

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

<i>AMY J. LILLY,</i>)	
)	
<i>Plaintiff</i>)	
)	
<i>v.</i>)	<i>No. 2:10-cv-389-DBH</i>
)	
<i>CAROLYN W. COLVIN, Acting</i>)	
<i>Commissioner of Social Security,¹</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION²

The plaintiff in this Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal contends that the administrative law judge improperly evaluated her credibility, gave improper weight to the opinions of certain medical sources, should have found her lumbar spinal stenosis and obesity to be severe impairments, and should have included in the residual functional capacity (“RFC”) that he assigned to her a need for unscheduled breaks to use a nebulizer. She also asserts that she is entitled to remand because the transcript of the hearing that the commissioner has provided is fatally deficient. I recommend that the commissioner’s decision be affirmed.

¹ Pursuant to Federal Rule of Civil Procedure 25(d), Carolyn W. Colvin is substituted as the defendant in this matter.

² This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2), as amended January 1, 2013, which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner’s decision and to complete and file a fact sheet available at the Clerk’s Office, and the commissioner to file a written opposition to the itemized statement. Oral argument was held before me on December 11, 2013, pursuant to Local Rule 16.3(a)(2)(D), requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority, and page references to the administrative record.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff met the insured status requirements of the Social Security Act only through June 30, 2008, Finding 1, Record at 25; that the plaintiff suffered from degenerative disc disease and sciatica, asthma, and fibromyalgia, impairments that were severe but which, considered separately or in combination, did not meet or medically equal the criteria of any impairment listed in Appendix 1 to 20 C.F.R. Part 404, Subpart P (the "Listings"), Findings 3-4, *id.* at 26-27; that she retained the RFC to perform the full range of light work, except that she could stand/walk about two hours in an eight-hour workday, could occasionally climb, stoop, kneel and crawl, and had to avoid uneven surfaces and fumes, Finding 5, *id.* at 28; that she was unable to perform any past relevant work, Finding 6, *id.* at 37; that, given her age (26 on the alleged date of onset of disability, July 15, 2005), high school education, work experience, and RFC, use of the Medical-Vocational Rules found in Appendix 2 to 20 C.F.R. Part 404, Subpart P (the "Grid") as a framework for decision-making led to the conclusion that there were jobs existing in significant numbers in the national economy that she could perform, Findings 6-10, *id.*; and that, therefore, she had not been under a disability, as that term is defined in the Social Security Act, at any time through the date of the decision, February 22, 2012, Finding 11, *id.* at 39. The Appeals Council declined to review the decision, *id.* at 1-3, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v.*

Secretary of Health & Human Servs., 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential evaluation process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than her past relevant work. 20 C.F.R. §§ 404.1520(g), 416.920(g); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain substantial evidence in support of the commissioner's findings regarding the plaintiff's RFC to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff's statement of errors also implicates Step 2 of the sequential evaluation process. Although a claimant bears the burden of proof at Step 2, it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1124 (1st Cir. 1986). When a claimant produces evidence of an impairment, the commissioner may make a determination of non-disability at Step 2 only when the medical evidence "establishes only a slight abnormality or [a] combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered." *Id.* (quoting Social Security Ruling 85-28).

I. Discussion

A. Transcript

The plaintiff asserts that she is entitled to remand because the defendant has not provided a complete transcript of the hearing before the administrative law judge. Plaintiff's Statement of Errors ("Itemized Statement") (ECF No. 22) at 20. Citing *Barnes v. Barnhart*, 251 F.Supp.2d 973, 974 (D. Me. 2003), she identifies five instances of the presence of the word "(inaudible)" in the transcript that she contends prejudice her or impede judicial review. *Id.* at 21-23. I will address each of the specific instances in the order in which she presents them.³

First. The plaintiff contends that "significant pieces" of the administrative law judge's following question to the vocational expert are missing:

Q. I guess the other question is the postural limitations that I included and [INAUDIBLE], would you expect those to significantly impact the sedentary work base?

A. No.

Record at 1334. The plaintiff does not explain how this omission prejudiced her, or how it impedes this court's review of her appeal. No such prejudice or impediment is apparent on the face of the record.

Second. This is also an instance of a question from the administrative law judge:

Q. [INAUDIBLE] from the functional capacity evaluation [INAUDIBLE] sounds like we don't have anything [in the record that's [INAUDIBLE].

VE. Excuse me, your honor, the call-out operator is occasional handling and fingering and the charge account clerk is frequent [INAUDIBLE].

³ I do not address general references to the transcript, such as the assertion that "[m]any questions from the Plaintiff's representative are either entirely inaudible or significant pieces of the question are inaudible.. (E.g., Record at 1307, 1308, 1312)." Itemized Statement at 21. It is not the court's role to locate specific omissions from the transcript that might be prejudicial to the plaintiff or impede its review of the plaintiff's claims.

Id. at 1336-37. Again, the plaintiff makes no attempt to explain how these omissions prejudiced her, or how they impeded this court's review. She does insert "[sic]" after the letters "VE," suggesting that she believes that this statement was not made by the vocational expert, but that interjection similarly does not demonstrate any such prejudice or impediment.

Third. The transcript attributes the following question to the administrative law judge:

Q. [INAUDIBLE] our witness indicated [INAUDIBLE] essentially [INAUDIBLE] 96-8p [INAUDIBLE].

ATTY: Yeah, no, well listening to the claimant today after the first hearing, I think that's the 800 pound gorilla in the room, you know, is the problems with being consistent, reliable and working without unscheduled breaks and being able to keep to a regular pace.

Record at 1337. The plaintiff again provides no indication of the manner in which these omissions prejudice her or impede the court's review of her claims.

Fourth. "The transcript does not accurately indicate that the Plaintiff's representative began asking questions of the Plaintiff after being sworn, suggesting that the ALJ did nearly all of the questioning of the Plaintiff at the beginning of the hearing." Itemized Statement at 22. The plaintiff does not explain how this error could have prejudiced her or impeded court review of her appeal.

Fifth. "Other sections of the transcript reverse statements from the ALJ and the Plaintiff's representative, for example requesting that a microphone be turned down. (Record at 1336). This section also contains [sic] inaccurately reflects what was spoken. The transcript reports, 'ALJ: Do you think we could get Mr. Stack to turn down his microphone. I'm having trouble hearing him.' (*Id.*) What was actually spoken was, first, spoken by the Plaintiff's representative and not the ALJ, and the final sentence was, 'I'm having a hard time hearing the judge.' While this particular transcription error is not significant to the case[.]" *Id.* at 23. In this instance, the plaintiff admits that the error is not significant.

The plaintiff apparently intends that the errors she has identified be considered as a whole. “Taken together, the missing sections of the hearing create a transcript that cannot be considered a complete transcript of the hearing, and certainly not a transcript that is reliable.” *Id.* at 24. That is not the applicable legal test. In order to be entitled to remand on the basis of omissions from or errors in the hearing transcript, the plaintiff must demonstrate resulting prejudice to her or impediment to the court’s review of her appeal. *Barnes*, 251 F.Supp.2d at 974; *Fallon v. Social Sec. Admin. Comm’r*, No. 1:10-cv-00058-JAW, 2011 WL 167039, at *9-*10 (D. Me. Jan. 14, 2011). The plaintiff has not done that here.

B. Credibility

The plaintiff contends that the administrative law judge drew negative inferences about her credibility “without a factual basis.” Itemized Statement at 3. She asserts that “much of what the ALJ uses to support the negative credibility finding is not supported in the evidence.” *Id.* at 4-5. Specifically, she focuses on the administrative law judge’s statement that “Dr. Hermans was uncomfortable completing a functional capacity assessment as requested by the claimant which the undersigned infers [sic] that she did not find the claimant entirely credible in light of the lack of objective evidence noted.” Record at 33.

The plaintiff argues vigorously that it is not reasonable to conclude that Dr. Hermans’ reluctance was due to any doubts about the plaintiff’s credibility because it “could equally have been due to her view that the Plaintiff’s RFC should be determined by a specialist in performing formal functional capacity testing[,]” for which she referred the plaintiff to Kristine St. Pierre, MSPT. Itemized Statement at 5.⁴ She points out that Dr. Hermans endorsed Ms. St. Pierre’s

⁴ As the defendant points out, Defendant’s Opposition to Plaintiff’s Statement of Errors (“Opposition”) (ECF No. 23) at 8, St. Pierre’s examination took place 18 months after Dr. Hermans made the remark at issue, *compare* Record at 604 (Dr. Hermans’ remark dated 3/1/06) *with id.* at 456 (date of evaluation 10/23/07), weakening the plaintiff’s interpretation of the remark.

findings, Record at 385, at the request of the plaintiff's attorney. From this endorsement, she concludes that that 'any uneasiness [Dr. Hermans] may have felt earlier disappeared after she read Ms. St. Pierre's extremely thorough functional capacity evaluation.'" Itemized Statement at 6. This conclusion is no less speculative than the inference drawn by the administrative law judge, which the plaintiff attacks.

If the administrative law judge's inference about Dr. Hermans' reluctance is excluded, the administrative law judge listed many other reasons for his decision to discount the plaintiff's credibility, in an extensive discussion. Record at 29-35. This discussion is sufficient, even if I were to accept – which I do not – the plaintiff's contention that Dr. Hage's "several" suggestions that she exhibited exaggerated pain behaviors were fully refuted by the fact that Ms. St. Pierre "did not see such pain behaviors in her thorough evaluation." Itemized Statement at 6-7.⁵ See generally Social Security Ruling 96-7p, reprinted in *West's Social Security Reporting Service Rulings* (Supp. 2013) at 133; *Murphy v. Astrue*, No. 2:11-cv-241-NT, 2012 WL 1067683, at *3-*4 (D. Me. Mar. 29, 2012).

The plaintiff is not entitled to remand on this basis.

C. Weight Given to Treating Sources' Opinions

The plaintiff next attacks the weight given by the administrative law judge to opinions of Ms. St. Pierre and Drs. Hermans and Hage. Itemized Statement at 7-17. Her argument is based in large part on a representation that the administrative law judge said only that "the treatment notes from Dr. Hermans are totally inconsistent with the severe degree of limitation assessed by Ms. St. Pierre" and that he gave "[l]ittle weight . . . to a functional assessment by Ms. St. Pierre in October 2007 since it is not consistent with the medical record and not supported by objective

⁵ In fact, Ms. St. Pierre noted Waddell's signs "with overreaction to touch," Record at 695. Waddell's signs are indications of nonorganic sources of lower back pain, including psychological, social or behavioral sources. *Ormon v. Astrue*, 497 Fed. Appx. 81, 86, 2012 WL 3871560, at **5 (1st Cir. Sept. 7, 2012).

evidence.” *Id.* at 9. The only additional reference to Dr. Hermans in this section of the plaintiff’s itemized statement is the statement, immediately following a lengthy discussion of Ms. St. Pierre’s findings, “because the ALJ’s explanation of his reasons for giving Ms. St. Pierre’s opinions, and Dr. Hermans’ endorsement of these opinions[,] little weight do not meet the standard required by Social Security Ruling 96-02p[.]” *Id.* at 12. This tangential reference is insufficient to place any claim that the administrative law judge improperly weighed Dr. Hermans’ opinions before this court, *Babb v. Astrue*, No. 2:10-cv-49-DBH, 2010 WL 5465839, at *4 n.5 (D. Me. Dec. 29, 2010), and I will not consider Dr. Hermans’ opinions further.

With respect to the administrative law judge’s treatment of Dr. Hage’s opinions, the plaintiff’s challenge rests solely on the administrative law judge’s use of the word “apparently” in the following sentence: “Dr. Hage apparently based her limitations on the claimant’s allegations, as she noted elsewhere that there was little objective evidence of impairment.” Record at 36. She states that the use of the word “apparently” can only mean that the administrative law judge was making an assumption “about why Dr. Hage provided [her] opinions on August 3, 2006.” Itemized Statement at 12-13. From this basis, she concludes that “it is clear error for the ALJ to leap to this conclusion,” and he should instead have inquired further of Dr. Hage or called a medical expert to testify at the hearing as to the basis for Dr. Hage’s opinions. *Id.* at 13.

Neither the plaintiff’s premise nor her conclusion underlying this argument is correct. I note first that the only specific opinion from Dr. Hage mentioned by the plaintiff is a limit “to part-time work with the need to take breaks as needed, i.e., unscheduled breaks.” *Id.* at 16-17. This must be a reference to Dr. Hage’s completion of the form entitled “Practitioner’s Report State of Maine Workers; Compensation Board” on which she wrote, on August 3, 2006, under

the heading “Restrictions,” “4 hrs/day; 5 days/wk; no forward bend, overhead work, lift >10#; no prolonged sit/stand[,]”⁶ rest breaks prn.” Record at 728.

The administrative law judge’s use of the work “apparently,” in reference to the basis for Dr. Hage’s opinions, means “from all that appears” or “on the face of the record.” It cannot reasonably be read as an admission by the administrative law judge that he does not know and cannot determine the basis for those opinions and therefore will pull an assumption out of thin air. An administrative law judge, and, indeed, a court, may draw reasonable inferences about the source of a treating physician’s opinions from that physician’s notes. *See, e.g., O’Neill-Beal v. Colvin*, No. 1:12-cv-399-GZS, 2013 WL 5941070, at *3 (D. Me. Nov. 3, 2013); *Cyr v. Astrue*, No. 1:11-cv-433-GZS, 2012 WL 3095437, at *3 (D. Me. July 10, 2013). No expert review is needed for this exercise.⁷

The plaintiff also argues that Dr. Hage’s treatment records “around the time of her August 3, 2006 [opinion] do provide evidence of the plaintiff’s objective severe impairments and are not inconsistent with her opinions.” Itemized Statement at 13. Specifically, she cites Dr. Hage’s diagnosis of lumbar degenerative disc disease and spinal stenosis, a then-recent MRI that showed degeneration with spinal stenosis, Dr. Hage’s unsuccessful attempts to relieve the plaintiff’s pain, and her recommendation that the plaintiff start cognitive behavioral therapy. *Id* at 13-14.

In response, the commissioner lists many findings by Dr. Hage, even before the date of the opinion at issue, that are inconsistent with the limits included in that opinion: she found that

⁶ At oral argument, the plaintiff’s attorney asserted that her need for positional changes would “clearly make the plaintiff off task during those periods.” A positional change can be accomplished in a matter of seconds. Absent a citation to evidence indicating otherwise, such “off task” periods do not appear likely to disrupt an individual’s work significantly.

⁷ I note that I could have begun the second sentence in the preceding paragraph with the words “This is an apparent reference to” or “The plaintiff apparently means to refer to” in place of “This must be a reference to” without changing the meaning of the sentence. Such language could not reasonably be construed to equate to “I have no idea what the plaintiff is referring to.”

the plaintiff demonstrated functional range of motion and relatively normal strength, sensation, and gait. Record at 425, 429, 439, 447, 453, 653, 727, 730. This is substantial evidence that supports the administrative law judge's evaluation of the opinion.⁸ The administrative law judge is not required to ignore such evidence.

With respect to Ms. St. Pierre's findings and opinions, it is true that this non-acceptable medical source⁹ conducted many tests during her evaluation of the plaintiff and reported results that she found to be consistent with the limitations she suggested.¹⁰ That does not mean, however, that the administrative law judge was required to accept all or any of those limitations.

The administrative law judge said the following about his evaluation of Ms. St. Pierre's report:

The claimant underwent a functional capacity evaluation on October 23, 2007[,] that was considered valid by the examiner, Kristine St. Pierre, MSPT. However, Ms. St. Pierre also stated that Waddell signs were clinically significant for non-organic signs of low back pain. She said that the claimant reported reduced sensation in the left lower extremity compared to the right, stabbing pain in the left lower ribs, numbness in both elbows, sharp pain in her right knee, numbness in both lower legs into the feet, and reduced strength in the right hand compare to the left. She found that the claimant was able to do only a greatly eroded range of sedentary work (Exhibit 34F).

* * *

Medical reports of record through April 2010 contain no objective evidence or indications that the claimant had significant difficulty on an

⁸ I agree with the commissioner's contention that Dr. Hage does not provide any supporting explanations for her opinions in the August 3, 2006, document, and that those opinions, therefore, cannot provide the basis for a decision as to RFC. Social Security Ruling 96-2p, reprinted in *West's Social Security Reporting Service Rulings* (Supp. 2013) at 111 ("A case cannot be decided in reliance on a medical opinion without some reasonable support for the opinion."). See also 20 C.F.R. §§ 404.1527(c)(2) & (3), 416.927(c)(2) & (3) (weight given to medical opinion "will depend on the degree to which [the sources] provide supporting explanations for their opinions).

⁹ Ms. St. Pierre is not an acceptable medical source. 20 C.F.R. §§ 404.1513(a), 416.913(a). Therefore, her report cannot serve as evidence of the existence of an impairment, but only as evidence of the limitations imposed by a medically determinable impairment. See, e.g., *Cummings v. Astrue*, No. 2:10-cv-453-DBH, 2011 WL 4566292, at *4 (D. Me. Sept. 29, 2011).

¹⁰ This court has repeatedly rejected the plaintiff's suggestion that the administrative law judge was required to "explain why he gave little weigh[t] to each one or any of [Ms. St. Pierre's] very specific findings and opinions." Itemized Statement at 10. See, e.g., *O'Neill-Beal*, 2013 WL 5941070, at *3; *Evans v. Colvin*, No. 1:12-cv-DBH, 2013 WL 1632644, at *3 (D. Me. Mar. 28, 2013).

ongoing basis with neck, shoulder, arms, left lower extremity, hips, knees, muscle loss, or shaking in the upper extremities. Although treatment notes refer to complaints of such difficulties once or twice, no significant objective findings have been noted and there is no indication that difficulties were more than mild or were ongoing for any significant period of time. Sciatica and bursitis were diagnosed only once each and no objective evidence of either impairment was noted. Arthritis was not diagnosed other than as degenerative disc disease. No examining medical practitioner noted tremors or shaking. Four medical experts at DDA found that the claimant had no significant limitations due to such difficulties.

* * *

Little weight is given to a functional assessment by Ms. St. Pierre in October 2007 since it is not consistent with the medical record and not supported by objective evidence. She also gave no indication of how long the claimant had been or would continue to be so limited. In addition, the treatment notes from Dr. Hermans are totally inconsistent with the severe degree of limitation assessed by Ms. St. Pierre.

Record at 31, 34, 37.

I agree with the plaintiff's assertion that the administrative law judge's statement that Ms. St. Pierre's assessment was "not supported by objective evidence" is in error, as her report includes results of what Ms. St. Pierre believed to be objective tests in her area of expertise. This error does not require remand, however. Without this statement, the administrative law judge's decision still contains specific reasons for the weight that he gave to Ms. St. Pierre's opinions, sufficient to make clear to readers the weight given and the reasons for that weight, as required by 20 C.F.R. §§ 404.1527(c)(2) and 416.927(c)(2) and Social Security Ruling 96-02p, the authorities cited by the plaintiff. Itemized Statement at 9-10.

More important here is that the plaintiff does not identify which of Ms. St. Pierre's specific findings, if adopted, would require a different outcome. It is significant in this regard that the two state-agency physical capacity assessments dated after Ms. St. Pierre's report, and upon which the administrative law judge relied, Record at 37, state that the reviewing physicians have "[n]o major disagreement w[ith]" Ms. St. Pierre's report, Record at 519, 591. The only

significant difference is that both reviewers assign the plaintiff an RFC for light work, noting that they consider the sedentary capacity assigned to the plaintiff by Ms. St. Pierre to represent only “the least” that the plaintiff should be able to accomplish, based on the physical evidence. *Id.* The RFC assigned by an administrative law judge to a claimant is intended to represent the highest exertional level at which the claimant is capable of performing work-related activities. *E.g., Hodge v. Astrue*, No. 3:10-cv-1419, 2012 WL 589984, at *19 (S.D. W.Va. Feb. 22, 2012).

The plaintiff is not entitled to remand on the basis of the administrative law judge’s treatment of the opinions of Dr. Hage and Ms. St. Pierre.

D. Step 2 Issues

The plaintiff argues that her obesity and lumbar spinal stenosis should have been found to be severe impairments at Step 2 of the sequential evaluation process. Itemized Statement at 17-19. “An error at Step 2 is uniformly considered harmless, and thus not to require remand, unless the plaintiff can demonstrate how the error would necessarily change the outcome of the plaintiff’s claim.” *Bolduc v. Astrue*, Civil No. 09-220-B-W, 2010 WL 276280, at *4 n.3 (D. Me. Jan. 19, 2010).

Obesity is not per se a severe impairment. *Drew v. Astrue*, Civil No. 09-363-B-W, 2010 WL 1946335, at *4 (D. Me. May 12, 2010). Here, the plaintiff argues only in general terms that Dr. Hermans stated that her obesity “is a chronic problem;” that her body mass index is 41.69, “Level III obesity;” and that “[i]t is likely that the Plaintiff’s Level III obesity has had more than a minimal [e]ffect on the Plaintiff’s low back pain and exertional capacity demonstrated in Ms. St. Pierre’s Functional Capacity Evaluation.” Itemized Statement at 18-19. Ms. St. Pierre’s report does not mention the plaintiff’s obesity. Record at 807-27. None of these observations meets the applicable test: that the plaintiff identify evidence in the record that her obesity caused

specific restrictions or limitations not addressed by the administrative law judge. *Pike v. Astrue*, No. 2:11-cv-78-JAW, 2012 WL 113311, at *5 (D. Me. Jan. 12, 2012).

With respect to the plaintiff's lumbar spinal stenosis, to the extent that it is a separate impairment from her degenerative disc disease, *see* Record at 402, 429, 434, 439, 1264, and 1272 (all referring to degenerative disc disease *with* spinal stenosis),¹¹ the plaintiff's argument is similarly deficient. The plaintiff has not demonstrated what additional limitations or restrictions would necessarily arise from a finding that her lumbar spinal stenosis was a severe impairment and would necessarily change the outcome of her claim for benefits. Any error at Step 2 in this regard, therefore, is harmless. The plaintiff suggests that Dr. Hage "relied on" an MRI report that showed spinal stenosis to support her August 3, 2006, one-page report to the Workers' Compensation Board, Record at 728, but that report mentions two diagnoses in addition to "stenosis," so that it is not possible to tie those limitations merely to the plaintiff's lumbar spinal stenosis.¹² In any event, the administrative law judge correctly provided his reasons for rejecting those limitations, whatever their source. *Id.* at 36.

The plaintiff takes nothing by this allegation of error.

E. Nebulizer Treatments

The plaintiff's final argument is directed at the administrative law judge's treatment of her use of a nebulizer. Itemized Statement at 19-20. Without citation to authority, she asserts that she must use her nebulizer immediately when symptoms occur, so that unscheduled breaks at work would be required, and the vocational expert testified that "the need for extra breaks to

¹¹ At oral argument, the plaintiff's attorney asserted that spinal stenosis is "very different from" degenerative disc disease "as you know," and that the two conditions lead to different physical limitations. No authority was cited for this assertion, which does not concern a commonly-understood fact, and the medical records, as discussed in the text, strongly suggest the contrary.

¹² In addition, as the administrative law judge noted, Record at 30, the neurosurgeon to whom the plaintiff was referred for evaluation of her back pain found that "there is nothing on her MRI" to account for her symptoms. *Id.* at 405.

use a nebulizer would limit the Plaintiff's opportunity for employment." *Id.* The administrative law judge's failure to include this need in the RFC that he assigned to the plaintiff is, she contends, reversible error.

The defendant responds that substantial evidence supports the administrative law judge's treatment of the plaintiff's claimed need to use a nebulizer. Opposition at 11-12. I agree, although my conclusion is based as much on the absence of evidence to support the plaintiff's argument as it is on the evidence that supports the administrative law judge's conclusions.

The administrative law judge said, in part:

At hearing, counsel for the claimant asked the vocational expert if it would limit the claimant's opportunity for employment if she required extra breaks to use the nebulizer, and the vocational expert agreed that it would. However, the undersigned is not convinced that claimant's use of the nebulizer should require extra breaks. Even if she is required to use it four times daily, there is no apparent reason why those uses could not be structured around a work schedule without the need for unscheduled breaks. For instance, a use of the machine before work, at lunch time, after work, and then later in the evening would provide the required four episodes.

Record at 38.

The plaintiff characterizes this as "pure speculation as there is nothing in the medical evidence to support this schedule." Itemized Statement at 20. When asked at hearing to point to medical evidence to the contrary in the record, the plaintiff's attorney mentioned only the plaintiff's own testimony. That testimony is not medical evidence.

Even if the passage quoted above were removed from the administrative law judge's opinion, there is substantial evidence to support his decision not to include nebulizer use in the plaintiff's RFC. As the administrative law judge noted, Record at 34, the treatment notes in the record do not include any prescription for the use of a nebulizer four times a day. Only one of the four state-agency RFC assessments even mentions the plaintiff's asthma, Record at 1272, and

that reviewing physician did not find any work-related limitations due to asthma, *id.* at 1273-80.¹³ In addition, the administrative law judge noted that the plaintiff had never seen a pulmonary specialist. *Id.* at 29. He also noted the following:

Neither Dr. Hermans' reports nor other reports contain evidence that the claimant had a significant breathing problem that was not well-controlled with medication. The record contains no evidence of emergency treatment for asthma. The claimant asserted that she never saw a pulmonary specialist. Four medical experts at DDS found that the claimant had no significant limitations due to asthma. However, in a July 29, 2011 Case Analysis, DDS medical examiner Dr. Cochran cited an element of obstruction with the FEV1 and FEV1/FVC ration decreased and, although the readings were well above listing-level, concluded that asthma is a severe impairment (Exhibit 50F/1). The undersigned accepts the opinion regarding these readings and finds that asthma is a severe impairment with limitation as described in the RFC.

Id. at 34. The "limitation as described in the RFC" is to avoid fumes. *Id.* at 28.

On the showing made, this challenge does not entitle the plaintiff to remand.

II. Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **AFFIRMED.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within fourteen (14) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within fourteen (14) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

¹³ The other state-agency reviews are at pages 513-20, 585-93, and 779-86 of the record.

Dated this 31st day of December, 2013.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge

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