left, and left hip pain. She also continued to have low back pain. Dr. Kodras detected slight swelling and crepitus in both knees. He diagnosed arthritis in both knees and bursitis in the right and prescribed Vioxx. Plaintiff then saw Dr. Huizenga, who diagnosed bilateral patellofemoral compression syndrome (commonly called anterior knee pain) with

secondary articular cartilage contusion. On November 19, 2004, plaintiff reported that the knee was still bothering her but was not too bad. However, she also had wrist pain, especially around the right thumb, and she continued to complain of low back pain with pain shooting down both legs. After examination, Dr. Kodras diagnosed plaintiff with tendinitis in the right wrist. He advised plaintiff to hold off on all activity with the right wrist for several days and then "go back at half speed." AR 271. Dr. Kodras referred plaintiff to neurology for her back, but the record contains no indication that plaintiff ever followed up with a visit to a neurologist.

On June 13, 2005, plaintiff told Dr. Kodras that in addition to her left back and leg symptoms, she now had pain going down the front of her right thigh to her knee. Dr. Kodras indicated that because of plaintiff's history of steroid use, he would order a spinal x-ray to rule out a compression fracture. He also ordered an MRI scan to evaluate plaintiff's lower spine. (If these studies were ever performed, the results are not in the record.)

Plaintiff also has a history of diverticulitis, for which she was seen in the emergency room for abdominal pain on April 15, 2003 and June 13, 2003. The only other mention of plaintiff's diverticulitis is in an office visit record from July 8, 2003, when plaintiff told Dr. Kodras that she still had some vague discomfort in her abdomen from diverticulitis but not the severe pain she had had before.

3. State agency physicians

Two doctors from the state disability determination service, Dr. Muceno and Dr. Crennan, reviewed plaintiff's medical records in August 2003 and November 2003, respectively, and concluded that plaintiff could perform light exertional work but had to avoid exposure to fumes, odors, dusts, gases or poor ventilation.

D. Administrative Law Judge's Decision

In his written decision, the administrative law judge applied the familiar five-step sequential process for evaluating disability claims. 20 C.F.R. § 404.1520. At step one, he found that plaintiff had not performed any substantial gainful activity since her alleged onset date. At step two, he found that plaintiff suffered from severe impairments, asthma and a back impairment, although he found the evidence related to the back impairment "somewhat limited." The administrative law judge noted that plaintiff had been treated for other medical conditions, including patellofemoral syndrome, diverticulitis, right wrist tenderness, hypertension and occasional headaches, but that these were not severe. At step three, the administrative law judge found that plaintiff's asthma did not meet or equal the criteria of the impairments presumed to be disabling, listed in 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4.

Before assessing plaintiff's residual functional capacity, the administrative law judge noted that he was required to evaluate plaintiff's subjective complaints under the criteria of

Social Security Ruling 96-7p. The administrative law judge's credibility assessment reads as follows:

> [Plaintiff] has only been hospitalized once for asthma in the last five years and there are relatively few emergency room visits on record. Spirometric testing has been generally fairly good, even normal, and x-rays of the lungs show no major abnormalities. The claimant's back complaints are not particularly well documented and have resulted in little treatment and no recent suggestion of surgery. With regard to the back, Dr. Kodras advised only that she avoid heavy lifting and, although Dr. Miller advised a ten pound weight limit, it appears that this physician only saw her on that one occasion and had no medical data to suggest any long-term limitations of any sort.
>
> The claimant testified that she had not worked since leaving the dollar store job two and a half years ago, but Dr. Huizenga's records from late 2003 indicate that at that time she was engaged in a housecleaning business with her mother. I find that the claimant's subjective complaints lack a reasonable medical basis and are not fully credible.

AR 21-22. Earlier in his decision, the administrative law judge had found that plaintiff's report to Dr. Huizenga "tends to indicate that [plaintiff's] asthma is not so significant that it would keep her from working, even in jobs exposing her to cleaning chemical fumes and the like." AR 20.

The administrative law judge noted that Dr. Kooistra had written a letter on June 10, 2005, stating that plaintiff was severely asthmatic and not a candidate for a consistent full time job. However, the administrative law judge gave the letter little weight, finding that it was conclusory, failed to reflect specific limitations and was "inconsistent with the claimant's level of function as described by Dr. Huizenga" and with Dr. Kooistra's own treatment notes. Also, the administrative law judge questioned Dr. Kooistra's motives for writing the

letter, noting that Dr. Kooistra had expressed concern in his treatment notes about plaintiff's ability to pay for her medications.

The administrative law judge found that plaintiff was capable of performing a range of sedentary work that did not require her to lift more than 10 pounds; kneel, climb or crawl; perform more than occasional stooping, bending and crouching; or be exposed to temperature or humidity extremes or to concentrated levels of dust, fumes, smoke, chemicals or noxious gases. In arriving at his residual functional capacity assessment, the administrative law judge noted that Dr. Miller had advised a 10-pound weight limit and that the physicians for the disability determination service thought that plaintiff could perform light work with environmental limitations.

At step four, the administrative law judge found that plaintiff was incapable of performing any of her past relevant work and had no transferable skills. Relying on the vocational expert's testimony, the administrative law judge found at step five that plaintiff was nonetheless able to perform a significant number of other jobs existing in Wisconsin, including interviewer, office clerk, information clerk and production inspector. Accordingly, the administrative law judge found that plaintiff was not under a "disability" as defined by the Social Security Act.

OPINION

A. Standard of Review

In a social security appeal brought under 42 U.S.C. § 405(g), the court does not conduct a new evaluation of the case but simply reviews the final decision of the commissioner. This review is deferential: under § 405(g), the commissioner's findings are conclusive if they are supported by "substantial evidence." Clifford v. Apfel, 227 F.3d 863, 869 (7th Cir. 2000). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971). When reviewing the commissioner's findings under § 405(g), the court cannot reconsider facts, reweigh the evidence, decide questions of credibility or otherwise substitute its own judgment for that of the administrative law judge regarding what the outcome should be. Clifford, 227 F.3d at 869. Thus, where conflicting evidence allows reasonable minds to differ as to whether a claimant is disabled, the responsibility for making that decision is the commissioner's. 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 administrative law judge 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).

B. Credibility Assessment

An administrative law judge's credibility determination is entitled to "special deference" because of her unique ability to observe and evaluate testimony. Powers v. Apfel, 207 F.3d 431, 435 (7th Cir. 2000), but an adverse credibility determination must be supported by reasons that are not "patently wrong," Schmidt v. Barnhart, 395 F.3d 737, 746-47 (7th Cir. 2005), and are sufficiently specific to enable meaningful appellate review. Brindisi v. Barnhart, 315 F.3d 783, 787 (7th Cir. 2003).

Plaintiff attacks the administrative law judge's credibility assessment on various grounds, the most compelling of which is her claim that the administrative law judge failed to address her testimony that she uses a nebulizer on a frequent basis. According to plaintiff, this testimony was critical to the outcome because the vocational expert testified that "[plaintiff] would be unemployable if she had to use a nebulizer while at work, even assuming the usage was only 12 days a year for 10-15 minutes at a time." Mem. in Supp. of Plt.'s Mot. for Summ. Judg., dkt. #8, at 24. Without explaining why he found plaintiff's alleged nebulizer use incredible, the administrative law judge's decision eludes informed review.

At the outset, I note that the vocational expert's testimony on the nebulizer issue is not as clear as plaintiff makes it out to be. Plaintiff contends that the "that" in the vocational expert's final conclusion, wherein he stated that "*that* would preclude employment," referred to "a workplace that would allow her to bring this machine to work, plug it in and go use it," as described by plaintiff's attorney immediately preceding the vocational expert's answer. However, when the vocational expert's testimony is read in its entirety, it appears that the vocational expert was actually testifying about the jobs available to a person who needed to take three to four unscheduled breaks for nebulizer use in addition to the regular breaks. (This reading also comports with common sense: it does not seem plausible that no employer would *ever* allow an employee to plug in and use a breathing machine during normal break periods.) Nonetheless, the commissioner has not disagreed that the vocational expert's testimony would mandate a finding of disability if plaintiff's testimony regarding her nebulizer use was accepted. Accordingly, I have assumed that plaintiff's characterization of the vocational expert's testimony is correct.

In response to plaintiff's argument, the commissioner argues only that the administrative law judge "properly assessed Plaintiff's allegations in the context of all the record evidence and he reasonably concluded that they were not fully credible." Yet the commissioner fails to discuss plaintiff's testimony regarding her nebulizer use and does not point to anything in the administrative law judge's decision showing that he considered plaintiff's testimony on that issue. The administrative law judge addressed plaintiff's

testimony concerning her asthmatic symptoms only broadly, citing two reasons for discounting plaintiff's subjective complaints: 1) the medical evidence, including the lack of hospitalizations and emergency room visits and plaintiff's generally good spirometric testing; and 2) plaintiff's report in September 2003 of having worked part time cleaning houses with her mother.[1] However, neither of these reasons provides an adequate bridge between the nebulizer testimony and the administrative law judge's ultimate conclusion that plaintiff was not disabled. The medical records do not address the frequency of plaintiff's nebulizer use. The fact that plaintiff's asthma was ordinarily kept under adequate if not optimal control by medication, as the administrative law judge implied, does not undermine her testimony that she uses the nebulizer often; to the contrary, nebulizer treatments might have actually helped plaintiff avoid a visit to the emergency room or hospital. The objective evidence simply does not tend to prove one way or the other the credibility of plaintiff's testimony regarding her need to use a nebulizer.

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[1]The commissioner argues that plaintiff's daily activities also support the administrative law judge's credibility determination. However, the administrative law judge did not mention plaintiff's daily activities. Accordingly, this court may not consider that evidence when reviewing the administrative law judge's credibility determination. Steele v. Barnhart, 290 F.3d 936, 941 (7th Cir. 2002) ("[R]egardless whether there is enough evidence in the record to support the administrative law judge's decision, principles of administrative law require the ALJ to rationally articulate the grounds for her decision and confine our review to the reasons supplied by the ALJ") (citations omitted). In any case, even if relevant, plaintiff's limited activities, which consisted of talking with her husband and daughters, showering, sewing and crocheting, cooking on occasion and "planning" her garden, provide little support for a finding that she is capable of consistent and regular full time work. Mendez v. Barnhart, 439 F.3d 360, 362 (7th Cir. 2006) (cautioning Social Security Administration against placing undue weight on claimant's household activities in assessing claimant's ability to work outside home).

The second plank of the administrative law judge's credibility determination rests on plaintiff's housecleaning activity in September 2003, but it is equally weak. Dr. Huizenga's note reads: "[Plaintiff] is no longer employed regularly. She helps her mother clean homes perhaps two or three times weekly." AR 233. The administrative law judge thought this evidence "tended to indicate that [plaintiff's] asthma is not so severe that it would keep her from working." I might agree with the administrative law judge if there were something in the record to indicate when plaintiff began helping her mother, how long she continued such activity and what the "help" involved. But there is not. (No one asked plaintiff to provide this information at the hearing.) It's possible that plaintiff began helping her mother clean homes a week before plaintiff saw Dr. Huizenga and stopped that work the following week because of asthma complications. It's also possible that plaintiff was able to take breaks at that job to use her nebulizer. Absent more information, it was patently wrong for the administrative law judge to rely on plaintiff's reported housecleaning work (and her failure to report it) as noted in one isolated medical report as a basis to find that plaintiff was overstating her asthma complaints (or her nebulizer use) or understating her work activity.

Having found that neither of the administrative law judge's credibility findings adequately addresses plaintiff's nebulizer use, I am remanding this case to the commissioner for further proceedings. On remand, the commissioner should make a specific finding regarding how often plaintiff must use a nebulizer. The commissioner may but is not

required to obtain new vocational expert testimony addressing employer tolerance for nebulizer use in the workplace.

The commissioner must also make a new credibility finding that comports with 20 C.F.R. § 404.1529(c) and Social Security Ruling 96-7p. Under these rules, an administrative law judge faced with a discrepancy between the objective medical evidence and the claimant's subjective complaints, as the administrative law judge perceived was the case here, must consider a number of factors to determine whether the individual's statements are credible, including the individual's daily activities; the location, duration, frequency, and intensity of the individual's pain or other symptoms; factors that precipitate and aggravate the symptoms; the type, dosage, effectiveness, and side effects of any medication the individual takes or has taken to alleviate pain or other symptoms; other treatment or measures taken for relief of pain; and any other factors concerning the individual's functional limitations and restrictions. Zurawski, 245 F.3d at 887. Besides ignoring plaintiff's alleged nebulizer use, the administrative law judge failed to consider plaintiff's daily activities, the extent to which her ability to work might be affected by medication side effects or the effect of weather conditions on her ability to work. Although plaintiff testified that she is unable to drive when her prednisone dosage is high and that she does not leave the house on hot, humid days, the administrative law judge did not mention this testimony. It appears that he gave short shrift to plaintiff's medication regime and did not make a thorough assessment of the degree to which plaintiff's medications were adequate to control her asthma

symptoms. On remand, the administrative law judge should consider all of the relevant factors in arriving at his credibility determination.

In addition, on remand the administrative law judge should undertake a more careful evaluation of the medical evidence. A review of his decision shows that he may have misunderstood the severity of plaintiff's condition. For example, in concluding that plaintiff's asthma is not disabling, the administrative law judge emphasized irrelevant evidence, including spirometry test results preceding plaintiff's alleged onset date and plaintiff's normal chest x-rays. Plaintiff's condition prior to her alleged onset date is not at issue and chest x-rays are generally not helpful in diagnosing asthma but are used to rule out other conditions. http://www.merck.com/mmhe/sec04/ch044/ch044a.html (last visited on May 30, 2007). And even the relatively normal results of spirometry testing performed at Dr. Kooistra's office are not compelling evidence that plaintiff's asthma is not disabling: plaintiff did not see Dr. Kooistra on a daily or even monthly basis. Further, the administrative law judge failed to note the numerous occasions on which Dr. Kooistra increased plaintiff's prednisone dosage or added additional medication to combat increased asthma symptoms, even when in-office spirometry testing showed only mild obstruction. The administrative law judge also failed to note that Dr. Kooistra recommended that plaintiff institute Xolair, a drug approved for use in adults and teens with moderate to severe allergic asthma who do not respond well to inhaled steroids. http://www.xolair.com/patient/about_xolair.jsp (last visited June 5, 2007). Finally, the fact

that plaintiff's asthma is not so severe as to require hospitalization or emergency room treatment on a regular basis is hardly proof that plaintiff can work.

As for plaintiff's back condition, the administrative law judge's credibility determination was adequate. As plaintiff points out, the administrative law judge appears to have adopted the majority of her subjective complaints by assigning plaintiff a very limited residual functional capacity that restricted her to sedentary work with no climbing, crawling or kneeling and only occasional stooping, bending and crouching. Apart from Dr. Kodras's advice to avoid heavy lifting and bending, plaintiff cites no evidence suggesting that she has any work-related limitations stemming from her back impairment beyond those found by the administrative law judge. Further, as the administrative law judge pointed out, imaging studies of plaintiff's spine showed rather minor abnormalities, none of which were thought to explain plaintiff's back complaints. Accordingly, the administrative law judge need not revisit the credibility of plaintiff's back-related complaints.

C. Dr. Kooistra's Opinion

"[T]he weight properly to be given to testimony or other evidence of a treating physician depends on circumstances." Hofslien v. Barnhart, 439 F.3d 375, 377 (7th Cir. 2006). When a treating physician's opinion is well supported and no evidence exists to contradict it, the administrative law judge has no basis on which to refuse to accept the opinion. Id.; 20 C.F.R. § 404.1527(d)(2). When, however, the record contains well-

supported contradictory evidence, the treating physician's opinion "is just one more piece of evidence for the administrative law judge to weigh," taking into consideration the various factors listed in the regulation. Id. These factors include how often the treating physician has examined the claimant, whether the physician is a specialist in the condition claimed to be disabling, how consistent the physician's opinion is with the evidence as a whole, and other factors. 20 C.F.R. § 404.1527(d)(2). An administrative law judge must provide "good reasons" for the weight he gives a treating source opinion. Id.

