



court denies the motion of the Commissioner for summary judgment and grants the motion of plaintiff insofar as he seeks a remand to the Commissioner for further consideration of evidence. Plaintiff's motion for summary judgment is otherwise denied.

### **STANDARD OF REVIEW OF FINAL DECISION OF SECRETARY**

The Act provides that "the findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive[.]" 42 U.S.C. § 405(g). The administrative law judge's ("ALJ's") opinion on a claimant's disability must be upheld if it is supported by "substantial evidence on the record as a whole." *Walker*, 834 F.2d at 639 (quoting *Smith v. Schweiker*, 735 F.2d 267, 270 (7<sup>th</sup> Cir. 1984)). "Substantial evidence" has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Aidinovski v. Apfel*, 27 F. Supp. 2d 1097, 1101 (N.D. Ill. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). The court may not reweigh the evidence. *Walker*, 834 F.2d at 640. "Where conflicting evidence allows reasonable minds to differ as to whether a claimant is disabled, the responsibility for that decision falls on the Secretary (or the Secretary's designate, the ALJ)." *Id.*, citing *inter alia*, *Delgado*, 782 F.2d at 82-83. "Therefore, the question presented for review is not whether [the claimant] is disabled, but only whether the ALJ's finding of non-disability is supported by substantial evidence in the record." *Walker*, 834 F.2d at 640.

### **DISCUSSION OF PLAINTIFF'S OBJECTIONS**

The facts as set out in the magistrate judge's report will not be reiterated and are adopted unless specifically stated otherwise herein. This case was decided at Step 4 of the sequential evaluation process set out in the Social Security Act and regulations. See 20 C.F.R. § 404.1520

(a)(4). In other words, the ALJ decided that, although severe, plaintiff's impairment or combination of impairments did not meet or equal the Listing of Impairments under "disorders of the spine," and plaintiff retained capacity to perform light and sedentary work. Plaintiff does not explicitly argue that he has an impairment or combination of impairments that meets or equals the Listing of Impairments, and the record belies such an argument.<sup>1</sup> Thus the question is whether there is substantial evidence in the record as a whole supporting the ALJ's and the magistrate judge's findings that plaintiff can perform the full range of light and sedentary work. Plaintiff's arguments are addressed in sequence below.

1. *Whether the ALJ evaluated all the evidence concerning plaintiff's alleged disability.*

Plaintiff contends that the ALJ disregarded discography findings and Dr. Shapiro's opinion in favor of outdated medical opinions of Dr. Panchal and Dr. Gutierrez, the opinion of a physical therapist generated two months after Dr. Shapiro's latest examination, and the ALJ's assessment of the plaintiff's demeanor at the hearing. The Commissioner acknowledges that Dr. Shapiro's opinion is the most current medical evidence of record but argues that the ALJ properly rejected Dr. Shapiro's opinion that plaintiff is disabled because (a) Dr. Shapiro did not

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<sup>1</sup>The Listing of Impairments against which the ALJ was measuring the medical evidence is as follows:

1.04 Disorders of the spine (e.g., herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet arthritis, vertebral fracture), resulting in compromise of a nerve root (including the cauda equina) or the spinal cord. With:

A. Evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight-leg raising test (sitting and supine) . . . .

20 C.F.R. § 404, Subpt P, App. 1. Neither Dr. Anderson, who examined plaintiff on June 28, 2001 (R. 196), nor Dr. Shapiro's treatment notes would justify a finding of disability based on the Listing. Other than pain associated with the back impairment, plaintiff identifies no other impairments beyond his back impairment that contribute to his disability.

see the later-done physical therapist's report and (b) he may have meant by "disabled" only that plaintiff could not return to his past (heavy) work.

The ALJ's lengthy summary of the medical evidence included the discography evidence and Dr. Shapiro's assessment. The ALJ summarized Dr. Shapiro's evaluation as follows:

May 15, 2001 note from Dr. Shapiro stated that the discography results was [*sic*] negative at L3-4 for recreation of any symptoms. L5-S1 recreated discordant pain. Review of the discogram itself showed that the disc was not compressed at L5-S1. Review of the CAT scan after the discogram suggested another herniated disc at L4-5. The doctor recommended a spine fusion at L4-5.

(R. 19-20). As the ALJ set out, "The opinion of a treating physician is entitled to great weight unless there is persuasive contradictory evidence. A treating physician'[s] medical opinion, on the issue of the nature and severity of an impairment, is entitled to special significance; and, when supported by objective medical evidence and consistent with other substantial evidence of record, entitled to controlling weight." (R. 20) (citing SSR 96-2p (Soc. Sec. Admin. 1996)).

Although the ALJ's decision is not entirely clear as to what he discredited in Dr. Shapiro's reports, the context indicates that the ALJ did not reject Dr. Shapiro's evaluation of the nature of the impairment or the quality or accuracy of the findings and diagnosis, including the fact of re-herniation, or that plaintiff suffered pain. Rather, the ALJ ultimately rejected Dr. Shapiro's conclusion that plaintiff is disabled. Accurately stating that the determination of disability is reserved to the Commissioner, the ALJ concluded that in spite of his impairments, plaintiff's pain was not so severe that he could not do any work in the national economy.<sup>2</sup>

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<sup>2</sup>On review, the magistrate judge did not mention the discography report or Dr. Shapiro's assessment in her summary or evaluation of the evidence. She noted in her evaluation of the ALJ's decision, however, that the ALJ properly did not give controlling weight to Dr. Shapiro's opinion "because his report was inconsistent with Dr.

(continued...)

It is true, as plaintiff contends, that in rejecting Dr. Shapiro's opinion, the ALJ identified as contrary evidence the 1999 opinion of Dr. Panchal (no neurological weakness, normal reflexes, could return to work with limitations) and the September, 2000 opinion of Dr. Gutierrez (no neurological deficit, could return to past work). The references to the anatomical findings of these doctors, however, are not markedly inconsistent with the findings of Dr. Shapiro made in October 2000 (easy forward flexion, with significant pain on flexion of more than 70%; negative straight leg raising test; neurological testing completely normal (R. 195)). Indeed, the inability to find the anatomical source of pain gave rise to Dr. Shapiro's request for the discogram. See Plaintiff's Memorandum at 4, citing Am. Ass'n of Neurological Surgeons, *Neurological Diagnostic Tests*, cited as available at <http://www.neurosurgerytoday.org/what/patient> (Discogram "is used to determine if intervertebral discs in the spinal column are a source of pain. CT and MRI scans only illustrate anatomy and cannot determine the source of pain.")<sup>3</sup> The difference was in the physicians' assessments of whether plaintiff could return to work. The court concludes that the ALJ did fairly consider the medical evidence.

2. *Whether the magistrate judge erred in determining that the ALJ's credibility determination was not patently wrong.*

The question of whether plaintiff could work resolved on the issue of residual functional capacity and whether plaintiff's allegations of pain were credible. *Prochaska v.*

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<sup>2</sup>(...continued)

Panchal's report, Dr. Gutierrez's report, and with [a] June 7, 2002 [FCE]." R & R at 8. She concluded that Dr. Shapiro's opinion was not "well supported by medically acceptable clinical and laboratory diagnostic techniques," and was thus inconsistent with the other substantial evidence (citing 20 CFR § 404.1527(d)(2)). R&R at 11-12. Because the court is to give the report and recommendation *de novo* review, it will not consider the merits of the magistrate judge's assessment on this issue.

<sup>3</sup>The court was denied access to this site.

*Barnhart*, 454 F.3d 731, 738 (7<sup>th</sup> Cir. 2006), sets out the standard of review of credibility findings concerning pain as follows:

We afford a credibility finding considerable deference and overturn it only if patently wrong. Only if the trier of fact grounds his credibility finding in an observation or argument that is unreasonable or unsupported ... can the finding be reversed. An ALJ may disregard a claimant's assertions of pain if he validly finds her incredible. SSR 96-7p instructs that when determining the credibility of the individual's statements, the adjudicator must consider the entire case record, and that a credibility determination must contain specific reasons for the finding on credibility, supported by the evidence in the case record. An ALJ should consider elements such as objective medical evidence of the claimant's impairments, the daily activities, allegations of pain and other aggravating factors, "functional limitations," and treatment (including medication).

(Internal citations and quotation marks omitted). Plaintiff contends that it was improper to allow the functional capacity evaluation (FCE) administrator to "trump" the treating orthopedist's contrary and well-supported opinion," citing 20 C.F.R. § 1513. Section 1513, however, merely sets out what evidence the Commissioner will consider. It does not guide the Commissioner in weighing the evidence. As stated, the ALJ considered the objective medical evidence and other evidence in reaching his conclusion. In assessing credibility, the ALJ relied on two functional capacity assessments (and one residual functional capacity assessment (RFCE)), as well as his own observations of the plaintiff at the hearing. The first FCE, performed by an occupational and a physical therapist dated November 28, 2000, concluded that plaintiff could perform at least sedentary work (R. 330). The RFCE dated April 2, 2001 and performed by a physician but without benefit of a treater's report regarding the plaintiff's capacities, concluded that plaintiff could lift 20 pounds occasionally, 10 pounds frequently, stand and/or walk at least 2 hours in an 8-hour day, and push, pull and operate hand controls without limitation (no finding was made

regarding sitting) (R. 174). The third FCE, performed by a physical therapist on June 7, 2002, concluded plaintiff could perform light-medium work (R. 337).

Plaintiff argues, with justification, that the ALJ's notation that there had been an indication of inappropriate symptoms according to a behavioral screening on the first FCE was not a fair assessment of the situation in 2002. The ALJ himself acknowledged that the first two reports predated Dr. Shapiro's finding.<sup>4</sup> Plaintiff also argues that the ALJ had an obligation to recontact Dr. Shapiro for clarification of what he meant by "disabled," as the ALJ inferred he might have meant only that he could not return to his past work, not any work. An ALJ need recontact medical sources only when the evidence received is inadequate to determine whether the claimant is disabled. *Skarbek v. Barnhart*, 390 F.3d 500, 504 (7<sup>th</sup> Cir. 2004) (citing 20 C.F.R. § 404.1512(e)).<sup>5</sup> As stated above, the medical evidence from Dr. Shapiro was not unclear or inadequate. What the physician meant by disabled was the ultimate issue for the ALJ, and there was relevant contemporary evidence in the FCE reports that illuminated the fact. Thus, the court cannot conclude that a request for clarification from Dr. Shapiro was necessary in order

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<sup>4</sup>This court also concurs with plaintiff's objection to the magistrate judge's implication (intended or not) that Dr. Shapiro's credibility was in doubt because he saw the plaintiff three times before reaching the conclusion of disability. This, however, was not part of the ALJ's reasoning and is disregarded here.

<sup>5</sup>Section 404.1512 provides in relevant part:

e) Recontacting medical sources. When the evidence we receive from your treating physician or psychologist or other medical source is inadequate for us to determine whether you are disabled, we will need additional information to reach a determination or a decision. To obtain the information, we will take the following actions.

(1) . . . 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. . . .

to reach a fair decision. Nor is it apparent that re-herniation, *per se*, meant that plaintiff could not perform any work. Plaintiff makes several other arguments, such as the inappropriateness of the ALJ's relying in part on his observations of plaintiff at the hearing, and the fact that plaintiff did not take pain medications, which the court has considered but concludes that, even if inappropriate, they do not undermine the ALJ's conclusion that plaintiff is not disabled within the meaning of the Social Security Act.

3. *Whether the magistrate judge misunderstood Smith's argument regarding the invalidity of the FCEs and erroneously found that the ALJ did not err in relying on the FCEs.*

Plaintiff contends that the ALJ erroneously relied on the FCEs in his finding despite admitting during the hearing that the tests were flawed and inaccurate; that the FCE's were invalid and not supported by the medical evidence, thus insufficient to support a finding of non-disabled. The Commissioner responds to the contrary on all of these issues. The record reflects that the ALJ did express some skepticism about FCEs that test the subject for a period of two to four hours in terms of their validity for sustained work of a 40-hour work week.<sup>6</sup> As the magistrate judge recognized, "if the FCE's are backed by medical evidence, they are credible." R&R at 15 (citing *White v. Barnhart*, 415 F.3d 654, 659 (7<sup>th</sup> Cir. 2005)). Plaintiff argues that the magistrate judge misapplied *White* because that case addresses a "residual functional capacity

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<sup>6</sup>ALJ: "The FCEs I used to see were always were [sic] two days. And the vocational experts would testify that, that was a valid sampling of what the individual could do. But it used to be two, I believe, two six- or seven-hour days that they would do it. I've never seen these short form two- and four- hour ones before." . . .

