

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION**

ROBERT S. MROZ,)	
Plaintiff,)	
)	
v.)	CAUSE NO.: 2:05-CV-434-PRC
)	
JO ANNE B. BARNHART,)	
Commissioner of the Social Security)	
Administration,)	
Defendant.)	

ORDER

This matter is before the Court on Plaintiff’s Motion for Summary Judgment [DE 14], filed by Plaintiff Robert S. Mroz on May 8, 2006. Pursuant to 42 U.S.C. § 405(g), Plaintiff seeks judicial review of a final decision of the Commissioner of the Social Security Administration (“Commissioner”), denying his request for Disability Insurance Benefits (“DIB”) under the Social Security Act (“SSA”). For the following reasons, the Court grants Plaintiff’s Motion for Summary Judgment and remands this matter for further proceedings consistent with this Order.

PROCEDURAL BACKGROUND

On April 18, 2003, the Plaintiff applied for DIB, alleging disability since June 24, 2002. On July 7, 2003, the Commissioner initially denied Plaintiff’s claim for benefits, and on September 25, 2003, the Commissioner again denied his claim upon reconsideration. On October 16, 2003, the Plaintiff requested a hearing before an Administrative Law Judge (“ALJ”). On October 20, 2004, ALJ William J. Wilkin held a hearing, at which Plaintiff appeared in person and by counsel, James Balanoff. Vocational expert Randall Strohl (“VE”) also testified at the hearing. On October 25, 2004, the ALJ requested that the Disability Determination Services schedule a consultative

examination for Plaintiff because the ALJ wanted to learn more about his alleged limitations regarding his ability to sit. After the hearing and subsequent consultative exam, the ALJ denied Plaintiff's claim for DIB in a decision dated February 12, 2005. The decision included the following findings:

1. The claimant meets the nondisability requirements¹ for a period of disability and Disability Insurance Benefits set forth in Section 216(I) of the Social Security Act and is insured for benefits through the date of this decision.
2. The claimant has not engaged in substantial gainful activity since the alleged onset of disability.
3. The claimant's status post left ankle fracture is a "severe" impairment, based upon the requirements in the Regulations (20 CFR § 404.1520(c)).
4. This medically determinable impairment does not meet or medically equal one of the listed impairments in Appendix 1, Subpart P, Regulation No. 4.
5. The claimant's allegations regarding his limitations are not totally credible for the reasons set forth in the body of the decision.
6. The claimant has the following residual functional capacity: he can lift a maximum of 10 pounds at a time, and occasionally carry items such as docket files, small tools and ledgers. In addition, he can occasionally stand and walk. The claimant cannot work at heights, however, or on uneven terrain. In addition, he has very limited ability to walk. Finally, he must be allowed to change positions at will.
7. The claimant is unable to perform any of his past relevant work (20 CFR § 404.1565).
8. The claimant is a "younger individual" (20 CFR § 404.1563).
9. The claimant has a "limited education" (20 CFR § 404.1564).
10. The claimant has no transferable skills from any past relevant work (20 CFR

¹The Court interprets the ALJ's statement that "[t]he claimant meets the nondisability requirements" to mean that the ALJ finds that claimant fails to meet the requirements for disability under the five-step sequential analysis.

§ 404.1568).

11. The claimant has the residual functional capacity to perform a significant range of sedentary work (20 CFR § 404.1567).
12. Although the claimant's exertional limitations do not allow him to perform the full range of sedentary work, using Medical-Vocational Rule 201.19 as a framework for decision-making, there are a significant number of jobs in the national economy that he could perform. Examples of such jobs include work as a gauger (600 Regional jobs), a table worker (800 Regional jobs) and a sorter (1,100 Regional jobs).
13. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 CFR § 404.1520(g)).

The ALJ ultimately concluded that the Plaintiff's impairments prevented him from performing his past relevant work, but that a significant number of sedentary jobs existed in the national economy that he could perform. Accordingly, the ALJ determined that the Plaintiff was not disabled within the definitions of the SSA and relevant regulations.

On March 3, 2005, the Plaintiff requested that the Appeals Council of the Social Security Administration review the ALJ's decision. On August 26, 2005, the Appeals Council denied his request for review. As a result, the ALJ's February 12, 2005 decision became the final decision of the Commissioner.

On November 29, 2005, the Plaintiff filed his Complaint in this Court, seeking review of the final decision pursuant to 42 U.S.C. § 405(g) and alleging that the ALJ's decision is not supported by substantial evidence and is premised on errors of law. On February 16, 2006, the Commissioner filed an Answer. On May 8, 2006, the Plaintiff filed the instant Motion for Summary Judgment or Remand and accompanying Plaintiff's Memorandum in Support of Summary Judgment or Remand. On July 17, 2006, the Commissioner filed a Memorandum in Support of the Commissioner's Decision, and on August 17, 2006, the Plaintiff filed Plaintiff's Reply to Defendant's Memorandum

in Support of the Commissioner's Decision.

Both parties have consented to have this case assigned to a United States Magistrate Judge to conduct all further proceedings and to order the entry of a final judgment in this case. Thus, this Court has jurisdiction to decide this case pursuant to 28 U.S.C. § 636(c) and 42 U.S.C. § 405(g).

FACTS

The Plaintiff was born on December 8, 1957, and was forty-six (46) years old at the time of the hearing before the ALJ. He is 5'11" tall and weighs 200 pounds. The Plaintiff has completed eleven years of education and has not obtained a GED. He acquired his work skills through on-the-job training. He previously worked as a laborer, performing work as a trencher and back hoe operator, and as a general carpenter, doing window and siding installation, gutter work, and other miscellaneous apartment maintenance. He is a widower and lives with his daughter.

A. Medical Evidence

According to Plaintiff's Disability Report, on November 9, 1989, Plaintiff visited the emergency room at St. Catherine's Hospital in East Chicago, Indiana, complaining of ankle pain. Plaintiff received an x-ray of his spine and ankle, however the record contains no medical evidence as to the results of the x-rays. In January of 1990 and in November of 1991, Plaintiff visited St. Mary's Medical Center in Hobart, Indiana, for two separate surgeries on his left ankle.

On April 1, 1999, Dr. Ricardo Hood performed a physical on Plaintiff in which he noted Plaintiff's medical history regarding the problems concerning his left ankle as well as a tender back, migraine headaches, and hypertension. Plaintiff expressed similar complaints at subsequent visits with Dr. Hood in August, 1999, October, 1999, and April, 2000.

On or about July 15, 2000, upon a referral by Dr. Hood, Plaintiff visited Dr. Shailesh Batt,

M.D., at Methodist Hospitals for an x-ray of his left foot. The x-ray revealed pins and fusion of the lower ankle joint of Plaintiff's left ankle with degenerative changes and flat foot. When Plaintiff visited Dr. Hood to obtain the results of his July 2000 x-ray, Dr. Hood referred the Plaintiff to Dr. Brian Coleman, an orthopedic specialist.

On December 4, 2000, Plaintiff visited Dr. Coleman for an examination of a fracture to his left foot. Plaintiff complained of left ankle pain and reduced range of motion. As to his left ankle, x-rays revealed a healed fusion and some calcification, but no ankle joint space narrowing. Dr. Coleman's impression was early degenerative joint disease of the left ankle and anterior impingement syndrome secondary to an ossicle left ankle. Dr. Coleman recommended that Plaintiff take an anti-inflammatory.

On April 19, 2001, Plaintiff complained of aching in all of his joints and migraine headaches. Dr. Hood prescribed medication for migraine headaches and general pain.

On August 3, 2001, Plaintiff visited the St. Mary Medical Center emergency room with complaints of an irregular heartbeat. Dr. Regina Iwinski ordered an EKG and chest x-ray, both of which returned normal results.

On December 5, 2001, Plaintiff received emergency care after waking up with increasing lower back pain, which he stated had been worsening over the prior eight days. Dr. Carl Metcalf, an emergency room physician, examined him and diagnosed Plaintiff with an acute lumbar strain. Dr. Metcalf sent Plaintiff home with a prescription for a muscle relaxant and an anti-inflammatory and instructed Plaintiff to return home and rest. He recommended that Plaintiff lift no more than ten pounds and ordered Plaintiff not to bend, stoop, twist, or climb.

On June 19, 2002, Dr. Hood noted that Plaintiff's ankle pain was so bad that Plaintiff was

experiencing difficulty walking. Dr. Hood recommended an Epsom salt soak, prescribed medication to treat anxiety (Xanax) as well as general pain medication, and ordered Plaintiff to rest his foot.

On June 24, 2002, Plaintiff visited St. Mary's Medical Center because he had sprained his right ankle while mowing a lawn. Dr. A. Semerjidian, M.D. reported that Plaintiff had soft tissue swelling and an otherwise normal right ankle. On July 1, 2002, Plaintiff visited Dr. Hood who reported that Plaintiff had a grade three ankle sprain to his right ankle and had been unable to work since the sprain occurred. He recommended an air cast and a warm water soak with Epsom salts. On July 8, 2002, Plaintiff visited Dr. Coleman for the ankle sprain who took radiographs of Plaintiff's foot and diagnosed him with a severe grade three ankle sprain and a probable capsular tear but no fracture. Dr. Coleman placed Plaintiff in an air cast and fracture walker and recommended therapy for edema control for one month. On August 16, 2002, Travis Sharp, Plaintiff's physical therapist, noted that Plaintiff exhibited minimum ankle pain during exercise, but still recommended the fracture walker and crutch. On August 19, 2002, the Plaintiff returned to Dr. Coleman for a final visit at which Dr. Coleman permitted the Plaintiff to discontinue using the fracture walker and prescribed pain medication. During that visit, Plaintiff expressed that he was actually having more trouble from his previous injury to his left ankle. On August 26, 2002, Plaintiff visited Dr. Hood in order to obtain a release to return to work. Dr. Hood noted the Plaintiff's progress under Dr. Coleman's care, but cautioned that the Plaintiff would require further surgery on his left ankle. On September 12, 2002, Dr. Hood cleared Plaintiff to return to work.

On September 27, 2002, Dr. Hood reported tenderness in both of Plaintiff's ankles and noted the usual complaints of hypertension and Plaintiff's prior grade three ankle strain. During the ensuing months, Plaintiff's complaints of migraines, ankle pain, anxiety, and high blood pressure

persisted on a constant basis. On May 22, 2003, Dr. Hood noted that Plaintiff's pains in his ankles, knees, hips, back, and left shoulder were worsening and that Plaintiff continued to experience migraine headaches. Plaintiff informed Dr. Hood that he intended to apply for DIB.

On June 13, 2003, Plaintiff visited Dr. M. Zeitoun, M.D., at the Institute of Family Health for an examination for the Disability Determination Bureau. Dr. Zeitoun did not list headaches as one of Plaintiff's symptoms, but did note Plaintiff's limping gait due to his left ankle, mild difficulty with heel to toe walking, decreased range of motion in both ankles, decreased range of motion in the back, and inability to fully squat. Dr. Zeitoun also found that Plaintiff had pain in both ankles, low back pain, and hypertension.

On June 28, 2003, Dr. R. Fife, M.D., submitted his evaluation regarding Plaintiff's residual functional capacity ("RFC"). His primary diagnosis was that Plaintiff had osteoarthritis and his secondary diagnosis was that Plaintiff had an injured left ankle. Dr. Fife determined that Plaintiff could occasionally lift twenty pounds, frequently lift ten pounds, stand or walk for a total of two hours in an eight-hour workday, sit for six hours in an eight-hour workday, and that pushing and pulling were limited in Plaintiff's lower extremities. Dr. Fife indicated that Plaintiff should never work with ladders, ropes, or scaffolds, but that Plaintiff could occasionally climb, balance, stoop, kneel, crouch, and crawl. Dr. Fife indicated that Plaintiff should also avoid exposure to extreme temperatures, moistness, and heights.

On September 13, 2002, Dr. Hood submitted his evaluation regarding Plaintiff's ability to do work-related activities on a daily basis in a regular work environment. He found that Plaintiff is limited to walking or standing one-half hour in an eight-hour day, sitting for a total of two hours, and sitting for one-half hour without interruption. Dr. Hood did not indicate that Plaintiff had any

lifting restrictions, but found that Plaintiff was unable to climb, stoop, kneel, and crawl, and had a limited ability to balance and crouch. He also indicated that Plaintiff had difficulty pushing and pulling due to the pain in his ankles, back, and knees, and that Plaintiff should not work at heights. Dr. Hood indicated that Plaintiff needed two reclining rest breaks of more than one hour each during an eight-hour period. Dr. Hood indicated that his findings were based on an exam and interview with the Plaintiff.

On August 16, 2004, due to Plaintiff's complaints of severe headaches and upon referral from Dr. Hood, Plaintiff had an Electroencephalogram (EEG) at Methodist Hospital, which returned normal results.

On December 16, 2004, Dr. Pankaj J. Patawari, a diagnostic radiologist, reviewed Plaintiff's ankles. Dr. Patawari did not find any irregularities to the right ankle, describing Plaintiff's right ankle as "unremarkable." Dr. Patawari also noted "old healed fractures" to Plaintiff's left ankle.

On December 16, 2004, after the ALJ's hearing in this matter, Dr. Phillip S. Budzenski, examined Plaintiff at the ALJ's request. Dr. Budzenski noted that Plaintiff favored his left leg when he walked, but otherwise did not find that Plaintiff had an unsteady gait or required assistance to walk. As to Plaintiff's left ankle, Dr. Budzenski also noted the scarring and the limited range of motion. Dr. Budzenski found partial fusion of Plaintiff's left ankle and hypertension with fair control. He did not find any residual issues with Plaintiff's right ankle sprain or medical findings to support Plaintiff's complaints of back pain. In assessing Plaintiff's ability to do work-related activities, Dr. Budzenski concluded that Plaintiff could lift/carry twenty pounds continually, maximum one hundred pounds occasionally, and maximum fifty pounds frequently. Dr. Budzenski further concluded that Plaintiff could carry twenty pounds for two hours in a work day, stand for

eight hours in a work day, and walk for four hours in a work day, all in thirty minute increments. Dr. Budzenski did not find any impairment to Plaintiff's ability to sit and indicated that Plaintiff could balance, stoop, crouch, kneel, or crawl frequently during the span of a day, climb occasionally, and that Plaintiff had no other limitations.

B. Plaintiff's Testimony

During the hearing, the Plaintiff testified that he was disabled due to ankle and back pain.

From 1988 to 1993, Plaintiff worked as a general carpentry worker, but left the position after falling twenty-two feet from a roof while working.² His fall resulted in a left fused ankle, requiring permanent pins and staples. After his fall, Plaintiff obtained employment as an apartment maintenance man, performing mainly indoor maintenance. He worked for four hours per day for six months in order to adjust to his fused ankle. From 1995 until 1998, Plaintiff worked installing siding and windows and eventually building homes. Next, Plaintiff worked in construction from 1999 until June 24, 2002, at which time he sprained his right ankle while mowing a lawn. Plaintiff testified that he tried to work twice in October of 2002, but was unable to work for two days after his attempt and was later sent home because his employer was unable to use an employee who could only work two out of every five days.

Plaintiff stated that his ankles cause him the most pain and that when he walks, the pain goes up his leg and into his back. He explained that his pain is caused by the fact that his left foot is now shorter than his right foot. Plaintiff stated that the doctor who initially treated his ankle had told him

²The exact date of the Plaintiff's fall is unclear from the record. The dates of the onset of Plaintiff's complaints and subsequent surgeries listed in his Disability Report as well as a note from his primary physician, Dr. Ricardo Hood, indicate that Plaintiff's fall occurred some time in November of 1989. R. 55, 58, 105. However, Plaintiff's initial paperwork from the time he began seeing Dr. Hood indicates that his fall occurred some time in 1992 and the report from an RFC evaluation performed by Dr. Phillip Budzenski indicated that Plaintiff's fall occurred some time in 1991.

that he would be “lucky to get ten years out of [his] foot.”

Plaintiff testified that his other problems are simply constant pain. He stated that he could not sit or stand for long or even drive much anymore. He testified that the medicine he takes for his pain no longer helps him very much. Plaintiff explained that his doctors had considered surgery to help him with his ankle, but then decided against it.

Plaintiff testified that his current treatment included numerous medications per day. He stated that his medications made him drowsy, but that he still rarely managed to sleep six hours per night. As to his daily routine, the Plaintiff stated that he would sit, stand, walk, and lie down as he felt comfortable, and would occasionally visit his mother or contribute to household chores by washing the dishes or vacuuming. He explained that he would lie down for several hours every afternoon. He stated that the furthest he had driven over the past few months was ten miles and that he had not walked continually during that time for more than a block. He explained that if he walked more than a block, his physical problems would bother him and that he definitely could not run. He testified that he was able to mow his lawn, which took approximately twenty minutes, as long as he used a sitting tractor even though the vibrations bothered his foot.

When the ALJ asked Plaintiff how his hands felt, the Plaintiff stated that they both felt stiff and that things had recently been “falling out of his hands.” However, Plaintiff stated that he had no difficulty turning doorknobs and was able to extend his arms out in front of his body without difficulty.

The Plaintiff estimated his own ability to stand continuously at fifteen minutes, assuming that he could shift his weight and change position. Plaintiff explained that if he stood for longer than fifteen minutes, the pain in his ankle would continue up into his back. When the ALJ asked him

how long he could sit, the Plaintiff explained that sitting was not nearly as bad as standing and estimated his ability to sit continuously at fifteen to twenty minutes. The Plaintiff testified that he could tie his shoes, but that he needed to sit to do so. The Plaintiff stated that, although his ability to lift was limited, he could take out the trash and carry a gallon of milk. The ALJ noted that the Plaintiff was able to hear, see, and speak without difficulty, but the Plaintiff testified that he had always had a very poor memory.

C. Testimony of the Vocational Expert

The VE testified at the hearing and classified the Plaintiff's past work experience. He stated that the Plaintiff's past relevant work as a laborer and construction worker was heavy and unskilled in nature, his work as a carpenter and maintenance man was medium and skilled, and his past work as a roofer was heavy and skilled. According to the VE, even though some of Plaintiff's past relevant work was categorized as medium, Plaintiff had performed all of his past relevant work at "heavy." The ALJ then asked the VE to consider a claimant with the Plaintiff's vocational background who was limited to light work that did not require him to work above ground or at heights and that involved very limited walking and permitted claimant to change position at will. The VE responded that the individual could not return to any of his past relevant work and had no transferable skills. The VE testified that there would be jobs that the claimant could perform at the light, unskilled level including information clerk (1200 jobs available), counter clerk (1100 jobs available), and cashier II (2400 jobs).

The ALJ proposed a second hypothetical involving a person who could only perform sedentary work with the same restrictions. The VE responded that the hypothetical person would not be able to perform any past relevant work or have any transferable skills, but could still perform

work as a gauger, table worker, and sorter.

A third hypothetical proposed by the ALJ, based on Dr. Hood's assessment of Plaintiff's RFC, involved an individual who could walk for less than one-half hour in an eight-hour day and sit for only two hours in an eight-hour day. The third hypothetical person would be unable to climb, stoop, crouch, crawl, or work at heights and would have limited ability to push and pull. The hypothetical person would also require at least two rest periods in an eight-hour period. The VE responded that the hypothetical person would be unable to perform any past relevant work and would not have any transferable skills. The VE further testified that the person in the third hypothetical would not be able to perform any unskilled, sedentary jobs because the person was restricted from eight hours of activity.

Finally, the ALJ concluded his questioning of the VE with a fourth hypothetical involving a claimant seeking sedentary and light work who had all the same physical limitations as the claimant in the ALJ's third hypothetical. The VE testified that there would be no full-time jobs in the economy that the claimant could perform.

D. The ALJ's Decision

In his decision, the ALJ found that, since his alleged onset date, Plaintiff had not engaged in substantial gainful work as defined in 20 C.F.R. § 404.1572. After considering all of the available medical evidence, the ALJ found that the Plaintiff was impaired by the condition of his left fused ankle and residual pain and that the impairment was severe under the standards of the SSA and accompanying regulations. The ALJ agreed with the state agency medical consultants that the Plaintiff's impairment does not meet or medically equal any condition listed in Appendix 1 to Subpart P, Regulation No. 4. The ALJ also found no objective evidence of any additional

impairments including, but not limited to, back pain, headaches, anxiety, or hypertension, that would significantly limit the Plaintiff's physical or mental ability to perform basic work tasks and thereby be considered severe.

In determining Plaintiff's RFC, the ALJ found Plaintiff's testimony only partially credible. The ALJ accepted that the Plaintiff could not stand or walk indefinitely due to his ankle injury but did not find anything that would prevent the Plaintiff from sitting for extended periods. Aside from slightly restricted forward flexion and lateral abduction of the shoulders, the ALJ did not find that the Plaintiff had any impairment of his upper extremities. The ALJ found that the drowsiness the Plaintiff experienced from his medications was not a significant factor in Plaintiff's case because the Plaintiff was not taking more medication than he had been taking while he was still working. Comparing x-rays of Plaintiff's left ankle from 2000 and 2004, the ALJ determined that the condition of Plaintiff's left ankle had remained essentially unchanged. The ALJ found that Plaintiff should not return to his former jobs, but that the Plaintiff was by no means precluded from all work activity. The ALJ determined that the Plaintiff could lift a maximum of ten pounds, occasionally carry items such as docket files, small tools, and ledgers. The ALJ also found that the Plaintiff could occasionally stand and walk, although Plaintiff's walking is very limited. The ALJ further found that the Plaintiff could not work at heights or on uneven terrain and must be permitted to change positions at will.

In reviewing Dr. Hood's assessment of the Plaintiff's RFC, the ALJ acknowledged that Dr. Hood had treated patient for a long time and that Dr. Hood's opinion should be accorded some weight. However, the ALJ found that the sitting restriction that Dr. Hood had cited was not supported by the evidence. The ALJ found that the Plaintiff has a demonstrated musculoskeletal

impairment involving only his left ankle and that Plaintiff's complaints of back pain were not corroborated by medically acceptable diagnostic techniques. The ALJ also noted that Dr. Hood's restriction limiting Plaintiff's standing and walking to only one hour total in an eight-hour day was at odds with Dr. Budzenski's unremarkable findings. The ALJ also found that the two rest breaks cited in Dr. Hood's report were based in part on Dr. Hood's interview with the Plaintiff as opposed to objective findings and conclusions.

The ALJ found that the Plaintiff was limited to sedentary work and therefore incapable of performing any past relevant work. The ALJ found that the Plaintiff could perform a significant range of sedentary work as defined in C.F.R. § 404.1567. Based on the VE's testimony, the ALJ found that the Plaintiff is capable of making a successful adjustment to sedentary work that exists in significant numbers in the economy and that the Plaintiff could work as a gauger, table worker, or sorter. Consequently, the ALJ concluded that Plaintiff was not under a disability as defined in the SSA.

STANDARD OF REVIEW

The Social Security Act authorizes judicial review of the final decision of the agency and indicates that the Commissioner's factual findings must be accepted as conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). Thus, a court reviewing the findings of an ALJ will only reverse if the findings are not supported by substantial evidence or if the ALJ has applied an erroneous legal standard. *See Clifford v. Apfel*, 227 F.3d 863, 869 (7th Cir. 2000). Substantial evidence consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Schmidt v. Barnhart*, 395 F.3d 737, 744 (7th Cir. 2005) (quoting *Gudgel v. Barnhart*, 345 F.3d 467, 470 (7th Cir. 2003)).

A court reviews the entire administrative record but does not reconsider facts, re-weigh the evidence, resolve conflicts in evidence, decide questions of credibility, or substitute its judgment for that of the ALJ. *See Boiles v. Barnhart*, 395 F.3d 421, 425 (7th Cir. 2005); *Clifford*, 227 F.3d at 869; *Butera v. Apfel*, 173 F.3d 1049, 1055 (7th Cir. 1999). Thus, the question upon judicial review of an ALJ's finding that a claimant is not disabled within the meaning of the Social Security Act is not whether the claimant is, in fact, disabled, but whether the ALJ's findings are supported by substantial evidence and under the correct legal standard. *See Lopez v. Barnhart*, 336 F.3d 535, 539 (7th Cir. 2003); *Schmidt v. Apfel*, 201 F.3d 970, 972 (7th Cir. 2000). If an error of law is committed by the Commissioner, then the "court must reverse the decision regardless of the volume of evidence supporting the factual findings." *Binion v. Chater*, 108 F.3d 780, 782 (7th Cir. 1997).

An ALJ must articulate, at a minimum, his analysis of the evidence in order to allow the reviewing court to trace the path of his reasoning and to be assured that the ALJ considered the important evidence. *See Scott v. Barnhart*, 297 F.3d 589, 595 (7th Cir. 2002); *Diaz v. Chater*, 55 F.3d 300, 307 (7th Cir. 1995); *Green v. Shalala*, 51 F.3d 96, 101 (7th Cir. 1995). The ALJ is not required to address "every piece of evidence or testimony in the record, [but] the ALJ's analysis must provide some glimpse into the reasoning behind [the] decision to deny benefits." *Zurawski v. Halter*, 245 F.3d 881, 888 (7th Cir. 2001) . The ALJ must build an "accurate and logical bridge from the evidence to his conclusion so that, as a reviewing court, we may assess the validity of the agency's ultimate findings and afford a claimant meaningful judicial review." *Young v. Barnhart*, 362 F.3d 995, 995 (quoting *Scott*, 297 F.3d at 595); *see also Hickman v. Apfel*, 187 F.3d 683, 689 (7th Cir. 1999) (citing *Sarchet v. Chater*, 78 F.3d 305, 307 (7th Cir. 1996)).

DISABILITY STANDARD

To be eligible for disability benefits, a claimant must establish that he suffers from a “disability” as defined by the Social Security Act and regulations. The Act defines “disability” as an inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. § 423(d)(1)(A). To be found disabled, the claimant’s impairment must not only prevent him from doing his previous work, but considering his age, education, and work experience, it must also prevent him from engaging in any other type of substantial gainful activity that exists in significant numbers in the economy. 42 U.S.C. § 423(d)(2)(A); 20 C.F.R. § 404.1520(e), (f).

When a claimant alleges a disability, Social Security regulations provide a five-step inquiry to evaluate whether the claimant is entitled to benefits. 20 C.F.R. § 404.1520(a)(4). The steps are:

(1) Is the claimant engaged in substantial gainful activity? If yes, the claimant is not disabled, and the claim is denied; if no, the inquiry proceeds to Step 2.

(2) Does the claimant have an impairment or combination of impairments that are severe? If not, the claimant is not disabled, and the claim is denied; if yes, the inquiry proceeds to Step 3.

(3) Does the impairment(s) meet or equal a listed impairment in the appendix to the regulations? If yes, the claimant is automatically considered disabled; if not, then the inquiry proceeds to Step 4.

(4) Can the claimant do the claimant’s past relevant work? If yes, the claimant is not disabled, and the claim is denied; if no, then the inquiry proceeds to Step 5.

(5) Can the claimant perform other work given the claimant's residual functional capacity, age, education, and experience? If yes, then the claimant is not disabled, and the claim is denied; if no, the claimant is disabled.

20 C.F.R. §§ 404.1520(a)(4)(I)-(iv); *see also Scheck v. Barnhart*, 357 F.3d 697, 699-700 (7th Cir. 2004). At the fourth and fifth steps, the ALJ must consider an assessment of the claimant's RFC. "The RFC is an assessment of what work-related activities the claimant can perform despite [his] limitations." *Young*, 362 F.3d at 1000. The ALJ must assess the RFC based on all the relevant evidence of record. *Id.* at 1001 (citing 20 C.F.R. § 404.1545(a)(1)). The claimant bears the burden of proving steps one through four, whereas the burden at step five is on the ALJ. *Id.* at 1000; *see also Zurawski*, 245 F.3d at 886; *Knight v. Chater*, 55 F.3d 309, 313 (7th Cir. 1995).

ANALYSIS

The Plaintiff proffers the following arguments: (1) the ALJ erroneously determined that the Plaintiff's right ankle sprain, back pain, hypertension, anxiety, and migraine headaches were not "severe" for the purposes of meeting the "*de minimus*" standard at Step Two; (2) the ALJ committed harmful error by making an erroneous and incomplete RFC assessment; (3) the ALJ's credibility finding failed to follow Social Security Ruling 96-7p; and (4) the ALJ failed to meet his burden at Step Five and demonstrate that there are a substantial number of jobs in the national economy that Plaintiff can perform.³

A. Step Two

The Plaintiff argues that the ALJ erred when he found that only Plaintiff's post left ankle

³Because the Court finds that the ALJ's erroneous RFC and subsequent hypotheticals posed to the VE at Step Four requires remand, the Court declines to address the substance of Plaintiff's Step Five argument.

fracture was “severe” at Step Two, dismissing evidence of his right ankle sprain, back pain, anxiety disorder, hypertension, and migraine headaches. Plaintiff argues that the ALJ failed to apply the proper “*de minimis*” standard at Step Two in evaluating the severity of Plaintiff’s other impairments, and, had he implemented the proper standard, the ALJ would have concluded that the other impairments were “severe” as well. The Commissioner responds that, at Step Two, the ALJ found in favor of Plaintiff by concluding that his fused left ankle was a “severe” impairment. Further, according to the Commissioner, while the ALJ reasonably assessed the limitations caused by each alleged impairment (severe or non-severe), regardless, because the ALJ found in favor of Plaintiff at Step Two, Plaintiff suffered no harm as a result of the ALJ finding his other impairments non-severe.

Before addressing the merits of Plaintiff’s Step Two argument, the Court finds that because the ALJ concluded that at least one of Plaintiff’s impairments were severe and thus proceeded with the five-step sequential analysis, the ALJ’s determination that other impairments were not severe can only amount to harmless error because the Plaintiff prevailed, in some form, at Step Two. At Step Two, an ALJ determines whether a claimant’s impairment(s), individually or in combination, are “severe.” 20 C.F.R. § 404.1523. If the ALJ determines that the claimant has a “severe” impairment, the ALJ must proceed to Step Three. Moreover, throughout the remaining steps of the five-step sequential analysis, the ALJ must consider all of the impairments, both severe and non-severe. Social Security Ruling 96-8p, 1996 WL 374184, at *5 (“In assessing RFC, the adjudicator must consider limitations and restrictions imposed by all of an individual’s impairments, even those that are not ‘severe’ ”). In *Ottman v. Barnhart*, 306 F.Supp.2d 829 (N.D. Ind. 2004), the Court concluded that the claimant’s assertion that the ALJ committed reversible error at Step Two was

“unavailing”, where the ALJ found some impairments severe but not others and continued through the five step process. “As long as a claimant has any severe impairment or combination of impairments, the ALJ must proceed beyond step two and must consider all of the impairments (including non-severe impairments) at the remaining steps of the sequential evaluation process, which in this case, was done.” *Id.* at 839. Likewise, here, the ALJ concluded that Plaintiff’s fused left ankle was a “severe” impairment, but that his right ankle, migraine headaches, anxiety, and hypertension were not severe. Accordingly, even if this Court were to agree with the claimant and find his other impairments to be “severe”, the claimant suffered no harm or prejudice at Step Two because the ALJ continued and completed the five-step sequential analysis.⁴ Furthermore, Plaintiff Mroz impliedly acknowledges that his Step Two argument is moot when he states that “[r]egardless of whether the ALJ erred at Step two of the sequential analysis... .” Pl. Mot., at 11. Because the ALJ found at least one of his impairments to be severe at Step Two and completed the five-step evaluation, the Court finds that the ALJ’s determination as to the non-severity of other impairments, assuming *arguendo* that the Court were to conclude those impairments were “severe” here, to be harmless error and not grounds for reversal or remand. *Keys v. Barnhart*, 347 F.3d 990, 994-95 (7th Cir. 2003) (applying harmless error doctrine in social security case). Nevertheless, the Court now turns to the substance of Plaintiff’s argument.

An impairment or combination of impairments is severe if it significantly limits an individual’s ability to perform basic work activities for at least twelve months. 20 C.F.R. § 404.1520(c); Social Security Ruling 96-3p, 1996 WL 374181, at *1. An impairment is severe when

⁴The Court finds that the Plaintiff’s Step Two severity argument resembles a misplaced RFC argument, and the Court will address the RFC, *infra* at Part B.

it has more than a minimal effect on a claimant's ability to work. SSR 96-3p, at *2. When assessing the severity of multiple impairments, the ALJ must consider the combined impact of those impairments on an individual's ability to function, rather than assess each impairment separately as if no other impairments existed. 20 C.F.R. § 440.1523; Social Security Ruling 85-28, 1985 WL 56856, at *3. "Symptoms, such as pain, fatigue, shortness of breath, weakness, or nervousness, will not be found to affect an individual's ability to do basic work activities unless the individual first establishes by objective medical evidence (i.e., signs and laboratory findings) that he or she has a medically determinable physical or mental impairment(s) and that the impairment(s) could reasonably be expected to produce the alleged symptom(s)." SSR 96-3p, at *2. The finding that the individuals's impairments could reasonably be expected to produce such symptoms does not involve a determination of the functional limitations those symptoms may cause. *Id* at *2. However, once the relationship between the medical impairments and the alleged symptoms has been established, the limiting effects of the symptoms must be considered in conjunction with the other objective medical evidence. *Id*. Finally, "[a] determination that an individual's impairment(s) is not severe requires a careful evaluation of the medical findings that describe the impairment(s) (i.e., the objective medical evidence and any impairment-related symptoms), and an informed judgment about the limitations and restrictions the impairment(s) and related symptom(s) impose on the individual's physical and mental ability to do basic work activities. SSR 96-3p, at *2.

The ALJ found that the Plaintiff is "impaired by reason of a status post left ankle fracture with residual pain." R. at 18. The ALJ acknowledged that Plaintiff had been receiving treatment for his right ankle, back pain, migraine headaches, anxiety, and hypertension, but stated that he did not find objective evidence in the record that any of the Plaintiff's other impairments would

significantly interfere with his ability to perform basic work tasks. R. at 18.

First, as to Plaintiff's right ankle pain, after Plaintiff injured his right ankle mowing the lawn on or about June 24, 2002, the ALJ cites an x-ray of Plaintiff's right foot that revealed no fracture or acute injury, but only a sprain. R. at 17. The ALJ also discusses Dr. Coleman's course of treatment for Plaintiff's right ankle sprain and his August 2002 note that Plaintiff's right ankle was healing satisfactorily, but that Plaintiff's left ankle was bothering him more. R. at 17. The ALJ cites the examination reports of Dr. Zeitoun from June 2003 and Dr. Budzenski from January 2005, which both indicate that Plaintiff walked with a slow, limping gait and highlighted the trauma to his left ankle. R. at 17-18. While Dr. Zeitoun's impressions expressed that Plaintiff had residual pain in his right ankle, R. at 17, conversely, Dr. Budzenski's more recent examination revealed no residual abnormality in Plaintiff's right foot. R. at 18. Finally, after Plaintiff's hearing, the ALJ ordered that x-rays be taken of both of Plaintiff's ankles. The December 14, 2004 x-rays revealed no abnormalities in Plaintiff's right ankle. R. at 17.

Second, as to Plaintiff's other alleged severe impairments (i.e., back pain, migraine headaches, anxiety, and hypertension), the ALJ states that although Plaintiff complains of migraine headaches, an EEG ordered by Dr. Hood came back negative. R. at 17. The ALJ also states that Dr. Zeitoun had found Plaintiff's blood pressure to be normal during his exam, but still returned an opinion that listed hypertension as part of his impression of Plaintiff's condition. R. at 17. Similarly, Dr. Budzenski found that Plaintiff had hypertension with fair control. R. 18. Drs. Zeitoun and Budzenski differ in that Dr. Zeitoun's report included an impression that Plaintiff had low back pain while Dr. Budzenski's opinion asserted no findings of back pain. R. at 17-18.

Based on the foregoing, the Court finds that the ALJ's opinion demonstrates that he

considered all of Plaintiff's alleged impairments together as required by law, but ultimately found that only one impairment substantially affected Plaintiff's ability to work and therefore was "severe" for the purposes of obtaining DIB. Further, the Court finds that the ALJ's determination of the severity of Plaintiff's complaints is supported by substantial evidence in the record.

B. RFC

The Plaintiff contends that the ALJ committed harmful error by making an erroneous and incomplete RFC assessment. Specifically, the Plaintiff argues that the ALJ should have (1) given his treating physician's opinion controlling weight, or, in the alternative, re-contacted Dr. Hood; (2) performed a mental RFC to determine how Plaintiff's anxiety disorder affects his ability to work; and (3) explained the contours of his RFC determination regarding Plaintiff's sit/stand option. The Court will address the Plaintiff's arguments with regard to the RFC in turn.

1. Weight of treating physician's opinion

The Plaintiff argues that the ALJ inappropriately weighed the medical evidence by giving more weight to the state reviewing physicians' opinions than to Plaintiff's primary treating physicians, specifically Dr. Hood. Further, the Plaintiff asserts that the ALJ disregarded Dr. Hood's opinions without providing good reason, as required by law. As a result, the Plaintiff claims that the ALJ made an erroneous and incomplete assessment of Plaintiff's RFC. The Commissioner responds that the ALJ reasonably did not fully accept Dr. Hood's opinions because they were not supported and inconsistent with other evidence of record.

In assessing disability, the ALJ generally gives more weight to the opinion of a source who has examined the claimant rather than to the opinion of a non-examining source. 20 C.F.R. § 404.1527(d)(1). The ALJ must give a treating physician's opinion controlling weight if it is well

supported by medical findings and is not inconsistent with the substantial evidence in the record. 20 C.F.R. § 404.1527(d)(2); Social Security Ruling 96-2p, 1996 WL 374188, at *1; *Hofslie v. Barnhart*, 439 F.3d 375, 376 (7th Cir. 2006); *White v. Barnhart*, 415 F.3d 654, 658 (7th Cir. 2005). In assessing disability, more weight is given to the opinion of a treating physician because of the greater familiarity with a claimant's conditions and circumstances. *Gudgel v. Barnhart*, 345 F.3d 467, 470 (7th Cir. 2003).

However, where a medical opinion is not supported by objective medical findings and is inconsistent with other record evidence, the ALJ is not required to accept that medical opinion or incorporate it into his findings. 20 C.F.R. §§ 404.1527(d)(3)-(4), 416.927 (d)(3)-(4). When the ALJ does not give the treating physician's opinion controlling weight, the ALJ applies the following factors in evaluating the opinion: length of treatment, the nature and extent of the treating relationship, to what extent the treating physician based his or her opinion on evidence such as medical signs and laboratory findings, how consistent the treating physician's opinion is with the record, whether the treating physician is a specialist, and any other relevant factors. 20 C.F.R. § 404.1527(d)(2)(I) and (ii)(1)-(6).

Here, the Court finds that the ALJ's opinion demonstrates that he weighed each doctor's opinion in determining Plaintiff's impairments and RFC. The ALJ examined progress notes from Dr. Hood as well as reports from Plaintiff's visits with Dr. Coleman and his consultative evaluation with Dr. Zeitoun. Further, after he held the hearing, the ALJ ordered another consultative examination with Dr. Budzenski because he noted that the Plaintiff's examination with Dr. Zeitoun had occurred more than a year and a half prior to the hearing. And once he received Dr. Budzenski's report, the ALJ considered Dr. Budzenski's opinion along with the other medical evidence of record.

The ALJ acknowledged that, as the opinion of the physician who had treated Plaintiff for a long time, Dr. Hood's opinion of Plaintiff's RFC was entitled to some weight. However, the ALJ ultimately rejected Dr. Hood's opinion as controlling because Dr. Hood's reported sitting restriction for the Plaintiff was unsupported by evidence. After reviewing all of Plaintiff's medical records, the ALJ concluded that the Plaintiff's only demonstrated musculoskeletal complaint was his left fused ankle and that his ankle pain would not necessarily affect his ability to sit. The ALJ noted that the Plaintiff's back pain was by self-report only and that Dr. Hood's opinion that the Plaintiff required two rest breaks during an eight-hour day was based in part on Dr. Hood's interview with the Plaintiff as opposed to objective medical findings. Similarly, the ALJ found that Dr. Hood had not cited any evidence to justify his total restriction against climbing, stooping, kneeling, and crawling, and that limiting the Plaintiff to standing and walking only one hour of an eight-hour day "is at odds with Dr. Budzenski's relatively unremarkable findings... ." R. at 19.

Contrary to the Plaintiff's assertion, the ALJ's decision to reject Dr. Hood's opinion was not solely based on conflicting opinions from state agency physicians. Oppositely, over the course of his opinion, the ALJ evaluated evidence from Dr. Hood's progress notes, reports from Dr. Coleman, Plaintiff's EEG, and Plaintiff's own testimony in addition to state agency physicians. In the portion of his opinion preceding his conclusion that only Plaintiff's left fused ankle was a severe impairment, the ALJ noted Plaintiff's treatment for his right ankle sprain in 2002 and Dr. Coleman's later impression that the sprain was healing satisfactorily. The ALJ also mentioned that Dr. Hood's progress notes indicated that the Plaintiff had returned to some kind of work activity in 2003. In addition, the ALJ considered Plaintiff's negative EEG as well as x-rays from the years 2000 and

2004 showing little change in Plaintiff's left ankle. Although the ALJ focused on the conflicting opinions of the state agency physicians when he analyzed Plaintiff's RFC, he also stated that he arrived at his decision after "careful consideration of the testimony, as well as the medical and other evidence of the record." R. at 19. The Court agrees.⁵

An ALJ is not obligated to give a treating physician's opinion controlling weight unless the opinion is both "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other evidence in [the claimant's] case record." 20 C.F.R. § 404.1527(d)(2); SSR 96-2p, at *1. As the ALJ noted in his opinion, Dr. Hood's RFC assessment of the Plaintiff cites little objective evidence to support his findings, and thus the ALJ's conclusion that the opinion was not well-supported is not unreasonable.⁶ Moreover, the ALJ noted that Dr. Hood's opinion is not consistent with the other evidence in the Plaintiff's record. For example, as the ALJ noted, Dr. Hood's RFC findings conflict with both the state agency examiners' and Dr. Budzenski's RFC assessments. The ALJ also focused on the fact that there was no objective evidence in the record supporting Dr. Hood's sitting restriction for Plaintiff. Because Dr. Hood's

⁵ Included in his argument regarding the ALJ's failure to credit Dr. Hood's opinion, Plaintiff also argues that his emergency room visit in December 2001 due to his complaints of back pain substantiates his assertions of chronic lower back pain. The Court finds that, on the basis of the record, the ALJ reasonably concluded that Plaintiff's alleged low back pain was not so severe that Plaintiff was unable to perform substantial work because (1) Dr. Metcalf's impression of Plaintiff's condition was that Plaintiff had acute lumbar strain, R. 135, and (2) Dr. Metcalf's report does not indicate that Plaintiff had any medical conditions that would lead to chronic back pain, R. at 135.

⁶ In further support of his argument that the ALJ erred by discounting Dr. Hood's opinion, Plaintiff cites *Carradine v. Barnhart*, 360 F.3d 751 (7th Cir. 2004), for the proposition that "once the claimant produces medical evidence of an underlying impairment, the Commissioner may not discredit the claimant's testimony as to subjective symptoms merely because they are unsupported by objective evidence." *Id.* at 753. However, the *Carradine* Court went on to explain that such a dispensation could influence claimants to exaggerate certain symptoms. Further, the Court stressed that when an ALJ evaluated a claimant's testimony on subjective symptoms, the ALJ was essentially making an assessment of the claimant's credibility. *Id.* Accordingly, the Court will address the ALJ's assessment of Plaintiff's credibility, *infra* at Part C.

opinion was only partially based on an examination of the Plaintiff and is inconsistent with the other objective medical evidence in the record, the ALJ properly refused to accord the opinion controlling weight.

In the alternative, Plaintiff argues that, rather than construe the evidence against the Plaintiff, the ALJ, at least, had a duty to contact Dr. Hood as Plaintiff's treating physician or obtain an additional consultative examination pursuant to 20 C.F.R. § 404.1512(e) and Social Security Ruling 96-5p. The Commissioner responds that SSR 96-5p only instructs an ALJ to contact physicians when the basis of their opinion that a claimant is "disabled" is unclear. Here, the Commissioner argues, not only did Dr. Hood not opine that Plaintiff was disabled, but nothing in the ALJ's opinion indicates that he viewed Dr. Hood's opinion as unclear.

The ALJ's duty to re-contact a medical source is triggered only when the evidence received is inadequate to determine whether or not a claimant is disabled. *Skarbek v. Barnhart*, 390 F.3d 500, 504 (7th Cir.2004); *see also Shinabarger v. Barnhart*, No. 1:05-CV-0276-DFH-TAB, 2006 WL 3206338, *13 (S.D. Ind. March 31, 2006) (same).

Section 404.1512(e)(1) provides that:

We will seek additional evidence or clarification from your medical source when the report from your medical source contains a conflict or ambiguity that must be resolved, the report does not contain all the necessary information, or does not appear to be based on medically acceptable clinical and laboratory diagnostic techniques.

20 C.F.R. 404.1512(e)(1). Similarly, SSR 96-5p provides that:

Because treating source evidence (including opinion evidence) is important, if the evidence does not support a treating source's opinion on any issue reserved to the Commissioner and the adjudicator cannot ascertain the basis of the opinion from the case record, the adjudicator must make "every reasonable effort" to recontact the source for clarification of the reasons for the opinion.

SSR 96-5p, 1996 WL 374183, at *6. In other words, "[f]or treating sources, the rules also require that we make every reasonable effort to recontact such sources for clarification when they provide

opinions on issues reserved to the Commissioner and the bases for such opinions are not clear to us.” SSR 96-5p, at *2. An ALJ has a duty to solicit additional information to flesh out an opinion for which the medical support is not readily discernable. 20 C.F.R. § 404.1527(c)(3); *Barnett v. Barnhart*, 381 F.3d 664, 669 (7th Cir. 2004).

Here, in Plaintiff’s RFC assessment, the ALJ notes that Dr. Hood’s opinion cites no evidence for his total restriction on Plaintiff’s ability to climb, stoop, kneel, and crawl. *See* R. at 19 (noting that “Dr. Hood did not cite any evidence to justify the total restriction against climbing, stooping, kneeling, and crawling”) Moreover, the ALJ also emphasized that Dr. Hood’s opinion that Plaintiff required two rest breaks of at least one hour in an eight-hour day was based partially on an interview with the Plaintiff as opposed to objective clinical findings and conclusions.

Accordingly, it appears to the Court that the ALJ’s reasons for rejecting Dr. Hood’s opinion as controlling indicate that the ALJ had a duty to re-contact Dr. Hood because (1) his report does not contain all the necessary information and (2) his report does not appear to be based on medically acceptable clinical and laboratory diagnostic techniques. *See* 20 C.F.R. § 404.1512(e). By failing to cite any evidence, Dr. Hood’s opinion is clearly inadequate to determine whether Plaintiff is disabled. Accordingly, the ALJ should have attempted to re-contact Dr. Hood for clarification as to his RFC assessment pursuant to 20 C.F.R. § 404.1512(e).⁷

In summary, while the ALJ properly rejected parts of Dr. Hood’s opinion, the Court finds

⁷ The Court finds the Plaintiff’s argument with regard to SSR 96-5p to be less convincing. While the ALJ concluded that the evidence did not support Dr. Hood’s opinion on Plaintiff’s need for two one-hour rest breaks, Dr. Hood indicated that his opinion was based partially on his examination of the Plaintiff and partially on an interview with the Plaintiff. SSR 96-5p requires the ALJ to recontact a treating physician only when the ALJ cannot ascertain the basis of a treating physician’s opinion from the case record. Because Dr. Hood listed a basis for his RFC assessment, the ALJ was able to ascertain the basis for Dr. Hood’s opinion, no matter how inadequate the ALJ may have found that basis to be.

that the ALJ had a duty to re-contact Dr. Hood for clarification of his assessment of Plaintiff's RFC pursuant to 20 C.F.R. § 404.1512(e).

2. *Mental RFC finding*

Plaintiff argues that the ALJ made an incomplete and erroneous RFC assessment by failing to perform a mental RFC in order to determine how Plaintiff's anxiety disorder affected his ability to work. The Commissioner responds that the Plaintiff failed to produce evidence that his alleged mental impairment (i.e., anxiety) caused any work-related limitation.

When an individual is not engaged in substantial gainful activity and the ALJ determines that the individual has a severe impairment that yet does not meet or equal the requirements of any impairment in the Listing of Impairments, the ALJ must continue with an assessment of the individual's RFC. Social Security Ruling 96-8p, 1996 WL 374184, at *1. "RFC is an administrative assessment of the extent to which an individual's medically determinable impairment(s), including any related symptoms, such as pain, may cause physical or mental limitations or restrictions that may affect his or her capacity to do work-related physical and mental activities." *Id.* An RFC represents the most that an individual can do in spite of his or her restrictions. *Id.* The ALJ's RFC assessment must be based on all of the relevant evidence in the case record and must consider the limitations and restrictions imposed by all of the claimant's impairments, even when the alleged impairments are not severe. *Id.* Even if the ALJ has concluded that certain of Plaintiff's impairments are not severe, those impairments combined with the impairments that the ALJ has found to be severe may narrow the range of work that the claimant is able to perform. *Id.* In order for an individual to perform the full range of work at a given exertional level, the individual must be able to perform substantially all of the functions required in work at that exertional level. *Id.* A function-by-function assessment of

the Plaintiff's RFC could be critical to the outcome of a case in that such assessment enables the ALJ to determine whether the individual is capable of the full range of work at an exertional level. *Id.* When a Plaintiff presents evidence of a mental impairment, the ALJ is required to follow a special technique and document the application of the technique in his or her decision. 20 C.F.R. §§ 404.1520a(a) and (e).

As the Commissioner points out in her brief, Plaintiff's main hurdle in regard to the ALJ's consideration of his anxiety is simply that nowhere in the record has Plaintiff asserted that his anxiety is a limitation on his ability to work. On the one hand, the record indicates that Plaintiff has been treated for anxiety since at least 1999 and that he informed the ALJ that he has been taking anxiety medication, specifically Xanax. However, on the other hand, when the ALJ asked the Plaintiff if he was currently under treatment by a psychiatrist for any mental disorders, the Plaintiff answered in the negative. Similarly, when the ALJ asked the Plaintiff about his symptoms, the Plaintiff described constant pain, but did not describe any anxiety or mention any mental disorder. Neither Plaintiff's treating physician nor the others who examined him found any mental abnormalities nor did they find Plaintiff's anxiety to be a limit on his ability to work, although all of Plaintiff's doctors were aware of his medication for anxiety.

Here, the ALJ fleshed out the gaps in Plaintiff's record by ordering an additional evaluation by a state doctor and by ordering new x-rays of Plaintiff's ankles. The ALJ reasonably relied on Plaintiff's testimony and the medical source opinions in assessing Plaintiff's RFC. However, the ALJ is obligated to consider *all* of Plaintiff's impairments, whether or not those impairments are severe, when assessing Plaintiff's RFC. SSR 96-8p, at *5. "While a 'not severe' impairment(s) standing alone may not significantly limit an individual's ability to do basic work activities, it may--when

considered with limitations or restrictions due to other impairments--be critical to the outcome of a claim.” *Id.* “For example, in combination with limitations imposed by an individual’s other impairments, the limitations due to such a ‘not severe’ impairment may prevent an individual from performing past relevant work or may narrow the range of other work that the individual may still be able to do.” *Id.*

SSR 96-8p further emphasizes that “[w]hen there is no allegation of a physical or mental limitation or restriction of a specific functional capacity, *and no information in the case record* that there is such a limitation or restriction, the adjudicator must consider the individual to have no limitation or restriction with respect to that functional capacity.” *Id.* (emphasis added). On the contrary, here, the record contains numerous references to Plaintiff’s anxiety and his constant medication for the condition. Because the language of SSR 96-8p requires the ALJ to consider both the Plaintiff’s allegations and the information in the record, the ALJ should have incorporated Plaintiff’s anxiety into his assessment of Plaintiff’s RFC. Conversely, the ALJ’s RFC assessment of the Plaintiff does not include any reference to Plaintiff’s mental limitations whatsoever.

The Plaintiff relies on *Keys v. Barnhart*, 430 F.Supp.2d 759 (N.D. Ill. 2006) and *Lowe v. Barnhart*, 99 Soc. Sec. Rep. Service (N.D. Ill. 2004) to support his arguments for remand. Of the two cases, *Keys* is most similar to the instant case. In *Keys*, the Plaintiff alleged disability due to back pain. *Keys*, 430 F.Supp.2d at 762. However, *Keys* was later diagnosed with depression and anxiety. *Id.* at 767. The *Keys* Court remanded the case in part because the ALJ failed to follow the special technique in 20 C.F.R. § 404.1520(a) and document it in her decision. 430 F.Supp.2d at 772 (remanding where “[t]he ALJ simply outlined the medical evidence related to claimant’s mental impairment and concluded ‘that claimant’s mental RFC is not significantly limited by depression or

other mental impairments’ ”). While *Keys* suggests that the Plaintiff in that instance provided clearer allegations of depression than the Plaintiff in the instant case, the Court finds *Keys* persuasive. Because the record contains numerous references to anxiety as a constant component of Plaintiff’s overall condition and the ALJ is obligated to consider the entire record in assessing Plaintiff’s RFC, the ALJ should have followed the special technique listed in 20 C.F.R. §§ 404.1520(a) and documented it in his decision. Unlike in *Keys* where the Court at least acknowledged the claimant’s alleged mental impairments, here, the ALJ’s assessment of Plaintiff’s RFC contains no reference whatsoever to Plaintiff’s alleged mental impairment. Consequently, this Court cannot conclude that the ALJ’s RFC determination is free from legal error. Accordingly, the Court finds that the ALJ’s inadequate RFC requires remand.

3. *Contours of sit/stand option*

The Plaintiff argues that the ALJ failed to explain the contours of his RFC assessment regarding Plaintiff’s sit/stand option, in particular the ALJ failed to specify how often Plaintiff would have to sit and stand or how this limitation affects his ability to work. The Commissioner responds that the ALJ’s RFC finding placed no limitations on Plaintiff’s sit/stand option.

In his decision with regard to the sit/stand option, the ALJ found that the Plaintiff could occasionally stand and walk, though only very limited walking, but must be able to change positions at will. R. at 19. Based on the RFC, the ALJ found that the Plaintiff is capable of performing a significant range, or less than a full range, of sedentary work. R. at 19.

In support, the Plaintiff relies on *Castrejon v. Apfel*, 131 F. Supp. 2d 1053 (E.D. Wis. 2001), for the proposition that an ALJ’s RFC finding with regard to the sit/stand limitation that fails to specify frequency is insufficient. Relying on Social Security Ruling 96-9p, the *Castrejon* Court

concluded that the ALJ had a duty to enumerate the specific contours of the claimant's sit/stand option because frequency "is a crucial component in assessing a claimant's ability to work." *Id.* at 1058. While the Court finds *Castrejon* to be on point and persuasive, a careful reading of SSR 96-9p further supports the Plaintiff's argument.

SSR 96-9p provides that, in determining a claimant's exertional and non-exertional limitations and restrictions,⁸ when evaluating the ability to do less than a full range of sedentary work, "[t]he RFC assessment must include a narrative that shows the presence and degree of any specific limitations and restrictions, as well as an explanation of how the evidence in file was considered in the assessment." Social Security Ruling 96-9p, 1996 WL 374185, at *5. Specifically as to standing and walking, SSR 96-9p provides:

The full range of sedentary work requires that an individual be able to stand and walk for a total of approximately 2 hours during an 8-hour workday. If an individual can stand and walk for a total of slightly less than 2 hours per 8-hour workday, this, by itself, would not cause the occupational base to be significantly eroded. Conversely, a limitation to standing and walking for a total of only a few minutes during the workday would erode the unskilled sedentary occupational base significantly. For individuals able to stand and walk in between the slightly less than 2 hours and only a few minutes, it may be appropriate to consult a vocational resource.

SSR 96-9p, at *6. Similarly, as to sitting, the Ruling states:

In order to perform a full range of sedentary work, an individual must be able to remain in a seated position for approximately 6 hours of an 8-hour workday, with a morning break, a lunch period, and an afternoon break at approximately 2-hour intervals. If an individual is unable to sit for a total of 6 hours in an 8-hour work day, the unskilled sedentary occupational base will be eroded. The extent of the

⁸Pursuant to Social Security Ruling 96-9p, exertional capacity addresses an individual's limitations and restrictions of physical strength and defines the individual's remaining ability to perform each of seven strength demands: sitting, standing, walking, lifting, carrying, pushing, and pulling. Social Security Ruling 96-9p, 1996 WL 374185, at *5.

limitation should be considered in determining whether the individual has the ability to make an adjustment to other work.

SSR 96-9p, at *6. Finally, and perhaps most relevant here, in the context of an individual's ability to perform the full range of sedentary work, "occasionally" means occurring from very little up to one-third of the time, and would generally total no more than about two hours of an eight-hour workday, or six hours as the term pertains to sitting. SSR 96-9p, at *3.

Here, the ALJ provided no specifics as to the contours of the Plaintiff's sit/stand option. Therefore, because the ALJ found Plaintiff unable to perform the full range of sedentary work at Step Five, the Court finds that the precise contours of Plaintiff's sit/stand restriction may be crucial to the determination of what sedentary jobs, if any, the Plaintiff is able to perform in the national economy. Although the medical source statements that the ALJ relied on do separate each of Plaintiff's functions, the ALJ failed to do so in his ultimate determination of Plaintiff's RFC. Due to the limited nature of sedentary work that the ALJ found the Plaintiff could perform, the Court finds that the ALJ committed harmful error by failing to enumerate the precise contours of the Plaintiff's sit/stand option in accordance with SSR 96-9p.

4. *Erroneous hypothetical to VE*

Because the ALJ failed to perform a complete assessment of Plaintiff's RFC, he, in turn, posed a flawed hypothetical to the VE, which cannot yield substantial evidence to support a denial of benefits. 20 C.F.R. § 404.920. When the ALJ poses hypotheticals to the VE, the hypotheticals must include all limitations supported by evidence in the record so that the VE will not refer Plaintiff to jobs that the Plaintiff cannot perform because the VE was unaware of all of the Plaintiff's limitations. *Patty v. Barnhart*, 189 Fed. Appx. 517, 521 (7th Cir. 2006); *Steele v. Barnhart*, 290 F.3d 936, 942 (7th Cir. 2002). Consequently, the ALJ's erroneous hypotheticals to the VE constitute legal error and

require remand.

C. ALJ's Credibility Determination

The Plaintiff argues that the ALJ did not provide sufficient evidence to support his adverse credibility determination. The Plaintiff asserts that the ALJ ignored his testimony about his physical limitations, in particular Plaintiff's assertion that sitting was as painful for him as standing. The Plaintiff also asserts that the ALJ committed harmful error by failing to consider the side effects of Plaintiff's medications. The Commissioner responds that the ALJ reasonably found Plaintiff only partially credible and the Plaintiff fails to meet his standard, i.e., that the ALJ's credibility analysis was "patently wrong."

The Social Security regulations provide that, in making a disability determination, the Commissioner will consider a claimant's statements about his symptoms, including pain, and how they affect the claimant's daily life and ability to work. 20 C.F.R. §§ 404.1529(a) & 416.929(a). The Social Security regulations establish a two-part test for determining whether complaints of pain contribute to a finding of disability: (1) the claimant must provide objective medical evidence of a medically determinable impairment or combination of impairments that could reasonably be expected to produce the symptoms alleged; and (2) once an ALJ has found an impairment that reasonably could cause the symptoms alleged, the ALJ must consider the intensity and persistence of the symptoms. 20 C.F.R. §§ 404.1529(a), (c) & 416.929(a), (c); *see Johnson v. Barnhart*, 4949 F.3d 804, 806 (7th Cir. 2006).

The ALJ must weigh the claimant's subjective complaints and the relevant objective medical evidence, as well as any other evidence, against the following factors:

- (1) The individual's daily activities;

- (2) Location, duration, frequency, and intensity of pain or other symptoms;
- (3) Precipitating and aggravating factors;
- (4) Type, dosage, effectiveness, and side effects of any medication;
- (5) Treatment, other than medication, for relief of pain or other symptoms;
- (6) Other measures taken to relieve pain or other symptoms; and
- (7) Other factors concerning functional limitations due to pain or other symptoms.

20 C.F.R. §§ 404.1529 (c)(3) & 416.929(c)(3). In making the credibility determination, Social Security Ruling 96-7p dictates that the ALJ “must consider the entire case record, including the objective medical evidence, the individual’s own statements about symptoms, statements and other information provided by treating or examining physicians or psychologists and other persons about the symptoms and how they affect the individual, and any other relevant evidence in the case record.” Social Security Ruling 96-7p, 1996 WL 374186, at *1. SSR 96-7p further provides that the “determination or decision must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual’s statements and the reasons for that weight.” SSR 96-7p, at *2; *see Steele v. Barnhart*, 290 F.3d 936, 942 (7th Cir. 2002).

An ALJ is not required to give full credit to every statement of pain or to find a disability every time a claimant states that he or she is unable to work. *Rucker v. Chater*, 92 F.3d 492, 496 (7th Cir. 1996). However, SSR 96-7p provides that a claimant’s statements regarding symptoms or the effect of symptoms on her ability to work “may not be disregarded solely because they are not substantiated by objective evidence.” SSR 96-7p, at *6; *Johnson v. Barnhart*, 449 F.3d 804, 806 (7th Cir. 2006) (explaining that an ALJ may not discredit a claimant’s allegations of pain merely because those

allegations exceed the objective medical evidence). “[T]he adjudicator may also consider his or her own recorded observations of the individual as part of the overall evaluation of the credibility of the individual’s statements.” SSR 96-7p, at *5. As the Seventh Circuit has stated, “because hearing officers are in the best position to see and hear the witnesses and assess their forthrightness, we afford their credibility determinations special deference.” *Powers v. Apfel*, 207 F.3d 431, 435 (7th Cir. 2000) (internal quotations and citations omitted); *see also 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”). Generally, an ALJ’s credibility determination will not be overturned unless it was “patently wrong.” *Prochaska v. Barnhart*, 454 F.3d 731, 738 (7th Cir. 2006). However, when “credibility determinations rest on objective factors or fundamental implausibilities rather than subjective considerations, appellate courts have greater freedom to review the ALJ’s decision.” *Palmer v. Barnhart*, 40 F. Appx. 278, 283 (7th Cir. 2002). Finally, “[t]he determination or decision must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual’s statements and the reasons for that weight.” SSR 96-7p, at *2.

After acknowledging the Plaintiff’s testimony of the pain he suffers and the restrictions he has as a result, the ALJ concluded that the Plaintiff was only partially credible. The ALJ based his assessment of Plaintiff’s credibility on the objective medical evidence and fundamental implausibilities, thus giving this Court a greater latitude to review his findings. The ALJ found that the Plaintiff’s assertions about his limitations exceeded the objective medical evidence, but did not wholly discredit Plaintiff’s testimony. The ALJ accepted that the Plaintiff had some limitation on his

ability to stand and walk due to his left ankle condition, but did not find any objective evidence in the record that supported a limitation on Plaintiff's ability to sit. To support his conclusions about the Plaintiff's credibility, the ALJ cited x-rays of Plaintiff's left ankle from 2000 and 2004, highlighting the lack of change. The ALJ accepted Dr. Budzenski's findings that Plaintiff had some limitations in his forward flexion and lateral abduction of the shoulders, but no other limits on his ability to use his upper extremities. The ALJ further noted that the only adverse findings Dr. Budzenski reported in regard to Plaintiff's lower extremities was an antalgic gait and limited range of motion in the left ankle. The ALJ specifically focused on the fact that Dr. Budzenski did not report any pain, effusion, swelling, or crepitus in Plaintiff's left ankle during Plaintiff's 2005 examination. Similarly, the ALJ stressed that the allegations of claimant's back pain came only by self-report and were uncorroborated by objective clinical findings.

The ALJ's opinion and the transcript from the Plaintiff's hearing indicates that the ALJ considered the factors as required by 20 C.F.R. §§ 404.1529 (c)(3) & 416.929(c)(3). For example, the ALJ asked the Plaintiff detailed questions about (1) his daily activities, R. at 211-214, and (2) the specifics of his pain and other symptoms, R. at 208-210. The ALJ also asked the Plaintiff about the drugs he was taking and their effectiveness in relieving his symptoms as well as the other treatment and measures the Plaintiff had used to relieve his pain and symptoms. R. at 210-211. Contrary to Plaintiff's assertion that the ALJ impermissibly relied on Plaintiff's daily activities to determine his ability to work, the ALJ's opinion indicates that he relied on Plaintiff's own testimony about his physical limitations as well as the medical source opinions from Dr. Budzenski, Dr. Hood, and the state agency examiners.

The Court finds that the ALJ supported his credibility findings by citing the impressions of the

doctors on behalf of the state agency and the lack of change in Plaintiff's 2000 and 2004 x-rays of his left ankle. Although the state agency examiners' assessed Plaintiff as being able to perform a narrow range of light work, the ALJ partially credited Plaintiff's testimony about his limitations and limited the Plaintiff to sedentary work. Given the fact that the Plaintiff's testimony conflicted with the medical source reports from the state agency examiners asserting the Plaintiff could do light work, the ALJ was not patently wrong to give only partial credibility to Plaintiff's assertions of pain and conclude that Plaintiff was capable of performing sedentary work. In sum, the ALJ accommodated the Plaintiff's limitations in the RFC by acknowledging that he was limited to sedentary work that permitted him to change positions at will.

While the Plaintiff claims that the ALJ did not consider the side effects of his medication, the Court finds that the ALJ did include such side effects in his findings when listing his limitations. He simply elected to reject the proposition that side effects from Plaintiff's medications limited his ability to work because Plaintiff was taking the same level of medication at the time of his hearing that he had during the years in which he was working.

In light of the objective medical evidence of record, the ALJ was not unreasonable in finding the Plaintiff's testimony regarding his pain not totally credible. The Court finds that the Plaintiff has not demonstrated that the ALJ's credibility determination was "patently wrong" and that the ALJ rationally articulated the grounds for his credibility determination.

CONCLUSION

The Court finds that the ALJ's conclusion that Plaintiff's left fused ankle was Plaintiff's only severe impairment is supported by substantial evidence. Similarly, the Court finds that the ALJ did not err in his assessment of Plaintiff's credibility or his rejection of Dr. Hood's opinion as controlling.

However, the Court finds that the ALJ had a duty to re-contact Plaintiff's treating physician and that the ALJ committed harmful error by performing an erroneous and incomplete RFC, in particular as to a mental RFC and the contours of the Plaintiff's sit/stand option. Consequently, the ALJ posed flawed hypotheticals to the VE. Therefore, the Court **GRANTS** Plaintiff's Motion for Summary Judgment [DE 14] and **REMANDS** this matter for further proceedings consistent with this Opinion and Order.

SO ORDERED this 5th day of March, 2007.

s/ Paul R. Cherry
MAGISTRATE JUDGE PAUL R. CHERRY
UNITED STATES DISTRICT COURT

cc: All counsel of record