The administrative law judge thought Dr. Kooistra's opinion was neither well-supported nor consistent with Dr. Kooistra's own treatment notes. However, the administrative law judge never identified any inconsistencies in Dr. Kooistra's treatment notes that refuted the doctor's opinion that plaintiff is disabled, making it impossible to determine whether the supposed inconsistency was a "good reason" for disregarding the opinion. It appears that the administrative law judge might have been referring to spirometry test results, but as noted previously, that evidence tells only part of the story and does not account for plaintiff's prednisone increases, numerous exacerbations for which she was not treated in person and Dr. Kooistra's institution of Xolair therapy. Because the administrative law judge's decision does not make clear that he considered this other evidence, I cannot say that substantial evidence supports his determination that Dr. Kooistra's opinion was inconsistent with his treatment notes. Godbey v. Apfel, 238 F.3d 803, 808 (7th Cir. 2000) ("While the ALJ need not articulate his reasons for rejecting every

piece of evidence, he must at least minimally discuss a claimant's evidence that contradicts the Commissioner's position").

The administrative law judge also found that Dr. Kooistra's opinion was undermined by plaintiff's reported housecleaning activity. For the same reasons it detracted from the administrative law judge's credibility determination, the administrative law judge's reliance on plaintiff's reported housecleaning activity was not a good reason to reject Dr. Kooistra's opinion.

However, I agree with the administrative law judge that Dr. Kooistra's letters were conclusory. In neither letter did Dr. Kooistra provide any specific information about how plaintiff's asthma affects her ability to work. Plaintiff's need for ongoing medication management, including "extra" albuterol treatments, certainly supports Dr. Kooistra's opinion that plaintiff's asthma is severe, but a severe impairment is disabling only if it prevents an individual from performing substantial gainful activity. Dr. Kooistra's letter does not answer this latter question. Does the severity of plaintiff's asthma affect her ability to sit, stand, walk or lift? Is plaintiff's condition likely to cause her to be absent from work more frequently than that tolerated by most employers? Do the effects of the medications or plaintiff's lack of sleep affect her ability to concentrate so significantly that she could not perform even unskilled work? Do the "extra" treatments take so much time to administer that plaintiff could not be employed competitively? Dr. Kooistra does not say, either in his

treatment notes or in his letters. The administrative law judge was not out of bounds in declaring that Dr. Kooistra's letters were conclusory.

The administrative law judge also concluded reasonably that Dr. Kooistra might have written his letters out of concern for plaintiff's financial ability to continue obtaining her medications. Plaintiff argues that this conclusion makes little sense because Dr. Kooistra wrote his first letter in support of disability before plaintiff began having insurance problems. I disagree. At the time Dr. Kooistra wrote his first letter, plaintiff was not working and Dr. Kooistra was urging plaintiff to begin Xolair therapy at a cost of $1,000 a shot. In light of the doctor's expressed concern for plaintiff's finances in his later treatment notes, the administrative law judge could reasonably surmise that Dr. Kooistra was motivated in part to help ensure that plaintiff could afford her medications. Stephens v. Heckler, 766 F.2d 284, 289 (7th Cir. 1985) (noting that "patient's regular physician may want to do a favor for a friend and client, and so the treating physician may too quickly find disability"). This is true even if, as plaintiff insists, Dr. Kooistra's statements reflect nothing but professional concern about caring for a patient with financial limitations.

Nonetheless, in spite of the administrative law judge's having had some reasons to question the credibility of Dr. Kooistra's opinion, the commissioner fails to point to any well supported evidence that contradicts that opinion. The objective medical evidence is equivocal and not *inconsistent* with Dr. Kooistra's opinion. The commissioner points to the opinions of the disability determination service doctors, but those opinions were even more

conclusory than that of Dr. Kooistra, consisting of nothing more than check-marks on a standardized form with no explanation of the doctors' conclusions. Moreover, as the commissioner concedes, the administrative law judge did not adopt the opinions of these doctors. In this situation, the administrative law judge ought to have contacted Dr. Kooistra and solicited additional information to flesh out his opinion or consulted with a medical expert. 20 C.F.R. § 404.1527(c)(3) (if evidence insufficient to make disability determination, ALJ may try to obtain additional evidence, including recontacting treating sources); Barrett v. Barnhart, 381 F.3d 664, 669 (7th Cir. 2004) ("[I]f the ALJ's real concern was the lack of backup support for Dr. Plascak's opinion, the ALJ had a mechanism [in 20 C.F.R. § 404.1527(c)(3)] to rectify the problem"); Smith v. Apfel, 231 F.3d 433, 437-38 (7th Cir. 2000) (ALJ's duty to develop record included soliciting updated medical records when ALJ did not afford treating doctor's opinion controlling weight on that basis); Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir. 1996) ("If the ALJ thought he needed to know the basis of [medical] opinions in order to evaluate them, he had a duty to conduct an appropriate inquiry, for example, by subpoenaing the physicians or submitting further questions to them."). See also Social Security Ruling 96-2p at 4 ("[I]n some instances, additional development required by a case---for example, to obtain more evidence or to clarify reported clinical signs or laboratory findings---may provide the requisite support for a treating source's medical opinion that at first appeared to be lacking or may reconcile what at first appeared to be an inconsistency between a treating source's medical opinion and the

other substantial evidence in the case record."). The administrative law judge should pursue one of these options on remand.

D. RFC Finding

Plaintiff argues that in addition to her asthma and back impairment, which the administrative law judge found to be severe, she suffers from a number of additional impairments, including patellofemoral syndrome, carpal tunnel syndrome and tendinitis of the wrist, diverticulitis and obesity. Plaintiff contends that the administrative law judge should have concluded that these impairments were severe, or in the alternative, should have included limitations resulting from these impairments in the residual functional capacity assessment.

With the exception of obesity, plaintiff's arguments concerning her additional impairments are unpersuasive. As an initial matter, the administrative law judge noted many of the conditions cited by plaintiff and explained why he found them not to be severe. Although not extensive, his discussion of these conditions is adequate to permit review. Overall, the administrative law judge failed to find evidence that any of plaintiff's various other medical conditions imposed any work-related limitations. The administrative law judge might not have addressed each and every minor medical problem noted in the records, but plaintiff overstates matters when she alleges that the administrative law judge failed to address "entire lines" of evidence.

To be severe, an impairment or combination of impairments must impose a significant limitation on the claimant's ability to perform basic work activities. 20 C.F.R. § 404.1521(a). Plaintiff proposes only two limitations resulting from her various medical problems: 1) an inability to perform constant or frequent reaching and handling, which plaintiff attributes to carpal tunnel syndrome, tendinitis and osteoarthritis; and 2) frequent absences from work because of stomach pain and nausea from diverticulitis. However, plaintiff fails to cite any evidence in the record to support her claim that she actually has such limitations. Plaintiff points only to the diagnoses, and argues that an individual with such problems could be *expected* to have the limitations plaintiff proposes. Such hypothetical arguments fall far short of meeting plaintiff's burden to establish disability. Absent actual evidence that plaintiff's various minor conditions either singly or in combination imposed any limitations on plaintiff's ability to perform basic work activities or exacerbated her existing conditions, a remand on this issue would not affect the outcome of the case. Keys v. Barnhart, 347 F.3d 990, 994-95 (7th Cir. 2003) (applying harmless error review to ALJ's determination).

Plaintiff's obesity is on slightly different ground, insofar as SSR 02-1p exhorts administrative law judges to consider the effects of a claimant's obesity together with the underlying impairments, even if the individual does not claim obesity as an impairment. Although I am not convinced that the administrative law judge's failure to consider plaintiff's obesity in this case affected the outcome, Prochaska v. Barnhart, 454 F.3d 731, 737 (7th

Cir. 2006) (failure to consider claimant's obesity may be harmless error), it is unnecessary to decide this question in light of my decision to remand the case for other reasons. On remand, the administrative law judge should comply with SSR 02-1p and consider plaintiff's obesity.

Finally, plaintiff complains that the administrative law judge failed to cite the specific medical facts or nonmedical evidence on which he relied in fashioning his residual functional capacity assessment, as required by SSR 96-8p.[1] I agree that the administrative law judge's residual functional capacity assessment falls short of the level of articulation required by SSR 96-8p. Again, I decline to decide whether the error was harmless. Instead, I merely instruct the administrative law judge on remand to provide a more thorough explanation of how he arrives at his residual functional capacity assessment, in accordance with SSR 96-8p.

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[1]SSR 96-8p provides, in pertinent part:

> The RFC assessment must include a narrative discussion describing how the evidence supports each conclusion, citing specific medical facts (e.g., laboratory findings) and nonmedical evidence (e.g., daily activities, observations). In assessing RFC, the adjudicator must discuss the individual's ability to perform sustained work activities in an ordinary work setting on a regular and continuing basis (i.e., 8 hours a day, for 5 days a week, or an equivalent work schedule) and describe the maximum amount of each work-related activity the individual can perform based on the evidence available in the case record. The adjudicator must also explain how any material inconsistencies or ambiguities in the evidence in the case record were considered and resolved.

E. Step Five Determination

Finally, plaintiff argues that the administrative law judge's step five determination must be reversed because various conflicts exist between the vocational expert's testimony regarding plaintiff's ability to perform certain jobs and the description of those jobs in the *Dictionary of Occupational Titles*. This court has taken the position that, in situations in which the administrative law judge asks the vocational expert whether his or her information is consistent with the *Dictionary*, the vocational expert responds that it is and plaintiff fails to challenge that response at the hearing, the plaintiff has forfeited her opportunity on judicial review to raise *Dictionary*-based challenges to the vocational expert's testimony. See, e.g., Iverson v. McMahon, 06-C-339-C, Rep. and Rec., Jan. 29, 2007, dkt. #11, at 31-32, adopted by district court in Order, Feb. 23, 2007, dkt. #13. Nonetheless, even if this court were to entertain plaintiff's post-hearing challenges to the vocational expert's testimony, they would fail.

First, plaintiff contends that she cannot perform any of the sedentary, unskilled inspection jobs or the interviewer job because all of these jobs require frequent or constant reaching and handling. Although she concedes that the administrative law judge's residual functional capacity assessment did not include any limitations on reaching or handling, plaintiff argues that reaching or handling from a seated position "could constitute bending," and therefore would be precluded because the administrative law judge limited plaintiff to only occasional bending. This argument is a nonstarter. Plaintiff provides no support for

her contention that the administrative law judge's restriction to occasional bending also limited plaintiff's ability to reach and handle. Reaching is reaching and bending is bending.

Plaintiff also contends that the *Dictionary* contains only one job for a sedentary, unskilled position involving the main task of interviewing, a charge account clerk (DOT # 205.367-014). Plaintiff appears to concede that the requirements of this job fit the administrative law judge's residual functional capacity assessment, but she questions how the vocational expert arrived at a figure of 700 interviewer jobs based upon this single job.

To establish that the administrative law judge's decision is not supported by substantial evidence, plaintiff must do more than merely "question" the vocational expert's numbers. Without any evidence to support the theory that the vocational expert manufactured his numbers out of whole cloth, plaintiff's argument fails.

Last, plaintiff contends that she cannot perform any of the office clerk or information clerk jobs identified by the vocational expert because all of those jobs are semiskilled whereas the administrative law judge limited her to unskilled work. As the commissioner points out, however, the job of telephone quotation clerk (DOT # 237.367-046), alternatively titled information clerk, is a sedentary unskilled job.

In sum, plaintiff has failed to show that the administrative law judge's conclusion at step five is not supported by substantial evidence.

ORDER

IT IS ORDERED that the decision of the Commissioner of Social Security denying Teresa Begolke's application for Disability Insurance Benefits and Supplemental Security Income is REVERSED AND REMANDED pursuant to sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this opinion.

The clerk of court is directed to enter judgment for plaintiff and close this case.

Entered this 7th day of June, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge