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

JAMES D. BYNUM, Plaintiff, vs. KENNETH S. APFEL, Commissioner of Social Security, Defendant.	)	No. 01-2331 GV

REPORT AND RECOMMENDATION

Claimant James D. Bynum's surviving spouse, as executrix of the claimant's estate, appeals from a decision of the Commissioner of Social Security, denying the deceased claimant's application for disability benefits under Title II and Title XVI of the Social Security Act. The appeal was referred to the United States Magistrate Judge for proposed findings of fact and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and (C).

In this case, the plaintiff has taken issue with the Administrative Law Judge's (ALJ) determination in step five of the sequential analysis that the claimant possessed the residual functional capacity to perform sedentary work and with the ALJ's application of the grid to determine that the claimant could perform other work in the national economy. In particular, the

plaintiff argues that the failed to give proper weight to the evidence of the claimant's pain, failed to consider the combined effects of the claimant's impairments, and applied the Medical-Vocational Guidelines or "grid" when claimant's nonexertional limitations made the grid inapplicable. For the reasons set forth below, the court recommends that the decision of the Commissioner be remanded.

I. PROPOSED FINDINGS OF FACT

The claimant first applied for Social Security disability benefits on March 1, 1999, due to peripheral vascular disease, arthritis, coronary artery disease, breathing problems, phlebitis, neck and back pain. He claimed a disability onset date of March 23, 1998. His application was denied initially and upon reconsideration. The claimant then filed a request for a hearing which was held on December 7, 1999, before Administrative Law Judge Anthony Fava. The ALJ denied the claimant's application for benefits on August 23, 2000. The claimant appealed this decision to the Appeals Council and on March 1, 2001, the Council denied the request for review, leaving the ALJ's decision as the final decision. The claimant died on April 13, 2001. On April 26, 2001, the claimant's wife filed this suit pursuant to 42 U.S.C. § 405(g) and 5 U.S.C. § 706 to review a final decision, alleging that several of the Commissioner's findings were not based on

substantial evidence and that the Commissioner committed numerous errors of law by applying improper or incorrect legal standards. On May 3, 2001, United States District Judge Julia Smith Gibbons referred this matter to the United States Magistrate Judge for a report and recommendation.

_____The claimant was born on July 12, 1952. He was forty-six years old at the time he applied for disability benefits. He had a high school education. The claimant was obese; he was 5'9" tall, and his weight fluctuated between 300 and 330 pounds. The claimant testified that immediately prior to the onset of his physical difficulties, he had worked as a farmer for two years. Prior to that job, he worked a few years as a dump truck driver, construction worker, security guard, and maintenance worker, respectively. His past employment involved heavy lifting, and in the case of the security job, extensive walking.

At the hearing, the claimant testified about severe, constant pain in his low back, hips and legs. He reported that he could not walk for longer periods of time. (R. 274.) He stated that because of the pain in his legs, he could not continue his job as a farmer and did not believe that he could perform any of his previous jobs in his current condition. (R. 274.) The claimant further stated that his days consisted mostly of watching television with his feet elevated. (R. 275.) He explained that he had to keep his feet

elevated due to the phlebitis in his legs. (R. 275.) The claimant testified he did little driving but occasionally rode the riding lawn mower. (R. 275.) He stated that he had discontinued all hobbies and recreational activities in March of 1998. He stated that he could probably lift about ten pounds, if infrequently required to do so. (R. 275.) He further explained that he could only walk about twenty-five to thirty feet at a time with the aid of a cane. (R. 279.) The claimant also stated that he could only sit for about ten to fifteen minutes at a time before he had to move to relieve some of the pain in his legs. (R. 279, 280.) The claimant added that he took medication for hypertension, used an inhaler for breathing difficulties, and he had a partially successful surgery on his heart for coronary blockages. (R. 285-87.) When asked about his smoking habit, the claimant admitted that he was unable to quit, as his doctor has instructed, but had reduced his amount of smoking from approximately three packs a day to one pack a day. (R. 277.) In conclusion, the claimant agreed that if there was a sedentary job at which he would be allowed to stand briefly from time to time, he would "try." (R. 280.)

The claimant's wife also testified at the hearing and corroborated the claimant's testimony. (R. 282.) She added that he did not sleep well and was unable to assist with housework. (R. 284-85.) She stated that the claimant has pain in his hips and

legs, and she agreed that he was unable to work. (R. 282.)

The administrative record contains several documents in which the claimant asserted that he was unable to bend, stand, or kneel in addition to his difficulty walking, sitting and standing. The documents also show that the claimant had an ulnar nerve entrapment in his left arm and arthritis in his hips and legs resulting from an accident as a dump truck driver in 1994.

_____The medical evidence in this case consists of medical reports of several treating physicians, hospital records and the claimant's prior medical history. Notwithstanding the plaintiff's alleged disability onset date of March 23, 1998, the administrative record contains a significant amount of medical evidence pertaining to plaintiff's physical status prior to that time period.

Dr. Robert Christopher at UT Medical Group examined the claimant in November of 1995 and obtained his medical history at that time. (R. 241.) According to Dr. Christopher's records, the claimant was involved in an accident while driving his dump truck on August 10, 1994. He experienced pain in his back and neck, but X-rays taken at Baptist Hospital East revealed no fractures. The physicians there gave him medication for the pain and instructed him to rest. (R. 241.) His pain persisted, however, and as a result he visited orthopaedic surgeon David LaVelle at Campbell's Clinic on August 22, 1994. Dr. LaVelle detected slight

degenerative changes in the mid-thoracic region of the claimant's spine and diagnosed the claimant with cervical strain, recommending physical therapy. (R. 241.) The claimant continued to experience pain, prompting a visit to Dr. Manugian, another orthopaedic surgeon, for evaluation. Dr. Manugian prescribed Voltaren for inflammation and Toradol for pain. (R. 241). The claimant visited Dr. Manugian on approximately sixteen different occasions, during which time Dr. Manugian diagnosed the claimant with severe bilateral carpal tunnel syndrome, resulting in surgery on first the left, then the right wrist by January of 1995. (R. 242-43.) The claimant underwent physical therapy for both his wrists and back under Dr. Manugian's supervision. He was diagnosed with ulnar nerve entrapment in his left elbow on May 1, 1995, and he returned to work on a trial basis on May 22, 1995. Dr. Manugian found no permanent impairment from the carpal tunnels.

After obtaining the claimant's medical history, Dr. Christopher performed a physical examination. On physical examination, the claimant tested positive for hip pain on straight leg raising. Dr. Christopher's findings upon examination of the claimant indicate:

> [he] shows evidence of a chronic cervical strain with muscle spasm and pain on the extremes of some ranges of motion of the neck. He also has status post bilateral carpal tunnel releases with an excellent result on the right and a very good result on the left.

> There is also evidence of ulnar nerve entrapment at the left elbow. With regard to the low back, Mr. Bynum has evidence of a chronic lumbosacral myofascial strain by history but there are no objective physical findings.

(R. 245.) Dr. Christopher further explained to the claimant that his symptoms would likely persist as long as he continued to drive a dump truck. (R. 245-46.) Consulting an American Medical Association evaluation guide, the doctor concluded that the claimant's permanent impairment rating was fifteen percent. (R. 246.)

In October of 1997, the claimant was admitted to Baptist Memorial Hospital Emergency Room complaining of chest pain, pain radiating down both arms, nausea and sweating. (R. 120.) He was told that he "may have had a light heart attack." (R. 76.) He was discharged with instructions to follow up with his primary physician the next day. His primary care physician, Dr. Ray Jeffers at the Peabody Group, referred him to Dr. Galyean at Methodist Hospital for a cardiology work-up. (R. 76.) The claimant stayed at Methodist Hospital for six days and was diagnosed with coronary artery disease, hypertension, obstructive sleep apnea and obesity. While at the hospital, the claimant underwent coronary angioplasty to insert stents in his arteries. (R. 76.) The claimant's heart was monitored by Telerythmics for a month and the claimant complained of "weak spells" and "feeling

lightheaded." (R. 85, 170.)

In April of 1998, the claimant complained of pain in his back and legs, primarily in his right leg. An examination by Dr. Jeffers revealed tenderness in the thigh and calf region. Dr. Jeffers placed the claimant on anti-inflammatory medication and instructed him to apply heat to his legs. He also ordered an arterial Doppler exam of the claimant; the results revealed some venous insufficiency in the right leg but no deep venous thrombosis. (R. 152, 162). The claimant returned two weeks later, still complaining of pain in his legs. At that time, Dr. Jeffers instructed the claimant to remain off work for one week and to elevate his legs to alleviate pain. (R. 164.) He also prescribed painkillers. Dr. Jeffers continued to see the claimant for constant leg pain for several months. At nearly every visit, Dr. Jeffers noted calf tenderness on examination. In August of 1998, Dr. Jeffers again instructed the claimant to elevate his legs. In sum, throughout Dr. Jeffers' patient log from 1997 to 1999, the claimant complained of pain in his chest, legs and back, and Dr. Jeffers prescribed anti-inflammatory medications, aspirin, Lortab and Percocet for the pain.

Dr. Jeffers referred the claimant to Dr. Michael Trotter, a cardiovascular surgeon, on May 19, 1998. Finding the claimant's "clinical scenario [to be] consistent with lower extremity

arteriosclerotic peripheral vascular disease," Dr. Trotter performed an arteriogram. (R. 137-38.) The arteriogram revealed minimal evidence of lower extremity arteriosclerotic occlusive disease.

In January of 1999, the claimant complained of facial numbness and Dr. Jeffers ordered a CT head scan. The results of the scan were normal. (R. 145.) In February of 1999, the claimant complained of dyspnea on exertion and Dr. Jeffers detected "mild wheezes bilaterally." (R. 154.)

On May 18, 1999, the claimant went to Dr. Paul J. Katz, a state agency medical consultant, for a consultative disability examination. According to Dr. Katz, the claimant suffered from peripheral vascular disease, back pain, coronary disease, sleep apnea, obesity and lung problems. (R. 227). Without the benefit of the claimant's medical records regarding his peripheral vascular disease, Dr. Katz determined that the claimant's ability to walk was limited to two hours a day; he could lift twenty-five pounds rarely, ten pounds frequently; and that activities that the claimant could perform seated would "probably" not be affected by his impairments. (R. 227.)

On May 25, 1999, Dr. Lester, a state agency medical consultant, made a residual functional capacity assessment. (R. 233.) Dr. Lester concluded the claimant could lift fifty pounds

occasionally, twenty-five pounds frequently, and could sit, stand or walk for a total of approximately six hours a day. The doctor further found that the claimant had no limitation in lifting, carrying, balancing, stooping, kneeling, crouching or crawling. (R. 234-35). Dr. Lester did limit the claimant to occasionally or never climbing stairs or ladders. It is not clear what evidence Dr. Lester reviewed in making his assessment other than Dr. Katz's report. (R. 239.)

The most recent doctor report is that of Dr. Gary D. Strasberg, an internist, who saw the claimant in August, September, and October, 2000, after the ALJ had rendered its decision in this matter.[1] Dr. Strasberg treated the claimant for pneumonia, the ongoing condition of coronary artery disease, and arthritis. Dr. Strasberg's records reflect that the claimant still took pain medication.

II. PROPOSED CONCLUSIONS OF LAW

A. The Evidence Submitted to this Court

At the outset, the court must first determine whether certain evidence submitted directly to this court - an April 12, 2001 letter from Dr. H. Frank Martin, Chairman of the Cardiology Department for Methodist Healthcare South - can be considered in

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[1] **Dr. Strasberg treated the claimant from July 17, 2000 until October 2, 2000. (R. 254-66.)**

determining whether the ALJ's decision was proper, or, in the alternative, whether it requires a sentence six remand under 42 U.S.C. § 405(g). After the ALJ issued his decision and the Appeals Council denied review in this case, the claimant submitted additional evidence in the form of a letter written by Dr. Martin on April 12, 2001,[2] to Congressman Ed Bryant, regarding the claimant's medical condition and Social Security Benefits status. (Ex. 2, Pl.'s Br.)

Evidence not before the ALJ at the time of his decision cannot be used to determine whether substantial evidence supports the ALJ's decision. *See Cotton v. Sullivan*, 2 F.3d 692, 696 (6th Cir. 1993). Pursuant to 42 U.S.C. § 405(g)(6), a claimant may request a remand based on new and material evidence. In order for a sentence six remand to be available, the claimant must submit the new and material evidence and bears the burden of showing good cause as to why the new evidence was not presented before. *See* 42 U.S.C. § 405(g).

The new evidence in this matter does not satisfy all three criteria for a sentence six remand. First, the information contained in the letter from Dr. Martin meets the initial requirement of newness, as this document was created only after the

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[2] **Incidentally, Dr. Martin's letter is dated one day prior to the claimant's death.**

ALJ's August 23, 2000 decision. Second, this information clearly would be material. If the ALJ had seen Dr. Martin's opinion that the plaintiff is totally disabled and that he would not be able to return to work, and if the opinion was supported by medical records,[3] there is a reasonable probability that he would have reached a different conclusion. *See Sizemore v. Secretary of Health and Human Services,* 865 F.2d 709, 711 (6th Cir. 1988).

Newness and materiality alone, however, are not sufficient. Plaintiff must also show good cause why this evidence was not presented earlier in the proceedings and plaintiff has failed to advance any argument to this court as to why this evidence could not have been presented earlier. In fact, plaintiff failed even to raise the question of the propriety of a sentence six remand, apparently assuming that this court could and would consider this new evidence in making its determination as to whether the ALJ's decision was supported by substantial evidence. However, absent such a request and in determining whether substantial evidence supports the ALJ's decision, the court must limit its consideration to the evidence that was before the ALJ at the time of the decision. *Eads v. Secretary*, 983 F.2d 815, 817-18 (7th Cir. 1993). Therefore, a sentence six remand is not proper in this matter.

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[3] **As it is, Dr. Martin submitted no medical records in furtherance of his opinion that the claimant cannot work.**

B. 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. *See* 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. Secretary of Health and Human Servs.*, 667 F.2d 524, 535 (6th Cir. 1981). 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 (citing *Smith v. Secretary of Health and Human Servs.*, 893 F.2d 106, 108 (6th Cir. 1989)). If supported by substantial evidence, the Commissioner's decision must be affirmed even if the reviewing court would have decided the case differently and even if substantial evidence supports the opposite

conclusion. *Kinsella v. Schweiker*, 708 F.2d 1058, 1059 (6th Cir. 1983). Similarly, the court may not try the case *de novo*, resolve conflicts in the evidence, or decide questions of credibility. *Cutlip v. Secretary of Health and Human Servs.*, 25 F.3d 284, 286 (6th Cir. 1994).

C. The ALJ's Credibility Assessment of the Claimant's Allegations of Pain

Initially, the plaintiff asserts that the ALJ erred in evaluating claimant's subjective complaints of pain and the evidence in the record of his pain.

After considering the record and the testimony at the hearing, the ALJ concluded that the claimant was not disabled within the meaning of the Social Security Act. (R. 16.) The ALJ prefaced his findings with a very brief summary of the medical evidence. (R. 14.) His summary focused primarily on the reports of the two consulting examiners, Dr. Katz and Dr. Lester. Using the five-step disability analysis,[4] the ALJ concluded first that the claimant was

[4] Entitlement to Social Security benefits is determined by the use of a five-step sequential analysis set forth in the Social Security Regulations. 20 C.F.R. §§ 404.1520 and 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 serious impairment. *Id.* In the third step, 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

not engaged in substantial gainful activity. (R. 16.) Second, the ALJ concluded that the claimant had severe medical impairments, consisting of cardiovascular disease, peripheral vascular disease, pulmonary disease and obesity. (R. 16.) At the third step, the ALJ found that these impairments were admittedly severe, but that none of them alone or in any combination met or equaled the impairments listed by the Commissioner in the regulations and therefore did not qualify the claimant as "disabled." (R. 16.) At the fourth step, the ALJ found that the claimant could not perform any of his past employment positions. The ALJ decided that the claimant's medical impairments were too severe to allow him to continue to work at previous jobs such as farmer and construction dump truck driver. (R. 15-16.) The ALJ found the consultative doctors' determinations of the claimant's ability to perform only sedentary work[5] to be credible. The ALJ found, however, that the

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impairment, the claimant is considered to be disabled. On the other hand, if the claimant's impairment does not 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 show that the claimant can perform other work existing in significant numbers in the national economy. 20 C.F.R. § 404.1520(f).

[5] The regulations describe sedentary work as one which involves sitting, the lifting of no more than 10 pounds occasionally and standing and walking occasionally. 20 C.F.R. § 404.1567(a).

evidence in the record of pain was not credible to support the claimant's subjective assertions of extremely severe pain. (R. 15.) The ALJ specifically found no evidence in the record of claimant's allegation that he was instructed by a doctor to elevate his legs. (R. 15.) The ALJ found that the claimant could perform a full range of sedentary work "on an ordinary and regular basis." (R. 16.) The ALJ noted particularly that the evidence indicated the claimant's ability to sit was not adversely affected by his impairments. Having found that the claimant was unable to perform any of his past work, the ALJ, at the fifth step of the , relied on the grids which directed a conclusion that the claimant was not disabled. (R. 16.) The ALJ pointed out the claimant's doctors instructed him on numerous occasions that to refrain from smoking entirely and to lose weight and that his impairments were exacerbated by his smoking habit and his weight. (R. 15-16.)

The ALJ's assessment of credibility is accorded great weight and deference, and his assessment need only be supported by substantial evidence. *Walters*, 127 F.3d at 530. "Discounting credibility to a certain degree is appropriate where an ALJ finds contradictions among the medical reports, claimant's testimony, and other evidence." *Id.* at 531.

In his testimony at the ALJ hearing, the claimant explained his need and his doctor's instruction to elevate his legs. (R.

276.) Finding the claimant's testimony that a health care professional instructed him to elevate his legs not to be credible, the ALJ stated, "there is no evidence of record of physician recommendation that the claimant elevate his lower extremities." (R. 15). The record contradicts this finding. On April 16, 1998, during a follow-up visit by the claimant for calf pain associated with thrombophlebitis, Dr. Jeffers clearly instructed the claimant to apply heat and to elevate his legs, and he prescribed pain and anti-inflammatory medication. (R. 164). In short, the ALJ simply overlooked this record entry and, in doing so, found fault with the credibility of the claimant. Thus, the ALJ's credibility determinations are not supported by substantial evidence in the record.

Nor is there substantial evidence in the record supporting the ALJ's conclusion that the claimant's allegations of pain of such severity as to preclude all sedentary work is not credible. In *Duncan v. Secretary of Health and Human Services*, 801 F.2d 847 (6th Cir. 1986), the Sixth Circuit established the following framework for evaluating a claimant's assertions of disabling pain:

> **First, we examine whether there is objective medical evidence of an underlying medical condition. If there is, we then examine: (1) whether objective medical evidence confirms the severity of the alleged pain arising from the condition; or (2) whether the objectively established medical condition is of such a severity that it can reasonably be expected to produce**

> the alleged disabling pain . . . . The standard does not require, however, "objective evidence of the pain itself."

Id. at 853 (quoting *Green v. Schweiker*, 749 F.2d 1066, 1071 (3d Cir. 1971)). Although the ALJ may have complied with Sixth Circuit requirements, his evaluation of each prong is not clear. First, his findings hinge upon the credibility of the claimant's need to elevate his legs. As mentioned previously, the ALJ erroneously found this requirement of lower extremity elevation not credible because he believed there was no medical statement corroborating that instruction. He also placed little to no emphasis on the claimant's numerous accounts of pain documented in the record by the claimant's treating physicians. The claimant's leg pain has been continual and persistent, up to the end January of 1999, according to Dr. Jeffers' records.

The *Duncan* analysis requires the Commissioner to determine first whether there is an underlying medical condition which could reasonably be expected to produce the symptoms alleged. In satisfaction of the first prong, the ALJ expressly found the existence of underlying medical conditions that could reasonably produce the alleged symptoms — pulmonary disease, peripheral vascular disease, cardiovascular disease, and obesity. (R. 15).

The second determination under the *Duncan* analysis consists of two parts: whether objective medical evidence confirms the severity

of the alleged pain, or whether the objectively established condition is of such severity that it can reasonably be expected to produce the alleged pain. According to Dr. Jeffers' records, the claimant often complained of leg pain and chest pain, and the doctor prescribed several different types of medication for the pain, inflammation and vascular disease. (R. 159). Indeed, in almost every encounter with Dr. Jeffers, the claimant reports pain, either in his legs, back or chest. Dr. Katz, in his disability determination, noted the various pains of the claimant and did not refute these subjective complaints. (R. 226-27).

In deciding whether plaintiff's complaints of pain were credible, the ALJ did not fully comply with the SSA regulations governing the evaluation of subjective complaints. The pertinent SSA regulation instructs the ALJ when evaluating the intensity and persistence of pain to consider all of the evidence presented, including information about prior work records, the claimant's statements about symptoms, evidence submitted by treating or consulting physicians, and observations by SSA employees and other persons. *See* 20 C.F.R. § 404.1529(c). The ALJ must reach a conclusion about the credibility of the claimant's allegations if the disability determination cannot be made solely on the basis of objective medical evidence. The decision must contain specific reasons for the finding on credibility, supported by evidence in

the case record, and must be sufficiently specific to make clear the weight given to the claimant's statements and the reason for that weight. SSR 96-7p, 1996 WL 374186 (S.S.A.), at *4. Before the ALJ rejects a claimant's subjective complaints of pain, the ALJ must set forth inconsistencies in the record. *Brock v. Secretary,* 791 F.2d 112, 114 (8th Cir. 1986). The ALJ is entitled to consider the claimant's continued smoking habit and obesity as part of a lifestyle inconsistent with a person suffering from intractable pain. *Sias v. Secretary*, 861 F.2d 475, 480 (6th Cir. 1988).

In this case, the claimant testified that he was unable to do any household work, never drove the car and spent most of the day watching television with his feet elevated. The medical records substantiate the persistent complaints of pain in the legs for practically one year. The claimant's treating physicians took the claimant's complaints seriously. The ALJ noted no inconsistencies between the claimant's complaints of pain in his legs, back, chest, and hips, and the record as a whole.

D. <u>Application of the Medical-Vocational Guidelines or "Grid"</u>

Once the ALJ determined that the claimant was not capable of returning to his past relevant work (Step Four), the final issue to be decided was the level of the claimant's residual functional capacity. Specifically, the ALJ had to determine whether the

severity of the claimant's medically determinable impairment, or combination of impairments, prevented him from performing a significant number of jobs which would be consistent with his functional limitations, age, education, and work experience. It is a long standing judicial view that at this step the burden shifts to the Commissioner. *See Walker v. Bowen*, 834 F.2d 635 (7th Cir. 1987). When a claimant's limitations are exertional in nature, the Commissioner may carry the burden of demonstrating the claimant's ability through the use of Medical-Vocational Guidelines or "grid." The grid exists to assist the fact finder in deciding whether the claimant is disabled by setting out the appropriate interaction between various factors such as age, education and work experience with whatever the ALJ determines to be the claimant's exertional limitations.[6] After the ALJ has made specific findings with respect to these four factors, he or she simply "plugs" these into the framework set out in the guidelines and the grid dictates a conclusion of "disabled" or "not disabled."

Here, the plaintiff argues that use of the grid was improper because the claimant suffered from various nonexertional impairments, such as his previous injury that left him 15% impaired, severe pain in his legs, and his need to elevate his legs

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[6] Jobs are classified according to their physical exertional requirements: sedentary, light, medium, heavy or very heavy.

The use of the grid to help make the disability determination when a claimant presents with both exertional and non-exertional limitations has been approved by the Sixth Circuit under certain circumstances. *See Cole v. Secretary*, 820 F.2d 768, 771-72 (6th Cir. 1987); *Kimbrough v. Secretary*, 667 F.2d 524, 528 (6th Cir. 1981). Specifically, if the fact finder decides that a claimant's non-exertional impairment does not significantly limit his ability to do a full range of work at a designated level, then the grid may be used. It is only when the alleged non-exertional impairment is severe enough to prevent the claimant from doing a full range of work that the application of the grid is precluded. In other words, if the claimant's non-exertional impairment is found to significantly limit his ability to perform other work, then the use of the grid is inappropriate, and the ALJ would have to rely on expert testimony to establish the claimant's ability to perform other work. *See Kirk v. Secretary*, 677 F.2d 524, 531 (6th Cir. 1981).

In this case, the ALJ's use of the grid may have been appropriate if the claimant did not have disabling pain and if he did not have to elevate his legs. Because the ALJ erred, however, in discrediting the claimant's testimony that a medical professional had instructed him to elevate his leg, the ALJ did not

consider fully the nonexertional impairments. These nonexertional impairments may have amounted to a significant limitation on the claimant's ability to perform the full range of sedentary work. In determining whether the claimant had a significant limitation on his ability to perform sedentary work, the need to elevate one's legs during the workday is a "potentially crucial detail" in making such a determination. *Eads v. Secretary*, 983 F.2d 815, 817 (7th Cir. 1993); *Cooper v. Sullivan*, No. 89-6081, 1990 U.S. App. LEXIS 7535, *10 (6th Cir. May 9, 1990)(unpublished)(recognizing that if a claimant needs to elevate his legs on occasion, he would be unable to perform a full range of sedentary work, his case would not within the grid, and a vocational expert must be appointed.) When a claimant cannot perform the full range of work at a certain level, a vocational expert must be appointed to satisfy the Commissioner's burden at the fifth step of the analysis. *Born v. Secretary*, 923 F.2d 1168, 1174 (6th Cir. 1990). Without a vocational expert to fully assess the claimant's significant job opportunities in the national economy, the finding that the claimant was not disabled must be determined upon remand, with a more complete development of the record.

CONCLUSION

The court recommends that the decision of the Commissioner be remanded for the purpose of assessing the ability of the claimant

to work at a sedentary level considering his exertional and nonexertional limitations, using the expert opinion of a vocational expert. Furthermore, the Commissioner should be instructed to re-weigh the claimant's credibility and to adequately articulate the specific conclusions with respect to the claimant's credibility.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE

Date: September 17, 2001