

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARLA L. ROBINSON,

Plaintiff,

v.

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL
SECURITY ADMINISTRATION,

Defendant.

CIVIL ACTION NO. H-08-2085

**MEMORANDUM AND ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Before the Court in this social security appeal is Plaintiff's Motion for Summary Judgment (Document No. 16), and Defendant's cross Motion for Summary Judgment (Document No. 17). After considering the cross motions for summary judgment, the administrative record, the written decision of the Administrative Law Judge, and the applicable law, the Court **ORDERS**, for the reasons set forth below, that Defendant's Motion for Summary Judgment is **DENIED**, that Plaintiff's Motion for Summary judgment is **GRANTED**, and that this case is **REMANDED** to the Commissioner for further proceedings.

I. Introduction

Plaintiff Carla L. Robinson ("Robinson") brings this action pursuant to Section 205(g) of the Social Security Act ("Act"), 42 U.S.C. § 405(g) seeking judicial review of an adverse final de-

of the Commissioner of the Social Security Administration (“Commissioner”) denying application for disability insurance benefits. Robinson argues that the Administrative Law Judge (“ALJ”) decision is flawed because: (1) the ALJ applied an incorrect legal standard in rejecting the opinion of her treating physician; (2) the ALJ did not meet the substantial evidence standard in determining that Robinson did not meet or medically equal an impairment in Listing 11.09; (3) the ALJ failed to meet the substantial evidence standard in determining that Robinson’s Residual Functional Capacity (“RFC”) was above sedentary and that Robinson could return to work. In response, the Commissioner claims that the ALJ properly assessed and rejected the opinion of Robinson’s treating physician, that Robinson failed to show that her disability equaled an impairment in Listing 11.09, and that the ALJ properly found that Robinson can perform light work.

II. Administrative Proceedings

On May 12, 2005, Robinson filed her claim for disability insurance benefits, claiming that she has been unable to work since January 31, 2005, due to complications from multiple sclerosis. (Tr. 203). The Social Security Administration denied her application at the initial and reconsideration stages (Tr. 34, 36). After that, Robinson requested a hearing before an Administrative Law Judge (“ALJ”). (Tr. 48). The request was granted and Robinson had a hearing before ALJ Robert M. McPhail on March 12, 2007. (Tr. 206).

On July 27, 2007, the ALJ issued an opinion unfavorable to Robinson. (Tr. 26). The ALJ used the five-step test found in 20 CFR 404.1520(a). (Tr. 19). He found that Robinson had not engaged in substantial gainful activity since January 31, 2005 and that Robinson has multiple sclerosis. (Tr. 20-21). The ALJ also found that Robinson does not have a physical impairment meeting or

medically evaluating one of the listed impairments in 20 C.F.R. 404.1520(d). Specifically, the ALJ found that “claimant does not have disorganization of motor function in two extremities, as described at 11.04B,” that claimant “has neither visual impairments... nor mental impairments,” and that the medical evidence in the file does not show significant, reproducible fatigue of motor function or substantial muscle weakness, demonstrated on physical examination.” (Tr. 21-22).

In making these findings, the ALJ rejected assertions by Dr. Newmark, Robinson’s private physician, to the effect that claimant is disabled and cannot work. The ALJ dismissed Dr. Newmark’s findings on the grounds that they were not supported by the medical evidence and that they were “general principles which do not decide this particular case.” (Tr. 13). Relying on the testimony of other expert witnesses, the ALJ concluded that the claimant can “perform all of the exertional demands of light work” including lifting, standing, walking and sitting throughout a full work day with normal breaks, and that the claimant is capable of performing her past relevant work as a probation officer. (Tr. 22-25).

Robinson sought review of the ALJ’s adverse decision with the Appeals Council. The Appeals Council will grant a request to review an ALJ’s decision if any of the following circumstances are present: (1) it appears that the ALJ abused his discretion; (2) the ALJ made an error of law in reaching his conclusion; (3) substantial evidence does not support the ALJ’s actions, findings, or conclusions; or (4) a broad policy issue may affect the public interest. 20 C.F.R. § 404.970; 20 C.F.R. § 416.1470. The Appeals Council for the Social Security Administration denied Robinson’s request on May 2, 2008, making the decision of the ALJ the final decision of the Commissioner of Social Security. (Tr. 4). Robinson has timely filed her appeal of the ALJ’s decision. 42 U.S.C. § 405(g). Both Robinson and the Commissioner have filed Motions for

Summary Judgment (Document Nos. 15 & 16). This appeal is now ripe for ruling.

The evidence is set forth in the transcript pages 1 through 237. (Document No. 11). There is no dispute as to the facts contained therein.

III. Standard for Review of Agency Decision

The court's review of a denial of disability benefits is limited "to determining (1) whether substantial evidence supports the Commissioner's decision, and (2) whether the Commissioner's decision comports with relevant legal standards." *Jones v. Apfel*, 174 F.3d 692, 693 (5th Cir. 1999). Indeed, Title 42, Section 405(g) limits judicial review of the Commissioner's decision: "The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive." The Act specifically grants the district court the power to enter judgment, upon the pleadings and the transcript, "affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing" when not supported by substantial evidence. 42 U.S.C. § 405(g). While it is incumbent upon the court to examine the record in its entirety to decide whether the decision is supportable, *Simmons v. Harris*, 602 F.2d 1233, 1236 (5th Cir. 1979), the court may not "reweigh the evidence in the record nor try the case de novo, or substitute [its] judgment for that of the [Commissioner] even if the evidence preponderates against the [Commissioner's] decision." *Johnson v. Howen*, 850 F.2d 340, 343 (5th Cir. 1988); *Jones v. Apfel*, 174 F.3d 692, 693 (5th Cir. 1999); *Cook v. Heckler*, 750 F.2d 391 (5th Cir. 1985). Conflicts in the evidence are for the Commissioner to resolve. *Anthony v. Sullivan*, 954 F.2d 289, 295 (5th Cir. 1992).

The United States Supreme Court has defined “substantial evidence” as used in the Act to be “such relevant evidence as a reasonable mind might accept as adequate support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 209 (1938)). Substantial evidence is “more than a scintilla and less than a preponderance.” *Spellman v. Shalala*, 1 F.3d 357, 360 (5th Cir. 1993). The evidence must create more than a suspicion of the existence of the fact to be established, but no ‘substantial evidence’ will be accepted only where there is a ‘conspicuous absence of credible choices’ or ‘no contrary medical evidence.’ *Hames v. Heckler*, 707 F.2d 162, 164 (5th Cir. 1983).

IV. Burden of Proof

An individual claiming entitlement to disability insurance benefits under the Act has the burden of proving his disability. *Johnson v. Bowen*, 864 F.2d 340, 344 (5th Cir. 1988). The Act defines disability as the “inability to engage in any substantial gainful activity by reason of a 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 12 months.” 42 U.S.C. § 4053(d)(3). The impairment must be proven through medical or accepted clinical or laboratory diagnostic techniques. 42 U.S.C. § 4053(d)(3). The impairment must be so severe as to limit the claimant in the following manner:

[She] is not only unable to do [her] previous work but cannot, considering [her] 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 [she] lives, or whether a specific job opportunity exists for [her], or whether [she] would be hired if [she] applied to the work.

42 U.S.C. § 123 (d)(2)(A). The mere presence of an impairment is not enough to establish that a claimant is suffering from a disability. Rather, a claimant is disabled only if he is “incapable of engaging in any substantial gainful activity.” *Anthony v. Sullivan*, 954 F.2d 289–293 (5th Cir. 1992) (quoting *Milam v. Bowen*, 782 F.2d 1284, 1286 (5th Cir. 1986)).

The Commissioner applies a five-step sequential process to decide disability status:

1. If the claimant is presently working, a finding of “not disabled” must be made;
2. If the claimant does not have a “severe impairment” or combination of impairments, he will not be found disabled;
3. If the claimant has an impairment that meets or equals an impairment listed in Appendix 1 of the Regulations, disability is presumed and benefits are awarded;
4. If the claimant is capable of performing past relevant work, a finding of “not disabled” must be made; and
5. If the claimant’s impairment prevents him from doing any other substantial gainful activity, taking into consideration his age, education, past work experience and residual functional capacity, he will be found disabled.

Anthony, 954 F.2d at 293; see also *Leggett v. Clatter*, 67 F.3d 558, 563 n.2 (5th Cir. 1995); *Wright v. Sullivan*, 955 F.2d 123, 125 (5th Cir. 1991). Under this framework, the claimant bears the burden of proof on the first four steps of the analysis to establish that a disability exists. If successful, the burden shifts to the Commissioner, at step five, to show that the claimant can perform other work. *McQueen v. Apfel*, 168 F.3d 152, 154 (5th Cir. 1999). Once the Commissioner knows that other jobs are available, the burden shifts, again, to the claimant to rebut this finding. *Sellers v. Sullivan*, 954 F.2d 614, 618 (5th Cir. 1990). If, at any step in the process, the Commissioner determines that the claimant is or is not disabled, the evaluation ends. *Leggett*, 67 F.3d at 560.

In determining whether substantial evidence supports the ALJ's decision, the court will consider four factors: (1) the objective medical facts; (2) the diagnosis and expert opinions of treating physicians on subsidiary questions of fact; (3) subjective evidence of pain and disability as testified by the plaintiff and corroborated by family and neighbors; and (4) the plaintiff's educational background, work history and present age. *Wreath*, 925 F.2d at 136.

V. Discussion

A. Objective Medical Evidence

The objective medical evidence, which dates back to January 2004, shows that Robinson suffers from multiple sclerosis. She has complained about the symptoms accompanying this disease, and has been treated for these symptoms.

According to the medical records, around January 7, 2004, Robinson made her initial visit to Dr. Newmark's office regarding a possible diagnosis of multiple sclerosis. Dr. Newmark recalls that, at the appointment, Robinson presented symptoms that were suggestive of the disease, including fatigue and numbness. (Tr. 62). A previous MRI revealed data that was consistent with a diagnosis of multiple sclerosis, including lesions and sensory dysfunction. (Tr. 195). A lumbar puncture performed on January 14, 2004, revealed an elevated count (27.0); this finding is consistent with a diagnosis of Multiple Sclerosis. (Tr. 158, 195). In addition, the diagnosis of multiple sclerosis was confirmed by an analysis of cerebrospinal fluid. (Tr. 62). While a somatosensory evoked response report conducted on January 28, 2004 revealed that somatosensory evoked response in the upper extremities was normal, the accompanying doctor's visit revealed

changes in sensation to the left side of Robinson's body. Around this time Robinson was prescribed Provigil, a medication used to counteract fatigue. (Tr. 153, 195). A series of MRIs dating from July 9, 2004 reveal "areas of increased signal" within Robinson's spinal cord, which was consistent with a diagnosis of multiple sclerosis. (Tr. 147) At this point, Dr. Newmark assessed Robinson's Multiple Sclerosis as being "so far mild." (Tr. 150).

Robinson consulted a second doctor, Dr. Reed-White, regarding her symptoms of multiple sclerosis on November 23, 2004. Robinson was concerned about pain in her lower back and right heel, as well as a drop in weight of six pounds. Dr. Reed-White, upon learning that Robinson had not been taking Provigil every day, prescribed naproxen and "ordered x-rays, laboratory tests and suggested supplemental meals with Boost or Ensure." (Tr. 198). Other than revealing that Robinson returned to Dr. Reed-White for a visit concerning a finger infection that was unrelated to her multiple sclerosis on March 1, 2005, the record is silent in regards to Dr. Reed-White's findings and test results. (Id.).

Robinson returned for another appointment to Dr. Newmark's office on January 6, 2005. Robinson's primary complaint during this appointment was extreme fatigue and paresthesias, as well as a "warr[ant] sensation on right pelvic area for 1 week." (Tr. 196). After seeing that Robinson's symptoms were worsening, Dr. Newmark suggested that Robinson retire from her job on the grounds of disability. He issued a physician's statement on disability on January 10, 2005. The statement cited a neurological exam that revealed hyperreflexes, decrease of RFLM in Robinson's left hand, lowered coordination, lowered reaction times and "fatigue unrelied by rest periods or stimulation." (Tr. 64). Dr. Newmark assessed that the multiple sclerosis is progressive, and that it would be unlikely that Robinson would ever be able to work a regular full time job again. (Id.).

Dr. Newmark elaborated on many of these points in a report filed with the Standard Insurance Company on March 21, 2005. Dr. Newmark commented that Robinson currently ranked 10 percent in the Karnofsky Performance Status Scale, indicating that while she could care for herself she could not "carry on normal activity or do active work." (Tr. 199). In addition, Dr. Newmark indicated that he expected Robinson's condition to regress, due to the progressive nature of multiple sclerosis. However, Dr. Newmark revealed that he never performed functional capacity testing on Robinson because he lacked appropriate facilities. (Tr. 198).

An April 6, 2005 memorandum by Shauha Sweet, RN for Standard Insurance, revealed that Dr. Dickerstein felt that the medical records did not support that Robinson "should be precluded from the physical demands of a light level occupation," though the report acknowledged that multiple sclerosis is an illness that is usually characterized by exacerbations and remissions of symptoms and unpredictable progression. (Tr. 197). The report also stated that additional medications were usually needed to counteract the symptoms of fatigue, though Dr. Newmark only prescribed Prozac for his patients. (Tr. 196). The report suggested that "Current records from a neurologist and new diagnostic reports would be helpful, if available." (Tr. 197).

On May 19, 2005, an interviewer named R. Luna performed a field examination on Robinson. He noted that Robinson did not have apparent difficulties with hearing, reading, breathing, understanding, coherency, concentrating, talking, answering, sitting, standing, walking, seeing, using her hands, or writing, and that "no signs of disabling condition" were spotted, though the attached report included an interview with Robinson where she cited her problems with constant exhaustion, keeping pace at work, remembering things, typing (due to numbness in the hands), and vision blurriness. (Tr. 97-99).

On May 20, 2005, Robinson received a daily activity questionnaire that inquired into her lifestyle, exercise habits, and how the disability affected her daily routine. Robinson left this questionnaire blank, except for a section in which she claimed that she did not have mental or emotional problems that limited what she was able to do and that she was not currently receiving treatment for such problems. (Tr. 104-105).

Pursuant to her claims of disability with the SSA, Robinson was evaluated by Dr. Joseph Anighogu on July 13, 2005. Dr. Anighogu noted that Robinson complained of fatigue, difficulty concentrating with her job, memory problems, problems with directions, and right heel pain (Tr. 169). Dr. Anighogu's record reveals that the right heel pain was "about 10" with 3-4 episodes per week lasting about 8 hours," that "the pain resolves spontaneously," and that "she had an x-ray of the heel which was told it was negative." (Id.). He performed a visual acuity test that registered 20/25 (20/200) in the right eye and 20/20 (20/100) in the left eye. (Tr. 170). In his neurological testing, Dr. Anighogu found that "Cranial nerves I-VI grossly intact," that "Strength 5-/5," that "sensation intact to pinprick and light touch," that "cerebellar examination was intact," and that "no cognitive defects noted." (Id.). Finally, Dr. Anighogu noted that Robinson was independent in her ability to care for herself and could walk, sit, and stand with good balance and no abnormalities. (Id.).

A routine doctor's visit for a case of the flu on November 8, 2005 revealed that Robinson complained of stiffness and having difficulties lifting her left arm above a horizontal degree for the last two months. It also noted that Robinson was tripping over her feet when walking, having extreme fatigue and becoming depressed for being unable to do the things that she wished to do. She also reported having numbness, particularly in the fingertips. (Tr. 21).

Here upon the totality of the record, the objective medical evidence weighs in favor of ALJ's conclusion that Robinson's multiple sclerosis did not meet or medical equivalent one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1. Virtually all of the evidence supports Robinson's diagnosis with multiple sclerosis. However, virtually none of the objective medical evidence reveals an equivalence to the listed conditions in 20 CFR Part 404, Subpart P, Appendix 1. The required conditions of "significant and persistent disorganization of motor function in two extremities resulting in sustained disturbance of gross and dexterous movements, or gait and station" is not demonstrated in the objective medical records. 20 C.F.R. Part 404, Subpt. P, Appendix 1, Listing 1.09. In addition, little of the objective evidence suggests that Robinson suffers from "visual or mental impairment." *Id.* The requirement of "significant, reproducible fatigue of motor function with substantial muscle weakness on repetitive activity" is not supported in the objective medical record, which suggests that Robinson has near-normal muscle strength. *Id.*

As stands, the objective medical evidence reveals little in regards to the symptoms that Robinson complains of. Therefore, this factor weighs in favor of the ALJ's decision.

B. Diagnosis and Expert Opinions

The second element considered is the diagnosis and expert opinions of treating and consulting examining physicians on subsidiary questions of fact. Unless good cause is shown to the contrary, "the opinion, diagnosis and medical evidence of the treating physician, especially where a consultation has been over a considerable length of time, should be accorded considerable weight." *Perez v. Schweiker*, 653 F.2d 997, 1001 (5th Cir. 1981); *see also Newton v. Apfel*, 209 F.3d 443 (5th Cir. 2000).

(5th Cir. 2000) (“The opinion of the treating physician who is familiar with the claimant’s impairment, treatments and responses should be accorded great weight in determining disability.”). In addition, a specialist’s opinion is generally to be accorded more weight than a non-specialist’s opinion. *Pulido v. Shalala*, 29 F.3d 208, 211 (5th Cir. 1994); *Moore v. Sullivan*, 919 F.2d 901, 905 (5th Cir. 1990). For the ALJ to give deference to a medical opinion, however, the opinion must be more than conclusory and must be supported by clinical and laboratory findings. *Scott v. Heckler*, 770 F.2d 422, 485 (5th Cir. 1985); *Oldham v. Schweiker*, 660 F.2d 1078 (5th Cir. 1981). Furthermore, regardless of the opinions and diagnoses and medical sources, “the ALJ has the ultimate responsibility for determining a claimant’s disability status.” *Martinez v. Chater*, 64 F.3d 1022, 1076 (5th Cir. 1995) (quoting *Moore v. Sullivan*, 919 F.2d 901, 905 (5th Cir. 1990)).

The Social Security’s Regulations provide a framework for the consideration of medical opinions. Under 20 C.F.R. §§ 404.1527(d)(2)-(6), 416.927(d)(2)-(6), consideration of a physician’s opinion must be based on:

- (1) the physician’s length of treatment of the claimant,
- (2) the physician’s frequency of examination,
- (3) the nature and extent of the treatment relationship,
- (4) the support of the physician’s opinion afforded by the medical evidence on the record,
- (5) the consistency of the opinion with the record as a whole, and
- (6) the specialization of the treating physician.

Newton, 200 F.3d at 456. While opinions of treating physicians need not be accorded controlling weight on the issue of disability, in most cases such opinions must at least be given considerable

deference. As to opinions of examining physicians, the Commissioner gave more weight to the opinion of a source who has examined the plaintiff rather than the opinion of a source who has performed such an examination. See 20 C.F.R. § 404.1527(d)(1), 416.927(b)(1). Finally, as to opinions of physicians who have reviewed the medical record, such as state agency physicians, the ALJ's opinion is evaluated according to the above framework, and the ALJ must explain in his decision the weight given those opinions. See 20 C.F.R. § 404.1527(f)(2)(ii) & (iii), 416.927(f)(2)(ii) & (iii). An "ALJ is free to reject the opinion of any physician when the evidence supports a contrary conclusion." *Newton*, 209 F.3d at 455 (quoting *Brown v. Apfel*, 192 F.3d 402, 400 (5th Cir. 1999)). "The ALJ's decision must stand or fall with the reasons set forth in the ALJ's decision, as adopted by the Appeals Council." *Id.* At 455; see also *Cole v. Barnhart*, 288 F.3d 49, 151 (5th Cir. 2001) ("It is well established that we may only affirm the Commissioner's decision on the grounds he stated for doing so."). However, perfection in administrative proceedings is not required. See *Mays v. Bowen*, 837 F.2d 1362, 1364 (5th Cir. 1988).

Dr. Newmark revealed his opinion in a medical questionnaire to the ALJ regarding the symptoms of Robinson's multiple sclerosis. (Tr. 179). Dr. Newmark confirmed that Robinson indeed had multiple sclerosis, as confirmed by MRI, CSF, and clinical observations. He listed some of Robinson's symptoms, including fatigue, balance problems, poor coordination, weakness, unstable walking, numbness, difficulty remembering, and depression. (Tr. 180). Dr. Newmark confirmed that Robinson was not a malingerer. (Tr. 181). While Dr. Newmark admitted that Robinson did not have "significant and persistent disorganization of motor function in two extremities resulting in sustained disturbance of gross and dexterous movement or gait and station," he did indicate that Robinson suffered from fatigue that could occur within less than two hours of

of minimal exertion. (Id.). Dr. Newmark noted that this disease could wax and wane in severity (Tr. 182). Emotional factors were not determined to contribute to the severity of Robinson's symptoms. (Id.). All of the listed impairments were noted as reasonably consistent with the diagnosis, with fatigue being the most disabling symptom. (Id.). He deemed the symptoms severe enough to frequently interfere with Robinson's concentration to a moderate degree, and the impairments were deemed expected to last for the rest of Robinson's life. (Id.). Robinson was deemed, as of January 6, 2005, to only be able to walk less than 1 block before tiring, and he required intermittent assistance of a cane to walk. (Tr. 182-83). The impairments were noted as likely to produce "good days" and "bad days," with Robinson likely to miss work about three days every month. (Tr. 184). However, Dr. Newmark declined to answer questions related to functional capacity testing, noting that he did not have the facilities to make such measurements. (Tr. 183).

Dr. James A. Wright formed a very different opinion regarding the status of Robinson's illness. On July 14, 2005, he completed a physical residual functional capacity assessment from a review of Robinson's medical records. From that review, Dr. Wright opined that Robinson could lift occasional weight up to 20 pounds, frequently lift 10 pounds, stand and walk for a total of at least one out of eight hours in a normal workday, sit for at least six out of eight hours in a normal workday, and perform an unlimited amount of pushing and pulling. (Tr. 172). He also deemed Robinson unable to climb ladders, rope, or scaffolds (Tr. 173). The report indicated that Robinson had no visual limitations established and that her vision "corrects to 20/20 and 20/5." (Tr. 174). No manipulative, communicative, or environmental limitations were noted. (Tr. 174-75). The report concluded that the conclusions of the treating physician (Dr. Newmark) were different from the

reports of the functional capacity test. The report noted that, though Dr. Newmark claimed fatigue and numbness were Robinson's primary symptoms, the "current CE does not support numbness" and that, although the claimant reported fatigue, "strength is 5-/4-" and the claimant could walk without abnormalities for the examination. In addition, "no cognitive deficits" were noted on the CE. (Tr. 177).

At the hearing, Dr. Oguejiofor, a medical expert, also presented an opinion contrary to the opinion of Dr. Newmark. Dr. Oguejiofor formed his opinion after reading Robinson's record (Tr. 228). He did not feel that any of Robinson's symptoms equaled a condition found in Listing 11 (Tr. 229). He also felt that Robinson's multiple sclerosis symptoms did not preclude her from a full work schedule:

Q: Right. And is fatigue a normal symptom of Multiple Sclerosis?

A: Well, Your Honor, the way that I look at it is especially looking at the Listing as we're talking about fatigue, you're talking basically as, even that there's multiple weakness.

Q: M-hum.

A: What is really what will give you fatigue.

Q: Okay.

A: So, again her exam have not the most treated, you know, muscle fatigue.

Q: Okay.

A: At least as of, as of the last time she was seen in July of 2015, her muscle strength was 5 over 5 in all extremities. So, aside from fatigue that you have from muscle weakness, any other fatigue that she's talking about are, you know, I'm not really sure how I'm going to be able to classify that, Your Honor.

Q: Okay. So, based on your review of the record, Dr. Oguejiofor, would you – would you place any restrictions upon Mrs. Robinson's ability to perform work-

related activity?

A: Your Honor, I believe that she can function at the light level.

Q: Full range?

A: Yes, Your Honor. (Tr. 231-32).

The ALJ rejected the opinion of Dr. Newmark on the basis of a conflict with the opinion of Dr. Ogueji and Dr. Wright. The ALJ began by correctly discounting the assertion that Robinson could claim benefits through the symptoms in Listing 11.09 of having “disorganization of motor function in extremities,” “visual impairments which do not correct,” or “mental impairments.” (Tr. 21-22). However, the ALJ proceeded to erroneously discount Dr. Newmark’s testimony by not considering if Robinson’s symptoms equaled the third listed symptom in Listing 11.09, that is, “Significant, reproducible fatigue of motor function with substantial muscle weakness on repetitive activity, demonstrated on physical examination.” 20 C.F.R. Part 404, Subpart P, App. 1, Listing 11.09. The ALJ erroneously cited conflicts with the pre-hearing examining medical expert who wrote:

Though the claimant complains of fatigue, the medical evidence in the file does not show significant, reproducible fatigue of motor function with substantial muscle weakness, demonstrated on physical examination – despite the answer by Dr. Newmark that she does (Exh. 4F-3). Mr. Anighogu has reported the claimant has decreased muscle strength, to 5-/5 (Exh. 2F-2). Dr. Newmark reports that the claimant’s strength has decreased to 4/5 in her left upper extremity, but reports all her other extremities show at 5/5 (Exh. 5F-1, 3, November 8, 2006).

The key absence, or missing evidence, is the reproducible fatigue demonstrated on physical examination. The medical evidence in the file does not show any physical examination in which the claimant’s fatigue was demonstrated. There is no report of any examination in which the claimant’s muscle strength or weakness was actually tested. Dr. Newmark specifically declined to answer as to the claimant’s functional capacity, replying that he had no facilities for functional capacity testing (Exh. 4F-5). The absence of direct evidence demonstrating reproducible and demonstrated muscle weakness and

fatigue shows Dr. Newmark's statement on this question cannot be correct. (Tr. 22).

From here, the ALJ relied on the testimony of Dr. Oguejiofor, as supported by the opinion of Dr. Wright, to support his conclusion that Robinson was not disabled:

In making this finding, I considered the evidence in accordance with the requirements of 20 CFR 404.1527 and SSRs 96-2p, 96-5p, 96-6p and 00-3p. The claimant's residual functional capacity was evaluated for the state agency by Dr. A. Wright, M.D., a medical expert, fully familiar with the evaluation of residual functional capacity for Social Security disability purposes. Dr. Wright evaluated the claimant as having the residual functional capacity for the exertional demands of light work, with the one postural limitation precluding climbing ropes, ladders or scaffolds—precisely the residual functional capacity stated above. I credit Dr. Wright, and, based on his evaluation, I assign the claimant the same residual functional capacity as he described.

Dr. Oguejiofor also testified as to his opinion of the claimant's residual functional capacity: that the claimant could perform the full range of light work. I agree generally with Dr. Oguejiofor, but include the postural limitation included by Dr. Wright. No doctor who has examined or evaluated the claimant has made a medical statement as to the claimant's residual functional capacity, or that she is disabled and cannot work.

Dr. Newmark, her treating physician, however, has made just such statements as to the claimant being disabled. He has stated, and directly, that the claimant is disabled based on a standard which is very like, or includes, that for Social Security disability, as compared to 20 CFR 404.1505 shows. (Exh. 1F-3). Another statement by Dr. Newmark, produced by the claimant herself after hearing, is to the same or very similar effect – that the claimant should stop work, as of January 2005, and cannot anticipate returning to work (Exh. 7B-2). These opinions as to disability are, of course, on issues reserved to the Commissioner, 20 CFR 404.1527(e). I note again that Dr. Newmark has specifically refrained from giving an opinion on the claimant's residual functional capacity, once by writing that he has no facilities for functional capacity testing (Exh. 4F-5; see also Exh. 7F-14, 15) and again by failing to reply to my request for such an opinion (See Exh. 8B).

Dr. Newmark's opinions, as he is the claimant's treating physician for her multiple sclerosis, are given significant weight, per 20 CFR 404.1527, but I do not credit his opinions as establishing the claimant's disability, because I do not find them supported by the medical evidence. I consider Dr. Newmark's opinions as generalized statements as to the medical severity, likely course and likely eventual result of multiple sclerosis, with application generally to all persons who have

multiple sclerosis – but not tied specifically to the claimant and her actual condition during the times relevant to this proceeding. Dr. Newmark's statements are, to paraphrase Mr. Justice Holmes, general principles which do not decide this particular case. The medical evidence in file, and specifically Dr. Newmark's notes of his appointments with the claimant, do not show observable signs of laboratory test results showing the claimant disabled or so functionally limited as to be disabled. Nerve tests for somato-sensory responses made in January 2004 were normal in places tested (Exh. 1F-12); and Dr. Newmark never reports any adverse change to this (See e.g. Exh. 7F-2, 3). Dr. Newmark never refers the claimant for a test of her fatigue, even for an exercise test of the type familiar from cardiovascular testing, and he never refers her for any kinesiology examination. And, of course, he never has her functional capacity actually tested, nor does he refer her for a physical therapy evaluation.

Dr. Newmark expressly relies on claimant's fatigue as the basis for her being, in his opinion, disabled (Exh. 5F-3). Dr. Newmark refers to only 2 other symptoms, in addition to her fatigue, as affecting the claimant's ability to work or perform her activities of daily life: paresthesias and pain (Exh. 5F-14). But the notes from an examination in November 2006 show that the claimant's vibration sense is intact, with no mention of any other sensory deficit (Exh. 5F-2). I see no report of Dr. Newmark finding any paresthesia on any examination of the claimant. And though those same notes describe the claimant as having pain in her left arm or shoulder, and she had her shoulder x-rayed based on reports of pain (See Exh. 5F-6), at her deposition she did not testify to shoulder pain or having pain at all. The contemporaneously made medical evidence does not support Dr. Newmark's later stated opinion.

Eliminating these 2 other symptoms leaves the claimant's reported fatigue only. And the claimant testified accordingly, that her major problem from her multiple sclerosis is her fatigue, and its effects – limited activity during the day, including inability to concentrate and remember, napping during the day and difficulty sleeping at night. And a claimant's reports of symptoms to her doctor are just that – her reports, to be evaluated as are any other reports of symptoms, under Social Security regulations and rulings.

I also considered all symptoms and the extent to which these symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence, based on the requirements of 20 CFR 404.1529 and SSRs 6-41p and 96-7p.

Evaluation of symptoms is a 2 part process. First, does the claimant have a medically determinable impairment reasonably likely to cause the complained symptoms? And, second, does the medical evidence, and the other evidence, support the claimant's reports of symptoms. Evaluation of symptoms raises the question of the intensity, persistence and effects of a claimant's symptoms. And evaluation of symptoms

raises the questions of the claimant's credibility.

The claimant has a medically determinable impairment reasonably likely to cause fatigue at some level: her multiple sclerosis. Dr. Newmark's evidence, with which there is no disagreement, is that fatigue is a major early symptom of multiple sclerosis, which can cause poor reaction times, decreased cognitive abilities and decreased concentration (Exh. 1F-3).

But the medical evidence does not support the claimant's reports of fatigue at the level she reports. As Dr. Oguejiofor noted, the medical evidence available at the hearing did not show muscle weakness having been observed on any examination. Even the later produced medical evidence does not show muscle weakness of any great extent. As already noted, at the consultative examination Dr. Anighogu reported the claimant has decreased muscle strength, to 4-/5 (Exh. 2F-2). In November 2006, Dr. Newmark reports that the claimant's strength has decreased to 4/5 in her upper extremity, but reports all her other extremities show at 5/5 (Exh. 5F-2, 1). I consider these deficits not significant, and note the increase in strength in three of the claimant's extremities.

When asked to report her daily activities, the claimant left the questionnaire blank save for signing and dating it (Exh. 3E). Her testimony as to daily activities is that she does not do much – she wakes early, sends her children to school, seeing to their dressing and grooming and eating breakfast; empties the dishwasher, and does the cleaning and the laundry, so she doesn't get overwhelmed; may do an hour or two out of the house, and does the grocery shopping herself; naps for an hour or two, and if she does not, she is exhausted the next day; helps her children with homework, and see they bathe and get put to bed in the evening; and has difficulty sleeping at night. She reports that if she gets off schedule she gets frustrated, and her day becomes a mess. She reads magazines and watches television, but has difficulty keeping up. She does not exercise, but reports having lost 40 lbs. in the last 2 years – she seldom goes to school events. She describes her days and weeks as being pretty much the same, with one week per month pretty bad, when getting up is hard. None of this, of course, is reflected in the medical record, and she does not report having a counselor or support or mutual help group. (Tr. 23-24).

In rejecting Dr. Newmark's medical opinion, the ALJ heavily relied on the assumption that fatigue is the same symptom as muscle weakness, and that the tests revealed no substantial muscle weakness on the part of Robinson. However, Dr. Oguejiofor admitted at the hearing that mental fatigue and physical fatigue can be two separate symptoms:

Q. Dr. Oguejiofor, is it correct to understand you to say that she that you're not able to categorize or to quantify the, the mental fatigue -- it's the physical fatigue that you're quantifying?

A. Yes.

Q. So, the mental fatigue could still, could still be there that she's, that she describes in her testimony, is that correct?

A. Yes, it's possible, yeah. (Tr. 232).

If muscle weakness and fatigue are not the same thing, then there is no conflict between the findings of Dr. Newmark and the medical evidence of the record at all. As quoted above, the ALJ cited muscle weakness tests to support his conclusions; however, these muscle weakness tests would do little to reveal mental fatigue. Dr. Oguejiofor's comments regarding mental fatigue make sense; some of Robinson's greatest difficulties, such as having to nap for 1-2 hours every day to avoid extreme exhaustion, having problems keeping up with the pace at work, and having to miss work as many as three days a month due to having bad days, would not be expected to show up on a muscle weakness test. (Tr. 184, 220, 223). Because the ALJ equated fatigue with muscle weakness without any basis in the record for doing so, the ALJ's rejection of Dr. Newmark's opinion is unsupported.

In discarding Dr. Newmark's opinion, the ALJ also failed to consider other factors listed in the regulations for weighing expert opinion. When assigning the weight that the opinion of a treating physician is given, the ALJ must consider the length, frequency and extent of the physician's treatment, as well as the specialization of the physician. See 20 C.F.R. § 404.1527(d)(6), 416.9(d)(2)-(6). The ALJ failed to consider the fact that Dr. Newmark had treated Robinson for multiple sclerosis since the onset of the illness in January 2004, that Dr. Newmark is a certified

MD who specializes in neurology and has over 40 years of experience, that Dr. Newmark was primary (and almost exclusive) physician that Robinson consulted regarding her illness, and Robinson saw Dr. Newmark periodically throughout 2004 and 2005. (Tr. 184-84). Consequently, Dr. Newmark would be expected to have more insights into the illness of the patient than Anighogu, Dr. Wright, or Dr. Oguejiofor, none of whom had any sort of long-term contact with Robinson. (Tr. 169, 171, 228). Dr. Newmark's opinion deserved considerable deference, and the ALJ erred in not giving it.

The ALJ erred in his assessment of Dr. Newmark's opinion by focusing on a conflict of interest where evidence that did not exist. As a result, the ALJ improperly rejected deference to Dr. Newmark's opinion. Given that improper rejection, this factor weighs against the ALJ's decision.

C. Subjective Evidence of Pain and Disability

The third element considered is the subjective evidence of pain and disability, including the claimant's testimony and corroboration by family and friends. Not all pain and subjective symptoms are disabling, and the fact that a claimant cannot work without some pain or discomfort will not render him disabled. *Cook*, 750 F.2d at 395. In an appeal of a denial of benefits, the Act requires this Court's findings to be deferential. The evaluation of evidence concerning subjective symptoms is particularly within the province of the ALJ, who has the opportunity to observe the claimant. *Hames v. Heckler*, 707 F.2d 162, 166 (5th Cir. 1983).

Credibility determinations, such as that made by the ALJ in this case in connection with Wilkins' subjective complaints, are generally within the province of the ALJ to make. *Greenspan v. Shalala*, 38 F.3d 232, 237 (5th Cir. 1994) ("In sum, the ALJ is entitled to determine

the credibility of medical experts as well as lay witnesses and weigh their opinions accordingly (quoting *Scott v. Heckler*, 770 F.2d 482, 485 (5th Cir. 1985)), *cert. denied*, 513 U.S. 1120 (1993).

In this case, there is plentiful subjective evidence of pain and disability. Dr. Newmark reported that Robinson was suffering from fatigue and numbness from the time of their first visit on January 20, 2004; he later commented that, though he prescribed Provigil to counteract the fatigue, the fatigue was unrelieved by rest periods or stimulants. (Tr. 142-43, 149). Later, Dr. Newmark confirmed that this fatigue causes loss in concentration, poor reaction time, and lowered cognitive abilities. (Tr. 144). By 2005, Dr. Newmark's nurse, Susan Reed, noted that Robinson was "Having more and more fatigue. By middle of day symptoms worsening. Lots of pain, lots of paresthesia. Becoming depressed." (Tr. 196).

Robinson revealed more about the level of fatigue that she was experiencing through her 2005 office disability report, conducted on May 19, 2005:

I'm fatigued and exhausted all the time, can't keep up the pace needed at work, and my memory's been affected. Numbness in my left hand keeps me from typing, other things involving use of hands. Vision, sometimes a temporary blurriness occurs. (Tr. 99)

In addition, during her appointment with Dr. Anighogu on July 8, 2005, Robinson revealed additional information regarding the level of disability of her symptoms.

She states since then she gets extremely fatigued and very tired all the time. She was having extreme difficulty completing her tasks or meeting deadlines (in) her job resulting in her giving up her job. She also has been having poor memory. She is not sure if her memory problem is so remote or recent even though probably a combination. She has most difficulty with directions, she got lost going to her father-in-law's house, which she has done several times in the past. (Tr. 59)

Dr. Newmark submitted a new, more detailed report on Robinson's symptoms in preparation for the hearing before the ALJ. He revealed that Robinson suffered from a multitude of subjective

symptoms, including fatigue, weakness, and difficulty remembering. (Tr. 180). He also recorded that the fatigue could occur with minimal exertion, even "less than two hours." (Tr. 181) Newmark also recorded that while these symptoms wax and wane in severity, they are frequently severe enough to interfere with attention and concentration and result in moderate limitations to Robinson's ability to deal with work stress. (Tr. 182). While Dr. Newmark did not have the facilities needed for a residual functional capacity test (which may have shed some further light on Robinson's disability), he noted that the patient's impairments could lead to good and bad days and they were likely to result in Robinson being absent from work three times a month. (Tr. 184)

Robinson testified as follows regarding subjective symptoms in her hearing before the court.

Q. Now tell me what's going on with your MS.

A. My primary symptom is fatigue.

Q. Okay. And do you experience the fatigue on a daily basis or-

A. Yes. (Tr. 211-12).

To cope with this fatigue, Robinson revealed that she naps daily for 1-2 hours. (Tr. 213)

She also revealed that the symptoms are worsening with time. (Tr. 214) Robinson repeated that these symptoms had been taking a toll on her career.

Q. Okay. And what kind of problems were you having when you were working as a Probation Officer, what type of problems were you having there towards the end that caused you to retire?

A. Toward the end, I was not meeting deadlines. I was not completing training hours. I was forgetting to sign in and out. I began the -- to get written up and I, I've never been written up before. It was a job I thought I could do --

Q. Um-hum.

A. -- with ease and it has got to a point in fact, in '03, I started to get, got my first

corrective action. That was before I was diagnosed.

Q. Oh, okay.

A. And I knew I was having trouble and I didn't know why I was having trouble.

Q. M-hum.

A. So I was having trouble meeting deadlines, completing my training hours with the not following Court policies, and the –

Q. What kind of problems have you had with your concentration or your memory?

A. It's almost the same as work. I would just forget. I'm forgetful and there's like I said there's a couple of cases where I, you know I'm driving, I kind of have a loss when I am.

Q. M-hum.

A. And that's happened a, like I said, a couple of occasions. You said concentrating?

Q. Or you –

A. You know, just being generally tired.

Q. Okay. Are you – during the day, do you spend part of the time watching TV or reading magazines, reading books, anything like that?

A. Yes, Sir.

Q. Do you have any difficulty keeping up with what's going on, in the TV shows or the news that you're watching or, or reading the book, keeping up with the, the storyline, anything like that?

A. I find that's – I used to do a lot of reading, but I can't do that right now. What I do I – to kind of do my reading, I'd read magazines so I know the main articles I'm going to be finished in a, you know, reasonable period of time.

Q. Do you find yourself ever having to go back and re-read chapters because you lost your place and or lost what was going on?

A. Yes. (Tr. 214-16).

Robinson also revealed that her exhaustion got in the way of doing routine household chores.

Q. How you indicated you are able to do the dishes and, and show what about the laundry, vacuuming, sweeping, mopping, things like that?

A. I try to do just a little every day, you know, so I won't be really burdened with it, you know.

Q. M-hum.

A. So, I just do maybe a load.

Q. Okay.

A. And let that be it and –

Q. Same thing with the house clean, keeping it clean?

A. Yeah. I just, the only thing I do is to try to keep things from being overwhelming. (Tr 218).

Robinson also testified that her napping was compulsory and limiting.

Q. Okay, and are you – have you ever gone without a day or been unable to go a day without having to take a nap?

A. No.

Q. And generally, how long do you nap for during the day?

A. It's probably an hour.

Q. That one nap?

A. M-hum. I have to nap every day. If I don't it's, it's another day of trying to get over not taking a nap on the day before.

Q. Okay let's say you, you skip a day without a nap. What kind of problems do you have, that night or the next day?

A. The next day I'm just exhausted.

Q. Okay.

A. And any time I just don't take a nap s, it's, it's a day lost.

Q. What about your mental comprehension or your attitude?

A. I guess I feel more frustrated or, you know, because I can't focus or do what I need to do and I feel like I'm just really off – I don't know, my schedule or just I'm – my day is just going to be, and it will be a mess.

Q. Okay. Are some days or weeks better than others? Or do you have more – you seem to have more energy for a short period of time, or is it pretty much just pretty steady across the, the board?

A. It's pretty, it stays pretty much the same, but you know, it's like a one week per month, it's just bad. It's just not, it's, it's, hard to even get up. (Tr. 20-21).

Robinson left her “daily activity questionnaire” blank. (Tr. 104). However, her testimony and the rest of the record reveals most of the information that she failed to provide in the activity questionnaire.

The ALJ concluded that the subjective evidence on the part of Robinson was suspect on the basis that it was unsupported by the medical record:

But the medical evidence does not support the claimant's reports of fatigue at the level she reports. As Dr. Oguejiofor noted, the medical evidence available at the hearing did not show muscle weakness having been observed on any examination. Even the later produced medical evidence does not show muscle weakness of any great extent. As already noted, at the consultative examination, Dr. Anighogu reported the claimant has decreased muscle strength, to 5-/5 (Exh. 2F-2). In November 2005, Dr. Newmark reports that the claimant's strength has decreased to 4/5 in her left upper extremity, but reports all her other extremities are at 5/5 (Exh. 5F, 3). I consider these deficits not significant, and note the increase in strength in the rest of the claimant's extremities. (Tr. 24).

As a result of this conflict, the ALJ dismissed the subjective evidence of pain and disability as being “not entirely credible.” (Tr. 25).

The ALJ erred in discarding this evidence. The ALJ, again, assumed that mental fatigue and muscle weakness are the same symptoms, and therefore any mental fatigue that Robinson has

experiencir would show up on a muscle strength test. However, his own experts disagreed with this assertion.

Q. Dr. Oguejiofor, is it correct to understand you to say that the, that you're not able to categorize or to quantify the, the mental fatigue -- it's the physical fatigue that you're quantifying?

A. Yes.

Q. So, the mental fatigue could still, could still be there that she's, that she describes in her testimony, is that correct?

A. Yes, it's possible, yeah. (Tr. 232).

According to Dr. Oguejiofor, the mental fatigue that is at the heart of Robinson's disability would not show up on any of the muscle strength tests or any of the objective medical evidence that was obtained.

Because the ALJ improperly equated muscle weakness with fatigue in rejecting Robinson's testimony as to her subjective symptoms (particularly her fatigue), the subjective evidence factor weighs against the ALJ's decision.

D. Education, Work History and Age

The fourth element considered is the claimant's educational background, work history, and present age. A claimant will be determined to be disabled only if the claimant's physical or mental 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. 42 U.S.C. § 423(d)(2)(a).

The record shows that Robinson, at the time of the hearing, was forty-four years old and had a college degree. (Tr. 210). She performed the duties of a probation officer for sixteen years before retiring due to multiple sclerosis. (Tr. 223). The ALJ questioned Charles R. Poor, a vocational expert ("Voc"), at the hearing about Robinson's ability to do her past work and her ability to engage in other gainful work activities. "A vocational expert is called to testify because of his familiarity with job requirements and working conditions. The value of a vocational expert is that he is familiar with the specific requirements of a particular occupation, including working conditions and attributes and skills needed." *Vaughan v. Shalala*, 58 F.3d 129, 131 (5th Cir. 1995) (quoting *Id.* v. *Bowen*, 105 F.2d 1168, 1170 (5th Cir. 1985)). It is well settled that a vocational expert's testimony, based on a properly based hypothetical question, constitutes substantial evidence. *Bowling v. Shalala*, 36 F.3d 431, 436 (5th Cir. 1994). A hypothetical question is sufficient work to incorporate the impairments which the ALJ has recognized to be supported by the whole record. Beyond the hypothetical question posed by the ALJ, the ALJ must give the claimant "the opportunity to correct deficiencies in the ALJ's... hypothetical questions (including additional disabilities not recognized by the ALJ's findings and disabilities recognized but omitted from the question)." Here, both the ALJ and Robinson's attorney had the opportunity to question the vocational expert. Robinson's attorney had no questions for the expert. The record shows that the ALJ posed the following questions to the vocational expert:

Q. I'll give you a couple of hypotheticals. Mr. Poor, assume if you were an individual the same age, education, and work experience as Ms. Robinson who can lift 10 pounds frequently and 20 pounds occasionally, stand and walk for 6 hours and sit for 6 hours or is to never work around ropes, ladders and scaffolds. Could such a person perform the past work as Ms. Robinson?

A. In my opinion, the person described herein the hypothetical could do the work of a Probation Officer.

Q. If such a person again, the same age, education and work experience as Ms. Robinson were restricted to lifting less than 10 pounds frequently but up to 10 pounds occasionally, standing and walking for 6 hours, but sitting for 6 hours, again never working around ropes, ladders or scaffolds. Could such a person still do the past work of a probation officer?

A. They couldn't do the job as officially described in the DOT. My personal and professional opinion is that probably at least a third of the jobs carrying the title of Probation Officer or Parole, Parole Officer would be consistent with your hypothetical but not all of them.

Q. Okay. Can you identify 3 other jobs such a person could perform within the residual functional capacity?

A. I think the person described in that hypothetical could perform the following representative jobs. They could work as a cashier, an information clerk, a telephone survey clerk. (Tr. 233-34).

To come up with the physical requirements that would be needed to perform Robinson's work as a probation officer, the ALJ used the findings from the record after choosing to discount the opinion of Dr. Newmark and the subjective evidence submitted by Robinson. As a result, the ALJ determined that Robinson, "with the residual functional capacity I have assigned her, could perform her past relevant work as a probation officer" or "approximately one-third of the probation officer jobs as generally performed and described in the Dictionary of Occupational Titles." (Tr. 233-34)

However, the record reveals that the vocational expert would have changed his opinion considerably had the opinion of Dr. Newmark and the subjective medical evidence from Robinson been factored in:

Q. Going back to the first hypothetical of Dr. Poor, if you add to that that a person can only, that due to fatigue, a person can only attend and concentrate for two-thirds of a working day, can such a person perform the past relevant work of Ms. Robinson?

A. In my opinion, no, Sir.

Q. Are there any other work such a person could perform?

A. No, not at a competitive level, no, Sir.

Q. And then going back to the first hypothetical again, add to that that a person because of fatigue would need to rest for an hour each day in addition to the usual and customary breaks. Again can such a person perform the past work of Ms. Robinson?

A. In my opinion, No, Sir.

Q. Are there any other work such a person can perform?

A. No, that's not a profile of a competitive worker.

Q. Okay. Thank you, Mr. Poor. (Tr. 235).

Because the ALJ improperly rejected the opinions of Dr. Newmark and the subjective evidence as presented by Robinson, the ALJ's residual functional capacity assessment is flawed. Given these flaws, remand is warranted.

VI. Conclusion and Order

Based on the foregoing, and the conclusion that the ALJ erred in his rejection of the treating physicians' opinions and in his rejection of the claimant's subjective symptoms, substantial evidence does not support the ALJ's decision. Accordingly, it is ORDERED that Plaintiff's Motion for Summary Judgment (Document No. 16) is GRANTED, that Defendant's cross Motion for Summary Judgment (Document No. 15) is DENIED, and that this case is REMANDED to the Social Security Administration pursuant to Sentence 4 of 42 U.S.C. § 405(g), for further proceedings consistent with this Recommendation.

Signed at Houston, Texas, this 24th day of July, 2009.

Frances H. Stacy

FRANCE H. STACY

UNITED STATES MAGISTRATE JUDGE