ATTY: . . . I think those would have more--

ALJ: Much more validity. . . . I was surprised to even see one that lasted two hours like Mr. Smith just testified to . . . ." (R. 65-66).

evaluation” which is prepared by a physician rather than an FCE prepared by a non-physician. Plaintiff does not cite anything in the regulations or case law making this distinction, however.

The question *White* poses is whether the FCE is backed by medical evidence. In this case, the physical therapist who examined plaintiff in June, 2002 noted that plaintiff could tolerate walking for 11 minutes and 20 seconds but with increased antalgic gait pattern; that he could carry 25 pounds for 10 feet, although he used his trunk to rest the load during the carry and demonstrated increased flexed posture and pelvic shift to the right; and that he could lift up to 25 pounds from 24" to waist but had difficulty performing the squat position to lift from the floor, and “deterioration of body mechanics” when attempting a floor-to-waist lift. He also experienced difficulty with repeated climbing of 3 stairs. The examiner further observed that plaintiff had difficulty sustaining a sitting posture for more than 5 minutes and his standing posture entailed frequent weight shift side to side. (R. 339-40). As well, the April, 2001 RFCE made no finding as to plaintiff’s ability to sit for a prolonged period nor his postural limitations. (R. 174).

In general, these observations are not inconsistent with the medical evidence but, at the same time, not consistent with a finding that plaintiff can sit or stand for 6 hours as would be required for sedentary work (“A sedentary job is defined as one which involves sitting. . . .”) and light work (“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.”).<sup>7</sup>

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20 C.F.R. § 404.1567, provides:

(continued...)

When all was said and done, of the capacity assessments the ALJ gave most of the credit to the June 2002 report and acknowledged the difficulty of extrapolating from a two-to-four hour test the ability to do sustained labor for an entire work week. Yet, the ALJ merely cited the observation that plaintiff could lift up to 25 pounds but did not address the documented difficulties plaintiff had in meeting each of the standards required of light-medium duty work or his inability to maintain a sitting or standing position. The plaintiff's difficulties in performing on the FCE were considered by the therapist to be valid observations. As a result this court cannot conclude with confidence that there is substantial evidence in the record to support a conclusion that plaintiff can perform sedentary and light work. *See* 42 U.S.C. § 405(g); *Jens v. Barnhart*, 347 F.3d 209, 212 97<sup>th</sup> Cir. 2003); *Stevenson v. Chater*, 105 F.3d 1151, 1153 (7<sup>th</sup> Cir.1997) (The court's task is limited to determining whether the ALJ's factual findings are supported by substantial evidence); *Young v. Barnhart*, 362 F.3d 995, 1001 (7<sup>th</sup> Cir. 2004) (citing

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<sup>7</sup>(...continued)

a) Sedentary work. Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

(b) Light work. 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.

*Stevenson*, 105 F.3d at 1153) (Evidence is substantial if a reasonable person would accept it as adequate to support the conclusion.).

**CONCLUSION AND ORDER**

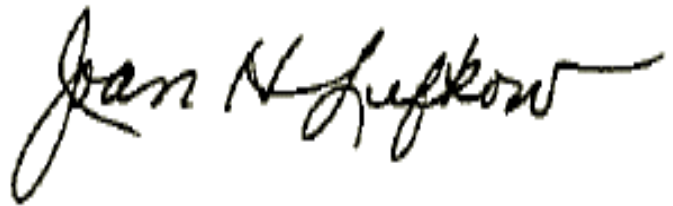
For the above stated reasons, the court adopts the report and recommendation of the magistrate judge as to all issues except the determination that the ALJ correctly decided that plaintiff could perform sedentary or light work in the national economy. The motion of plaintiff for summary judgment is denied; his alternative motion for a remand for further consideration of whether plaintiff can perform work in the national economy is granted. The motion of the defendant for summary judgment is denied.

ENTER:

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JOAN HUMPHREY LEFKOW  
United States District Judge

Dated: October 26, 2006

A handwritten signature in black ink, appearing to read "Joan H. Lefkow", written in a cursive style.