UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAYNE A. MATHEWS-SHEETS, Plaintiff,	)	
v.	)	1:08-CV-1426-WTL-DML
MICHAEL J. ASTRUE, Commissioner of the Social Security Administration, Defendant.	)	

PLAINTIFF'S REPLY TO DEFENDANT'S MEMORANDUM IN SUPPORT OF COMMISSIONER'S DECISION

The Plaintiff, Jayne A. Mathews-Sheets, by her counsel, C. David Little, herein files her Reply to Defendant's Memorandum in Support of Commissioner's Decision. As demonstrated herein, the Commissioner's decision is replete with incorrect legal standards and errors of law. In support of his decision to deny disability benefits to Plaintiff, the Commissioner has misstated the plain facts and logical impact of Plaintiff's testimony as well as the opinions and records of treating physicians, specialists, and examining sources. For these reasons, this decision cannot stand and must be reversed as a matter of law.

1. Restatement of Standards of Review

Under 42 U.S.C. § 405(g), a court reviews whether substantial evidence supports the ALJ's final decision and whether the ALJ applied the proper legal criteria in reaching the decision. 42 U.S.C. § 405(g); *Eberhart v. Sec'y of Health and Human Serv.,* 969 F.2d 534 (7th Cir. 1992). The reviewing court will uphold the Administrative Law Judge's (ALJ) decision if the ALJ employed the correct legal standard and his

ultimate conclusions are supported by substantial evidence. *Simpson v. Barnhart*, 91 Fed. Appx. 503 (7th Cir. 2004) and *Groskreutz v. Barnhart*, 108 Fed. Appx. 412 (7th Cir. 2004). Substantial evidence is defined as adequate, relevant evidence of record that a reasonable mind might accept to support a conclusion. Evidence is insubstantial if it is overwhelmingly contradicted by other evidence. A finding of no substantial evidence will be found only where there is a conspicuous absence of credible choices or no contrary medical evidence. 42 U.S.C. 405(g). "Substantial evidence" (1) may be less than a preponderance of the evidence; (2) must be more than a scintilla of evidence; and (3) is such relevant evidence as a reasonable mind might accept to support a conclusion. *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938); *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 618-19 (1966).

To determine whether substantial evidence supports the ALJ's decision, a court reviews the whole record, *Ark. v. Okla.*, 503 U.S. 91, 113 (1992), including evidence that detracts from the ALJ's findings and decision. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 487-88 (1951). A court should adopt the findings suggested by the claimant if the record requires those findings. *Campbell v. Shalala*, 988 F.2d 741, 744 (7th Cir. 1993). An error of law warrants reversal "irrespective of the volume of evidence supporting the factual findings." *Schmoll v. Harris*, 636 F.2d 1146, 1150 (7th Cir. 1980). Therefore, the ALJ's decision must be supported by substantial evidence and it must not contain an error of law. This decision cannot stand because it is not supported by substantial evidence of record and contains errors of law.

2. Restatement of Relevant Medical Evidence

Plaintiff is afflicted with fibromyalgia, chronic deep vein thrombosis and morbid obesity, conditions which are complicated by bilateral plantar fasciitis, venous

thromboembolic disease, degenerative joint disease, restless leg syndrome, depression, peptic ulcer disease, hyperlipidemia and antiphosphoipid antibody syndrome with multiple DVT's, pulmonary emboli, and tricompartmental degenerative arthritis. (Tr. 659, 685, 613, 246, 541). Plaintiff has multiple medical problems which combine to decrease her vitality and viability. Her long term prognosis is incredibly poor, and she is considered "a walking time bomb." (Tr. 482, 503). Her condition has been documented by, tended to, and monitored for nearly a decade by a battery of treating physicians and specialists.[1]

Although Plaintaiff worked continually as a nurse's assistant/secretary from 1985 to 2004, this was not full time work. Plaintiff worked one or two days a week for about three hours per day, but was often unable to finish those days. As of September 2004, she was unable to continue working even these reduced hours because of her illnesses. (Tr. 719, 715).

While Defendant's Memo implies disbelief as to the existence and severity of fibromyalgia, rheumatologist Dr. Veronica Mesquida, a specialist in fibromyalgia[2], stated repeatedly that Plaintiff exhibited the 'triggerpoints', which are objective, medically accepted indicia of fibromyalgia. Dr. Mesquida's notes make clear that Plaintiff's conditions have worsened because of her morbid obesity, increasing the pain

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[1] 1) Dr. Robert Watts, Adult Medical Specialist, seven years of treatment, http://www.witham.org/body.cfm?xyzpdqabc=0&id=12&action=detail&ref=28, 2) Dr. Veronica Mesquida, Rheumatology Specialist, almost three years of treatment, http://www.fvortho.com/index.aspx/Physicians/Veronica_Mesquida_MD., Dr. John Tuttle, Primary Care Physician, Internal Medicine, for four years, http://www.witham.org/body.cfm?xyzpdqabc=0&id=12&action=detail&ref=27, and Dr. Barth Conard (erroneously referred to in Defendant's Memo as "Dr. Conrad", Orthopedic Specialist, three years of treatment, http://www.witham.org/body.cfm?xyzpdqabc=0&id=12&action=detail&ref=114.

[2] Defendant's Memo only refers to the examination notes from thirty four months of Dr. Mesquida's treatment (Tr. 535-683) thusly: "Dr. Mesquida saw Plaintiff twice in 2007, and recommended that she begin aerobic exercise (Tr. 681-84)" (Defendant's Memo, p. 3).

in her hands, shoulders, knees, hips, lower back, and neck as a logical result of the additional stress on her joints, which exacerbates her stiffness, fatigue, and weight gain. (Tr. 682,535, 68-684). Dr. Mesquida noted that Plaintiff's pain frequently equaled ten out of ten possible pain points (Tr. 682), mitigated only by pain medications that often made it hard for her to concentrate and stay awake. (Tr. 701-716).

Contrary to the assertions in the Defendant's Memo that Plaintiff successfully performs average daily activities and assists in the care of her grandchildren (Memo, p. 2), Plaintiff actually testified that her whole body hurts all the time (Tr. 703, 706-710), she cannot walk anywhere because of intense pain, which she feels even when sleeping (Tr. 86, 91), and she specifically cannot take care of her grandson or chase after him because of pain. (Tr. 81).

3. Errors Requiring Reversal

a. Listing Impairments as the exclusive way to prove disability.

Defendant's Memo asserts that a Plaintiff bears the burden of proving that she met or equaled a listed impairment, citing *Maggard v. Apfel*, 167 F.3d 367 (7th Cir 1999). Yet, this is an incorrect statement of the law in this circuit. Regardless of Social Security listings, it is possible for an SSA recognizable disability to exist based on pain alone. *Carradine v. Barnhart*, 360 F.3d 751, 2004 U.S. App. LESXIS 4707 (7th Cir. 2004). As Plaintiff's Brief discusses extensively (Plaintiff's Brief, p. 12-15), the *Carradine* opinion specifically considered whether the severity of a claimant's conditions, including fibromyalgia, caused her such severe pain that she could not work full time even though her condition did not meet or equal a listed impairment.

In *Carradine, supra*., Judge Posner wrote that:

> a claimant's subjective testimony supported by medical evidence that satisfies the pain standard is itself sufficient to support a finding of disability. Indeed, in certain situations, pain alone can be disabling, even when its existence is unsupported by objective evidence. *Foote v. Chater*, 67 F.3d 1553 (11th Cir. 1995) *as cited in Carradine, Id.* (Plaintiff's Brief, p. 14.)

Thus, Defendant's assertion that the only way to obtain disability benefits is to prove that Plaintiff's condition meets or equals a listed condition is patently wrong. Since the ALJ also operated under this erroneous statement of the law in this circuit, both parties clung to an erroneous legal standard and are clearly wrong.

The truth is that there are two paths to obtaining disability benefits. First, claimant's condition can be evaluated as to whether it meets or equals a listing as Defendant's Memo asserts. Second, a claimant's testimony about pain, fatigue, and other subjective factors can be used to award disability benefits under *Carradine*. Any suggestion to the contrary is clear evidence that both the ALJ and Defense counsel do not understand or adequately apply SSA procedures, let alone the law of this circuit.

Since SSA does not have a listing for fibromyalgia. (Defendant's Memo, p. 6-7 and Plaintiff's Brief, p. 7-10), are claimants who suffer from fibromyalgia automatically and completely excluded from disability coverage? If satisfaction of a Listing condition were the only way to obtain disability benefits, as Defendant's Memo contends, then anyone who suffers from debilitating fibromyalgia is totally excluded from the umbrella of disability benefits as a matter of law. While this is the logical conclusion of both the ALJ and Defendant's Memo, this is not true[3].

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[3] "To insist in such a case, as the social security disability law does not . . . that the subjective complaints (of pain, fatigue, and other subjective, non-verifiable complaints which characterize fibromyalgia) . . . is insufficient to warrant an award of benefits would place a whole class of

In reality, the Social Security Administration (SSA) does recognize fibromyalgia as a medically determinable impairment. Fibromyalgia is compensable if there are specified signs and findings that are clinically established by the medical record which comply with the definition set forth by the American College of Rheumatology (ACR). *SSA Memo: Fibromyalgia, Chronic Fatigue Syndrome, Objective Medical Evidence Requirements for Disability Adjudication, May 11, 1998 at p.5.* These signs are primarily the presence of tender points, the same tender points or trigger points repeatedly documented by Dr. Mesquida. If the correct legal standard had been used in this case, Plaintiff's evidence would have satisfied that standard as a matter of law. The assertion of both Defense counsel and the ALJ that fibromyalgia, since it is not set forth in an SSA listing, cannot be a compensable disability is a serious misstatement of SSA policy and Seventh Circuit law. Such an egregious misapplication of policy and law cannot continue to go unredressed, offering this Court the opportunity to correct the dismal situation of thousands of disability applicants who suffer from severe fibromyalgia, but have been turned away empty handed from a system which is, when correctly used, designed to help them.

Here, as perhaps is done in similar cases, the ALJ used the inflammatory arthritis listing standard set forth by SSA to assess Plaintiff's fibromyalgia. Yet simple logic shows that inflammatory arthritis is not the same as fibromyalgia, and trying to jam one set of symptoms into an unrelated category cannot suffice as a sufficient analysis under the appropriate legal standards. For this reason, this decision must be reversed and remanded for a proper consideration under the correct legal standards.

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disabled people outside the protection of that law." *Judge Posner quoting Cooper v. Casey*, 97 F. 3d 914 (7th Cir. 1996) and 20 C.F.R. § 404.1529(b)(2) *as set forth in Carradine, Ibid.*

b. Plaintiff's Symptoms Ignored as Not Credible.

In assessing the symptoms which Plaintiff reported, the ALJ merely made the conclusory statement that claimant's evidence did not meet or equal a listing. Likewise, the Defendant's Memo merely concludes that:

> The ALJ's weighing of these relevant credibility factors was reasonable and ought not be disturbed upon judicial review. *Skarbek v. Barnhart*, 390 F. 3d 500 (7th Cir. 2004). Defendant's Memo, p. 6.

As though written in lock step, both statements of the ALJ and Defense counsel are inadequate as a matter of law. While an ALJ is not required to discuss every piece of evidence, he must build a logical bridge from evidence to conclusion. *Steele v Barnhart*, 290 F.3d 936 (7th Cir. 2002) *as cited in Villano v. Astrue*, 556 F.3d 558 (7th Cir. 2009); *see Indoranto v. Barnhart*, 374 F. 3d 470 (7th Cir. 2004); *Zurawski v. Halter,* 245 F. 3d 881 (7th Cir. 2001). In short, an ALJ must explain why Plaintiff testimony is not credible.

In order for this Court to affirm this decision, the ALJ's opinion must contain specific reasons for the finding on credibility, supported by evidence in the case record. To determine credibility, an ALJ must consider several factors, including the claimant's daily activities, his level of pain or symptoms, aggravating factors, medication, treatment, and limitations, *see* 20 C.F.R. § 404.1529(c); S.S.R. 96-7p[4], 1996 SSR LEXIS 4, and justify the finding with specific reasons, *see Steele v Barnhart,* 290 F.3d 936 (7th Cir. 2002) as cited in *Villano v. Astrue*, 556 F.3d 558 (7th Cir. 2009). The ALJ's decision

[4] Social Security Ruling 96-7p affirms that the ALJ's determination or decision regarding claimant credibility 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. In this regard, it is not sufficient for the adjudicator to make a single, conclusory statement that "the individual's allegations have been considered" or that "the allegations are (or are not) credible." It is also not enough for the adjudicator simply to recite the factors that are described in the regulations for evaluating symptoms. SSR 96-7p *in Zurawski v. Apfel*, 245 F.3d 881, 887 (7th Cir. 2001).

must be sufficiently specific to make clear to the individual, and to any subsequent reviewers, the weight the adjudicator gave to the claimant's statements and the reasons for that weight. *Rogers v. Comm'n of Social Security,* 486 F.3d 234 (6th Cir. 2007). Again, the ALJ's decision in this case cannot meet this legal standard. He does not make clear why he chose not to believe Plaintiff's testimony. Thus, his decision cannot meet the requisite legal and standard and must be reversed.

c. Effect of Obesity and combination with other impairments.

The Defendant's Memo states that the ALJ "expressly considered the impact of Plaintiff's obesity throughout his decision" (Defendant's Memo, p. 7), but concludes that "Plaintiff does not identify evidence that required that the ALJ find that her obesity causes her to be limited to less than sedentary work." Such a statement defies logic. Here, the evidence shows that doctors consider Plaintiff to be a 'walking time bomb' who is 200 lbs. overweight, and can't exercise because of pain (Tr. 682, 535, 683, 684), can't concentrate because of the effect of prescribed medications (Tr. 707), can't sit for more than thirty (30) minutes, is unable to walk or go anywhere because of pain, and hurts all the time, all attributable to morbid obesity because excessive weight places a terrible burden on her joints. (Tr. 703, 706-710, 86, 503, 683 and Plaintiff's Brief, p. 36).

Where both the Plaintiff and her doctors testified that her obesity aggravates her fibromyalgia, the ALJ should have considered how obesity affected her functionality. Here, the ALJ had evidence, even from Dr. Kennedy, a non-examining consultant, that Claimant's obesity interfered with her ability to work, but the ALJ incorrectly rejected it, writing that:

> Such an opinion – that one cannot work due to extreme obesity – is, in essence, a revival of the now defunct obesity regulation. As noted above, a function by function assessment is necessary to determine what work activities a disability claimant can perform. (Tr. 28).

But the ALJ did not perform a function by function analysis nor did he consider how Plaintiff's obesity affected her functionality. Thus, the ALJ's words reveal that he did not understand the task before him, and additionally, Defendant's Memo shows a misunderstanding as to how SSA procedures and law are properly applied.

The failure to consider all impairments, singly and in combination with other impairments, is reversible error under SSR 02-01p[5]. The ALJ must consider all of the available medical evidence and assess with a thorough and reasoned analysis the effect of all of claimant's impairments. *Fleetwood v. Barnhart, 211 Fed. Appx. 736 (10th Cir, 2007).* Because the ALJ did not assess this matter with a thorough and reasoned analysis, particularly as to the impact of morbid obesity on fibromyalgia, this decision must be reversed or remanded.

d. Assessment and weight given to opinions of treating physicians and specialists.

On page 8 of Defendant's Memo, Defense counsel lays the foundation for the incredible argument that:

> Plaintiff does not, however, identify any specific portion of those doctors' record that establish that she was unable to perform sedentary-level work. None of these doctors described Plaintiff as disabled, nor did they impose specific functional limitations that exceeded those in the ALJ's assessment of Plaintiff's residual functional capacity. Defendant's Memo, pp. 8-9.

Res ipsa loquitur is a legal term from Latin meaning, "the thing itself speaks," but is more often translated as "the thing speaks for itself." It signifies that further details

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[5] See also *Salazar v. Barnhart*, 468 F3d 615, 621, 622 (10th Cir. 2006) as cited in *Fleetwood v. Barnhart*, 211 Fed. Appx. 736, 2007 U.S. App. LEXIS 199 (10th Cir. 2007).

are unnecessary; the facts of the case are self-evident[6]. Here, Plaintiff testimony, as substantiated by treating physician and specialist opinions, prescriptions, treatment plans, and recommendations, clearly show that she is 200 lbs. overweight, cannot exercise because of pain, suffers level ten pain almost all the time, tries to take medications to alleviate the pain, but the medications make her foggy and sleepy, she can't sit or stand for more than half an hour, and isn't well enough to do much of anything most of the time. All of this is substantiated by treating physician and specialist records. The "thing" does indeed speak for itself, and the logical conclusion to draw from her continued treatment with these doctors is that Plaintiff has severe, life threatening disabilities which almost completely curtail her ability to do much of anything at all. The conclusions of these doctors is obvious and apparent from not only their assessment and comments about Plaintiff in treatment notes, but in the fact that they continue to treat her, refusing to consider any indication at all that she is able to work or is malingering as to the nature and extent of her disabilities. To the contrary, Plaintiff is so overweight and so severely afflicted with multiple aliments that the mere suggestion of her gainful employment is absurd. Yet, when faced with this situation, the ALJ simply chose to ignore Plaintiff's claims and the physician opinion and treatment which confirms them, preferring to turn a blind eye. Complete refusal to consider or reasonably weigh such substantial evidence cannot meet the requisite legal standard.

On the other hand, if anything about Plaintiff's testimony or the treating physician/specialist evidence of record was unclear or insufficient in the ALJ's mind, he had the obligation to get more evidence. As in *Moss v. Astrue,* 555 F.3d 556; 2009 U.S.

[6] Definition of res ipsa loquitur at http://en.wikipedia.org/wiki/Res_ipsa_loquitur.

App. LEXIS 269 (7th Cir. 2009), if the medical record does not corroborate the level of pain reported by the claimant, the ALJ must develop the record and seek information about the severity of the pain and its effects on the applicant. *Clifford v. Apfel*, 227 F.3d 863 (7th Cir. 2000) as *cited in Moss, Id.*[7]

Similarly, in *Day v. Astrue,* 2009 U.S. App. LEXIS 9227 (7th Cir. 2009)., the ALJ discounted the treating physicians' opinions to conclude that Day's "statements concerning the intensity, duration, and limiting effects of his (injury) are not entirely credible: because he could do housework, attend movies, walk five blocks, sit for 45 minutes, stand for about 25 minutes, and was looking for a job." *Day, Ibid.* However, the *Day* Court cautioned against placing undue weight on a claimant's household or outdoor activities in assessing his ability to work full time. *Day, Id.* Particularly in the context of fibromyalgia cases, the ability to engage in activities such as cooking, cleaning, and hobbies does not constitute substantial evidence of the ability to engage in substantial gainful activity. *Brosnahan v. Barnhart*, 336 F.3d 671 (8th Cir. 2003).

In short, Seventh Circuit opinions, and those of other circuits, have repeatedly warned that an ALJ must be careful not to succumb to the temptation to "play doctor" and avoid making his own independent medical assessments. *Schmidt v. Sullivan*, 914 F.2d 117, 118 (7th Cir. 1990). Rather, an ALJ must explain why he/she has chosen not to accept a medical expert's diagnosis. *Baker v. Bowen*, 86 F.2d 289,291 (10th Cir. 1989). Nevertheless in this case, the ALJ ignored Plaintiff's treating doctor and specialist

[7] The *Moss* Court found that the ALJ simply marginalized doctor opinions without a sound explanation and then went on to conclude that neither Moss' own testimony nor the remaining medical evidence supported her subjective complaints of pain. *Moss, Ibid.* Plaintiff submits that this ALJ reached the same result using the same path.

opinions, concluding that neither the objective medical evidence, such as he recognized it, nor Plaintiff's testimony supported her extreme claims of pain, thereby discrediting Plaintiff without setting forth any sound reasoning. Therefore, just as the result in *Moss*, the ALJ's determination in this case must be reversed and remanded because he did not follow the required legal standards, explain how he reached his conclusions, or create a bridge between the evidence and his ultimate determination. Thus, this decision must be reversed and remanded.

Conclusion

For any or all of these reasons, the ALJ misapplied the proper legal standards to determine disability in this matter. Therefore, it is imperative that this Court reverse this decision and remand for a proper application of fact and law under SSA procedures and well established Seventh Circuit legal standards.

Respectfully submitted,

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Certificate of Service

I certify that on the 4th day of September, 2009, service of a true and complete copy of the above foregoing pleading or paper was made upon Thomas E. Kieper by the Court's CM/ECF delivery system as well as by first class mail, postage prepaid.

POWER, LITTLE & LITTLE

BY:________________________
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