UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANN COX,	)	
	)	
Plaintiff,	)	CIVIL ACTION
	)	NO. 08-10400-DPW
v.	)	
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of the Social Security	)	
Administration,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER
January 16, 2009

The Plaintiff, Ann Cox ("Cox"), seeks review of the denial of her application for Social Security Disability Insurance ("SSDI") and Supplemental Security Income ("SSI") benefits. Her alleged disability stems from injuries sustained in a motor vehicle accident on January 23, 2003. After a hearing, the Administrative Law Judge ("ALJ") denied Cox both SSDI and SSI benefits. When the Appeals Council of the Social Security Administration ("SSA") declined to review the ALJ decision, the ALJ decision became a final judgment of the SSA and is now the subject of this appeal pursuant to 42 U.S.C. § 405(g). I will affirm the decision of the SSA.

I.

Cox has a high school education and worked as a

bartender/waitress prior to her motor vehicle accident in 2003 and has not been employed since. She alleges that she is currently unable to work because of pain caused by a leg injury sustained during the 2003 accident.

A. Medical History

On January 23, 2003, Cox was involved in a serious motor vehicle accident. She suffered several injuries from the collision, including a subdural hematoma (bleeding in the brain), fractures in the right humerus (a bone in her right arm), and fractures in the left femur (a bone in her left leg). On January 24, 2003, Cox underwent surgery at Boston Medical Center on the fractured femur, performed by Dr. Paul Tornetta, an orthopedic surgeon. She was not discharged from Boston Medical Center until February 20, 2003. Dr. Tornetta performed a second surgery on February 24, 2003, to treat the fractured right arm and to treat the left femur further.

Cox began physical therapy on March 18, 2003. Medical records show that Cox was progressing well in physical therapy, but had to cease therapy due to physical pain. The surgeries seem to have healed the fractures successfully. Upon her discharge from Boston Medical Center, the tests showed "good healing" of the humerus. The femur healed more slowly. Cox underwent x-ray studies of her femur injuries on July 22, 2003, September 30, 2003, and December 16, 2003. Dr. Tornetta found on

February 3, 2004 that the femur injury had "essentially healed," but the distal fracture of the femur was "still healing." During that examination, Cox complained of pain related to the distal screws still in her left leg. She also complained of pain on February 13, 2004 and April 15, 2004, and was prescribed Vicodin for relief.

On May 7, 2004, Cox complained that the pain had worsened, and was advised to contact her orthopedic surgeon. Dr. Samuel McFadden examined Cox's x-rays on May 10, 2004, which showed evidence that the distal femur had healed. But in a letter dated May 14, 2004, Dr. Thomas Gleason, Cox's primary care physician, stated that the distal fracture showed only incomplete healing, and that Cox experienced significant pain when the left leg was weight-bearing. On June 8, 2004, medical imaging led Dr. Tornetta, however, to conclude that the femur was completely healed. Dr. Tornetta did note tenderness in the anterior medial joint line. Although he opined that the tenderness was more likely related to meniscal pathology, rather than the distal screws, he planned to remove the distal screws as soon as possible.

Dr. Tornetta removed the distal screws successfully on July 8, 2004, and observed on July 20, 2004 that Cox was doing well and had seen improvement in her knee. On November 5, 2004, Dr. Richard Mauceri compared Cox's x-rays to those taken on May 10, 2004, and concluded that the fractures were healed, there was no

evidence of fracture, and that a "destructive process is not seen."

On August 24, 2004, her treating physician Dr. Gleason noted that Cox was experiencing vertigo when she went from sitting to lying down, or vice versa, and he prescribed Meclizine to treat the condition. During a visit on November 29, 2004, Cox complained of pain to Dr. Gleason, who recorded that Cox should resume physical therapy. Dr. Gleason also noted that her prior round of physical therapy had ended because Cox undertook to help care for her terminally ill mother. On May 27, 2005, during a visit with Dr. Marc Feingold, who replaced Dr. Gleason as her primary care physican, Cox complained of pains in the left leg, hip, and arm; Cox was referred to physical therapy and to an orthopedist. Dr. Feingold also noted that the Meclizine "helps" with the vertigo. Cox resumed physical therapy in June 2005. She complained to Dr. Feingold of vertigo and pain on June 27, 2005, and was discharged from physical therapy on August 2, 2005, due to pain in her right knee having limited her progress. On August 3, 2005, Dr. Feingold recorded pain and swelling in the right knee. During an August 27, 2005 visit, Dr. Feingold examined Cox and again noted the vertigo condition, but found no change in her symptoms.

