IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KEVIN G. SIMILA,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

OPINION AND ORDER

07-C-0029-C

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This is an action for judicial review of an adverse decision of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). Plaintiff Kevin Simila has moved for summary judgment, seeking reversal of the commissioner's decision that he is not disabled and therefore is ineligible for either Disability Insurance Benefits or Supplemental Security Income under Titles II and XVI of the Social Security Act, codified at 42 U.S.C. §§ 416(I), 423(d) and 1382c(a). Plaintiff contends that the decision of the administrative law judge who denied his claim is not supported by substantial evidence because the judge did not adequately consider his examining psychologist's opinion and made an improper credibility determination. In a separate motion, dkt. # 10, plaintiff seeks remand under sentence six of § 405(g) on the ground that his examining psychologist submitted new and material evidence that would have caused the administrative law judge to reach a different

conclusion had she considered it. Defendant submitted a memorandum responding to both motions.

For the reasons explained below, I am denying both plaintiff's motion for summary judgment and motion to remand and affirming the administrative law judge's decision.

The following facts are drawn from the administrative record (AR):

RECORD FACTS

A. Procedural History

Plaintiff filed applications for Social Security Disability Insurance Benefits and Supplemental Security Income on November 3, 2003, alleging that he suffered from multiple joint arthritis, headaches and sinusitis. AR 78-85. After the local disability agency denied his applications initially and upon reconsideration, plaintiff requested a hearing, which was held on April 11, 2006 before Administrative Law Judge Mary Kunz in Minneapolis, Minnesota. Plaintiff was represented by counsel. The administrative law judge heard testimony from plaintiff, neutral medical expert Dr. Andrew Steiner and neutral vocational expert William Villa. On May 25, 2006, the administrative law judge issued her decision, finding plaintiff not disabled. AR 19-28. This decision became the final decision of the commissioner on November 8, 2006, when the Appeals Council denied plaintiff's request for review. AR 8-10.

B. Background

Plaintiff was 43 years old on the date of the hearing, making him a "younger person" for the purposes of his applications for disability benefits. AR 83; 20 C.F.R. §§ 404.1563©) and 416.963©). Plaintiff has a twelfth grade education and completed three semesters of college. He has past work experience in asbestos abatement and construction.

C. Medical Evidence

1. Physical symptoms

In September 2002, plaintiff saw Dr. Gene Enders, his family practitioner, for a sudden onset of muscle and joint pain in his upper extremities, shoulders and neck. Subsequently, plaintiff developed throbbing headaches. Enders diagnosed plaintiff with arthralgias and myalgias of undetermined etiology and possible sinusitis. Physical examinations and results of laboratory testing and x-rays were all normal, but a computed tomography scan showed that plaintiff had a sinus infection. When antibiotics did not improve plaintiff's condition, Enders referred him to an otolaryngologist, who surgically drained plaintiff's sinuses and corrected his deviated septum. However, plaintiff continued to report severe headaches and muscle pain, and on November 8, 2002, the otolaryngologist noted that he could not attribute plaintiff's pain to his septum or sinonasal disease. AR 199-217.

During the next few months, plaintiff saw a number of specialists, including Dr. Felix Chukwudelunzu and Dr. Donn Dexter in neurology and Dr. Timothy Shelley in rheumatology, but none found any cause for his headaches or joint pain. AR 182-98. Chukwudelunzu noted that plaintiff had chronic daily headaches possibly superimposed with a narcotic-induced headache. AR 193-98. Dexter noted that narcotic pain relievers were "not likely going to be a long-term solution for him." AR 186-90.

In January 2003, plaintiff began seeing physicians in neurology, rehabilitation, rheumatology and otorhinolaryngology at the Mayo Clinic. During his visits throughout 2003, plaintiff was diagnosed with probable chronic myofascial pain syndrome, maxillary sinusitis, persistent headache with migrainous features, neck stiffness, mechanical low back pain, arthralgias and bilateral high-tone sensorineural hearing loss with a history of tinnitus. AR 232-65. Between March and June 2003, Dr. Peter Kent in the rheumatology department treated plaintiff with prednisone, which quickly and dramatically ended plaintiff's general aches and musculoskeletal pain, including his wrist, elbow and knee pain. Plaintiff's condition improved to the point that he could do physical work without trouble (including peeling logs and building a log home) and return to work. However, when Kent reduced the prednisone dosage, plaintiff's symptoms returned and he reported significant pain in his trapezii, chest, back and shoulders. AR 170, 242-49. Plaintiff reported that when he had pain he could not work and had to take narcotics. AR 237-39.

In July 2003, Kent stated that he believed that plaintiff had "a myofascial pain syndrome/fibromyalgia." AR 242. Because the higher dose of prednisone was not a long-term option, Kent prescribed Enbrel. AR 239-41. By September 30, 2003, plaintiff was able to taper off prednisone and reported a 75 percent improvement in his symptoms. However, plaintiff also reported that if he over exerted himself (for example by using a jackhammer at work) his pain increased. AR 236-38.

On November 10, 2003, plaintiff called Kent and stated that he had significant pain in his knees and hips and was taking Vicodin. He asked Kent to complete a disability form. AR 235. Kent wrote on November 18, 2003 that plaintiff's "condition will prevent him from doing hard physical labor indefinitely" but "[w]hile his musculoskeletal pain makes hard physical labor extremely difficult, I see no reason he couldn't perform clerical work, etc." AR 286. On January 7, 2004, Kent noted that he had received a second form from plaintiff, who was applying for total disability. He wrote the following:

> I told him it is unclear to me why he is totally disabled, and this makes it difficult for me then to fill out his forms and make any predictions about the future. His prior bone scan, MRI of the spine, and all of his laboratories at Mayo have been negative. He did seem to have a response to prednisone 20mg a day. Despite that, on physical examination, he has had mainly muscular tender points, particularly trapezius and other myofascial tenderness. He was examined by myself and Dr. Storgard at one point, and we both felt his constellation was more consistent with a chronic pain syndrome.

AR 232.

On December 18, 2003 and March 9, 2004, state agency consulting physicians assessed plaintiff's residual functional capacity and noted that he could lift and carry 50 pounds occasionally and 25 pounds frequently and sit, stand and walk six hours out of an eight-hour workday. AR 224-31.

Throughout 2004, plaintiff saw Enders, Shelley, physicians at the Mayo Clinic and Dr. Stephen Endres at the Pain Clinic of Northwestern Wisconsin. Plaintiff tried injections of Enbrel and Remicade with little success. Although Endres thought that plaintiff may have ankylosing spondylitis, magnetic resonance imaging in the fall of 2004 and spring of 2005 did not show evidence of the disease. Plaintiff was discharged from the pain clinic in May 2005 because he had a urine test that was positive for cocaine. Throughout the remainder of 2005, plaintiff took Vicodin and Flexeril, which helped control his pain. AR 287-328.

2. Psychological symptoms

On February 7, 2006, Paul Caillier, Ph.D. performed an independent psychological evaluation of plaintiff at the request of plaintiff's attorney. In a March 1, 2006 letter to plaintiff's attorney, Caillier wrote that plaintiff was well oriented, had normal mood and affect and had adequate attention and concentration on the task at hand. Caillier noted that plaintiff reported "in a dramatic fashion that he cannot function" because his pain was too severe. Caillier administered the Minnesota Multiphasic Personality Inventory 2 which

showed that plaintiff had a classical conversion V pattern profile. Caillier noted that this profile indicated that plaintiff had a neurotic orientation, practiced circular self-defeating patterns of behavior without learning from experience and tended to emphasize strength and physical prowess because he sees himself as stereotypically masculine. He also stated that individuals with this profile convert stress and anxiety into physical pain (noting that headaches and back pain were common) and complain about overwhelming physical symptoms. Caillier diagnosed plaintiff with chronic pain syndrome and somatoform disorder and recommended anti-depressant medication and counseling. AR 337-39.

Caillier also completed a Psychiatric Review Technique assessment of plaintiff on March 1, 2006, noting that plaintiff met the listing for somatoform disorders (12.07) as evidenced by a persistent disturbance in sensation, chronic pain syndrome and an unrealistic interpretation of physical signs or sensations associated with the preoccupation or belief that he had a serious disease or injury. Under the B criteria of the listings, Caillier rated plaintiff's functional limitation as "marked" for restrictions in daily activities and difficulties in maintaining concentration, persistence or pace. Caillier found that plaintiff had only moderate difficulties in maintaining social functioning and one or two episodes of decompensation. AR 345-58.

D. Hearing Testimony

Plaintiff testified that he can not work because he is in constant pain in his shoulders, elbows, neck, knees, hips and ankles. AR 413-14. He can stand about 12 minutes and walk a few hundred yards before needing to rest. Plaintiff tried deer hunting and ice fishing in the fall and winter of 2005-2006, but he had to go home after three or four hours on each occasion. AR 415-17, 422-23. Plaintiff testified that he went fishing two weeks before the hearing in a boat for two to three hours. AR 424.

Plaintiff testified that he could not do sedentary work even if he could get up every couple of hours because getting to work and being there a few hours would wear him out. He takes Vicodin daily and it reduces his pain, but his limitations are the same. He does not have any significant side effects from his medications. AR 426-28. During a typical day, plaintiff takes his two children to school, lies down for a few hours watching television, showers and prepares dinner. AR 431-35. Once or twice a week, plaintiff over exerts himself and can not do anything at all. He stated that he probably could do some other cleaning around the house but his wife has always done it. He does not do any outside work or lengthy shopping. Plaintiff testified that he attends his sons' hockey games and can stand through them if he sits between periods. AR 435-39. He stated that sitting for long periods bothers him, and he "more or less live[s] on his couch." AR 417. Plaintiff cannot lift

anything except a gallon of milk. He drives but only for up to a couple of hours at a time. AR 418-19.

The neutral medical expert, Steiner, testified that there was no objective medical evidence showing that plaintiff's musculoskeletal pain meets a listing. In his opinion, plaintiff would have the residual functional capacity to perform light work if he avoided hazardous machinery or unprotected heights. AR 446-47. Steiner agreed with plaintiff's attorney that a diagnosis of somatoform disorder is not unusual for a person with a similar medical history to plaintiff. AR 450.

In response to hypothetical questions from the administrative law judge, the vocational expert, Villa, testified that there would be a significant number of jobs in the national economy at the light or sedentary exertional level for a person of plaintiff's age, education, experience and impairments.

E. The Administrative Law Judge's Decision

In reaching her conclusion that plaintiff was not disabled, the administrative law judge performed the required five-step sequential analysis. See 20 C.F.R. §§ 404.1520, 416.920. Although she noted that plaintiff had an unsuccessful work attempt in 2003, the administrative law judge found at step one that plaintiff had not engaged in substantial gainful activity since October 2, 2002, his alleged onset date. At step two, she found that

plaintiff is severely impaired by musculoskeletal or myofascial pain, mild degenerative disc disease, headaches, high frequency hearing loss, chronic pain syndrome and somatoform disorder. The administrative law judge found at step three that plaintiff did not have an impairment or combination of impairments that met or medically equaled any impairment listed in 20 C.F.R. 404, Subpart P, Appendix 1. AR 21-22. At step four, the administrative law judge assessed plaintiff's residual functional capacity, taking into account plaintiff's subjective complaints regarding his symptoms and limitations, as well as the various medical opinions in the record. She determined that plaintiff had the residual functional capacity to perform light work but was limited to unskilled work because of his complaints of pain and that he should not be exposed to hazards, moving machinery or heights because of his hearing loss. AR 23.

With respect to plaintiff's mental impairments, the administrative law judge gave little weight to the opinion of Caillier, determining that it was not supported by the objective medical evidence of record and inconsistent with plaintiff's testimony. She noted that Caillier apparently did not know of plaintiff's history of intravenous drug use or that some physicians had concerns over plaintiff's narcotic use, which possibly explained some of his pain. The administrative law judge also wrote that none of plaintiff's treating physicians ever mentioned the possibility of somatoform disorder. AR 25-26.

The administrative law judge found that plaintiff experiences only mild restrictions in daily activities, which include caring for himself without assistance, cooking, taking his children to school, occasional hunting and fishing, attending his children's hockey games and helping his friends with projects. She found that plaintiff has only mild difficulties maintaining social functioning based on the following: plaintiff did not claim any difficulties relating to his wife, children or friends; plaintiff did not assert that he has difficulties going out in public or in crowds; and his physicians have described him as pleasant and enjoyable. Given plaintiff is in constant pain and has to lie down at least once a day, the administrative law judge found that plaintiff has moderate difficulties in maintaining concentration, persistence or pace. AR 25-26. However, she noted that plaintiff did not claim that he had any specific difficulties in those areas. The administrative law judge also determined that there was nothing in the record to suggest that plaintiff had any episodes of decompensation. AR 26.

The administrative law judge concluded that plaintiff's subjective complaints of disabling joint pain were not entirely credible because they were inconsistent with the objective medical findings, his conservative course of medical treatment, his reported daily activities and work history. Specifically, she noted that despite plaintiff's having seen several physicians and undergone numerous imaging studies and tests, the cause of his pain remained unexplained. The administrative law judge remarked on the conservative nature

of plaintiff's treatment, which included only pain medication, physical therapy and one series of injections. AR 24. She noted that although his activities exacerbate his pain, plaintiff continues to engage in them, suggesting that he is able to handle the increase in his symptoms. She discussed the sharp decline in plaintiff's work history between 1997 and 2003, noting that it indicates that factors other than his pain have contributed to his not working. She also observed that plaintiff had not attempted to find other types of work or sought out vocational rehabilitation to accommodate his limitations. AR 24-25.

Relying on the testimony of the vocational expert, the administrative law judge found that plaintiff could not perform his past relevant work because it exceeded the exertional limitations of his residual functional capacity assessment. However, she found that the vocational expert's testimony was sufficient to satisfy the commissioner's burden at step five to show that other jobs existed in significant numbers in Wisconsin that plaintiff could perform, namely small products assembler, packager in the re-pack food industry and cashier. The administrative law judge also found that even with a reduction to sedentary work with the same hazard and height restrictions, plaintiff could perform benchwork and protective medical device inspection, both of which include jobs that exist in significant numbers in Wisconsin. AR 27-28.

F. Additional Evidence

Following the administrative law judge's decision, plaintiff's attorney asked Caillier to respond to several questions. In a letter dated June 22, 2006, Caillier reiterated the type of testing that he had performed on plaintiff and his diagnosis. Caillier also noted that he had known that plaintiff had used intravenous drugs as a young man, but because plaintiff reported not using drugs in the past twenty years, it was not an issue. Plaintiff submitted this letter with his appellate brief to the Appeals Council. AR 400-02.

OPINION

A. Standard of Review

The standard by which a federal court reviews a final decision by the commissioner is well settled: the commissioner's findings of fact are "conclusive" so long as they are supported by "substantial evidence." 42 U.S.C. § 405(g). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971). When reviewing the commissioner's findings under § 405(g), the court cannot reconsider facts, reweigh the evidence, decide questions of credibility or otherwise substitute its own judgment for that of the administrative law judge 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 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. Examining Psychologist's Report

Plaintiff contends that the administrative law judge erred in not placing greater weight on the opinion of Caillier, the consulting psychologist who examined him in February 2006. He asserts that the administrative law judge was inconsistent and did not explain why she accepted Caillier's diagnoses of chronic pain syndrome and somatoform disorder but not Caillier's opinion that plaintiff was disabled. Plaintiff also argues that because the administrative law judge rejected Caillier's opinion, her findings at steps three and four of the five-step process for evaluating disability claims, 20 C.F.R. §§ 404.1520(a), 416.920(a), reflect merely her own lay opinion and are insufficient to support her decision.

Although an administrative law judge must consider all medical opinions of record, she is not bound by those opinions and must evaluate them in the context of the expert's medical specialty and expertise, supporting evidence in the record, consistency with the record as a whole and other explanations regarding the opinion. Haynes v. Barnhart, 416 F.3d 621, 630 (7th Cir. 2005); 20 C.F.R. §§ 404.1527(d) and (e), 416. 927(d) and (e). An administrative law judge can reject an examining physician's opinion if her reasons for doing so are supported by substantial evidence in the record. Gudgel v. Barnhart, 345 F.3d 467, 470 (7th Cir. 2003). When the record contains well supported contradictory evidence, even a treating physician's opinion "is just one more piece of evidence for the administrative law judge to weigh." Hofslien v. Barnhart, 439 F.3d 375, 377 (7th Cir. 2006); 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2). Opinions from physicians "who do not have a treatment relationship with the individual are weighed by stricter standards, based to a greater degree on medical evidence, qualifications, and explanations for the opinions, than are required of treating sources." Social Security Ruling 96-6p, 1996 WL 374180, *2 (1996). An administrative law judge may not substitute her opinion for that of a medical expert by disregarding or independently evaluating the medical evidence. Rohan v. Chater, 98 F.3d 966, 970 (7th Cir. 1996); Wilder v. Chater, 64 F.3d 335, 337 (7th Cir. 1995). However, in the end, the final decision about whether plaintiff is disabled is a legal one to be made by the administrative law judge, and the administrative law judge's reasonable resolution of

conflicts in the medical evidence is not subject to review. Kapusta v. Sullivan, 900 F.2d 94, 97 (7th Cir. 1989); see also Diaz v. Chater, 55 F.3d 300, 306 n. 2 (7th Cir. 1989) (determination of claimant's limitations is decision reserved to Social Security Administration, which must consider entire record and not only physicians' opinions).

Contrary to plaintiff's assertions, the administrative law judge did not play doctor and draw her own medical conclusions. She relied on Caillier's expert opinion in finding that plaintiff had chronic pain syndrome and somatoform disorder. However, she rejected Caillier's opinion that plaintiff satisfied the B criteria of Listing 12.07 for somatoform disorders because it was not supported by the objective medical evidence of record and it was inconsistent with plaintiff's testimony. The administrative law judge adequately explained her reasoning and her findings are supported by substantial evidence in the record.

The administrative law judge correctly noted that apart from repeating plaintiff's subjective complaints, Caillier did not explain why he reached the conclusion that plaintiff would have marked difficulties in performing daily activities or maintaining concentration, persistence or pace. Neither Caillier's report nor any of plaintiff's other medical records detail findings or observations that would support the severity of impairments described in Caillier's assessment. In late 2003, Kent noted that although plaintiff could not perform hard physical labor, he saw no reason why plaintiff could not do less physical work, such as clerical work.

As noted by the administrative law judge, plaintiff testified that he was able to care for himself without assistance, cook, take his children to school, occasionally hunt and fish, attend his children's hockey games and help his friends with projects. The ability to perform a daily routine and sporadic diversions does not refute a claim of disability. Zurawski, 245 F.3d at 887; Clifford, 227 F.3d at 872. However, plaintiff's testimony about his outdoor activities and assisting friends with physical tasks show that he is engaging in more than minimal or sporadic activity. Further, the fact that plaintiff engages in these activities while allegedly in constant pain supports the administrative law judge's conclusion that he has only mild functional limitation in daily activity. See Zurawski, 245 F.3d at 887 (administrative law judge must consider and explain inconsistencies among daily activities, complaints of pain and medical evidence); Clifford, 227 F.3d at 871 (same). Recognizing his allegations of constant pain, the administrative law judge gave plaintiff the benefit of the doubt and ranked him as having moderate difficulty in maintaining concentration, persistence or pace, even though plaintiff did not allege any specific difficulties in these areas.

Although plaintiff criticizes several statements made by the administrative law judge, he has not come forth with substantial medical evidence that the administrative law judge failed to consider. Plaintiff incorrectly argues that the administrative law judge failed to discuss the Minnesota Multiphasic Personality Inventory 2, which provided objective evidence of his somatoform disorder. The administrative law judge wrote that Caillier

"administered the MMPI-2 to claimant," summarized the results and adopted Caillier's diagnoses of somatoform disorder and chronic pain syndrome. AR 25. Plaintiff also claims that the administrative law judge erred in writing that Caillier did not perform a mental status examination and questioned the relevancy of her statement. However, the commissioner has promulgated regulations explaining that major limitations in concentration, persistence or pace can often be assessed through mental status examinations. 20 C.F.R. § 404, Subpart P, Appendix 1, 12.00(C)(3). The administrative law judge merely was emphasizing that Caillier did not cite any medical evidence, including test results, to support his opinion that plaintiff had marked difficulties in maintaining concentration, persistence or pace.

Plaintiff criticizes the administrative law judge for stating that none of his treating physicians mentioned the possibility that he suffers from somatoform disorder, arguing that they were focused on ruling out physical causes. That may be true, but given plaintiff's lengthy medical history and the lack of physical findings, it was reasonable for the administrative law judge to conclude that at least one of the many physicians that plaintiff saw might have suggested the possibility of a psychological cause for his symptoms. In any case, plaintiff's argument is beside the point because the administrative law judge found that plaintiff has somatoform disorder, notwithstanding her apparent doubts about the accuracy of that diagnosis. In making the statement, the administrative law judge was emphasizing

the lack of corroborating medical evidence for Caillier's opinion. Caillier had seen plaintiff only once, and at the time of the hearing, plaintiff had not yet sought treatment for his newly-diagnosed psychological disorders.

Plaintiff also asserts that the administrative law judge ignored Steiner's testimony that it is not unusual to rule out possible physical causes of pain before assessing psychological causes. However, Steiner's testimony does not contradict the findings of the administrative law judge, who agreed that plaintiff suffered from somatoform disorder. Further, any error that the administrative law judge may have made in referring to plaintiff's physicians' failure to diagnose somatoform disorder and not mentioning Steiner's testimony is harmless.

Plaintiff faults the administrative law judge for questioning whether Caillier knew about plaintiff's history of intravenous drug use or the concerns that some of plaintiff's treating physicians had about plaintiff's narcotic use. The administrative law judge explained that there was evidence that plaintiff's intravenous drug use and long-term narcotic use may provide another explanation for his pain. I agree with plaintiff that although several of plaintiff's treating physicians did express concern over his reliance on narcotics, there is little evidence showing that they thought that narcotics were causing his pain. As a result, whether Caillier considered information about plaintiff's drug or narcotic use would not be sufficient grounds for discounting his opinion. However, as discussed above, the administrative law judge gave several reasons to support her conclusion that

plaintiff's limitations were not so severe as to preclude him from working. Therefore, even if the administrative law judge improperly concluded that Caillier relied in part on inaccurate information, that error would be harmless.

Finally, plaintiff argues that if the administrative law judge had questions about how Caillier reached his conclusions, she should have solicited additional information. Contrary to plaintiff's assertion, the administrative law judge was not required to recontact Caillier or obtain other medical expert testimony. An administrative law judge does not need to recontact a medical source or call a medical expert unless she is unable to determine whether the claimant is disabled. 20 C.F.R. §§ 404.1512(e), 416.912(e) (administrative law judge will recontact medical source when evidence is inadequate to determine disability); 20 C.F.R. §§ 404.1519a(b), 416.919a(b) (administrative law judge may order consultative examination "when the evidence as a whole, both medical and nonmedical, is not sufficient to support a decision on [the] claim"); 20 C.F.R. §§ 404.1527(f)(2)(iii), 416.927(f)(2)(iii) (administrative law judge may ask for opinion from medical expert on nature and severity of impairment and on whether impairment equals listed impairment). Here, the evidence was adequate to find plaintiff not disabled, and the administrative law judge acted within her discretion in deciding not to seek further medical information in making her step three and four findings. See Luna v. Shalala, 22 F.3d 687, 692 (7th Cir. 1994) (court "generally respects the ALJ's reasoned judgment" regarding how much evidence needed to make finding

about disability). In sum, the administrative law judge appropriately considered and weighed Caillier's assessment of plaintiff's limitations and discounted his opinion for good reasons that are supported by substantial evidence in the record.

C. Credibility Determination

Plaintiff asserts that the administrative law judge failed to account for the limiting effects of his pain and to follow the requirements of Social Security Ruling 96-7p. Under Social Security Ruling 96-7p, an administrative law judge must follow a two-step process in evaluating an individual's own description of his or her impairments: 1) determine whether an "underlying medically determinable physical or mental impairment" could reasonably be expected to produce the individual's pain or other symptoms; and 2) if such a determination is made, evaluate the "intensity, persistence, and limiting effects of the individual's symptoms to determine the extent to which the symptoms limit the individual's ability to do basic work activities." Social Security Ruling 96-7p, 1996 WL 374186, *1 (1996); see also Scheck v. Barnhart, 357 F.3d 697, 702 (7th Cir. 2004).

When conducting this evaluation, the administrative law judge may not reject the claimant's statements regarding his symptoms solely on the ground that the statements are not substantiated by objective medical evidence. Carradine v. Barnhart, 360 F.3d 751, 753 (7th Cir. 2004). Instead, the administrative law judge must consider the entire case record

with great care to determine whether the individual's statements are credible. Id. Relevant factors the administrative law judge must evaluate are 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. Social Security Ruling 96-7p; 20 C.F.R. § 404.1529©). See also Scheck, 357 F.3d at 703; Zurawski, 245 F.3d at 887.

An administrative law judge's credibility determination is given special deference because the administrative law judge is in the best position to see and hear the witness and to determine credibility. Shramek v. Apfel, 226 F.3d 809, 812 (7th Cir. 2000). In general, an administrative law judge's credibility determination will be upheld unless it is "patently wrong." Prochaska v. Barnhart, 454 F.3d 731, 738 (7th Cir. 2006); Sims v. Barnhart, 442 F.3d 536, 538 (7th Cir. 2006) ("Credibility determinations can rarely be disturbed by a reviewing court, lacking as it does the opportunity to observe the claimant testifying."). However, the administrative law judge still must build an accurate and logical bridge between the evidence and the result. Shramek, 226 F.3d at 811.

Contrary to plaintiff's assertions, the administrative law judge considered the effects of his pain. She specifically noted that plaintiff stated that he was in constant pain and determined that he had moderate difficulties maintaining concentration, persistence or pace. Although the administrative law judge found that plaintiff had a residual functional capacity for light work, she also found that there were a significant amount of sedentary jobs that plaintiff could perform.

The administrative law judge stated good reasons for concluding that plaintiff's testimony was not entirely credible. She considered the fact that the various medical reports and tests indicated that plaintiff's pain remained not fully explained. She remarked on the conservative nature of plaintiff's treatment, which included only pain medication, physical therapy and one series of injections. Cf. Carradine, 360 F.3d at 755 (improbable that claimant with somatoform disorder would undergo heavy doses of strong drugs and surgical implants to bolster credibility of pain complaints).

In addition to the medical evidence, the administrative law judge also considered other relevant factors listed in SSR 96-7p. She noted that although plaintiff's activities exacerbate his pain, he continues to engage in them, suggesting that he is able to handle the accompanying increase in his symptoms. There is no indication that the administrative law judge failed to take into consideration the limited extent that plaintiff engaged in these activities. Plaintiff's performance of the activities, even for a limited period, is still evidence

that his alleged symptoms are not as severe as he claims and that he is capable of performing light work.

The administrative law judge discussed the sharp decline in plaintiff's work history between 1997 and 2003, noting that it indicates factors other than his pain have contributed to his not working. Plaintiff argues that his decline in work history was because of lack of available construction work and he points out that he returned to work when the prednisone relieved his symptoms. However, as noted by the administrative law judge, plaintiff did not attempt to find other types of work or seek out vocational rehabilitation to accommodate his limitations. This is confirmed by Kent, one of plaintiff's treating physicians, who indicated that although plaintiff's condition precluded heavy physical labor, he should be able to perform less strenuous work.

The administrative law judge could have viewed the above evidence in a different light. However, the court's reviewing authority does not extend to deciding whether the administrative law judge reached the "best" decision or the one that the court might have reached; it is limited to deciding whether the decision she did make is supported by substantial evidence. Because the administrative law judge's credibility determination was not patently wrong and is supported by the evidence, there is no basis for remand.

D. Additional Evidence

Evidence submitted to the Appeals Council after the administrative law judge issued her decision is not part of the record for judicial review in this court unless plaintiff shows the evidence is new, "material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." 42 U.S.C. § 405(g); Perkins v. Chater, 107 F.3d 1290, 1296 (7th Cir. 1997). Evidence is "new" if it "was not in existence or available to the claimant at the time of the administrative proceeding." Perkins, 107 F.3d at 1296. New evidence is "material" if there is a "reasonable probability" that the administrative law judge would have reached a different conclusion had the evidence been considered. Johnson v. Apfel, 191 F.3d 770, 776 (7th Cir. 1999). Thus, to be material, the new evidence must relate to the claimant's condition "during the relevant time period encompassed by the disability application under review." Kapusta, 900 F.2d at 97.

Plaintiff contends that Caillier's June 22, 2006 letter is new evidence because it could not have been written at the time of the administrative law judge's decision. He asserts that the letter is material because it directly rebuts the administrative law judge's findings and would have addressed her concerns had she been able to consider it. Plaintiff also contends that he had good cause for not submitting this evidence at the time of the hearing, arguing that he did not know the basis on which the administrative law judge would rely in rejecting Caillier's initial report until she issued her written decision. According to plaintiff, the

administrative law judge did not advise him of her concerns about the psychological evidence at the time of the hearing, preventing him from addressing those concerns.

I am not persuaded that Caillier's rebuttal to the administrative law judge's decision would have affected the outcome of her decision. In any event, it is not new evidence. Even though Caillier's letter was not technically in existence at the time the hearing, he based his "new" statements entirely on his prior evaluation of plaintiff, explaining how he had reached his prior conclusions. Perkins, 107 F.3d at 1296 (holding same with similar evidence). Therefore, this derivative evidence also was "'available' at the time of the earlier proceeding and does not qualify under sentence six as 'new.'" Id. (quoting Sample v. Shalala, 999 F.2d 1138, 1144 (7th Cir. 1993)). Further, plaintiff has not shown good cause for his failure to include Caillier's explanations in the earlier record. The mere fact that Caillier critiqued and responded to the administrative law judge's written opinion does not amount to good cause. "[S]uch a rule would amount to automatic permission to supplement records with new evidence after the ALJ issues a decision in the case, which would seriously undermine the regularity of the administrative process." Id. Accordingly, I am denying plaintiff's motion to remand.

ORDER

IT IS ORDERED that:

1. Plaintiff Kevin Simila's motion to remand pursuant to sentence six of 42 U.S.C. § 405(g) is DENIED.

2. The decision of defendant Michael Astrue, Commissioner of Social Security, is AFFIRMED and plaintiff Kevin Simila's appeal is DISMISSED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 1st day of October, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge