

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

LISA WHISENANT,	)	
Plaintiff,	)	
v.	)	No. 06 CV 5322
	)	Judge Blanche M. Manning
MICHAEL J. ASTRUE,	)	
Defendant.	)	

**MEMORANDUM AND ORDER**

In 1999, plaintiff Lisa Whisenant was rear-ended while driving. Since then, she's reported a multitude of medical problems including pain, seizures, and hallucinations. As a result, she contends she has been unable to work and applied for disability benefits from the Social Security Administration. After a confusing history of multiple applications and inconsistent decisions, the Commissioner ultimately concluded that she can still work and denied her benefits. She has now filed a motion for summary judgment asking the court to either award her benefits or remand her case. For the reasons that follow, the court remands for further proceedings.

**I. BACKGROUND**

On the afternoon of her accident, Whisenant sought treatment from emergency room doctors for neck, back and knee pain. She was diagnosed with lumbar and cervical strain, for which she was given Vicodin for her pain. The following day she saw her own physician, Dr. Herbert Alan Jones, who prescribed her more pain medications—Vioxx and Robaxin. A week later on September 7, 1999, she saw Dr. Jones again, who prescribed her more Vicodin. She returned the next day complaining of worsening pain, vaginal bleeding, and hallucinations. Dr.

Jones asked her to return in a week. When she did, she complained of continuing pain and hallucinations, for which Dr. Jones prescribed Wellbutrin and Ambien.

Whisenant regularly visited multiple doctors over the coming months. During that time, she was diagnosed with mild tenosynovitis in her right ankle joint and tendon, bilateral carpal tunnel syndrome, post-traumatic stress syndrome, mild bilateral facet degenerative changes in one of her lumbar discs, cervical myalgia, post-concussion syndrome, and depression. She was prescribed a variety of medicines as well as physical therapy. In November 1999, Dr. Jones concluded that she should not do any lifting and was permanently disabled from all types of employment.

Whisenant's complaints of pain, sleeplessness, anxiety, weight gain, and seizures continued in January 2000, at which time Dr. Jones prescribed Depakote for the seizures. In March 2000, Whisenant underwent an electroencephalogram, which returned normal results, and a brain perfusion spectrogram, which revealed decreased uptake in the right basal ganglia and parts of the cerebral cortex. At about the same time she underwent surgery for her carpal tunnel conditions on both her left and right sides. The surgery appears to have successfully relieved the pain due to those conditions.

In April 2000, she saw a neurologist about her seizures. He increased her dosage of Depakote. In July 2000, she began seeing Dr. Robert Young for seizures, which she reported having twice a week. Dr. Young continued her on Depakote. He also noted that her cervical myalgia was worsening.

Whisenant continued to complain of pain and seizures during the coming years. In May 2001, a witness documented her observation of one of Whisenant's seizures, which the witness

wrote lasted four minutes and left Whisenant dazed and confused. In May 2004, Whisenant began receiving treatment for migraines, backpain, and epilepsy and received prescriptions for a large number of painkillers (Soma, Vioxx, Tramadol, Vicoprofen, Bextra, Tegretol, and Klonopin). In October 2004 an Advance Practice Nurse noted that Whisenant had fibromyalgia that caused her back pain and prevented her from completing her physical therapy. The following year the nurse also noted that Whisenant suffered from neuropathy.

Whisenant first applied for Social Security Disability Insurance Benefits and Supplemental Security Insurance on November 30, 1999, alleging an onset date of August 31, 1999, the date of her car accident. Her claim was denied initially and upon reconsideration. Following the denial, she requested a hearing before an administrative law judge. Following the hearing, administrative law judge William Wilkin issued a decision on May 30, 2002, denying her benefits. ALJ Wilkin determined that Whisenant had severe seizures, back pain, and migraines, but that those impairments were not listed, or equivalent to one of the impairments listed, in Appendix 1 to Subpart P of Social Security Regulation No. 4. *See* 20 C.F.R. § 416.920(e) (“Listing”). Because he also concluded that she could still work, he found her ineligible for disability benefits. Whisenant appealed Wilkin’s decision to the Appeals Council.

On October 22, 2002, Whisenant filed a second claim for benefits even though her appeal of her first claim had not yet been decided. Once again she alleged an onset date of August 31, 1999. This second application was approved on April 14, 2003—the onset date was established as June 1, 2002, the day after ALJ Wilkin denied her first application. The second application was approved based upon an organic mental disorder and a seizure disorder.

On March 12, 2004, the Appeals Council issued a decision in which it (1) set aside ALJ Wilkin's denial of her first application, (2) reopened the favorable determination of her second application, (3) consolidated the claims, and (4) sent the cases back to an administrative law judge for a new decision. The Appeals Council's reasoning for sending the cases back was the inconsistency between the denial of the first application and the granting of the second.

However, the March 12 Appeal Council decision never made it to Whisenant because it was sent to her old address. Upon discovering the error, on June 18, 2004, the Appeal Council issued a revised decision in which it, once again, (1) set aside ALJ Wilkin's denial of her first application, (2) reopened the favorable determination of her second application, (3) consolidated the claims, and (4) sent the cases back to an administrative law judge for a new decision. The June 18, 2004, order also directed the new administrative law judge to obtain additional evidence about Whisenant's alleged cognitive disorder and to give further consideration to her residual functional capacity.

On December 14, 2005, administrative law judge Denise McDuffie Martin conducted the rehearing ordered by the Appeals Council. In addition to evidence presented at the hearing, ALJ Martin considered a medical report prepared at her request by psychologist Dr. William Hilger, who observed that Whisenant exaggerated her symptoms and showed signs of malingering. On January 10, 2006, ALJ Martin issued her written decision denying Whisenant benefits. In the decision, ALJ Martin concluded that Whisenant has a severe somatization disorder, but that it did not meet or was not equivalent to an impairment in the Listing, that her subjective allegations were not credible, that she could perform "simple, unskilled work involving low levels of stress," that such jobs are available, and that Whisenant is therefore not disabled. Whisenant requested a

rehearing and appealed. But her requests were to no avail; the Appeals Council denied her request for review on July 3, 2006, making the ALJ's decision the final decision of the Commissioner. Whisenant then sought judicial review of the Commissioner's decision by timely initiating the instant suit.

## **II. STANDARD OF REVIEW**

Before turning to Whisenant's arguments in favor of summary judgment or remand, the court first reviews the criteria that Administrative Law Judges must apply when determining whether an applicant is disabled and eligible for benefits. The court will then set out the standard it applies when reviewing the ALJ's decision.

Under the Social Security Act, an individual is disabled "if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 32 U.S.C. § 1382c(a)(3)(A).

Additionally, an individual is disabled "only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." 42 U.S.C. § 1382c(a)(3)(B).

The Social Security Administration sets out a five-step analysis used to determine whether an individual is disabled. *See* 20 C.F.R. § 416.920. The ALJ must determine in sequence: (1) whether the claimant is presently working and whether that work constitutes

substantial gainful activity; (2) whether the claimant's impairment is "severe"; (3) whether the impairment meets or equals an impairment in the Listing; (4) whether the claimant is able to perform her past relevant work; and (5) whether the claimant's age, education, and past work experience, in relation to his residual functional capacity, enable her to do other work. *Id.* Once the ALJ has reached step five, the Commissioner has the burden of proving that there are jobs in the national economy that the individual can perform. *See* 20 C.F.R. § 1520(a)-(f).

In reviewing the ALJ's decision (as adopted by the Commissioner as its final decision), the court must review all of the evidence in the record. *See Delgado v. Bowen*, 782 F.2d 79, 82 (7th Cir. 1985). Judicial review of the Commissioner's final decision is governed by 42 U.S.C. § 405(g), which provides that "the findings of the commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive." Thus, the court will not decide the facts anew, reweigh the evidence, or substitute its own judgment for that of the Commissioner. *Cass v. Shalala*, 8 F.3d 552, 555 (7th Cir. 1993).

Instead, the court must determine whether the ALJ applied the correct legal standards in reaching a decision and whether there is substantial evidence in the record to support the findings. 42 U.S.C. § 405(g); *see also Scivally v. Sullivan*, 966 F.2d 1070, 1075 (7th Cir. 1992). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). The ALJ's decision must be affirmed if the findings and inferences reasonably drawn from the record are supported by substantial evidence, even though some evidence may support the claimant's argument. 42 U.S.C. § 405(g). A credibility determination made by the ALJ will not be disturbed unless it is patently wrong. *See Powers v. Apfel*, 207 F.3d 431, 435 (7th Cir. 2000). The ALJ's conclusions

of law, however, are not entitled to such deference. If the ALJ committed an error of law, “reversal is required without regard to the volume of the evidence in support of the factual findings.” *Imani v. Heckler*, 797 F.2d 508, 510 (7th Cir. 1986).

### **III. ANALYSIS**

Whisenant presents three arguments that she contends entitle her to summary judgment or remand. First, she contends that ALJ Martin failed to follow the directions of the Appeals Council on remand. Second, she contends that ALJ Martin’s residual functional capacity determination was incomplete. Third, she contends that at step five of the sequential analysis, ALJ Martin failed to account for all of Whisenant’s limitations. The court analyzes each argument in turn.

#### **A. Appeals Council’s Directions On Remand**

Whisenant argues that ALJ Martin neglected to follow directions the Appeals Council gave her when it remanded Whisenant’s case. Specifically, Whisenant contends that ALJ Martin ignored the following directions from the Appeals Council: (1) to develop additional evidence of Whisenant’s cognitive impairment including ordering appropriate testing; (2) to specifically ask a medical expert about whether Whisenant’s cognitive impairment met a listing; and (3) to take into account any of the evidence elicited during the consideration of Whisenant’s second application for benefits (the one that was initially approved but ultimately set aside by the Appeals Council).

##### **1. Additional Evidence and Testing**

The court has carefully reviewed Whisenant’s arguments, the Appeals Council’s order remanding her case, the transcript of her rehearing on remand, and the ALJ’s written decision.

As a result of its review, the court rejects Whisenant's contention that the ALJ ignored the Appeals Council's directions. Although Whisenant argues that ALJ Martin failed to develop additional evidence of her cognitive impairment as directed, ALJ Martin in fact did develop additional evidence. Specifically, at the direction of ALJ Martin, the following additional evidence was developed and presented: (a) psychologist Dr. Hilger prepared a report based upon a mental status exam he performed in April 2005; (b) psychiatrist Dr. Robert Marquis testified as a medical expert at Whisenant's hearing in December 2005; and (c) Pamela Tucker testified at the hearing as a vocational expert. Whisenant argues that Dr. Hilger's mental status exam was inadequate because ALJ Martin failed to order Dr. Hilger to include cognitive testing as part of his exam. However, the Appeals Council's remand order stated only that "appropriate testing" *may* be included "if warranted and available." (R. at 92). It did not *require* testing, as Whisenant now contends.

In summary, Dr. Hilger, Dr. Marquis and Ms. Tucker all provided ALJ Martin with additional evidence about Whisenant's cognitive impairment, and therefore her argument that the ALJ failed to obtain additional evidence is without merit.

## **2. Testimony About the Listing**

Whisenant argues that ALJ Martin disregarded the Appeals Council order "that specifically required the ALJ to ask the [medical expert, Dr. Marquis] whether Plaintiff met a Listing, not just call upon a Medical Expert as Defendant contends." (Reply at 1.) According to Whisenant, Dr. Marquis testified that Whisenant had a marked limitation in social functioning, but the ALJ failed to question Dr. Marquis whether that impairment met a Listing. Instead, Whisenant contends, the ALJ concluded on her own that the limitation did not meet a Listing.

Whisenant argues that had the ALJ specifically questioned Dr. Marquis whether the limitation met a Listing, Dr. Marquis would have been required to consider not only whether the single limitation met a Listing, “but also whether her combination of impairments equaled the Listing.” (Reply at 2.)

Whisenant’s argument fails for two reasons. First, Whisenant’s contention that the Appeals Council specifically directed the ALJ to ask Dr. Marquis whether Whisenant’s impairments met or equaled a Listing is incorrect. The order does not direct the ALJ to pose any specific questions, but rather merely directs the ALJ to “[o]btain evidence from a medical expert to clarify whether the claimant’s alleged cognitive disorder meets or equals the severity of [a Listing] impairment.” (R. at 92.) Dr. Marquis’ testimony satisfied this order. Second, Whisenant’s contention that posing a specific question about the Listing would have obligated Dr. Marquis to take into account all of her impairments, not just the one he observed, is unsupported by any authority. *See Trustees of Chicago Painters & Decorators Pension, Health & Welfare & Deferred Savings Plan Trust Funds v. Royal Int’l Drywall & Decorating, Inc.*, 493 F.3d 782, 789 (7th Cir. 2007) (arguments unsupported by citations to authority are forfeited). Accordingly, Whisenant has not established any error by the ALJ regarding asking Dr. Marquis about the Listing.

### **3. Evidence from Whisenant’s Second Application for Benefits**

Whisenant also contends that ALJ Martin erred by not taking into account the evidence upon which the Social Security Administration initially approved her second application for benefits. Whisenant contends that the ALJ’s failure to consider this evidence is demonstrated by the absence of any of this evidence in the administrative record.

Whisenant has identified only one piece of evidence from the second application that is missing from the record and that would have made any difference. That missing evidence is a report prepared by state agency physicians who concluded that Whisenant had an organic mental disorder that met a Listing and therefore established that she was disabled. However, the Appeals Council discredited the state agency report in its order remanding Whisenant's case. Specifically, the Appeals Council concluded that the report of the state agency physicians was flawed because it was based not on objective observations but rather "on the report of the consultative examiner who appears to have relied solely on the claimant's statements." (R. 92.) Because the Appeals Council already discredited the report, ALJ Martin correctly stated in her decision that she had no occasion to consider it on remand. Accordingly, Whisenant has not identified any evidence missing from the administrative record that would have made a difference in ALJ Martin's reconsideration of her applications for benefits.

In summary, Whisenant has not shown that ALJ Martin failed to follow the directives set out by the Appeals Council in its order remanding her case. Accordingly, she is not entitled to summary judgment or remand on this basis.

**B. Incomplete Residual Functional Capacity Determination at Step Four**

Next, Whisenant argues that ALJ Martin erred at step four of the sequential analysis by failing to consider the aggregate effect of her reported non-severe impairments on her severe impairment when determining Whisenant's residual functional capacity. The non-severe impairments that the ALJ allegedly neglected to account for include Whisenant's reports of continuing pain as well as seizures.

When assessing a claimant's residual functional capacity, an ALJ must take into account any combined effect of impairments supported by the record. *See Sims v. Barnhart*, 309 F.3d 424, 432 (7th Cir. 2002) ("we urge the SSA in the future to carefully examine the issue of disability in light of a claimant's total impairments."). However, Whisenant contends, ALJ Martin failed to do that by improperly disregarding some of her symptoms. For instance, Whisenant argues, ALJ Martin did not take into account Whisenant's reports of pain because the ALJ found them to be not credible in light of the lack of evidence "that she has any ongoing medically determinable musculoskeletal impairment" or other objective medical evidence supporting her reports of pain. However, Whisenant argues that the ALJ did not acknowledge records dated October 2004 and September 2005 in which an Advance Practice Nurse noted neuropathy (R. 335) and fibromyalgia (R. 351).

"[O]nce a 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." *Carradine v. Barnhart*, 360 F.3d 751, 753 (7th Cir. 2004) (internal quotations and citation omitted). The Commissioner has identified nothing in the record in which the ALJ either acknowledges the reports of neuropathy and fibromyalgia, or offers a reason for disregarding the reports. The ALJ may well have had legitimate reasons for disregarding the reports, but having chosen not to articulate her reasons, the ALJ leaves this court unable to review them. Therefore, the ALJ erred in finding Whisenant's subjective complaints of pain not credible without explaining her reasons for discrediting the medical reports of neuropathy and fibromyalgia.

The ALJ also discredited Whisenant's reported history of seizures because (1) she found Whisenant's "subjective allegations . . . not credible," and (2) records documenting a history of seizures appeared to be based solely upon what Whisenant had told caregivers rather than first-hand observations, and were therefore unsupported by objective medical evidence. In discrediting Whisenant's allegations of seizures, the ALJ noted that her "description of symptoms has been quite vague and general, lacking the specificity that might otherwise make it more convincing; and she has not provided convincing details regarding factors which precipitate the alleged disabling symptoms." (R. 30.)

However, Whisenant argues, in discrediting her self-reports of seizures, ALJ Martin did not account for a letter detailing one of Whisenant's seizures written by a person who observed it first-hand. According to the letter, on "May 21, 2001, I, Nicole L. Amberson witnessed Lisa Madison have a seizure. Her hands and feet were shaking she was incoherent the symptoms lasted approximately [sic] three to four minutes. After the seizures she was still slightly dazed and confused."

Again, the Commissioner has identified nothing in the record to suggest that ALJ Martin took into account the written observation of Whisenant's seizure. While the ALJ may have had a legitimate reason to disregard the first-hand account, the court cannot review her decision because she did not articulate her reason or even acknowledge the existence of the letter in the record. As a result, the court cannot know whether she took the letter into account and justifiably disregarded it, or whether she neglected to consider it at all.

In summary, the ALJ did not fully account for all of the evidence in the record favorable to Whisenant. As a result, her decision fails to build the "accurate and logical bridge from the

evidence to [her] conclusion so that, as a reviewing court, we may assess the validity of the agency's ultimate findings and afford a claimant a meaningful judicial review." *Scott v. Barnhart*, 297 F.3d 589, 595 (7th Cir. 2002). Accordingly, Whisenant is entitled to her request for a remand of her case to allow the Commissioner to more fully account for the evidence she presented and to explain his ultimate decision.

**C. Inaccurate Hypothetical to the Vocational Expert at Step Five**

Finally, Whisenant argues that the hypothetical that ALJ Martin presented to the vocational expert during her remand hearing was inaccurate because it incorporated the incomplete residual functional determination. As a result, Whisenant contends, the vocational expert did not take into account all of her symptoms and impairments when concluding that she could successfully perform a significant number of jobs in the national economy.

As discussed in the previous section, the court agrees with Whisenant that the ALJ's residual functional determination at step four was incomplete. It follows, then, that the ALJ's use again in step five of the incomplete residual functional determination led to the presentment to the vocational expert of an inaccurate hypothetical. However, use of an inaccurate hypothetical does not necessarily require remand if other evidence in the record reveals that the vocational expert knew the extent of the claimant's limitations or that the error was in some other way harmless. *See Young v. Barnhart*, 362 F.3d 995, 1003 (7th Cir. 2004). However, the defendant has made no such argument and therefore the court will not consider that possibility any further. *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 627-28 (7th Cir. 2007) (arguments that are not presented are forfeited).

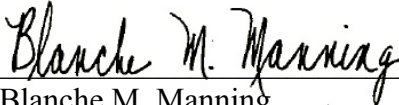
**CONCLUSION**

The Commission's final determination failed to address all of Whisenant's symptoms and failed to explore whether they had an aggregate negative effect on her ability to work. As a result, the determination of her residual functional capacity may have been incomplete at step four of the sequential analysis which may, in turn, have led to the presentation of an inaccurate hypothetical to the vocational expert at step five.

Accordingly, Whisenant's motion for a remand is granted. Because the court is remanding for the reasons stated above, the court expresses no opinion on Whisenant's remaining arguments, including that Dr. Hilger was biased against her and therefore ALJ Martin erred in crediting a medical report in which he opined that Whisenant was malingering.

ENTER:

DATE: January 10, 2008

  
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Blanche M. Manning  
United States District Judge