Cox visited an orthopedist, Dr. Stephen Heacox, on July 13, 2006. Dr. Heacox reported that Cox continued to experience pain in her left groin and right knee, as a result of favoring her

left leg. An MRI performed on July 15, 2006 showed that Cox's ligaments were intact, with small joint effusion and "mild degenerative change in the focal menisci without focal tear."

Several doctors have conducted evaluations of Cox's progress over the course of Cox's treatment. Dr. Mallavalli Gopal performed a "physical residual functional capacity assessment" of Cox on June 8, 2004. He concluded that Cox could sit for six hours a day, stand or walk for three to four hours a day, frequently lift up to ten pounds, and was able to push and pull. Dr. Gopal concluded that Cox could perform sedentary work.

On November 5, 2004, Dr. John Howard performed a consultative evaluation. Cox told him that she took Vioxx for pain, but denied any other medical problems. Dr. Howard concluded that Cox had healed completely from her injuries, and that she should be suitable for work activities other than those that involved walking and standing for more than four hours at a time.

A second physical residual functional capacity assessment was performed on November 30, 2004 by Dr. Mark Colb. These conclusions were very similar to those of Dr. Gopal and Dr. Colb concluded that Cox could stand or walk for a total of six hours in an eight-hour workday.

Dr. Heacox, Cox's treating orthopedist at the time of the ALJ hearing, completed a "physical capacity evaluation" on July 19, 2006. Dr. Heacox expressed his opinion that Cox would miss

at least three days a month if she attempted to work, and that she was disabled. He also observed that during an eight-hour day, Cox could sit for six hours, stand for two hours, walk for one hour, and frequently carry up to twenty pounds.

B. The ALJ Hearing

Cox was thirty-four years old at the time of the ALJ hearing. Her attorney stated that Cox was in a great deal of pain from the automobile accident of January 23, 2003, and that the disability claim was based on how the pain affected her daily activities. Cox testified that "I'm just in constant pain, and it is not getting better." The pain, she said, had spread to her right leg, and kept her from sleeping at night. She testified that she was taking Vicodin four times a day for the pain, and Meclizine for vertigo symptoms. She also used heat and ice for her pain.

Cox stated that in a typical week, she would spend five days in bed due to being unable to sleep during the night. On "good days," she drove to the grocery store and could prepare dinner. She would try to limit her driving, however, because since the 2003 accident she was frightened to drive long distances. Cox said that she could not lift, using her legs, but that she had no problem lifting things while sitting down. After twenty minutes of standing, her knees begin to hurt, Cox said, but she does not use a cane because of fear of becoming dependent on it. Cox

stated that since the accident, she experiences vertigo after turning from side to side, or shifting from lying down to sitting up. She also stated that since the accident, she has struggled with memory and concentration.

A vocational expert, Carl Barchi, testified at the hearing as well. The ALJ questioned Barchi about a hypothetical claimant with Cox's age, education and work background, and with functional capacity that permitted her to lift up to 20 pounds occasionally, up to 10 pounds frequently, but who would be limited to sedentary work in terms of standing and walking. Barchi concluded that such a worker would be limited to sedentary unskilled work, which included sedentary unskilled assembly and sedentary unskilled inspecting and testing occupations. According to the vocational expert, there were approximately 1,241 such jobs in Rhode Island and Massachusetts, and 62,000 in the national economy. If, however, the claimant had to miss more than one day a month of work, this would preclude her from keeping regular gainful employment.

II.

The Social Security Act defines "disability" as an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less

than 12 months." 42 U.S.C. §§ 416(i)(1), 423(d)(1). The impairment must be of such severity that "considering age, education, and work experience" of the claimant, she is unable to engage "in any other kind of substantial gainful work which exists in the national economy." § 423(d)(2)(A). "'Work which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives or in several regions of the country." *Id.* The claimant has the burden to furnish evidence of a disability. 42 U.S.C. § 423(d)(5)(A).

The SSA performs a five-step sequential inquiry to determine if the claimant is "disabled." 20 C.F.R. § 416.920(a)(1).[1] The relevant step here is the fifth step, at which point the SSA considers the claimant's "age, education, and work experience to see if you can make an adjustment to other work." § 416.920(a)(4)(v). If the claimant can adjust to other work, the SSA will find that the claimant is not disabled; if the claimant

[1]The five sequential steps in the analysis are as follows: (1) If the claimant is performing gainful activity, the SSA will find that the claimant is not disabled; (2) if the claimant does not have a severe medically determinable impairment that meets the duration requirement in 20 C.F.R. § 416.909, the SSA will find no disability; (3) if the claimant has an impairment which is disabling per se, under 20 C.F.R. § 404.1520, and which satisfies the duration requirement, the SSA will find a disability; (4) if the claimant can perform past relevant work given her residual functional capacity, the SSA will find no disability; (5) if the claimant cannot perform past relevant work, but can adjust to another type of work, the SSA will find no disability. 20 C.F.R. § 416.920(a)(4).

cannot make this adjustment, she will be found to be disabled. *Id.* Deciding that a claimant can make an adjustment to other work depends on a residual functional capacity assessment, along with the claimant's vocational factors (age, education, and work experience). § 416.920(g)(1).

The ALJ found that Cox, although unable to perform her past relevant work, could make an adjustment to other types of work. The ALJ noted that Cox did not have the capacity to perform the full range of sedentary work because she was limited in her ability to sit and stand due to pain in her legs. Based on the vocational expert's testimony, the ALJ found that there were jobs in the regional and national economy that permitted Cox to work, given her age, education, work experience, and residual functional capacity.

III.

Because the Appeals Council denied Cox's request for review, the ALJ decision became the final decision of the SSA. 20 C.F.R. §§ 404.981, 416.1481. Under Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), this Court has the "power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing" and states that the Commissioner's findings of fact, "if supported by substantial evidence, shall be

conclusive." 42 U.S.C. § 405(g).

This Court must uphold the SSA's resolution of conflicting medical evidence unless it is unsupported by "substantial evidence." *Falu v. Sec'y of Health and Human Servs.*, 703 F.2d 24, 28 (1st Cir. 1983) (per curiam); *Lizotte v. Sec'y of Health and Human Servs.*, 654 F.2d 127, 128 (1st Cir. 1981). The Court does not review the decision de novo. A decision is supported by substantial evidence when "a reasonable mind" might accept the evidence as "adequate to support his conclusion." *Rodriguez v. Sec'y of Health and Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981). This Court must uphold the denial unless the SSA has committed a legal or factual error in evaluating the claim. *Manso-Pizarro v. Sec'y of Health and Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996) (per curiam).

IV.

The fundamental issue before me is whether the ALJ had "substantial evidence" to conclude that, at step five of the disability analysis under 20 C.F.R. § 416.920(a)(4)(v), Cox had the residual functional capacity to perform sedentary, unskilled work. Cox contends that the ALJ decision suffers from three failings: first, the ALJ disregarded Cox's vertigo condition; second, the ALJ failed to contact the treating physician, Dr. Heacox, to clarify his opinion before disagreeing with it; and third, the ALJ concluded, without support by substantial

evidence, that Cox's complaints of pain were not credible.

A. The Vertigo Condition

Cox argues that despite the fact that a diagnosis of her vertigo was in the record, including her direct testimony about its effects during the hearing, the ALJ failed to discuss the impact of vertigo in his decision. According to Cox, without the discussion of the restrictions from Cox's vertigo, the ALJ decision is incomplete and fails to show that Cox can adjust to other types of work in the economy. The claimant argues that the ALJ was required to record his findings explicitly on the matter of Cox's vertigo, and to identify the reasons that he disregarded the effects of vertigo on Cox's ability to work.

The regulations and case law require an ALJ to consider all relevant medical and non-medical evidence when evaluating a claimant's disability. 20 C.F.R. § 404.1529(a); *Dewey v. Chater*, 942 F. Supp. 711, 714 (D. Mass. 1996). The ALJ is required to "explicitly indicate" the weight he gives to all "relevant evidence." *Nguyen v. Callahan*, 997 F. Supp. 179, 182 (D. Mass. 1998) (quoting *Murphy v. Bowen*, 810 F.2d 433, 437 (4th Cir. 1987)). The ALJ must consider the conflicts in the evidence and resolve them. *Irlanda Ortiz v. Sec'y of Health and Human Servs.*, 955 F.2d 765, 769 (1st Cir. 1991) (per curiam). But the ALJ "is not required to expressly refer to each document in the record, piece-by-piece." *Rodriguez v. Sec'y of Health and Human Servs.*,

915 F.2d 1557 (table only), 1990 WL 152336, at *1 (1st Cir. Sept. 11, 1990) (per curiam); *Lord v. Apfel*, 114 F. Supp. 2d 3, 13 (D.N.H. 2000) (concluding that the ALJ "need not directly address every piece of evidence in the administrative record").

I find that the ALJ did not commit an error in his treatment of Cox's vertigo condition. First of all, the record shows that Cox's vertigo symptoms were not relevant to her application. This is made evident by Cox's failure to identify vertigo as a basis for her request for SSDI and SSI benefits. When she filed for disability benefits, she made no mention of vertigo; her application was based on pain allegedly suffered as a result of the car accident. When asked on subsequent forms whether her condition had changed since May 18, 2004, Cox answered in the negative. The list of medications that Cox provided to the SSA prior to her ALJ hearing did not identify her vertigo medication, Meclizine; the ALJ had to press her for more information about the prescription at the hearing. Also during the hearing, Cox stated that she experienced the condition primarily when lying down, occasionally when sitting down, but never when walking around. Her attorney also made no mention of the condition at the hearing, stating rather that Cox "is in a great deal of pain, and that is basically our claim to disability."

Vertigo's lack of relevance as a medical condition to the disability determination is reflected in her medical records.

Dr. Feingold's medical records show that the Meclizine prescription had successfully treated the vertigo. Dr. Howard's consultative evaluation of Cox made no mention of vertigo. Dr. Heacox, Cox's treating orthopedist, made no record of vertigo in his examination of July 13, 2006, and did not list Meclizine among her medications. Cox did state in her Questionnaire on Pain for the SSA that she avoided driving long distances because of vertigo. This statement was contradicted during the hearing, however, when Cox claimed that she avoided driving because she feared doing so as a result of the accident.

After evaluating the medical records, the SSA files, and the testimony at the ALJ hearing, I conclude that the vertigo symptoms were not relevant to Cox's application for SSDI and SSI benefits. The claimant did not identify vertigo as a cause of her alleged disability, and the record contained no evidence that vertigo affected her functionality. The ALJ was therefore not compelled to discuss the condition in his written decision.

B. Contacting the Treating Physician

A second error alleged by the claimant is that the ALJ failed to recontact Dr. Heacox, Cox's treating physician, before disagreeing with Heacox's conclusions regarding Cox's injuries. The ALJ found Dr. Heacox's opinion that Cox was disabled to be "not well-articulated," "not supported by [his] treatment record," and "not accompanied by any narrative explanation."

Based on this language, Cox argues that the ALJ had a duty to recontact Dr. Heacox, seeking clarification of the basis of his opinion, before rejecting his conclusions. The Commissioner contends that the ALJ is not compelled to recontact the physician when the objective evidence on the record contradicts the physician's conclusion about the claimant's disability.

Before turning to the issue of recontacting the physician, I first address the weight given to a treating physician's medical (and non-medical) opinions. The opinions of sources who have examined a claimant generally have more weight than sources who have not. 20 C.F.R. § 404.1527(d)(1). And among sources who have examined a claimant, the opinion of a treating physician merits even greater deference: "Generally, we give more weight to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) . . . ." § 404.1527(d)(2). If the opinion on the nature and severity of the impairment is well supported, and is not inconsistent with the other evidence in the record, the SSA "will give it controlling weight." *Id.* Such deference, however, is limited to medical opinions; the SSA gives no deference to a treating physician's opinion that the claimant is "disabled" or "unable to work." § 404.1527(e)(1). Likewise, the claimant's residual functional capacity is an issue reserved to the

Commissioner. § 404.1527(e)(2).

When a treating physician's records are incomplete, the regulations provide a mechanism for supplementing the available information. The ALJ has a duty to recontact the treating physician "[w]hen the evidence we receive from your treating physician or psychologist or other medical source is inadequate for us to determine whether you are disabled." 20 C.F.R. §§ 404.1512(e), 416.912(e). When that occurs, the ALJ takes the following actions:

> (1) We will first recontact your treating physician or psychologist or other medical source to determine whether the additional information we need is readily available. We will seek additional evidence or clarification from your medical source when the report from your medical source contains a conflict or ambiguity that must be resolved, the report does not contain all the necessary information, or does not appear to be based on medically acceptable clinical and laboratory diagnostic techniques. We may do this by requesting copies of your medical source's records, a new report, or a more detailed report from your medical source . . . .

20 C.F.R. §§ 404.1512(e)(1), 416.912(e)(1). A Social Security Ruling has likewise held that:

> [b]ecause treating source evidence (including opinion evidence) is important, if the evidence does not support a treating source's opinion on any issue reserved to the Commissioner and the adjudicator cannot ascertain the basis of the opinion from the case record, the adjudicator must make "every reasonable effort" to recontact the source for clarification of the reasons for the opinion.

Social Security Ruling 96-5p, 1996 WL 374183, at *6 (July 2, 1996).

The law has placed "the onus . . . on the ALJ" to develop the record where it is incomplete. *Schaal v. Apfel*, 134 F.3d 496, 505 (2d Cir. 1998) ("[E]ven if the clinical findings were inadequate, it was the ALJ's duty to seek additional information from [the treating physician] sua sponte."); *Ripley v. Chater*, 67 F.3d 552, 557 (5th Cir. 1995) (imposing a duty on the ALJ "to develop the facts fully and fairly relating to an applicant's claim for disability benefits").

When the medical record resolves the claim, however, the ALJ is not obligated to recontact the treating physician. Social Security Ruling 96-2P, 1996 WL 374188, at *4 (July 2, 1996) ("Ordinarily, development should not be undertaken for the purpose of determining whether a treating source's medical opinion should receive controlling weight if the case record is otherwise adequately developed."); *White v. Massanari*, 271 F.3d 1256, 1261 (10th Cir. 2001) ("It is the inadequacy of the record, rather than the rejection of the treating physician's opinion, that triggers the duty to recontact that physician."). In *Shaw v. Sec'y of Health and Human Servs.*, 25 F.3d 1037 (table only), 1994 WL 251000 (1st Cir. June 9, 1994) (per curiam), the First Circuit rejected the plaintiff's argument that the ALJ failed to recontact the treating physician. "There was a consultative examination here," and the court found that "the ALJ apparently did not see the need for more evidence" from the treating

physician. *Id.* at *5.

The issue before me then is whether the ALJ had a duty to recontact Dr. Heacox, given the requirements set forth in the regulations, and given the nature of the evidence and the opinion in the record. During the hearing, the ALJ saw that he needed more evidence from Dr. Heacox; he specifically referred to the gap in the orthopedist's records provided to the SSA. But the ALJ left the record open for a period of time in which Cox could secure the MRI report and Dr. Heacox's physical capacities assessment. These documents were submitted by Cox and were included in the record that was examined by the ALJ. The record was adequately developed in large part because the ALJ himself was insistent that the missing reports be provided, and that Cox have an opportunity to obtain them before he closed the record. The ALJ also had the records of Cox's other treating physicians: her prior orthopedist, Dr. Tornetta, who had performed the humerus and femur surgeries, and who monitored her progress at least until July 2004, finding at that time that Cox was doing well; her primary care physician during the period following the accident, Dr. Gleason; and her subsequent primary care physician, Dr. Feingold.

If Dr. Heacox made merely cursory medical entries, without assessing the claimant's impairments, then I should remand the matter to the SSA. *Bowman v. Barnhart*, 310 F.3d 1080, 1085 (8th

Cir. 2002). But the aspect of Dr. Heacox's report that the ALJ found inadequate was not the medical assessment, but rather the "opinion of Dr. Heacox that the claimant is totally disabled," and "[h]is conclusion that she cannot do any work activity whatsoever." These conclusions are not medical findings. Although the SSA uses medical sources to provide evidence on the nature of the impairments, "the final responsibility for deciding these issues is reserved to the Commissioner." 20 C.F.R. § 404.1527(e)(2). The First Circuit determined in an unpublished opinion that the ALJ had no duty to recontact the physician when the physician had filled out a questionnaire, articulating the basis for his opinion that the claimant was disabled. *Colon v. Chater*, 187 F.3d 621 (table only), 1998 WL 1085796, at *1 (1st Cir. Sept. 30, 1998) (per curiam, unpublished). Here the ALJ had Dr. Heacox's completed questionnaire, an MRI requested by Dr. Heacox, and Dr. Heacox's report of the injuries. Based on this evidence, as well as the record as a whole, the ALJ had reason to disagree with Dr. Heacox's ultimate conclusions regarding the claimant's ability to work.

The Commissioner raises two additional objections to requiring the ALJ to recontact Dr. Heacox in this matter. First, the Commissioner states that Cox herself, as the claimant, has a duty to provide evidence to the SSA, 20 C.F.R. § 404.1512(a), and that failure to do so effectively cancels out the ALJ's duty to

recontact the treating physician sua sponte. *See Shaw*, 1994 WL 251000, at *5 (citing C.F.R. § 404.1512(a) for the principle that "[a]ppellant, too, had an obligation," and that failure to satisfy it weighs against requiring the ALJ to contact the treating physician). To the extent that the First Circuit has expressed a concern about SSDI and SSI claimants using the "recontact" rule to evade their own evidentiary responsibilities, *see Shaw*, 1994 WL 251000, at *5, this too weighs in favor of affirming the ALJ decision.

The Commissioner also argues that Cox's position fails because she has not shown prejudice as a result of the gap in the medical records. *See Newton v. Apfel*, 209 F.3d 448, 458 (5th Cir. 2000) ("Reversal, however, is appropriate only if the applicant shows prejudice from the ALJ's failure to request additional information."); *Shannon v. Chater*, 54 F.3d 484, 488 (8th Cir. 1995) (concluding that the claimant "was treated fairly, and he has failed to show that he was prejudiced"); *Shaw*, 1994 WL 251000, at *5 ("[W]e see no prejudice in the ALJ's failure to recontact the doctors."). Cox has not argued that the record is in fact incomplete, or that Dr. Heacox is in possession of reports or opinions not yet admitted into the record; Cox has only argued that the ALJ's impression that Dr. Heacox's opinion was "not well-articulated" is itself an indication that the record was not adequately developed. Cox has also failed to

argue that if the ALJ had additional narrative or analysis from Dr. Heacox, this would have altered the SSA decision. I cannot reverse the decision or remand the matter to the SSA on so thin a showing.

C. Credibility Determination

Cox's final challenge is that when the ALJ concluded that Cox's subjective complaints of pain were not credible, he failed to support the finding with specific facts and substantial evidence. The ALJ decision concluded that "I find that the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely credible." According to Cox, the ALJ decision did not provide sufficient discussion of the factors that contributed to this determination, as required by the applicable case law.

Determining issues of credibility, like the resolution of other conflicts in the evidence, is the responsibility of the Secretary, not the courts. *Irlanda Ortiz*, 955 F.2d at 769. In *Avery v. Sec'y of Health and Human Servs.*, 797 F.2d 19 (1st Cir. 1986), the First Circuit articulated six factors in determining the claimant's credibility regarding a claimant's subjective complaints:

> 1. The nature, location, onset, duration, frequency, radiation, and intensity of any pain;
>
> 2. Precipitating and aggravating factors (e.g., movement, activity, environmental conditions);

> 3. Type, dosage, effectiveness, and adverse side-effects of any pain medication;
>
> 4. Treatment, other than medication, for relief of pain;
>
> 5. Functional restrictions; and
>
> 6. The claimant's daily activities.

Id. at 28-29. These factors were later codified at 20 C.F.R. § 404.1529(c)(3)(i)-(vii).

When considering these factors and "all of the available evidence, medical and other, that reflects on the impairment," *Avery*, 797 F.2d at 29, the ALJ "must make specific findings as to the relevant evidence he considered in determining to disbelieve" the claimant. *Da Rosa v. Sec'y of Health and Human Servs.*, 803 F.2d 24, 26 (1st Cir. 1986) (per curiam). If the substantial evidence on the record supports these findings, then I must affirm the decision with respect to the credibility issue. *Gordils v. Sec'y of Health and Human Servs.*, 921 F.2d 327, 330 (1st Cir. 1990) (per curiam).

Although Cox claims that the ALJ "failed to provide even a minimal discussion of any of the Avery factors," I find the contrary to be true. The first *Avery* factor, the characteristics of the claimant's pain, was discussed by the ALJ at several points. He stated that Cox alleged constant pain in both legs; the ALJ noted the references to pain in the medical record, including Dr. Howard's consultative examination in 2004 and Dr.

Heacox's examination in 2006. The ALJ also noted the pain in Cox's right knee, which developed later in the recovery process because of favoring her left leg. To address the second *Avery* factor, the ALJ identified the aggravating factors to include "prolonged walking or weight-bearing." Third, the ALJ referred to Cox's use of Vicodin for pain relief. Fourth, with respect to non-medication treatment, he mentioned Cox's cane, which she stated she chooses not to use because she does not want to become dependent on it. The ALJ also referred to physical therapy, which, according to the medical records, had been working well, "despite her testimony to the contrary."

The fifth *Avery* factor is functional restrictions. The ALJ noted that Cox walks with a slight limp, but otherwise walks without assistance or difficult. The ALJ also noted that Cox complains of knee and leg pain, as well as headaches, but that "she has no other limitations or complaints which affect her functioning in any substantial way." Cox complained during the hearing that she was unable to sleep for even an hour a night, but the ALJ concluded that this complaint was not supported by or reflected in the medical records. Finally, the ALJ made reference to Cox's daily activities: Cox is able to drive, but hesitates from doing so because of her accident and Cox stated she is unable to sleep except for short periods of time.

Although the ALJ did discuss each of the *Avery* factors in

his written opinion, he did not discuss them with the same specificity that he used during the hearing. For example, he did not describe the dosage or effectiveness of the Vicodin prescription, stating simply that "[s]he takes Vicodin to control her discomfort"; but this was discussed during the hearing itself. Also, he did not go into great detail about Cox's daily activities, other than her driving and her sleep habits. During the hearing, however, he went into considerable detail, including laundry, driving, cooking, cleaning, errands outside the house, visiting friends and relatives, and more generally, time spent on her feet. The First Circuit, faced with similar circumstances, found that the determination was adequate when the ALJ "thoroughly questioned the claimant regarding his daily activities, functional restrictions . . . in conformity with the guidelines set out in *Avery*." *Frustaglia v. Sec'y of Health and Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987) (per curiam). Although "more express findings . . . are preferable," the *Frustaglia* court found that the entire record provided substantial evidence for the ALJ's decision. *Id.*

Despite the lack of detail on these issues in the written decision, the ALJ provided enough discussion of the *Avery* factors in that decision to demonstrate the basis on which he determined Cox's credibility regarding her statements of subjective pain. He compared Cox's testimony to the medical records, and noted

with clarity where they were inconsistent, such as the reaction to physical therapy. He also expressly observed when the medical record failed to corroborate an allegation on her part, such as her headaches and difficulty sleeping. Finally, he found inconsistencies between her testimony that she "would love to go back to work" and her lack of efforts to seek vocational retraining that would help her cope with the physical limitations she has alleged. In sum, I find that the ALJ fulfilled his obligation to state explicitly the factors that contributed to the credibility determination regarding Cox's assessment of the pain she was experiencing. More fundamentally, I conclude that the ALJ decision is supported by substantial evidence in the record.

CONCLUSION

For the reasons stated more fully above, I affirm the decision of the Social Security Administration, granting the Defendant's motion to affirm (Docket No. 13) and denying the Plaintiff's motion for reversal (Docket No. 11).

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE