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

JOE L. SEELEY,

Plaintiff, OPINION AND ORDER

v. 07-C-0017-C

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

This is an action for judicial review of an adverse decision of defendant Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). Plaintiff Joe Seeley claims that substantial evidence does not support the commissioner's determination that he was not disabled during the period from September 2000 to March 2004 and therefore not entitled to Disability Insurance Benefits under Title II of the Social Security Act, codified at 42 U.S.C. §§ 416(i), 423(d). More specifically, plaintiff contends that the administrative law judge who denied his claim at the hearing level erred in deciding to give little weight to the opinion of plaintiff's treating physician and to plaintiff's own contention that, because of back and leg pain and two back surgeries, plaintiff was incapable of performing any substantial gainful activity during the time period in question.

As will be explained in more detail below, I am rejecting plaintiff's arguments and affirming the commissioner's decision. Although the administrative law judge made some

erroneous factual findings in arriving at his conclusion that plaintiff was not disabled, I am convinced that evidence favoring the commissioner's position is so substantial that the result would not change even if the administrative law judge had portrayed the record accurately.

From the administrative record, I make the following findings of fact.

FACTS

A. Background and Medical Evidence

Plaintiff was 42 years old on his alleged disability onset date and 46 years old on March 22, 2004, the date he concedes his disability ended. He completed the eleventh grade and has past work experience as a tractor-trailer truck driver, which is heavy, skilled work.

On September 21, 2000, plaintiff underwent back surgery to repair a herniated disk and associated nerve compression that was caused by a fall at work in October 1999. The operation was performed by Dr. Theresa Cheng. Although plaintiff initially experienced a great deal of improvement, within two months after the surgery he reported that he still had radicular symptoms in his left leg. Plaintiff saw a pain specialist, Dr. Mark Schlimgen. in November 2000 and again on January 3, 2001, March 22, 2001 and April 4, 2001 for continuing complaints of back and leg pain on the left side. Dr. Schlimgen prescribed various medications to attempt to relieve plaintiff's symptoms, including Lortab, Neurontin, methadone and Vicodin.

In April 2001, Dr. Schlimgen referred plaintiff to Dr. Joseph Hebl, an occupational health specialist. Plaintiff reported numbness and pain in his entire left leg, with the pain ranging from eight to 10 on a 10-point scale. On examination, plaintiff had tenderness and limited range of motion in his back. He walked with a limp favoring the left leg. Straight leg raising was positive on the left at 45 degrees and plaintiff's reflexes were decreased on the left. Dr. Hebl diagnosed a mechanical back disorder, status post back surgery, with persistent back pain and radiculopathy. He indicated that plaintiff could return to work with sedentary to light restrictions as indicated on a Worker Illness form (a copy of which is not in the record). Dr. Hebl ordered an MRI and indicated that plaintiff might be a candidate for a spinal cord stimulator to relieve his chronic back pain and radiculopathy. AR 215-16.

The MRI revealed findings suggesting to the reviewing physician that the surgery might have failed or that plaintiff might have reinjured the disc at L5-S1. AR 160. Because of the MRI findings, on May 18, 2001 Dr. Hebl referred plaintiff back to Dr. Cheng for further evaluation and treatment. Dr. Hebl noted that he had previously released plaintiff to return to work with sedentary to light restrictions but that plaintiff had been unable to find work with those restrictions. AR 215.

Plaintiff saw Dr. Cheng on May 23, 2001. Plaintiff reported that he had initially experienced improvement following his September 2000 surgery, but that his symptoms

eventually came back. Dr. Cheng reviewed plaintiff's May 2001 MRI scan and found no definite evidence of recurrent disc herniation or foraminal stenosis. On examination, plaintiff walked with a limp but his neurological examination was normal and there were no objective signs of radiculopathy. Dr. Cheng suspected that plaintiff might still not have recovered fully from the surgery. She recommended physical therapy and epidural steroid injections. Although she told plaintiff that he could consider a fusion for failed back syndrome, she warned him that he was not likely to benefit from additional surgery. She told plaintiff that a CT myelogram would be required before plaintiff would be considered for fusion surgery. Plaintiff indicated that he was not interested in pursuing a myelogram or additional surgery. AR 213-14.

Dr. Schlimgen administered epidural steroid injections at plaintiff's left L5 nerve root on June 1, 2001 and October 12, 2001. At the October 12 visit, plaintiff reported that the first injection had offered him some relief but he still had pain in his left leg. Plaintiff was taking Oxycontin as prescribed by Dr. Schlimgen, but was still having some breakthrough pain. Dr. Schlimgen added hydrocodone for breakthrough pain and told plaintiff to increase his dosage of Neurontin. AR 155.

Dr. Schlimgen referred plaintiff to Dr. James Manz, an orthopedic surgeon, to determine whether plaintiff might be a candidate for a spinal cord stimulator. Dr. Manz ordered a myelogram and CT scan, which showed no definite impingement of the thecal sac

or nerve root at L5-S1. On examination, plaintiff had difficulty heel raising on the left compared to the right, "guarded" motor strength throughout the left leg because of pain, increased buttock and left leg pain on straight leg raising at 70 degrees and decreased reflexes and sensation on the left. From his examination of plaintiff and review of the myelogram and CT scan, Dr. Manz concluded in January 2002 that plaintiff had post laminectomy syndrome at L5-S1 with symptoms suggesting segmental instability. AR 205.

After further evaluation, Dr. Manz recommended that plaintiff undergo a spinal fusion with hardware implantation at L5-S1. The surgery was performed on October 23, 2002. At a followup visit with Dr. Manz on December 3, 2002, plaintiff reported that he was doing well and was much better than he was before surgery. His back pain and left leg symptoms were mostly gone, apart from a little numbness in his foot. However, in March and again in May 2003, plaintiff reported that he continued to have residual left leg symptoms that interfered with his walking and his sleeping at night. Dr. Manz detected no neurological problems or signs that plaintiff's implant had failed. He referred plaintiff to the Pain Clinic for medication management and later to Dr. Hebl for an evaluation of plaintiff's ability to return to work. Dr. Manz noted that it would take approximately a year for plaintiff to recover fully from his fusion surgery, and that if he continued to have left leg symptoms at that time, he could consider a spinal cord stimulator. AR 184-186.

Plaintiff saw Dr. Hebl on May 23, 2003. Plaintiff reported that his back and leg pain was better than it had been before the surgery, although he still had pain going down his left leg and numbness in his left foot and he felt unsteady when walking. Dr. Hebl detected tenderness across plaintiff's lower back and noted that his range of motion of the low back was limited in all planes. Plaintiff was unsteady when heel- or toe-walking and had trouble squatting. Dr. Hebl indicated that plaintiff could engage in activities "with restrictions as outlined in the worker illness form;" however, a copy of that form is not in the record. Dr. Hebl noted that further treatment might include an implantable stimulator. AR 182-83.

At a followup visit with plaintiff on September 2, 2003, Dr. Hebl noted that plaintiff's condition had not changed and that Dr. Manz had told plaintiff that his symptoms were not likely to improve. He noted that plaintiff "continues on an 8 pound lifting restriction." AR 175. Dr. Manz saw plaintiff in October and November 2003 and concluded that his residual leg symptoms were likely the result of a noncompressive radiculitis. He noted that from a neurological standpoint, plaintiff's motor function and sensation were intact. Dr. Manz recommended that plaintiff see Dr. Schlimgen for consideration of a spinal cord stimulator. AR 278, 280.

On January 13, 2004, state agency consulting physician Pat Chan, M.D., reviewed the record and concluded that plaintiff could perform a full range of sedentary work. AR 36, 254-61.

On January 19, 2004, Dr. Schlimgen implanted a spinal cord stimulator for a one-week trial. The stimulator made plaintiff's pain worse; accordingly, plans to implant one permanently were abandoned. On February 10, 2004, Dr. Hebl noted that plaintiff had exhausted all of the treatment options that were available to him. Accordingly, he referred plaintiff to a physical therapist for a functional capacity evaluation to help assess his permanent work restrictions. AR 272.

On March 17, 2004, physical therapist Georgia Davis conducted the functional capacity evaluation. AR 307-17. She concluded that plaintiff was functioning between the sedentary and light physical demand classifications. She found that plaintiff could lift approximately 15 pounds occasionally; sit between 1/3 and 2/3 of the workday so long as he could change positions every 30-60 minutes; occasionally stand, walk, kneel, crawl, and reach overhead; and rarely stoop, twist, crouch, or climb stairs. AR 315-16. In her report, Davis questioned whether plaintiff would be able to tolerate full-time work in his current condition.

Following Davis's assessment, plaintiff saw Dr. Hebl on March 22, 2004, for a final evaluation. 264-67. Dr. Hebl's assessment was status post work injury on or about October 17, 1999, which resulted in injury to plaintiff's low back; status post nerve root decompression at two levels on September 21, 2000, with poor results; and status post lumbar fusion at L5-S1 on October 23, 2002, with persistent and chronic low back pain,

weakness, loss of range of motion, and left lower extremity radicular symptoms with weakness and chronic positive straight leg raise on the left. Dr. Hebl noted that plaintiff had had "significant work restrictions . . . throughout this recovery, and which are now corroborated by the functional capacity evaluation that was just performed." AR 265. Dr. Hebl concluded that plaintiff was restricted to sedentary work with lifting 10-15 pounds occasionally; standing or walking occasionally with changing position every 10 minutes; reaching occasionally; and no bending, kneeling, squatting, crouching, twisting, or climbing. Dr. Hebl also recommended vocational rehabilitation because plaintiff could not return to his former heavy job. AR 265, 267, 334.

On June 1, 2004, state agency consulting physician Mina Khorshidl, M.D., reviewed the record and determined that plaintiff could perform work at the sedentary level with no climbing and only occasional balancing, stooping, kneeling, crouching or crawling. AR 283-291.

B. Administrative Proceedings

On September 2, 2003, plaintiff filed an application for Disability Insurance Benefits, alleging that he was disabled from degenerative disc disease and leg pain in spite of having undergone two back surgeries. After the local disability agency twice denied plaintiff's application, plaintiff exercised his right to a *de novo* hearing before the Social Security

Administration. On March 8, 2006, an administrative law judge convened a hearing at which plaintiff, a medical expert and a vocational expert testified. Plaintiff was represented by a lawyer.

At the hearing, plaintiff indicated that he was seeking a "closed" period of benefits from September 30, 2000, when he underwent his first back surgery, until March 22, 2004, when Dr. Hebl issued permanent work restrictions stating that plaintiff could perform work in the sedentary to light range. (Plaintiff's lawyer stated that plaintiff was seeking, "at a minimum," a closed period of benefits ending on March 22, 2004, suggesting that he was not waiving a claim for an open-ended award. AR 352. However, plaintiff has asserted in his briefs both to the Appeals Council and this court that he seeks benefits only for the period from September 30, 2000 to March 22, 2004.) At the time of the hearing, plaintiff was working part-time for a forest products company.

Before plaintiff testified, the administrative law judge called Dr. Andrew Steiner, a physical medicine specialist, to testify. Dr. Steiner testified that plaintiff's back impairment did not meet the criteria of a listed impairment because there was no evidence of significant radicular loss. As for functional limitations, Dr. Steiner testified that apart from a recovery period of roughly six weeks after the first surgery and six months after the second, plaintiff ought to have been able to perform work at the sedentary level that allowed him to change positions briefly every hour, required only occasional bending, twisting, stooping, kneeling,

crawling, crouching or exposure to vibrations and involved no work in temperatures below 40 degrees Fahrenheit. Dr. Steiner indicated that these limitations were based upon the clinical record, which showed that plaintiff's fusion surgery was successful and his back was stable, and upon "what we normally would expect with this kind of clinical picture, as far as the residual ability, including pain." AR 358. Dr. Steiner indicated that the administrative law judge was going to have to decide whether plaintiff's pain complaints were legitimate, noting that the pain complaints described in the record were "perhaps more than we'd expect considering the . . . clinical picture." AR 357.

Plaintiff testified that after his first surgery, he was "miserable" because he was in a lot of pain. He could lift up to 15 pounds, but could not carry anything that heavy very far. He could walk about six blocks, sit about a half hour to 45 minutes at a time and stand about a half hour to 45 minutes at a time. Plaintiff said he did not think he could work full time between the first and second surgeries because he could not lift much or stand for long and all of his past jobs were in truck driving or construction. Plaintiff testified that he felt a lot better after the second surgery, with his pain going down from about an eight to a five on a 10-point scale.

When asked by the administrative law judge whether between the first and second surgeries he could have performed a job where he could sit most of the time but get up when

he needed to, plaintiff answered: "I think I could, yeah, but there's not much in . . . sit down jobs for me . . .". AR 370.

On followup, plaintiff indicated that he would lie down periodically throughout the day, which helped to relieve the pain "a little bit." AR 372. Plaintiff's lawyer then asked:

> So when the Judge was asking you about jobs that you might do, fair to say you'd have to have a job where you could lay down throughout the day?

Id. Plaintiff replied: "Yes." AR 373.

After the hearing, plaintiff's attorney submitted a letter dated January 10, 2006 from Dr. Hebl. Dr. Hebl stated that from his review of the medical records, he had formed the opinion that plaintiff was unable to perform substantial gainful activity from July 2000 until March 2004. Dr. Hebl explained that during that time period, plaintiff was having alternating good and bad days with respect to pain and would not have been a reliable worker. AR 336. The administrative law judge forwarded Dr. Hebl's letter to Dr. Steiner for his review. Dr. Steiner indicated that the new evidence did not alter his conclusions regarding plaintiff's impairments or their resulting functional limitations. AR 339-347.

On April 27, 2006, the administrative law judge issued a decision denying plaintiff's application for disability insurance benefits. The administrative law judge applied the familiar five-step process for evaluating disability claims. Barnhart v. Thomas, 540 U.S. 20, 24-25 (2003) (describing evaluation process). At steps one through four, the administrative

law judge found that plaintiff had not engaged in substantial gainful activity since his alleged onset date (step one); plaintiff had the severe impairment of degenerative disc disease of the lumbar spine status-post two spinal surgeries (step two); the impairment did not meet or medically equal any listed impairment (step three); and plaintiff was not able to perform his past relevant work (step four).

As part of his step four evaluation, the administrative law judge assessed plaintiff's residual functional capacity. He recognized that plaintiff was "suffering pain," but found that it was not so severe as to prevent plaintiff from working. AR 33. He determined that plaintiff could perform work at the sedentary exertional level (lifting 10 pounds frequently, standing and walking two of eight hours and sitting six of eight hours) that involved no assembly line work or work in which the product of others was dependent on plaintiff; that required no more than occasional stair or ramp climbing, exposure to vibrations, bending, twisting, stooping, crawling, crouching or kneeling and no exposure to temperatures below 40 degrees; and which allowed an hourly sit-or-stand option for one to five minutes. In addition, the administrative law judge found that plaintiff was limited to no more than semi-skilled work that was simple, routine and repetitive.

In reaching this conclusion, the administrative law judge gave great weight to Dr. Steiner's opinion concerning plaintiff's residual capabilities before March 2004, explaining that Dr. Steiner was an expert in Physical Medicine and Rehabilitation, was familiar with

the Social Security disability program, had offered an opinion that was consistent with the findings of the state agency medical consultants and had "had an opportunity to review all of the objective medical evidence and hear the claimant's testimony." AR 32. In contrast, the administrative law judge found that Dr. Hebl's opinion and plaintiff's own allegation of disability before March 2004 were not supported by Dr. Hebl's reports and were inconsistent with substantial evidence in the record, including plaintiff's failure to pursue therapy as recommended by Dr. Cheng, plaintiff's "lack of regular and ongoing treatment," the success of the treatment provided, and plaintiff's daily activities and testimony concerning his abilities. Id.

Relying on vocational expert testimony adduced at the hearing, the administrative law judge concluded at step five that plaintiff was not disabled because there were jobs that existed in significant numbers in the economy that plaintiff could perform in spite of his limitations. These jobs included woodwork dowel inspector (1,500 jobs), polisher in the optical industry (5,000 jobs) and surveillance system monitor (1,500 jobs). The administrative law judge's decision became the final decision of the commissioner when the Appeals Council denied plaintiff's request for review.

OPINION

Unless the commissioner has committed an error of law, his determination that plaintiff was not disabled for purposes of receiving Social Security benefits is conclusive if supported by substantial evidence. 42 U.S.C. § 405(g); 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). In reviewing the commissioner's decision, the court conducts "a critical review of the evidence," considering both the evidence that supports, as well as the evidence that detracts from, the commissioner's decision. Clifford, 227 F.3d at 869. However, the court cannot substitute its own judgment for that of the commissioner by reevaluating the facts or reweighing the evidence to decide whether the plaintiff is in fact disabled. Diaz v. Chater, 55 F.3d 300, 305 (7th Cir. 1995).

Plaintiff contends that substantial evidence does not support the administrative law judge's conclusion that, with the exception of brief, post-surgery recovery periods, plaintiff retained the residual functional capacity to perform a limited range of sedentary work between September 2000 and March 2004. The regulations define sedentary work as requiring primarily sitting, some walking and standing and minimal lifting. 20 C.F.R. § 404.1567(a). A claimant can do sedentary work if he can (1) sit up for approximately six hours of an eight-hour workday, (2) occasionally lift objects up to ten pounds, and (3)

occasionally walk or stand for no more than about two hours of an eight-hour workday. Diaz, 55 F.3d at 306.

Plaintiff challenges the administrative law judge's decision to reject the opinion of his treating physician, Dr. Hebl, and plaintiff's own allegation that he was unable to perform any competitive employment during the time period in question. An administrative law judge is free to reject the opinion of a treating physician if it is contradicted by other evidence in the record and the administrative law judge provides good reasons for rejecting the opinion. Hofslien v. Barnhart, 439 F.3d 375, 377 (7th Cir. 2006). However, 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). As for an administrative law judge's credibility determination, the court ordinarily will reverse it only if the claimant can show it was patently wrong. Powers v. Apfel, 207 F.3d 431, 435 (7th Cir. 2000).

I begin with plaintiff's argument that the administrative law judge erred by failing to discuss the specific functional limitations identified by Dr. Hebl when he released plaintiff to return to work on March 22, 2004. These restrictions included a need to change positions every 10 minutes, a need for ongoing narcotic and neurologic medications and an inability to bend, kneel, squat, crouch, twist or climb. Plaintiff argues that these limitations show that he would not have been able to perform any competitive employment before

March 22, 2004 and thus the administrative law judge should have found him disabled during the 200-2004 period for which he seeks benefits. After all, he points out, if Dr. Hebl's office notes show that the March 17, 2004 functional capacities evaluation had "corroborated" the significant work restrictions that the doctors had issued "throughout" plaintiff's recovery, shouldn't this evaluation be deemed to relate back to plaintiff's pre-March 2004 condition?

Perhaps so, but plaintiff forfeited this argument when he stipulated at the hearing that he was seeking a closed period of benefits ending as of March 22, 2004. Whatever significance plaintiff might now attribute to Dr. Hebl's March 22, 2004 work restrictions, the fact remains that at the administrative hearing, plaintiff gave up his opportunity to obtain benefits after March 22, 2004, thus indicating to the administrative law judge that his limitations after that time would not support a finding of disability. Dr. Hebl expressed this same view in his letter of January 10, 2006, stating that plaintiff was "unable to work in substantial gainful employment from July 2000 until March 2004." AR 336. If the restrictions would not have supported a finding of disability as of March 22, 2004, then it follows that they would not have supported such a finding had they been in place earlier. Indeed, the record indicates that plaintiff's condition did not change much between the time he recovered from his second surgery and March 2004. Although plaintiff continued to receive treatment during that time, much of it was devoted to preparing for the implantation

of a spinal cord stimulator, which plaintiff's doctors tried as a final attempt to provide plaintiff with some permanent relief from his pain. It was the failure of that treatment, not any change in plaintiff's condition, that prompted Dr. Hebl to issue final work restrictions. (It is notable that in his January 2006 letter, Dr. Hebl did not explain why March 22, 2004 was the first date on which plaintiff could have performed sedentary work activity.) In other words, plaintiff's condition was stable long before March 22, 2004. Accordingly, Dr. Hebl's March 22, 2004 restrictions, combined with plaintiff's concession that he was not disabled under those restrictions, actually *support* the administrative law judge's conclusion that plaintiff could have returned to work with restrictions long before March 22, 2004.

I turn then to plaintiff's argument that the administrative law judge erred in rejecting Dr. Hebl's retrospective opinion that plaintiff was disabled from July 2000 to March 2004. One of the factors on which the administrative law judge relied was plaintiff's failure to seek "regular and ongoing medical treatment." In reaching this conclusion, the administrative law judge found that plaintiff had not been seen by a medical professional from October 13, 2000 to April 27, 2001, which suggested that his symptoms were stable during that time period. The administrative law judge also criticized plaintiff for failing to purse physical therapy and a CT myelogram as recommended by Dr. Cheng in May 2001.

As the commissioner acknowledges, these findings were erroneous. Plaintiff did seek regular and ongoing treatment from Dr. Schlimgen from October 2000 to April 2001 for

continuing complaints of leg and back pain. As for the CT myelogram, Dr. Cheng recommended the procedure only in the event plaintiff wanted to pursue fusion surgery, an option in which plaintiff was not interested at that time and which Dr. Cheng did not recommend. Plaintiff did not follow Dr. Cheng's recommendation to pursue physical therapy, but that failure alone does not constitute substantial evidence to support the administrative law judge's conclusion that plaintiff failed to aggressively or regularly seek treatment. Overall, the evidence shows that plaintiff sought treatment regularly and pursued nearly all the treatment options that his doctors recommended.

As plaintiff admits, however, his alleged failure to pursue regular treatment was not the only reason cited by the administrative law judge for giving little weight to Dr. Hebl's retrospective opinion. The administrative law judge also found that Dr. Hebl's opinion was not well supported by the doctor's own treatment notes and inconsistent with other substantial evidence in the record, including the opinion of Dr. Steiner, the opinions of the state agency physicians and the success of the treatment provided. In addition, the administrative law judge noted that plaintiff's daily activities and his testimony at the hearing that he could probably have performed a seated job allowing for changes in position were inconsistent with a finding of disability. The administrative law judge relied on this same evidence as support for his conclusion that plaintiff's statements concerning the intensity, duration and limiting effects of his symptoms were not entirely credible.

Plaintiff attacks each of these findings, but his arguments are unpersuasive. With respect to Dr. Hebl's treatment notes, the administrative law judge pointed out that after plaintiff's first surgery, Dr. Hebl had released plaintiff to work between the sedentary and light levels of exertion. Although plaintiff argues that the administrative law judge gave short shrift to Dr. Hebl's notes following plaintiff's second surgery documenting plaintiff's restricted range of motion, limp favoring his left leg and difficulties getting up from a chair and heel- and toe-walking, a detailed discussion of these notes was not necessary because plaintiff testified that he had a lot less pain six months after the second surgery. In other words, if Dr. Hebl thought plaintiff capable of at least some types of work after his first surgery, then it follows that plaintiff should still have been capable of performing such work after he had recovered from his second surgery.

Plaintiff argues that the medical evidence does not support the administrative law judge's conclusion that plaintiff's back surgeries were successful. He points out that even after his surgeries, he had ongoing lower back and left leg pain for which he consistently sought treatment. However, the administrative law judge's conclusion is supported by the testimony of Dr. Steiner, who testified that plaintiff's surgeries were successful "from a technical point of view." AR 357. Dr. Steiner explained that plaintiff's back had healed after both surgeries and that after the first surgery, there was no evidence of nerve compression. Plaintiff insists that his second surgery proves that the first surgery was not

successful, but I disagree. Although it is true that plaintiff continued to have persistent pain and ultimately another operation after his first surgery, neither is proof that the first surgery was not performed properly or resulted in any complications, which are the types of concerns Dr. Steiner appeared to be addressing when he testified that the surgeries were "technically" successful. Plaintiff also points to the May 2001 MRI, which suggested to the radiologist that plaintiff's left L5 nerve root might be impinged. However, when Dr. Cheng reviewed that MRI scan, she found no definite evidence of impingement, a finding later confirmed by a subsequent myelogram and CT scan on January 14, 2002.

It is indisputable that numerous reports document plaintiff's complaints of radicular pain. However, the administrative law judge never found that plaintiff did not have pain. To the contrary, he acknowledged that plaintiff was suffering pain and articulated a very restrictive residual functional capacity designed to accommodate that pain. The issue is whether plaintiff's pain was so intense before March 22, 2004, that it would have prevented him from performing all substantial gainful activity. Overall, I am satisfied that the objective evidence in the record supports the administrative law judge's determination that plaintiff's pain was not disabling during the time period in question.

As noted previously, Dr. Steiner testified that, based upon his review of the medical records and his knowledge of the "typical" degree of pain that could be expected to result from plaintiff's impairments, plaintiff was capable of performing sedentary work with

postural and temperature limitations for most of the time period in question. The administrative law judge explained that he was giving more weight to the opinion of Dr. Steiner than to that of Dr. Hebl because Dr. Steiner was an expert in Physical Medicine and Rehabilitation, was familiar with the Social Security disability program, had reviewed all of the medical evidence and had heard plaintiff testify. With the exception of this last finding, all of these reasons were good ones for affording more weight to Dr. Steiner's opinion. 20 C.F.R. § 404.1527(d)(5) and (6) (medical source's specialty, familiarity with social security disability program and knowledge of other evidence in record are factors relevant to medical source opinion's weight). Although the administrative law judge erred in finding that Dr. Steiner had heard plaintiff testify (Dr. Steiner testified first and was excused before plaintiff testified), I am convinced that this error did not have any effect on the outcome of plaintiff's application. The administrative law judge found that plaintiff had additional limitations beyond those identified by Dr. Steiner (including a limitation to low stress work and no assembly line-type work), indicating that he considered plaintiff's testimony independently and did not rely on any credibility determination that Dr. Steiner might have made.

Further, the administrative law judge reasonably concluded that Dr. Steiner's opinion was most consistent with the evidence as a whole. This evidence included not only the medical evidence, which showed no post-surgical evidence of significant spinal abnormalities

or nerve root compression, but plaintiff's own testimony regarding his activities and abilities. Although plaintiff argues that his activities of preparing meals, cleaning up the kitchen and dishes, housecleaning, laundry, driving, shopping, going out to eat and to movies are "minimal," the administrative law judge could reasonably conclude otherwise. In addition, plaintiff testified that during the time period between his first and second surgeries, when he was in the most pain, he could lift 10-15 pounds, walk six blocks and sit and stand up to 45 minutes at a time. This is substantial evidence that he could have performed sedentary work with a sit-or-stand option. Accord Diaz, 55 F.3d at 306 (plaintiff's testimony that he could perform a job where he could sit at least six hours per workday and would not have to lift more than 10 pounds so long as he could move around while sitting supported conclusion that he could perform sedentary work); Binion v. Shalala, 13 F.3d 243, 247 (7th Cir. 1994) (plaintiff's testimony that she could sit and stand for about an hour without a break, walk about five blocks and pick up 10 pounds provided substantial evidence that she could perform sedentary work).

Plaintiff provided substantial evidence for the administrative law judge's decision when he acknowledged at the hearing that he could probably have performed a seated job that allowed for changes in position. Although plaintiff attempts to minimize that testimony now by arguing that "he had never before worked a sedentary job and likely did not know what it would entail," Pl.'s Reply, dkt. #17, at 5, the administrative law judge did not ask

plaintiff whether he could have performed "sedentary" work; he asked him whether he could have performed a job where he could sit and get up and move around on occasion. The administrative law judge was entitled to credit plaintiff's testimony that he could have performed such a job.

Plaintiff points out that he testified that his boss at his new part-time job allowed him to take breaks to lie on the ground to rest his back. Plaintiff appears to suggest that he cannot work without such an accommodation. However, at the hearing plaintiff did not identify the need to lie down as a restriction that prevented him from working during the relevant time period until he was asked a leading question to that effect by his lawyer. Furthermore, plaintiff testified that lying down relieved his pain only "a little bit." This testimony reasonably supports the administrative law judge's implicit conclusion that the opportunity to lie down was not a prerequisite to working.

Finally, the administrative law judge noted that Dr. Steiner's opinion was consistent with the opinions of the state agency physicians, who determined that plaintiff could perform sedentary work. Although plaintiff argues that these opinions should be disregarded because the physicians did not articulate their rationale adequately, the level of support a medical source provides for his or her opinion is only one factor bearing on the opinion's strength. 20 C.F.R. § 404.1527(d).

In any case, even had the administrative law judge ignored the opinions of the state agency physicians, substantial evidence still would support his determination that plaintiff

could perform some types of sedentary work. Dr. Steiner's testimony, the objective medical evidence and plaintiff's own statements concerning his activities and abilities provide more than substantial support for the administrative law judge's determination that Dr. Hebl's opinion was entitled to little weight and that plaintiff's allegations of total disability before March 2004 were not fully credible. In fact, although the administrative law judge committed a serious error when he found that plaintiff had failed to pursue treatment aggressively, I am persuaded that no reasonable trier of fact reviewing this record could have concluded that plaintiff was disabled during the time period in question. Allord v. Barnhart, 455 F.3d 818, 822 (7th Cir. 2006) (flaws in credibility analysis do not require remand if no conceivable way trier of fact could have made different credibility finding); Sarchet v. Chater, 78 F.3d 305, 308-09 (7th Cir. 1996) (when decision of administrative law judge is "unreliable because of serious mistakes or omissions, the reviewing court must reverse unless satisfied that no reasonable trier of fact could have come to a different conclusion, in which event a remand would be pointless"). Accordingly, the commissioner's decision must be affirmed.

ORDER

IT IS ORDERED that the decision of defendant Michael Astrue, Commissioner of Social Security, denying plaintiff Joe Seeley's application for a closed period of Disability Insurance Benefits is AFFIRMED.

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

Entered this 13th day of September, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge