

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

SHEMEKA M. SHAW,)
)
 Plaintiff,)
)
 vs.) No. 02-2894 BV
)
 JO ANNE B. BARNHART,)
 Commissioner of)
 Social Security,)
)
 Defendant.)

REPORT AND RECOMMENDATION

Shemeka M. Shaw appeals from a decision of the Commissioner of Social Security denying her applications for a period of disability and disability insurance benefits under Title II of the Social Security Act and supplemental security income under Title XVI of the Social Security Act due to alleged nerve damage to her right hand. The appeal was referred to the United States Magistrate Judge for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1).

On appeal, Shaw contends that the Commissioner's decision should be reversed and remanded and that the Administrative Law Judge (ALJ) erred as a matter of law in failing to grant due deference to the opinion of Shaw's treating physician and in assessing Shaw's complaints of pain; made findings as to residual functional capacity that were not supported by substantial

evidence; posed to the vocational expert a hypothetical question that did not accurately portray Shaw's impairments and limitations; and concluded without substantial evidence that Shaw could perform work existing in significant numbers in the national economy. For the reasons given below, it is recommended that the decision of the ALJ be affirmed.

PROPOSED FINDINGS OF FACT

A. Procedural Background

On November 22, 2000, Shaw filed an application for Social Security benefits pursuant to Titles II, XVI, and XVII of the Social Security Act, with a claimed disability onset date of April 20, 1998. (R. at 90-93, 240-42.) Both applications were denied initially and on reconsideration. Shaw requested a hearing before an administrative law judge, which duly was held on June 10, 2002. The ALJ denied Shaw's application for benefits. (R. at 13.)

The ALJ concluded that Shaw was insured for disability and disability insurance benefits through March 31, 2003. (R. at 23.) The ALJ further concluded that Shaw's status post-injury to the right upper extremity, with residual hand and wrist pain, was a severe impairment. In addition, the ALJ found Shaw unable to perform any of her past relevant work. (*Id.*) However, the ALJ also found that Shaw was not under a disability as defined in the Social Security Act, that she had transferable skills from past relevant

work, and that she had the residual functional capacity to perform a significant range of light work. (R. at 23-24.) The Appeals Council denied review, leaving the ALJ's decision as the final decision of the Commissioner of Social Security. (R. at 8-9.) Shaw then brought this suit in federal district court on November 21, 2002, pursuant to 42 U.S.C. § 405(g) and 1383(c), alleging that the decision denying her claim is neither in accordance with the law nor supported by substantial evidence. The cause was referred to the United States Magistrate Judge for a report and recommendation.

B. Factual Background

Shaw was born on July 27, 1977, and was twenty-four years old at the time of the hearing before the ALJ. She had a high school education and prior work experience as a packer, food service cashier, restaurant server and hostess, cleaner, security guard, and telemarketer. (R. at 33-34, 134-140.) She most recently was employed by Austin Staffing Company, through which she was assigned to Reebok as a warehouse worker. On April 20, 1998, a table collapsed at Reebok, pinning Shaw's right hand and wrist to the floor. Shaw is right-handed. She had not worked since the accident.

At the hearing before the ALJ, Shaw testified to her symptoms and functional capacity. She testified to pain in her right hand, which she described as a ". . . burning, stinging sensation from

the fingers radiating the wrist on up." (R. at 34.) She also stated that her arm was "heavy to lift," as "if something heavy is weighing [it] down." (*Id.*) She testified that the pain sometimes made it hard to concentrate and that it sometimes was so severe that it triggered headaches. (R. at 41.) Medication alleviated the pain in her right arm and hand, but working with the appendage caused swelling, aches and pains, and also caused her arm to sweat. (R. at 34.) Use of her right hand and arm purportedly was limited to guiding and bracing objects. She stated that she was unable to write, (R. at 41), drive, (R. at 43), type, (R. at 41), cook, (R. at 45), manipulate small objects with her fingers, (R. at 40), pinch with her fingers and thumb to pick up small objects (*id.*), or hold an object in her right hand and work on it with her left hand, (R. at 41).

Shaw also testified as to her daily activities. At the time of the hearing, Shaw had two children, ages three years and nine months, and lived her parents. (R. at 41, 45.) She stated that her family took care of the household chores, e.g., cleaning, shopping, running errands, providing transportation, and paying the bills. (R. at 43.) Her father, James Allen Shaw, testified that Shaw washed the clothes and cleaned up the spills and messes that her children made. (R. at 48.)

At the hearing, a vocational expert, Michelle McBroom,

evaluated Shaw's past work and present functional capacities. McBroom classified Shaw's previous jobs as medium duty unskilled, light duty unskilled, sedentary duty semi-skilled, and light duty semi-skilled. (R. at 51.) She testified that Shaw could not return to any past relevant work because all her past relevant work required extensive use of her right hand. (R. at 52.) She testified, in response to the ALJ's hypothetical question and to questioning by Shaw's counsel, that Shaw could perform the jobs of information clerk and parking lot attendant, which were sedentary and light duty positions, (R. at 53), and that she likely could perform the job of a security gate guard depending on a particular employer's requirements, (R. at 56-58).

The medical evidence in this case includes records from Delta Medical Center, where Shaw first sought treatment for the incident; from Paul Dang, M.D., Shaw's primary care physician at Southwind Medical Specialists; from Drs. Knight and Lochemes at the Memphis Orthopedic Group; from John D. Brophy, M.D. of the Neurosurgical Clinic; from Phillip Green, M.D. of the Mid-South Pain and Anesthesia Clinic; and from Darel A. Butler, M.D. of the Wesley Neurology Clinic. In addition, the record includes two physical functional capacity assessments by non-treating, non-examining physicians; a mental assessment by a non-treating, non-examining psychiatrist; a mental assessment by an examining but non-treating

psychiatrist; and a physical functional capacity assessment by Shaw's treating physician.

Shaw received emergency treatment at the date of injury at the Delta Medical Center. Ice and a splint were recommended. (R. at 223.) X-rays were negative. (R. at 165.)

According to the medical records in general, Dr. Dang at Southwind Medical, Shaw's primary care physician, treated Shaw for her wrist injury in 1998 with Naprosyn and pain medication; however, his records date back only to March of 2000.

Dr. Dang referred Shaw to the Memphis Orthopedic Group in September 1999 for an evaluation. Dr. Knight at Memphis Orthopedic saw Shaw three times. He noted no significant swelling and no focal tenderness but that Shaw was very hesitant to move her wrist. X-rays of her forearm and hand were negative. Dr. Knight diagnosed tendinitis and probable reflex sympathetic dystrophy (RSD). He recommended physical therapy, which Shaw briefly followed and which seemed to help in a limited way. (R. at 160.) Diagnostic tests in November of 1999, including a bone scan and an electromyogram/nerve conduction study, were negative for wrist injury or nerve-muscle abnormality. (R. at 224, 227.) Shaw missed several appointments with Dr. Knight.

In March of 2000, Shaw returned to Dr. Dang and reported wrist pain so severe she was unable to move the wrist. (R. at 176.) Dr.

Dang referred her back to Memphis Orthopedic for a reevaluation. On March 23, 2000, Dr. Lochemes of Memphis Orthopedic saw Shaw. He noted no significant swelling in her right elbow, some swelling in the hand, and "a lot of pain behaviors." (R. at 162.) He noted that unless Shaw was determined to proceed with physical therapy despite pain, the condition probably would not benefit from additional treatment. (*Id.*) His diagnosis favored "neurologic type pain" over RSD. (*Id.*) He felt that her condition may be "self-limited." (*Id.*) He started her on Neurontin.

Over the next two months, Shaw was followed by Dr. Dang. Shaw tested negative for rheumatoid factor. (R. at 178.) An MRI identified carpal tunnel but no tenosynovitis and no bone abnormality in the wrist. (R. at 177.) Shaw reported numbness, tingling, weakness in the wrist and arm, and wrist swelling that came and went but which was not present in March or April of 2000. (R. at 173-175.) Dr. Dang treated Shaw's pain with Vioxx, (R. at 175), Neurotonin, (R. at 173-74), and a wrist splint, (R. at 174).

Dr. Dang also referred Shaw to John Brophy, M.D. for a neurological evaluation in May of 2000. Dr. Brophy reported that Shaw's range of motion was "difficult to test" due to extreme pain reported by Shaw when the wrist was palpitated or manipulated. (R. at 165.) He noted "significant sweating" in the palm of the right hand. (*Id.*) Dr. Brophy felt the clinical exam was most consistent

with RSD but wanted additional tests to confirm the diagnosis. He suggested referral to a pain clinic for blocks. (R. at 166, 164.)

Dr. Green at the Mid-South Pain and Anesthesia Clinic saw Shaw on July 11, 2000, at Dr. Brophy's request. He initially diagnosed possible RSD and possible carpal tunnel syndrome, recommended physical therapy, continued the Neurontin, and started Paxil and methadone. (R. at 231.) Green also recommended nerve block therapy.

As of August, 2000, Shaw had not participated in any physical therapy program and remained sedentary at home. (R. at 163.) She told Dr. Brophy that she planned to maintain a splint on the wrist and hope for spontaneous improvement. (*Id.*) Dr. Brophy disagreed and specifically recommended that Shaw discontinue the splint and attempt to regain motion in the wrist. (*Id.*) He also recommended a psychiatric evaluation based on the disparity between the bone scan results and the extreme pain and tenderness reported on physical examination. (*Id.*) Shaw refused to see a psychiatrist. (R. at 163, 172.)

In September of 2000, on referral from Dr. Dang, Shaw consulted Darel Butler, M.D., at the Wesley Neurology clinic. Dr. Butler was unable to fully examine Shaw because Shaw refused to allow manipulation or palpitation of the wrist due to excessive pain. (R. at 168.) Dr. Butler recommended referral to a pain

clinic and/or medication. (R. at 169.)

In October of 2000, Dr. Green again discussed with Shaw nerve block treatment, but more strongly recommended aggressive physical therapy and a psychological evaluation. (R. at 228.) At that time, Dr. Green concluded that there was a low probability that Shaw's condition was RSD given the absence of skin pigmentation and hair distribution changes as well as no abnormalities on a bone scan. He nevertheless was willing to perform a sympathetic nerve block if Shaw wanted one, but she declined.

In December 15, 2000, Dr. Dang opined that Shaw's upper right arm strength was intact, but that she was "100%" disabled due to severe pain. (R. at 185.)

The record also contains mental and physical functional capacity assessments. On January 2, 2001, Michael Guinle, Ph.D, a non-treating but examining psychiatrist at Tennessee Disability Determination Services, produced a mental functional capacity report. Dr. Guinle found Shaw to be free from mental disorders and also opined that "[h]er ability to understand and remember, ability to sustain concentration and persistence, social interaction and adaption skills do not appear to be significantly limited." (*Id.*)

On January 3, 2001, non-treating, non-examining physician James N. Moore, M.D. opined that Shaw could occasionally lift and carry up to 50 pounds; frequently lift and carry up to 25 pounds;

stand or walk for 6 hours in an 8-hour workday; sit for 6 hours in an 8-hour workday; frequently climb ramps, stairs, ladders, and scaffolds; and frequently balance, stoop, kneel, crouch, and crawl. (R. 204-211.) He suggested that Shaw's ability to push and/or pull may be limited in her upper extremities, that Shaw was not capable of climbing a rope, and that Shaw's abilities to handle, finger, and/or feel objects were limited. (*Id.*) He explained that these limitations stemmed from reported July 10, 2003 right hand pain, but noted that Shaw's diagnostic tests were normal. (*Id.*)

On January 8, 2001, a psychiatric technique review form completed by a non-examining, non-treating DDS physician opined that Shaw had "no medically determinable impairment."¹ (R. at 190.)

On March 9, 2001, non-examining, non-treating physician Andrew Miller, M.D. opined that Shaw could occasionally lift and carry 20 pounds; frequently lift and carry 10 pounds; stand, walk, or sit about 6 hours in an 8-hour workday; and that she was unlimited in her abilities to push and/or pull. (R. at 215-222.) Dr. Miller indicated a limited ability to handle and finger objects, but

¹ The physicians' name is illegible, (see R. at 190), and the rest of the 13-page form is entirely blank except for brief notes indicating that Shaw could perform personal hygiene, child care, light chores, television, washing, and food preparation and that her alleged mental limitations appeared to arise solely from her physical condition, (R. at 202).

otherwise found no postural, visual, communicative or environmental limitations. (*Id.*)

Finally, the medical evidence contains a functional capacity assessment from Shaw's primary treating physician, Dr. Dang, in the form of interrogatories completed on April 25, 2002. Dang opined that Shaw's persistent pain prevented her from regular or sustained lifting, carrying, pushing, pulling, operating hand controls, and using the right hand to manipulate or grasp tools, pinch, pick, or perform bilateral manipulation. (R. at 233.) He further opined that Shaw's pain would prevent Shaw from maintaining attention and concentration; maintaining job attendance; and sustaining work performance through an eight-hour day or forty-hour week. (R. at 234.) He concluded that Shaw was totally disabled due to atypical RSD. (*Id.*)

C. The ALJ's Decision

Using the five-step disability analysis,² the ALJ found at the

² Entitlement to Social Security benefits is determined by a five-step sequential analysis set forth in the Social Security Regulations. 20 C.F.R. §§ 404.1520, 416.920. First, the claimant must not be engaged in substantial gainful activity for a period of not less than twelve months. 20 C.F.R. § 404.1520(c). Second, a finding must be made that the claimant suffers from a severe impairment. *Id.* Third, the ALJ determines whether the impairment meets or equals the severity criteria set forth in the Listing of Impairments contained in the Social Security Regulations. 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526. If the impairment satisfies the criteria for a listed impairment, the claimant is considered to be disabled. If the claimant's impairment does not

first and second steps that Shaw had not been gainfully employed since her claimed onset date, (R. at 16), and that her wrist injury status with upper right extremity pain constituted a "severe" impairment within the meaning of the regulations, (R. at 20).

At the third step of the analysis, the ALJ found that Shaw's impairments did not, singly or in combination, meet or equal the level of severity described for any listed impairment as set out in 20 C.F.R. Part 404, Subpart P, Appendix 1. (*Id.*) In reaching this determination, the ALJ relied on the opinions of DDS consultants and Social Security Ruling 96-6p, which sets forth the Administration's policy guidelines concerning the weight to be given to agency medical and psychological consultant opinions.³

In step four of the evaluation, the ALJ found that Shaw was unable to perform past relevant work, but that she remained capable

meet or equal a listed impairment, the ALJ must undertake the fourth step in the analysis and determine whether the claimant has the residual functional capacity to return to any past relevant work. 20 C.F.R. § 404.1520(e). If the ALJ finds the claimant unable to perform past relevant work, then, at the fifth step, the ALJ must discuss whether the claimant can perform other work which exists in significant numbers in the national economy. 20 C.F.R. § 404.1520(f).

³ SSR 96-6p is entitled "Policy Interpretation Ruling: Titles II and XVI: Consideration of Administrative Findings of Fact by State Agency Medical and Psychological Consultants and Other Program Physicians and Psychologists at the Administrative Law Judge and Appeals Council Levels of Administrative Review; Medical Equivalence."

of lifting 20 pounds occasionally and 10 pounds frequently and capable of standing, sitting, and walking for six hours a day, but that her prior work required activities that were precluded by these limitations. (R. at 21.) In reaching this conclusion, the ALJ relied on the medical opinions in evidence, the underlying medical records, and in part on Shaw's subjective testimony. He did not find Shaw's testimony entirely credible because of inconsistencies within the hearing testimony, inconsistencies between the allegations and the medical evidence, and inconsistencies between the described severity of symptoms and the frequency and nature of medical treatment. (R. at 19.)

The ALJ then proceeded to the fifth step of the analysis and concluded that Shaw could perform other work existing in significant numbers in the national economy, including work as a parking lot attendant or an information clerk, and accordingly that Shaw was not disabled. (R. at 24.) In reaching this determination, the ALJ relied upon the testimony of the medical-vocational expert and upon the framework set forth in 20 C.F.R. 404, Subpart P, Appendix 2.

PROPOSED CONCLUSIONS OF LAW

On appeal, Shaw contends that the ALJ's decision should be reversed because the ALJ gave improper weight to the opinion of Shaw's treating physician, improperly discounted Shaw's complaints

of pain, made findings as to Shaw's residual functional capacity that were not supported by substantial evidence, and posed an inaccurate hypothetical question to the vocational expert, thereby failing to rely on substantial evidence in concluding that Shaw could perform work existing in significant numbers in the national economy.

A. Standard of Review

Judicial review of the Commissioner's decision is limited to whether there is substantial evidence to support the decision and whether the Commissioner used the proper legal criteria in making the decision. 42 U.S.C. § 405(g); *Barker v. Shalala*, 40 F.3d 789, 794 (6th Cir. 1994); *Abbott v. Sullivan*, 905 F.2d 918, 922 (6th Cir. 1990). Substantial evidence is more than a scintilla of evidence but less than a preponderance and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Kirk v. Sec'y of Health and Human Servs.*, 667 F.2d 524, 535 (6th Cir. 1981) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In determining whether substantial evidence exists, the reviewing court must examine the evidence in the record taken as a whole and must take into account whatever in the record fairly detracts from its weight. *Abbott*, 905 F.2d at 923. If substantial evidence is found to support the Commissioner's decision, however,

the court must affirm that decision and "may not even inquire whether the record could support a decision the other way." *Barker*, 40 F.3d at 794 (quoting *Smith v. Sec'y of Health and Human Servs.*, 893 F.2d 106, 108 (6th Cir. 1989)). Similarly, the court may not try the case *de novo*, resolve conflicts in the evidence, or decide questions of credibility. *Cutlip v. Sec'y of Health and Human Servs.*, 25 F.3d 284, 286 (6th Cir. 1994).

B. Weight Given to Medical Reports and Records

Shaw argues that the ALJ erred in rejecting the opinion of her primary treating physician, Dr. Dang, and to some extent the opinions of Dr. Knight, Dr. Lochemes and Dr. Brophy, instead relying on opinions of non-treating physicians. The opinions of treating physicians generally are entitled to greater weight than those of non-examining physicians. *Farris v. Sec'y of Health and Human Servs.*, 773 F.2d 85, 90 (6th Cir. 1985); 20 C.F.R. § 404.1527(d). However, treating physician opinions receive controlling weight only when they are supported by sufficient clinical findings and are consistent with the evidence. 20 C.F.R. § 404.1527(d)(2); *Cutlip*, 25 F.3d at 287. The lack of "detailed, clinical, diagnostic evidence" can render a treating physician's opinion less creditworthy. *Walters v. Comm'r of Social Security*, 127 F.3d 525, 530 (6th Cir. 1997).

Here, Dr. Dang, after receiving and reviewing opinions of

consulting specialist, opined that Shaw suffered from atypical reflex sympathetic dystrophy. In addition, he found a number of physical limitations to her right hand and that her pain rendered her incapable of maintaining attention and concentration, meeting job requirements of work, and sustaining performance throughout an eight-hour work day.

None of the specialists upon whom Dr. Dang relied, however, conclusively determined that Shaw suffered from RSD. Dr. Knight's initial impression was tendinitis and probable RSD. Dr. Lochemes concluded that there was an outward appearance of RSD but that several significant symptoms and findings were absent. His diagnosis favored "neurologic type pain" over RSD. Dr. Green initially diagnosed possible RSD and possible carpal tunnel syndrome. He ultimately concluded that there was a low probability that Shaw's condition was RSD given the absence of skin pigmentation and hair distribution changes as well as no abnormalities on a bone scan. Dr. Brophy felt the clinical exam was most consistent with RSD but wanted additional tests to confirm the diagnosis. There is no indication that the diagnosis was ever confirmed in his records. He ultimately referred Shaw for a psychiatric evaluation.

Based on the above, it does not appear that the ALJ disregarded the records from Shaw's treating physicians. Rather,

the ALJ duly noted Shaw's full course of treatment with Dr. Dang and all the specialists. He chose to discredit Dang's disability finding and give less weight to Dang's opinions because he found it unsupported by objective clinical evidence and by the opinions and diagnoses of the consulting specialists. More weight is given to the opinion of a specialist about medical issues related to his speciality than to the opinion of a doctor who is not a specialist. 20 C.F.R. §§ 404.1527(d) (5) and 416.927(d) (5) .

It is submitted therefore that the ALJ properly discredited Dr. Dang's opinion based on the lack of objective medical findings and the absence of any conclusive diagnosis of RSD by any consulting specialist, and there is substantial evidence to support the ALJ's determination.

C. The Pain Standard and the ALJ's Credibility Determination

 An ALJ's credibility determination is given great deference because the fact finder has the unique opportunity to observe and evaluate the witness. *Walters*, 127 F.3d at 531; *Kirk*, 667 F.2d at 538. However, the ALJ's credibility determination must be supported by substantial evidence. See, e.g., *Walters*, 127 F.3d at 531; *McGuire v. Comm'r of Social Sec.*, 1999 U.S. App. LEXIS 5915, *17 (6th Cir. 1999) (unpublished). In this case, the ALJ discounted Shaw's credibility because of inconsistencies in the testimony, between the allegations and the medical evidence, and

between the allegations of pain and the frequency and nature of medical treatment. The ALJ set forth specific examples supporting his findings. For instance, Shaw testified that she could not grasp or pick up objects but her father testified that she could cook and do household chores, care for her children, and feed a baby with a bottle. (R. at 19.) Shaw testified that she could not concentrate due to pain, but mental assessments indicated no reduction of mental functioning. (R. at 20.) In addition, the clinical testing and bone scans of record were negative for disorders that reasonably could be expected to give rise to the claimed symptoms. The "pain standard" test in the Sixth Circuit, which is used to determine whether pain alone may constitute a functional limitation, generally requires some underlying diagnostic finding to support the claimant's assertions. See *King v. Heckler*, 742 F.2d 968, 975 (6th Cir. 1984) (finding disability where the claimant testified to "severe and constant back pain, resulting from two laminectomies and degenerative disc disease" and there was a lack of conflicting medical evidence); *Felisky v. Bowen*, 35 F.3d 1027, 1038-42 (6th Cir. 1994) (accepting as credible claimant's complaints of back pain in light of medical evidence showing inflammation of bones, tenderness in muscles, and degenerative joint disease). The court also notes that the record contains repeated indications that Shaw has refused to

comply with her treating physicians' recommendations, i.e., to abandon the splint, resume physical therapy, and seek a psychiatric evaluation for pain management. For these reasons it is submitted that the ALJ gave correct weight to Shaw's testimony.

D. Residual Functional Capacity Determination

Shaw next argues that the ALJ's findings as to her functional capacity of a light range of work were unsupported by substantial evidence. The ALJ's findings echoed those contained in the most recent RFC, produced on March 9, 2001 by Andrew Miller, M.D., a non-examining physician. Dr. Miller and the ALJ found greater limitations than were suggested by the preceding RFC assessment conducted on January 3, 2001. In determining Shaw's residual functional capacity, the ALJ also considered Shaw's testimony and the medical evidence of record.

As discussed above, the ALJ properly disregarded Dr. Dang's findings as to Shaw's physical limitations and disability because his findings were not supported by objective medical evidence and the opinions of the consulting specialists. After discrediting Dr. Dang's findings, the ALJ properly relied on the residual functional capacity assessment of Dr. Miller. In addition, the ALJ's determination of residual functional capacity for a reduced range of light work is supported by Shaw's testimony that she takes care of household chores such as washing clothes and taking care of her

two pre-school aged children.

Therefore, it is submitted that the ALJ's determination as to Shaw's residual functional capacity is based on substantial evidence and should be upheld.

E. Vocational Expert Testimony and Finding of Ability to Work

Shaw next argues that the ALJ's question to the vocational expert did not accurately portray Shaw's condition and that the vocational expert did not testify to transferable skills as the ALJ stated in his decision. Shaw therefore insists that the ALJ's conclusion that Shaw could work at another job existing in the national economy was not based on substantial evidence.

A vocational expert's testimony provides substantial evidence of ability to perform work when the testimony is responsive to a hypothetical question that accurately portrays a claimant's impairments. *Howard v. Comm'r of Soc. Sec.*, 276 F.3d 235, 239 (6th Cir. 2002) (quoting *Varley v. Sec'y of Health & Human Servs.*, 820 F.2d 777, 779 (6th Cir. 1987)). In this case, the ALJ posed the following hypothetical:

Assume a Claimant, same age, education, occupational experience. Further assume full credibility of the testimony you've heard today. Would such a Claimant be able to perform any of her past relevant work? . . . Now, again assuming full credibility of the testimony would such a Claimant be able to perform any work . . . ? . . .
. But if you just assume that she could use her left hand only for the moment let's assume that. Would there be jobs available for that?

(R. at 51-53.) It is submitted that this hypothetical is sufficient in all necessary respects. First, although the ALJ ultimately found Shaw's testimony only partly credible, he instructed the vocational expert to take as true all testimony adduced at the hearing. Second, the hypothetical accounts for complete right hand disability, without even requiring the use of the right hand as a "helper" hand. Finally, although a hypothetical should include the claimant's diagnosis as well as limitations, *Howard*, 276 F.3d at 241, the ALJ instructed the vocational expert to consider all hearing testimony and the medical records contain contradictory diagnoses, even from Shaw's treating sources. The ALJ was not required to include Dr. Dang's limitations because the ALJ properly discredited Dr. Dang's opinion. Accordingly, the hypothetical does not appear fundamentally flawed and therefore the vocational expert's testimony based on the hypothetical provides substantial evidence for the ALJ's conclusion.

As to the ALJ's statement regarding Shaw's transferable skills, the government concedes that the ALJ's statement that Shaw had transferrable skills from her warehouse work is not supported by the vocational expert's testimony. An ALJ's mistake as to a fact on the record, however, or the mention of a fact not on record, does not justify overturning a decision that is otherwise

supported by substantial evidence. *Diorio v. Heckler*, 721 F.2d 726, 728-29 (11th Cir. 1983); *Hawkins v. Secretary of Health and Human Services*, Civil Case No. 89-1438, 1989 U.S. App. LEXIS 19091, *12 at n.1 (6th Cir. 1989) (unpublished). Here, the mistake was harmless because one of the jobs identified by the vocational expert, that of parking lot attendant, is unskilled work. Thus, the lack of transferable skills would not affect Shaw's ability to perform the job of parking lot attendant.

CONCLUSION

The totality of record indicates that the ALJ's decision was supported by substantial evidence at each step of the decision-making process. Further, the ALJ's error as to transferable skills was harmless because the ALJ's ultimate conclusions were made according to correct legal standards and supported by other substantial evidence. Accordingly, it is recommended that the Commissioner's decision should be affirmed.

Respectfully submitted this 7th day of August, 2003.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE