

**UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF ILLINOIS  
 Urbana Division**

<b>IRIS O. GREEN,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>COMMISSIONER OF SOCIAL    SECURITY, sued as JoAnne B. Barnhart,</b>	)	<b>Case No. 06-2016</b>
	)	
	)	
<b>Defendants.</b>	)	

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**REPORT AND RECOMMENDATION**

In December 2004, Administrative Law Judge Gerard Rickert (hereinafter “ALJ”) denied Plaintiff Iris Green’s application for social security disability insurance benefits (hereinafter “DIB”) and social security income (hereinafter “SSI”). The ALJ based his decision on a finding that although Plaintiff is unable to perform her past relevant work, she is capable of performing other work that exists in significant numbers in the national economy.

In January 2006, Plaintiff filed a complaint against Defendant Jo Anne Barnhart, the Commissioner of Social Security, seeking judicial review of the ALJ’s decision to deny her social security benefits. In July 2006, Plaintiff filed a Motion for Summary Judgment or Remand (#13). In August 2006, Defendant filed a Motion for an Order Which Affirms the Commissioner’s Decision (#15). After reviewing the administrative record and the parties’ memoranda, this Court recommends, pursuant to its authority under 28 U.S.C. § 636(b)(1) that Plaintiff’s Motion for Summary Judgment or Remand (#13) be **GRANTED**.

**I. Background**

**A. Procedural Background**

Plaintiff filed her applications for DIB and SSI in September 2002, alleging that she became disabled on August 10, 2002, due to an injury in her lower back that caused pain in her back and left leg. The Social Security Administration (hereinafter “SSA”) denied Plaintiff’s application originally in November 2002 and upon consideration in February 2003. In March 2003, Plaintiff requested a hearing, which ALJ Rickert held in October 2004. At the

hearing, Plaintiff and vocational expert Dr. Chrisann Schiro Geist testified. Plaintiff was not represented by counsel at the hearing. In December 2004, the ALJ issued a decision denying Plaintiff benefits based on a finding that she was not disabled within the meaning of the Social Security Act because she was capable of performing certain work that is available in significant numbers in the national economy. In November 2005, the Appeals Council denied Plaintiff's request for review, making the ALJ's decision the final decision of the Commissioner. In January 2006, Plaintiff appealed this decision by filing a complaint with this Court pursuant to 42 U.S.C. § 405(g).

### **B. Plaintiff's Medical Background**

In August 2002, Plaintiff consulted Dr. Frank Wrestler complaining of back pain that extended down her left leg. (R. 102.) Dr. Wrestler reported that any type of movement of her legs or feet produced severe, excruciating lower back pain to the extent Plaintiff was "writhing in pain." (R. 102.) This pain radiated from her lower back to her left leg. An MRI of the lumbar spine showed disc protrusion at L4-5, herniation at L5-S1, and possible fragmentation at L5-S1. (R. 102, 114.) Dr. Wrestler also noted Plaintiff's obesity, listing her weight as 260 pounds. (R. 102.) He recommended a diagnostic myelogram and CT scan. (R. 102.) Dr. Wrestler's subsequent office notes (through April 2004) indicate Plaintiff's continuing complaints of back and leg pain, referrals to other doctors, and also note Plaintiff's weight and the need to lose weight. (R. 171-86.) For example, in January 2003, Dr. Wrestler recommended TOPS, a weight loss program. (R. 185.)

A CT scan taken in August 2002 suggested disc bulging at L4-5 and possible herniation at L5-S1. (R. 112.) Dr. John Helfrich noted that the CT scan was difficult to perform and read because of Plaintiff's obesity. (R. 112.) In September 2002, Dr. Helfrich opined that Plaintiff had lumbar radiculopathy with a herniated disc at L5-S1. (R. 128.) Plaintiff consulted Dr. Helfrich again in February and March 2003, complaining of continuing pain in her thigh and left leg. (R. 139.) Dr. Helfrich reiterated his diagnosis of lumbar radiculopathy. (R. 139.) At the March consultation, he added obesity to his diagnosis. (R. 138.) An MRI conducted in March 2003 showed increased disc bulging at L5-S1 compared to the August 2002 MRI.

(R. 141.) Dr. Helfrich noted that he could not conduct the entire examination because Plaintiff could not tolerate the pain. (R. 141.)

In April 2003, Dr. Sadasiva Jampala opined that Plaintiff had a herniated disc at L5-S1 and probable disc fragment. (R. 140.) He recommended surgery or other intervention. (R. 140.) Dr. Helfrich saw Plaintiff again in April 2003 and reported that she had disc fragmentation at L5-S1 that had not been present in 2002. (R. 137.) He again diagnosed her with left lumbar radiculopathy and obesity. He recommended surgery and referred her to Dr. Emilio Nardone for surgery. (R. 137.)

In May 2003, Dr. Nardone performed microdisectomy surgery on Plaintiff's L5-S1 disc herniation and removed several pieces of extruded fragments. (R. 143.) In June 2003, Dr. Nardone noted that Plaintiff seemed to be doing well and she could return to work six weeks after the surgery. (R. 162.) In September 2003, Dr. Nardone noted that Plaintiff was doing well but still had some back and thigh pain. (R. 161.) He told her to lose weight. Plaintiff told Dr. Nardone she was not ready to return to work. He referred her to SafeWorks for a functional capacity evaluation (hereinafter "FCE") and stated that he would make a final decision regarding her work status at that point. (R. 161.)

In September 2003, Karen Caraway of SafeWorks Illinois conducted a FCE. (R. 146.) Ms. Caraway reported that Plaintiff put forth a mixed effort during testing, demonstrated questionable motivation, and exhibited abnormal pain behaviors and test responses, but tested negative for symptom magnification on most tests. (R. 147.) Based on Plaintiff's tested strength in a number of areas, the FCE report noted "safe weight restrictions" for occasional, frequent, and continuous lifting situations of fifteen pounds, ten pounds, and six pounds, respectively. (R. 150, 156.) The report concluded that Plaintiff demonstrated a capacity for work at a "sedentary-light physical demand level (0-35 pounds)." (R. 148.) Ms. Caraway opined that "[i]t is believed that Ms. Green has become accustomed to her current lifestyle." (R. 148.) She stated that Plaintiff could work a modified duty of four hours per day while completing a conditioning

program that would allow her time “to psychologically prepare for her return to full duty work, and continue to build muscular endurance.” (R. 148.)

Plaintiff consulted Dr. Wrestler in November 2003 regarding her back pain. He noted that Plaintiff needed to lose weight and stated “[w]ill go to TOPS.” (R. 176.) Plaintiff also began physical therapy in November 2003, at which time she continued to complain of pain in her lower back and legs. (R. 157-58.)

In December 2003, Plaintiff complained to Dr. Nardone of back and thigh pain. (R. 160.) Dr. Nardone opined that the pain did not seem to be related to the disc herniation. (R. 160.) He reported that she was taking Vicodin and was obese. (R. 160.) He told her that to improve her condition, she needed to lose weight, participate in a work out program with strengthening exercises, and most importantly, stop taking Vicodin. (R. 160.)

In April 2004, Dr. Wrestler noted that Plaintiff weighed 269 pounds and complained of back and left hip pain lasting four weeks. He reported that Plaintiff did not want any shot and listed pain clinic as a treatment option. He also noted that Plaintiff needed to lose weight to reduce pressure on her back. (R. 171-72.) In April 2004, Plaintiff consulted Dr. Nardone with complaints of back and thigh pain. (R. 159.) He noted that she would jump off the table when he touched the skin on her lower back and that she seemed to have more tenderness on the left side. He recommended a left sacroiliac joint injection. (R. 159.)

### **C. The Hearing Before the ALJ**

The ALJ held a hearing in October 2004, during which Plaintiff and Dr. Chrisann Schiro Geist, a vocational expert (hereinafter “VE”), testified. The ALJ first asked Plaintiff if she was aware of her right to representation, and she answered yes. After some discussion, Plaintiff stated that she wanted to proceed without an attorney.

Plaintiff testified that she left her job at Motel 6 after injuring her back on August 10, 2002. (R. 233, 235.) She stated she was in the hospital for a week and a half. In May 2003, she

had surgery, which did not stop her pain. (R. 236.) Her back hurts and the pain also radiates down her left leg. (R. 237.) She is unable to play with her children, clean her house, do laundry, do much cooking, or garden. (R. 238-39.) She drives only to take her son to school or to go to the doctor. (R. 239.) She attends parent-teacher conferences and is able to bathe and dress herself. (R. 241.) Plaintiff also testified that she weighed 272 pounds, and that she had gained about twenty pounds in the last four months. (R. 232.)

When the ALJ questioned Plaintiff about the cane she was using, Plaintiff testified that the hospital asked her if she had a cane, and she told them she could use her grandfather's cane. She stated that she only needs it when she is walking and she is hurting badly. (R. 240.)

The ALJ then called the VE to the stand and asked her if someone with Plaintiff's limitations would be able to perform her past work. (R. 242.) He described her limitations as the ability to do only light work, to lift ten pounds frequently or twenty pounds occasionally, to only occasionally climb stairs, and no stooping, kneeling, crouching, or crawling. (R. 242.) The VE testified that Plaintiff would be unable to do her past work with these limitations, but that she would be able to perform certain portions of her past work, such as cashiering. (R. 242-44.) The VE testified that, in Illinois, there are a number of jobs that someone with Plaintiff's limitations could perform including 13,900 cashier jobs with a sit-stand option, 30,217 cashier jobs at the light exertional level, 2,000 inspection jobs at the sedentary level, and 6,960 assembly jobs at the sedentary level with a sit-stand option.

The ALJ also asked the VE whether her testimony was consistent with data published in the Dictionary of Occupational Titles (hereinafter "DOT") and the VE stated it was. (R. 246.) The ALJ then asked Plaintiff if she had anything further to add and Plaintiff stated that she cannot stand for a long time and that when her back begins hurting, she needs to go straight to bed. She added that it is hard for her to do anything. (R. 246.)

#### D. The ALJ's Decision

The SSA defines “disabled” as the inability “to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. § 1382c(a)(3)(A). Social Security Regulations set forth a five-step inquiry to determine whether a claimant is disabled. 20 C.F.R. § 416.920(a-f). The ALJ must follow these steps in sequence, considering: (1) whether the claimant is presently employed; (2) whether the claimant’s impairment is “severe”; (3) whether the claimant’s impairment meets or exceeds one of a list of specific impairments; (4) whether the claimant is unable to perform his or her former occupation; and (5) whether the claimant is unable to perform any other work within the economy. *Garfield v. Schweiker*, 732 F.2d 605, 607 (7th Cir. 1984). At each step, if the claimant is affirmatively found disabled or not disabled, the inquiry ends, but if no determination can be made, the Commissioner proceeds to the next step. 20 C.F.R. § 416.920(a)(4).

The ALJ found that Plaintiff had not engaged in substantial gainful activity since the onset of her alleged disability. (R. 21.) He found that she had lower back pain with radiculopathy, and this medically determinable impairment or combination of impairments was severe under the Social Security Act and Regulations, but these impairments did not meet or medically equal one of the listed impairments in Regulation No. 4, Subpart P, Appendix 1. (R. 21.) He stated that Plaintiff was able to perform many daily activities. (R. 19.) He also stated that her “unwillingness” to lose weight was a factor that contributed to her continued back pain, and that although he observed Plaintiff using a cane at the hearing, it was too long for her. (R.19.) Furthermore, he found that Plaintiff’s allegations about her limitations were generally credible, but not to the extent alleged, and not with respect to her claim of total disability. (R. 21.) At Step Four, the ALJ found that, according to the VE’s testimony, Plaintiff could not perform any of her past relevant work based on her current limitations.

Regarding Plaintiff’s residual functional capacity (hereinafter “RFC”) to perform work, the ALJ found that Plaintiff was able to perform light work. In addition, the ALJ noted the

following limitations: She should not climb ladders, ropes, or scaffolds; she should only occasionally climb ramps and stairs; she should only occasionally stoop, kneel, crouch, or crawl; and she should avoid excessive vibrations. (R. 21-22.) Although Plaintiff could not perform her past relevant work, the VE testified that a number of jobs existed in the national economy that Plaintiff could perform. (R. 22.) Therefore, the ALJ concluded that she was not disabled.

## II. Standard of Review

Courts review an ALJ's decision pursuant to 42 U.S.C. § 405(g), which provides that "the findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive." The United States Supreme Court has defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Where conflicting evidence may allow reasonable minds to differ as to whether a claimant is disabled, the responsibility for making that determination rests with the ALJ. *Books v. Chater*, 91 F.3d 972, 978 (7th Cir. 1996); *Walker v. Bowen*, 834 F.2d 635, 640 (7th Cir. 1987). Therefore, the question for review is not whether the claimant is disabled, but only whether substantial evidence in the record supports the ALJ's finding of nondisability. *Id.*

The Court defers to the ALJ's determinations of credibility, "so long as they find some support in the record." *Edwards v. Sullivan*, 985 F.2d 334, 338 (7th Cir. 1993). However, when a credibility determination rests on objective rather than subjective factors, the reviewing court has greater freedom to review the ALJ's conclusion. *Herron v. Shalala*, 19 F.3d 329, 335 (7th Cir. 1994).

## III. Discussion

Plaintiff argues that the Court should reverse the ALJ's decision because it is not based on substantial evidence and it contains errors of law. Specifically, Plaintiff contends that (1) the ALJ failed to obtain a valid waiver of counsel from Plaintiff and then failed to fully develop the record; (2) the ALJ failed to consider the effect of Plaintiff's obesity on her ability to work;

(3) the ALJ's RFC finding is not supported by substantial evidence; (4) the ALJ failed to make a proper credibility finding; and (5) the ALJ erred when analyzing Step Five.

#### A. Waiver of Counsel

Plaintiff first argues that the ALJ failed to obtain a valid waiver of counsel because the ALJ failed to inform Plaintiff of the advantages of attorney representation.

The following colloquy occurred at the hearing:

ALJ: I note you're here without an attorney or other representative. Were you aware of your right to be represented by an attorney?

CLMT: Yes, sir.

ALJ: Okay, and you received a letter from my office reminding you of that right, giving you a list of possible sources of representation, do you remember getting that?

CLMT: Yes, sir.

ALJ: Okay. And that letter would have pointed out to you that, although we cannot appoint an attorney to represent you, that if you can't afford an attorney sometimes services are available from a legal aide [(sic)] agency and in and apart from that, there are many attorneys that take these cases on a contingent fee where you don't pay anything up front. You only pay if your claim is successful and then you only pay a percentage of the past due money. Were you aware of all of that?

CLMT: Yes, sir.

ALJ: Is it your desire to proceed without an attorney?

CLMT: Yes, sir.

ALJ: Okay. Hang on one second here, let me make sure, want to make sure, okay. Okay, we do have the letter in the record, okay.

(R. 228-29.) The ALJ referred to a letter Plaintiff received. Plaintiff received several letters informing her that she had a right to representation. The following excerpt is from one of those letters:

You may choose to be represented by a lawyer or other person. A representative can help you get evidence, prepare for the hearing, and present your case at the hearing. If you decide to have a representative, you should find one immediately so that he or she can start preparing your case.

Some private lawyers charge a fee only if you receive benefits. Some organizations may be able to represent you free of charge. Your representative may not charge or receive any fee unless we approve it.

We have enclosed the leaflet “Social Security and Your Right to Representation.” We are also enclosing a list of groups that can help you find a representative.

(Letter to Plaintiff dated March 6, 2003, R. 39-40.) The leaflet that the ALJ mentioned describes in detail what a representative, including an attorney, can do to help the claimant. It also discusses what a representative can charge and states as follows: “The court can allow a reasonable fee for your attorney. The fee usually will not exceed 25 percent of all past-due benefits that result from the court’s decision. Your attorney cannot charge any additional fee for services before the court.” (Leaflet, R. 41-41A.)

A claimant has a statutory right to counsel at a disability hearing. 42 U.S.C. § 406; 20 C.F.R. § 404.1700. If properly informed of the right, the claimant may waive it. *Thompson v. Sullivan*, 933 F.2d 581, 584 (7th Cir. 1991). The *Thompson* decision established the requirements for a valid waiver, stating as follows:

Information that will ensure a valid waiver of counsel includes an explanation of the manner in which an attorney can aid in the proceedings, the possibility of free counsel or a contingency arrangement, and the limitation on attorneys' fees to twenty-five percent of past-due benefits plus required court approval of the fees.

*Id.* In *Thompson*, the plaintiff received a letter with language that was very similar to the language in Plaintiff’s letter, as shown by the following excerpt:

**YOU HAVE THE RIGHT TO BE REPRESENTED BY AN ATTORNEY OR OTHER REPRESENTATIVE OF YOUR CHOICE.** A representative can help you obtain evidence, and can help you and your witnesses prepare for the hearing. Also, a representative can question witnesses and present statements in support of your claim . . . .

. . . If you are unable to find a representative, we have enclosed a list of organizations which may be able to help you in locating one. As indicated on the enclosed list, some private attorneys may be willing to represent you and not

charge a fee unless your claim is allowed. Your representative must obtain approval from the Social Security Administration for any fee charged. Also, if you are not able to pay for representation and you believe you might qualify for free legal representation, the list contains names of organizations which may be able to help you.

*Id.* At the hearing, the ALJ briefly questioned Thompson regarding whether he was aware of his right to have a lawyer and whether he had given up that right.

Thompson later argued that the SSA failed to advise him of the twenty-five percent limitation on fees and the court agreed. Furthermore, notwithstanding the fact that Thompson had received written information regarding the other two elements of a valid waiver, the court stated as follows:

The dialogue regarding counsel also evidences the ALJ's failure to fully discuss the benefits of legal representation or the possibility of contingency arrangements. As noted by the court in *Hawwat*, “[t]he information regarding the cost of any attorney is particularly relevant in disability cases where shortage of funds is likely to be an issue for the claimants.” *Hawwat [v. Heckler]*, 608 F.Supp. [106] at 109 [(N.D. Ill. 1984)]. The ALJ should have made an effort to cover these important matters concerning representation by an attorney.

*Id.* at 585. Based on the ALJ’s failure to adequately explain the three elements, the court concluded that Thompson had not knowingly and intelligently waived his right to counsel. *Id.*

The facts in this case are similar to those in *Thompson*. Here, Plaintiff received the letters and the leaflet explaining her right to representation. However, the language in *Thompson* indicates that the ALJ has an independent obligation to explain the three elements of a claimant’s right to representation to ensure that the waiver is knowing and valid, even if the Social Security Administration has sent the claimant written materials regarding her right to counsel. In *Binion v. Shalala*, the Seventh Circuit court reiterated that the obligation to inform a claimant of her rights regarding representation devolves on the ALJ. The court stated as follows: “To ensure a valid waiver of counsel, we require the ALJ to explain to the *pro se* claimant (1) the manner in which an attorney can aid in the proceedings, (2) the possibility of free counsel or a contingency arrangement, and (3) the limitation on attorney fees to 25 percent of past due benefits and

required court approval of the fees.” *Binion v. Shalala*, 13 F.3d 243, 245 (7th Cir. 1994) (emphasis added) (citing *Thompson*, 933 F.2d at 584).

Some courts have indicated that the written materials may provide enough information to show a valid waiver if the ALJ establishes at the hearing that the claimant received, read, and understood the notices. *See, e.g., Seamon v. Barnhart*, No. 05-C-13-C, 2005 WL 1801406, \*9-10 (W.D. Wis. July 29, 2005) (unreported). In the instant case, the ALJ did not ask that question. Furthermore, the Seventh Circuit court indicated in *Binion* that the ALJ has an obligation to explain the claimant’s rights that apparently is independent of the Commissioner’s obligations.

In this case, the ALJ did not explain to Plaintiff the benefits of having an attorney (or the twenty-five percent limitation on attorney fees<sup>1</sup>). Accordingly, the Court concludes that Plaintiff’s waiver of counsel was invalid.

### **B. Whether the ALJ Adequately Developed the Record**

The ALJ has a heightened responsibility to an unrepresented claimant regardless of the waiver's validity. *Binion*, 13 F.3d at 245 (“the ALJ has the same duty to develop the record when a plaintiff is without counsel regardless of whether the plaintiff’s waiver of counsel was valid”). But even when a claimant proceeds *pro se*, the court generally respects the ALJ’s “reasoned judgment” regarding how much evidence is needed to make a finding about disability. *Luna v. Shalala*, 22 F.3d 687, 692 (7th Cir. 1994). As long as the ALJ has enough evidence before him to make a disability determination that is supported by substantial evidence, the ALJ has adequately developed the record. *Henderson v. Apfel*, 179 F.3d 507, 513 (7th Cir. 1999). “Moreover, a significant omission is usually required before this court will find that the

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<sup>1</sup>The Court notes that at least one court has stated that certain language in the written materials regarding the twenty-five percent fee limit is unclear. *Slaughter v. Barnhart*, 05-C-5988, 2006 WL 2506215, \*3 n.2 (N.D. Ill. July 21, 2006).

Secretary failed to assist *pro se* claimants in developing the record fully and fairly." *Luna*, 22 F.3d at 692.

When a claimant's waiver of counsel is invalid, this fact alone is not automatic cause for reversing the ALJ's decision. *Binion*, 13 F.3d at 245. The significance of an invalid waiver is that the burden shifts to the Commissioner to show that the ALJ adequately developed the record. *Id.* To do this, the Commissioner must prove that the ALJ "'scrupulously and conscientiously probe[d] into, inquire[d] of and explore[d] . . . all of the relevant facts'." *Id.* (citing *Gold v. Sec. of HEW*, 463 F.2d 38, 43 (2d Cir. 1972)). If the Commissioner establishes that the ALJ fully and fairly developed the record, the plaintiff then has an opportunity to rebut this showing by demonstrating prejudice, by proving that the ALJ did not elicit all of the relevant information from the claimant, or by demonstrating an evidentiary gap. *Id.*

After reviewing the record in this case and the parties' memoranda, the Court concludes that the Commissioner has failed to show that the ALJ adequately developed the record. Most significantly, the medical record creates a question as to Plaintiff's ability to return to work. The Court notes that Dr. Nardone specifically stated that he would make a final decision regarding Plaintiff's work status after SafeWorks performed a FCE. (R. 161.) The record contains no information from Dr. Nardone or Plaintiff's other doctors regarding Plaintiff's work status after that point. This is particularly significant in light of the fact that the FCE stated only that Plaintiff could work a modified schedule, that is, four hours, while she completed a work-hardening program. Accordingly, the Court recommends remanding the case.

Plaintiff also argues that the Commissioner failed to meet her burden of showing that the ALJ adequately developed the record because the ALJ failed to (1) make a proper RFC finding incorporating all of Plaintiff's impairments, including obesity; (2) follow the most current recommendations made by Plaintiff's treating physicians and instead relied on outdated recommendations by nontreating, non-examining doctors; (3) follow SSR 96-7p in analyzing Plaintiff's credibility; and (4) properly inquire into the accuracy of the VE's testimony in order to make a proper Step Five determination. Besides arguing that the Court should remand for

failing to develop the record, Plaintiff contends that each element that the ALJ failed to address constitutes independent error subject to remand. The Court will address some of these issues below.

### **C. Plaintiff's Obesity**

Plaintiff argues that the ALJ failed to address the effects of Plaintiff's obesity in his decision. The Court notes that Plaintiff has raised this argument only with regard to the ALJ's determination of Plaintiff's RFC at Steps Four and Five. Therefore, she has waived the issue as it relates to the ALJ's Step Three analysis.

Pursuant to SSR 02-1p, an ALJ must consider a claimant's obesity when assessing a claimant's RFC assessment. SSR 02-1p. In addition, the ALJ must consider the claimant's medical record as a whole. *Barrett v. Barnhart*, 355 F.3d 1065, 1068 (7th Cir. 2004) (citing 20 C.F.R. § 404.1523). ALJ Rickert's decision does not discuss how obesity affected Plaintiff's RFC at Steps Four and Five. He failed to weigh the evidence relating to Plaintiff's obesity or to exercise his judgment in accordance with SSR 02-1p's guidelines. He has not articulated his assessment of that evidence to assure us that he considered it nor does his decision enable us to trace the path of his reasoning as it relates to the issue of obesity. *See Blakes v. Barnhart*, 331 F.3d 565, 569 (N.D. Ill. 2003) (stating that the ALJ must build an accurate and logical bridge from the evidence to her conclusions so that the court may provide a meaningful review of the findings).

The Seventh Circuit court has stated that a failure to explicitly consider the effects of obesity may be harmless error. *Prochaska v. Barnhart*, 454 F.3d 731, 736 (7th Cir. 2006). In *Prochaska*, the court found that because the ALJ's decision was predicated on the opinions of doctors who discussed the plaintiff's weight, and because the plaintiff had not pointed to any evidence suggesting that her obesity significantly aggravated her physical impairments or contributed to her physical limitations, the ALJ's failure to comply with SSR 02-1p was harmless. The court reached the same conclusion in *Skarbek v. Barnhart*, 390 F.3d 500, 504 (7th Cir. 2004), explaining as follows:

[A]ny remand for explicit consideration of Skarbek's obesity would not affect the outcome of this case. *See Keys v. Barnhart*, 347 F.3d 990, 994-95 (7th Cir. 2003) (applying harmless error review to ALJ's determination). Notably, Skarbek does not specify how his obesity further impaired his ability to work, but speculates merely that his weight makes it more difficult to stand and walk. Additionally, the ALJ adopted the limitations suggested by the specialists and reviewing doctors, who were aware of Skarbek's obesity. Thus, although the ALJ did not explicitly consider Skarbek's obesity, it was factored indirectly into the ALJ's decision as part of the doctor's opinions.

*Skarbek*, 390 F.3d at 504.

Although Plaintiff contends that the ALJ should have considered the impact of her obesity on her RFC, she does not point to any evidence in the record apart from her weight to suggest that she would be unable to perform light or sedentary work with the postural restrictions set forth by the ALJ. Absent evidence, the ALJ may not infer that Plaintiff's obesity limited her functional ability. *See* SSR 02-1p (“[W]e will not make assumptions about the severity or functional effects of obesity combined with other impairments”). Moreover, the ALJ did consider Plaintiff's obesity indirectly by relying on Dr. Nardone's report. As in *Skarbek* and *Prochaska*, the ALJ's failure in this case explicitly to consider Plaintiff's obesity at Steps Four and Five of the sequential evaluation process appears harmless based on the evidence in the record.

Nevertheless, the ALJ had an obligation under SSR 02-1P to address the issue of Plaintiff's obesity. Therefore, on remand, the ALJ is directed to consider whether Plaintiff Green's obesity affects her RFC and whether it prevents her from working. He should also articulate his reasoning on this issue. To the extent the record is inadequate for the ALJ to address the issue of Plaintiff's obesity, the ALJ is directed to fully develop the record consistent with his obligation to do so (that is, if Plaintiff is acting *pro se*).

#### **D. The ALJ's RFC Finding**

Plaintiff next argues that substantial evidence fails to support the ALJ's RFC finding. Specifically, Plaintiff contends that the ALJ relied too heavily on the state agency physician's

report dated November 13, 2002, and he failed to perform a function-by-function assessment as required by SSR 96-8p.

Plaintiff contends that any weight the ALJ gave the state agency doctor's RFC is improper because that assessment occurred before Plaintiff's surgery. The Court agrees that the November 2002 assessment does not aid the ALJ in determining RFC and the ALJ should not have considered it. However, disregarding that evidence entirely does not affect the ALJ's RFC determination. It appears that the ALJ did not rely on this pre-surgery assessment; instead, he relied on Dr. Nardone's June 2003 assessment and the FCE dated September 30, 2003.

The ALJ accurately characterized Dr. Nardone's June 2003 report, except that he erroneously stated that Plaintiff could continuously drive a vehicle while the doctor reported that she could drive only "frequently." (R. 19.) In addition, Plaintiff contends that the ALJ erred by relying on Dr. Nardone's speculation regarding Plaintiff's likely maximum improvement. Contrary to Plaintiff's argument, it is clear that the ALJ based the RFC on Dr. Nardone's assessment of Plaintiff's current condition, rather than on his statement that Plaintiff would have no functional restrictions at some time in the future.

The ALJ accurately characterized the September 2003 FCE as indicating that Plaintiff could work modified duty at a sedentary-light level (0-35 pounds) while undergoing work conditioning. (R. 19.) Plaintiff contends that the ALJ ignored entire sentences in the report and focused on one statement that supported the ALJ's RFC determination rather than looking at the foundation for the FCE, which stated that Plaintiff can lift fourteen pounds occasionally, ten pounds frequently, and six pounds continuously. Plaintiff also contends that the ALJ ignored the FCE's statements that Plaintiff could perform modified duty work, that is, only four hours a day.

As noted earlier, the medical record has raised some questions. In light of the ALJ's obligation to fully develop the record for a *pro se* claimant, this error requires remand. In particular, Dr. Nardone expressly stated that he would make a final decision regarding Plaintiff's work status after SafeWorks performed a FCE. (R. 161.) The record contains no information

from Dr. Nardone or Plaintiff's other doctors regarding Plaintiff's work status after that point. In addition, the FCE is not entirely consistent with Dr. Nardone's report. The FCE stated only that Plaintiff could work a modified schedule, that is, four hours a day, while she completed a work-hardening program. It stated that Plaintiff could do "sedentary-light physical demand level (0-35 lbs.)." (R. 19.) Dr. Nardone indicated no limits on an eight-hour day and he reported that Plaintiff could lift and carry forty pounds occasionally. The ALJ did not articulate how he reconciled the two reports.

Furthermore, the ALJ's conclusion that Plaintiff could perform light work raises another fundamental problem. The regulations define light work as follows:

Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

20 C.F.R. § 404.1567. In addition, SSR 83-10 requires a claimant to be able to stand or walk for a total of six hours in an eight-hour day for the full range of light work. The Seventh Circuit court has explicitly recognized that light work requires a capacity to stand and walk for six hours a day. *Allen v. Sullivan*, 977 F.2d 385, 390 (7th Cir. 1992) (citing *DeFrancesco v. Bowen*, 867 F.2d 1040, 1044 (7th Cir. 1989)).

Based on this authority, the ALJ's conclusion that Plaintiff was capable of performing the exertional requirements of light work implies (absent relevant limitations) that she is able to stand or walk for six hours in an eight-hour day. Here, the ALJ did not include limitations on Plaintiff's ability to stand or walk nor did the RFC include a sit-stand option. Moreover, Dr. Nardone's June 2003 assessment reported that Plaintiff could sit, stand, and walk "frequently," that is, 34-66% of the day (2.6 to 5.3 hours in an eight-hour day). Thus, the medical evidence does not support the ALJ's RFC determination that Plaintiff can do light work

including standing or walking for six hours a day. In addition, the “hypothetical question posed by the ALJ to the VE must fully set forth the claimant's impairments to the extent that they are supported by the medical evidence in the record.” *Herron*, 19 F.3d at 337. Here, the ALJ’s hypothetical questions to the VE did not include any limitations on Plaintiff’s ability to stand or walk consistent with Dr. Nardone’s report. Therefore, on remand, the Court directs the ALJ to reconsider whether Plaintiff can meet the standing/walking requirements for light work and to articulate his reasoning. If the record is inadequate to determine this issue, then the ALJ should develop the record consistent with his legal obligation to do so. *See Skarbek*, 390 F.3d at 504 (“An ALJ need recontact medical sources only when the evidence received is inadequate to determine whether the claimant is disabled. *See* 20 C.F.R. § 404-1512(e).”).

Finally, the Court finds that the ALJ did not adequately articulate how he arrived at his RFC determination. He described the three sources of information in the medical record, then introduced his conclusion with the following clause: “Considering the evidence as a whole, and discounting the claimant’s allegations to some extent for the reasons indicated above . . . .” (R. 19.) Even assuming that the “discounting” occurred as a result of the ALJ’s credibility assessment, the Court cannot provide a meaningful review of the decision without knowing how the ALJ’s “discounting” applied to the medical evidence on which the ALJ based his RFC determination. *See* SSR 96-8p (“The RFC assessment must include a narrative discussion describing how the evidence supports each conclusion, citing specific medical facts (e.g., laboratory findings) . . . .”). Accordingly, on remand, the Court directs the ALJ to articulate how he arrived at the RFC determination in addition to addressing the specific issues raised above.

### **E. The ALJ’s Credibility Finding**

Plaintiff also argues that the ALJ erred by determining that Plaintiff was not totally credible.

Regarding Plaintiff's credibility, the ALJ stated as follows:

The claimant's statements regarding her symptoms and resulting limitations are generally credible, but not to the extent alleged, and not with respect to her claim of total disability. On July 1, 2003, the claimant was cleared to return to work at the light exertional level with restrictions that would last until February 2004, at which point all restrictions would end. When the claimant underwent a functional capacity evaluation in September 2003, the examiner noted signs of symptom magnification and lack of effort. The claimant was assessed as capable of working modified duty at the sedentary to light exertional level. Part of the reason for any continued back pain would seem to be unwillingness on the claimant's part to follow her doctor's instructions. The claimant was told in December 2003, that if she wanted her condition to improve, she would need to lose weight, begin an exercise program, and stop taking Vicodin. At the hearing, the claimant testified that Vicodin was one of the medications she was currently taking. Also, she testified that she had gained weight in recent months. The claimant is apparently not exercising. The claimant is capable of performing many activities of daily living. She cooks, goes shopping, regularly drives several hours a day, occasionally goes to church, occasionally plays cards and other games, watches television, reads, and takes care of her personal hygiene needs. Although the claimant uses a cane, it is actually her father's cane and it was obvious at the hearing that the cane was too long for her.

R. 48-49 (citations omitted).

Plaintiff contends that this credibility finding constitutes reversible error because (1) it relied on the FCE report that indicated symptom magnification; (2) it was based partly on Plaintiff's failure to comply with her doctor's instructions; (3) it was based partly on Plaintiff's testimony regarding her daily activities; (4) it was based partly on Plaintiff's use of her grandfather's too-large cane; and (5) it ignored Plaintiff's testimony as to the degree of pain she experienced.

As an initial matter, the Court finds less than helpful credibility determinations that use vague language such as that found here: "The claimant's statements regarding her symptoms and resulting limitations are generally credible, but not to the extent alleged, and not with respect to her claim of total disability." (R. 18.) To what "statements" is the ALJ referring? What limitations? What symptoms? The language seems to imply that the ALJ has simply "discounted" any of Plaintiff's statements that might contradict the ALJ's conclusions, and

indeed, the ALJ refers to “discounting the claimant’s allegations to some extent” later in his decision, again without discussing what allegations he is referring to.

When a credibility determination rests on subjective factors, the Court defers to the ALJ’s determinations of credibility. Subjective evidence of credibility has been described as “intangible and unarticulable elements which impress the ALJ [and] unfortunately leave no trace that can be discerned.” *Kelley v. Sullivan*, 890 F.2d 961, 964 (7th Cir. 1989) (internal quotations omitted). However, when, as here, a credibility determination rests on objective rather than subjective factors, the reviewing court has more freedom to review the ALJ’s determination of credibility and the ALJ “has no special advantage over a reviewing court in determining credibility.” *Dray v. R.R. Ret. Bd.*, 10 F.3d 1306, 1314 (7th Cir. 1993).

First, the ALJ referred to the FCE’s report of possible symptom magnification. This is a valid reason for questioning a plaintiff’s credibility as to those symptoms or functional abilities involved in the test, especially in this case where, as Defendant noted, Plaintiff has cited no medical evidence that she had any mental impairment that might explain the symptom magnification. Second, the fact that Plaintiff used her grandfather’s cane, even though it may be too large, is not a persuasive basis for determining Plaintiff’s testimony to be not credible. Third, as Plaintiff noted, consideration of activities of daily living is always subject to certain caveats. *See* SSR 96-7p (“The individual’s daily activities may be structured so as to minimize symptoms to a tolerable level or eliminate them entirely, avoiding physical or mental stressors that would exacerbate the symptoms.”); *Clifford v. Apfel*, 227 F.3d 871, 872 (7th Cir. 2000) (noting that minimal daily activities do not establish that a person is capable of engaging in substantial physical activity). Given the deference that the Court applies to an ALJ’s credibility determination, none of these three reasons establish that the ALJ’s credibility determination is “patently wrong.” *Pope v. Shalala*, 998 F.2d 473, 486 (7th Cir. 1993) (stating that the court generally will defer to the ALJ’s credibility determination unless it is “patently wrong in view of the cold record”).

More significant, however, is the ALJ's reference to Plaintiff's failure to follow her doctors' instructions to lose weight, work out, and stop taking Vicodin. Presumably (although he did not articulate this), the ALJ believed that this indicated that Plaintiff's complaints of disabling pain and functional limitations were not credible because one would expect a person disabled by pain to make a greater effort to comply with recommended medical treatment.

The Court first notes that the ALJ did not base his finding of no disability on Plaintiff's failure to follow her doctors' instructions. *See* SSR 82-59, Titles II and XVI: Failure To Follow Prescribed Treatment. He only considered her failure to comply with her doctor's instructions as one of several factors suggesting that Plaintiff's complaints of disabling pain were not entirely credible.

SSR 96-7p supports the contention that an ALJ can properly consider evidence of noncompliance as a factor bearing on credibility. SSR 96-7p, Titles II and XVI: Evaluation of Symptoms in Disability Claims: Assessing the Credibility of an Individual's Statements (stating "[T]he individual's statements may be less credible if the level or frequency of treatment is inconsistent with the level of complaints, or if the medical reports or records show that the individual is not following the treatment as prescribed and there are no good reasons for this failure.") However, it states that the ALJ "must not draw any inferences about an individual's symptoms and their functional effects from a failure to seek or pursue regular medical treatment *without first considering any explanations* that the individual may provide, or other information in the case record, that may explain infrequent or irregular medical visits or failure to seek medical treatment." SSR 96-7p (emphasis added). Thus, when a claimant has failed to lose weight as recommended by a physician, an ALJ may not summarily question the claimant's credibility on this basis without considering other factors.

Failing to lose weight is not like failing to follow a prescribed mode of treatment because weight loss is not like following a prescription or taking a pill. *Hammock v. Bowen*, 879 F.2d 498, 503-04 (9th Cir. 1989). "Significant weight loss is indeed difficult even for the iron willed. For the less determined, who suffer from other painful and debilitating impairments that restrict

movement, and no doubt sap the resolve for self-improvement, such a significant loss of weight may be impossible.” *Lovelace v. Bowen*, 813 F.2d 55, 59 (5th Cir. 1987); *Scott v. Heckler*, 770 F.2d 482, 486 (5th Cir. 1985) (stating that losing weight is a task that is not equivalent to taking pills or following a prescription). *See also Graham v. Sullivan*, 794 F.Supp. 1045, 1052-53 (D.Kan. 1992) (“Obesity by itself does not mean the claimant has refused treatment.”).

The Seventh Circuit court has cautioned that disability adjudicators should be wary of drawing adverse inferences from an individual’s failure to alter behaviors viewed by many as merely bad habits, such as smoking and obesity. In *Shramek v. Apfel*, the court rejected an ALJ’s credibility determination that was based on the plaintiff’s failure to quit smoking where there was no evidence that the plaintiff could work if she stopped smoking or that smoking contributed to her pain, swelling, and other symptoms. *Shramek v. Apfel*, 226 F.3d 809, 812 (7th Cir. 2000). In *Barrett v. Barnhart*, the court rejected the ALJ’s suggestion that the plaintiff’s arthritis would be less severe if she lost weight, noting that the plaintiff’s obesity was not remediable but was caused by hypothyroidism. The court also stated that “if an applicant’s obesity is *in fact* remediable, then it is no more a basis for an award of benefits than any other remediable condition would be.” *Barrett*, 355 F.3d at 1068.

Here, there is no evidence that Plaintiff’s obesity was not remediable; in fact, her doctors repeatedly recommended that she lose weight. Nevertheless, the ALJ had an obligation under SSR 96-7p to ask Plaintiff why she did not follow her doctors’ instructions and consider those reasons before assuming that her failure to follow instructions indicates her pain and limitations were less severe than she reported. The ALJ must also explain his reasoning in the decision. Accordingly, the Court finds that the ALJ erred by considering this failure without also “considering any explanations that the individual may provide, or other information in the case record,” that may explain Plaintiff’s failure to follow her doctors’ instructions. SSR 96-7p. On remand, the Court directs the ALJ to reconsider his credibility determination in light of SSR 96-7p and explain his reasoning.

#### F. The ALJ's Step Five Analysis

Plaintiff argues that the ALJ erred at Step Five because he did not fully incorporate all of Plaintiff's limitations into the hypotheticals. Because the Court has recommended remanding this case for reconsideration of Plaintiff's RFC among other things, it will not consider the ALJ's Step Five analysis at this time.

#### IV. Summary

For the reasons set forth above, this Court recommends that Plaintiff's Motion for Summary Judgment (#13) be **GRANTED**. The decision of the ALJ should be reversed and the case remanded pursuant to sentence 4 of 42 U.S.C. § 405(g)<sup>2</sup> for further consideration consistent with this recommendation. Remand pursuant to 42 U.S.C. § 405(g), sentence 4, will terminate the case. *Shalala v. Schaefer*, 509 U.S. 292, 299 (1993) (a sentence 4 remand order terminates the case).

The parties are advised that any objection to this recommendation must be filed in writing with the clerk within ten (10) working days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1). Failure to object will constitute a waiver of objection on appeal. *Video Views, Inc. v. Studio 21, Ltd.*, 797 F.2d 538, 539 (7th Cir. 1986).

ENTER this 8<sup>th</sup> day of December, 2006.

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s/ DAVID G. BERNTHAL  
U.S. MAGISTRATE JUDGE

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<sup>2</sup>Under 42 U.S.C. § 405(g), Sentence 4, "[t]he court shall have power to enter, upon pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing."