

TO BE PUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DIANA JO MEYERHOFF,

Plaintiff,

vs.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

No. C12-3046-MWB

REPORT AND RECOMMENDATION

Introduction

Plaintiff Diana Jo Meyerhoff seeks judicial review of a final decision of the Commissioner of Social Security (the “Commissioner”) denying her application for supplemental security income (“SSI”) benefits pursuant to Title XVI of the Social Security Act, 42 U.S.C. § 1383(c)(3). Meyerhoff contends the administrative record (“AR”) does not contain substantial evidence to support the Commissioner’s decision that she is not disabled. For the reasons that follow, I recommend that the Commissioner’s decision be **reversed and remanded** for further proceedings.

Background

Meyerhoff was born in 1955 and completed the eleventh grade. AR 274, 284. She previously worked as a cleaner and child care provider. AR 1395. Meyerhoff filed for SSI on August 17, 2006, alleging disability beginning on July 1, 1997.¹ AR

¹ Under SSI, benefits are not payable for any period prior to the date a claimant files a SSI application, so the application date of August 17, 2006, became Meyerhoff’s onset date. *See* SSR 83-20, 1983 WL 31249, at *1 (Jan. 1, 1983) (“Under title XVI, there is no retroactivity of payment . . . the only instances when the specific date of onset must be separately

274. She has the following medically-determinable severe impairments: degenerative disc disease/arthritis, fibromyalgia, osteoporosis, depression, anxiety, carpal tunnel syndrome, rotator cuff tear on the left and headaches. AR 1065.

Meyerhoff's claims were denied initially and on reconsideration. AR 81-85, 91-99. She requested a hearing before an Administrative Law Judge ("ALJ"). AR 101. On April 9, 2009, ALJ Jo Ann L. Draper held a hearing during which Meyerhoff and a vocational expert ("VE") testified. AR 34-64. On May 8, 2009, the ALJ issued a decision finding Meyerhoff not disabled since August 17, 2006. AR 11-28. Meyerhoff sought review of this decision by the Appeals Council, which denied review on August 28, 2009. AR 1-3. The ALJ's decision thus became the final decision of the Commissioner. 20 C.F.R. § 416.1481.

Meyerhoff filed a complaint in this court on October 22, 2009, seeking review of the ALJ's ruling. AR 1136-79. On March 31, 2011, Judge Bennett entered an order remanding the case to the Commissioner for further proceedings, stating, "The court believes that circumstances here required further inquiry by the ALJ into Meyerhoff's need for periodic breaks or the opportunity to shift or change positions, particularly from Dr. Dankle and Dr. Trimble." AR 1777. Judge Bennett noted that additional vocational expert testimony may be necessary. AR 1777-78.

On May 28, 2009, Meyerhoff filed a subsequent claim for Title XVI benefits. The Appeals Council found the subsequent claim duplicative and associated it with Meyerhoff's remanded claim. The ALJ was instructed to hold a new hearing, take any further action to complete the administrative record and issue a new decision on the associated claims. AR 1182. On September 8, 2011, ALJ Jo Ann L. Draper held a hearing during which Meyerhoff and a VE testified. AR 1085-1107.

On January 13, 2012, the ALJ issued a decision finding Meyerhoff not disabled prior to July 24, 2009, but finding she became disabled on that date due to a change in

determined for a title XVI case is when the onset is subsequent to the date of filing or when it is necessary to determine whether the duration requirement is met.").

her age category and had continued to be disabled through the date of her decision. AR 1061-84. Meyerhoff filed written exceptions with the Appeals Council on February 27, 2012. AR 1036. The Appeals Council denied review because the exceptions were not filed within 30 days. AR 1036. The ALJ's decision thus became the final decision of the Commissioner. 20 C.F.R. § 416.1484(a).

On July 16, 2012, Meyerhoff filed a complaint in this court seeking review of the ALJ's decision and arguing that she became disabled on August 17, 2006. As such, this case involves the period of time between that alleged onset date and July 24, 2009, the onset date determined by the Commissioner. This matter was referred to me pursuant to 28 U.S.C. § 636(b)(1)(B) for the filing of a report and recommended disposition of the case. The parties have briefed the issues and the matter is now fully submitted.

Summary of Evidence

Most of the evidence relevant to Meyerhoff's claim was summarized in *Meyerhoff v. Astrue*, No. C09-3067-MWB, 2011 WL 1233185, at *2-15 (N.D. Iowa Mar. 31, 2011). That summary is incorporated herein. I will only discuss the new evidence that was added to the record on remand and is relevant to Meyerhoff's claim.

A. Medical Evidence of Physical Impairments

On April 7, 2009, Dr. Eshelman-Peters completed a Treating Medical Source Statement, which was included in the previous record and summarized in this court's previous decision. However, what was not in the record was a treatment note from April 7, 2009, which indicates Dr. Eshelman-Peters and Meyerhoff spent 30 minutes "asking and answering the questions put forth on the form." AR 1418. The April 7, 2009, treatment note states, "Questions were answered on the form, strictly on the basis of the patient's report. Further details regarding Diana's capacity to work or clarification of any of the questions on the form will require specialized testing that

would be out of the scope of practice of this office.” *Id.* Additional treatment notes from Dr. Eshelman-Peters indicate Meyerhoff sought treatment for chest pain, abdominal discomfort and headaches, which were treated with medication. AR 1412-17, 1503-35.

On April 6, 2009, Meyerhoff had a CT scan for her abdominal pain, which revealed nothing had appreciably changed since her previous exam on April 18, 2007. AR 1443. A bone density exam was performed on February 9, 2009, which indicated Meyerhoff met the criteria for osteopenia. AR 1446.

A radiology report from September 19, 2010, revealed multilevel degenerative disc disease with moderate narrowing of the more inferior lumbar interspaces and moderate mid and lower lumbar facet arthritis. AR 1595. Grade 1 anterolisthesis of L2 on L3 was increased when compared to a study on August 1, 2005. Overall, her degenerative disc disease and facet arthritis had slightly progressed since the previous study. *Id.*

B. Medical Evidence of Mental Impairments

On July 29, 2009, William Morton, Psy.D., performed a consultative psychodiagnostic evaluation. AR 1450-52. He summarized:

It appears that Ms. Meyerhoff is able to adequately self-care and attend to the activities of daily living. She can adequately manage her own finances and thus could handle cash benefits should she receive them. It appears that there are minimal mental limitations in regard to remembering and understanding instructions, procedures, and locations. There are mild mental limitations in regard to carrying out instructions. There are minimal mental limitations in regard to maintaining attention, concentration, and pace. There are minimal mental limitations in regard to interacting appropriately with supervisors, co-workers, and the public. There are mild mental limitations in regard to using good judgment and responding appropriately to changes in the work place.

AR 1452.

C. State Agency Medical Consultants

Rene Staudacher, D.O., conducted a physical RFC assessment on August 6, 2009. AR 1453-60. She reached the same conclusions as her previous assessment on February 12, 2007. AR 864-71. She found that Meyerhoff could occasionally lift and/or carry 20 pounds, frequently lift and/or carry 10 pounds and stand and/or walk and sit about six hours in an eight-hour workday. AR 865. She wrote that Meyerhoff could occasionally climb, balance, stoop, kneel, crouch and crawl. AR 866. She noted no manipulative limitations. AR 867. In the 2009 assessment, Dr. Staudacher noted that Meyerhoff's complaints of being unable to sit or stand longer than 5 to 10 minutes at a time were inconsistent with the psychological consultative examination, which indicated she had no difficulty with extended sitting. AR 1455. Both assessments were affirmed as written on reconsideration. AR 903-10, 1482.

Lon Olsen, Ph.D., performed a psychiatric review technique and mental RFC assessment on August 24, 2009 to consider the functional limitations of Meyerhoff's impairments from May 10, 2009, to the present. AR 1461-78. Dr. Olsen found Meyerhoff had moderate difficulties in maintaining concentration, persistence, or pace, and no difficulties in activities of daily living or maintaining social functioning. AR 1475. She also had no episodes of decompensation. *Id.* In the mental RFC assessment, Dr. Olsen indicated Meyerhoff had moderate limitations in her ability to understand and remember detailed instructions, carry out detailed instructions, maintain attention and concentration for extended periods and respond appropriately to changes in the work setting. AR 1461-62. In all other areas she was not significantly limited. *Id.*

In the narrative portion of the RFC assessment, Dr. Olsen remarked that the consultative examiner found that Meyerhoff's work-related limitations were minimal or mild in all areas. AR 1463. Meyerhoff was forgetful and distractible and responded

poorly to stressors and changes in routine. All other limitations she alleged were due to her physical condition. *Id.* Dr. Olsen found that Meyerhoff's allegations were partially supported by the medical evidence, noting "[s]he is capable of moderately complex tasks that do not require intense concentration or frequent changes in routine." *Id.* On reconsideration, Dr. Olsen's assessment was affirmed as written. AR 1483.

Hearing Testimony

At the beginning of the hearing on September 8, 2011, the ALJ asked Meyerhoff's attorney about this court's instructions on remand. AR 1087. The ALJ stated she had not actually read the opinion, but believed that this court had directed her to inquire further into the opinions of Dr. Dankle and Dr. Trimble on Meyerhoff's need to alternate between sitting and standing. *Id.* The ALJ then acknowledged she had not done this, but noted that the file contained some additional medical records. However, she also noted that Dr. Trimble's records did not address standing and sitting limitations and that there were no additional records from Dr. Dankle. *Id.* Meyerhoff's attorney stated that she had sought clarification from Dr. Eshelman-Peters, but she had refused her request. AR 1088. The ALJ read from Judge Bennett's opinion and stated she was never convinced from the evidence that a shift in position was needed every 15 minutes. AR 1089. She added, "I'm not sure, but it was actually the frequency of the need for change that still remains troublesome to me, in that I could actually use clarification on, because I did find some inconsistencies in the record on that particular point, a little bit of ambiguity." AR 1090.

Meyerhoff's attorney pointed out that the sitting and standing limitation was vague because the physicians indicated the frequency was guided by Meyerhoff's pain and tolerance. AR 1090. She thought the physicians would not be able to add clarity beyond that because they thought the frequency required was up to Meyerhoff. *Id.* She indicated that Dr. Lovick said it was guided by pain and tolerance. *Id.* Dr. Trimble had referred Meyerhoff to Dr. Lovick. *Id.* Dr. Dankle said she could stand, move

about, and walk at her tolerance, and she would need to change positions on a regular basis. AR 1090-91. Dr. Eshelman-Peters substantially limited her activities and indicated her difficulty with sitting and standing. *Id.* Meyerhoff's attorney stated there was only one physician who had a contrary view, and she thought he had changed his mind a little bit on the restrictions. *Id.* The ALJ indicated she wanted to proceed with the hearing and obtain testimony from the VE. AR 1091. Meyerhoff's attorney also asked Meyerhoff and the VE questions.

A. Meyerhoff's Testimony

Meyerhoff testified there had been no changes in her condition and ability to stand, walk and sit for more than 15 minutes at a time since 2005, except that standing was more difficult due to a problem with her left knee. AR 1092-93. Generally, she stated things were getting worse and not better. AR 1093. Meyerhoff's attorney asked why Meyerhoff stood up during the hearing. *Id.* Meyerhoff said it helps her to stretch and move about. *Id.*

Meyerhoff said she had never refused medical treatment and follows the advice of her physicians. *Id.* However, she said she had objections to taking some medications because of the side effects, such as suicidal thoughts, shaking and becoming flushed. *Id.* She testified that Dr. Trimble had suggested she exercise and had set her up with a physical therapist. AR 1097. Meyerhoff testified she would do the exercises at home until she started feeling pain. *Id.*

Meyerhoff testified she had not worked since 2005, but then clarified she had briefly done some cleaning work for the City of Joyce in 2006, working only about two hours each week. AR 1094-95. She did not recall any work for another employer listed in her earnings record for 2006. AR 1096-96. She said she also babysat for her son and his wife in 2007 while they worked the night shift. AR 1095-96.

B. Vocational Expert's Testimony

After clarifying that Meyerhoff did not have any past relevant work, the ALJ provided the VE with Meyerhoff's vocational profile, age, education and past work experience. AR 1099-1100. She then provided the following hypothetical:

Now, this first hypothetical individual is limited exertionally to the performance of no more than light work activity, lifting and carrying 20 pounds occasionally, 10 pounds frequently. This individual would be limited in standing and walking to four hours a day, sitting four hours a day. What I'm looking for would be jobs that could be performed either sitting or standing. So I'm going to even out the time. I know a full range of light work requires standing and walking for six hours, but I'm more interested in someone – is – are jobs that the individual could sit or stand, perform them in either sitting or standing. So I'm going to split the baby on this one, standing and walking four hours, sitting four hours, with kind of a sit/stand option throughout the day where they could sit or stand at will.

This individual could only occasionally climb, balance, stoop, kneel, crouch, crawl. This individual could only – should only occasionally be exposed to extreme heat or humidity. This individual would be limited to tasks that could be learned in 30 days or less, involving no more than simple, work-related decisions, with no more than occasional workplace changes. This individual should have just brief, superficial interaction with public and co-workers. And there should be no work at a production rate pace.

Now with these limitations, could – are there jobs in the national economy at the light level of exertion that an individual with these limitations could perform?

AR 1101.

The VE responded there were some light, unskilled jobs that had a sit/stand option. *Id.* These included a parking lot attendant, pricer and office helper, which

were available in significant numbers in the national economy. AR 1101-02. The ALJ asked the VE to explain the sit/stand option for these jobs in more detail. AR 1102. The VE stated:

Well, Your Honor, those are light, so they do typically, as you indicated, require standing for six out of eight hours per day. In my experience, however, those positions sometimes might have a stool available, for example, the parking lot attendant. The office helper, oftentimes, has a chair available. And the pricer or tagger, I've seen that position usually have a chair or a stool available. So I suppose, if you're asking my opinion, it would depend on the employer, but in my experience, those three light, unskilled jobs do have the option of sitting on occasion.

Id.

Meyerhoff's attorney asked the VE if she agreed with the previous VE's testimony that someone who needed to change positions from sitting to standing every 10 to 15 minutes would be unable to work. AR 1102-03. The VE responded that a person could not perform light, unskilled work if he or she needed to switch positions every 10 to 15 minutes. AR 1103. The VE was also asked if some of the parking lot attendant jobs would be affected by the identified limitations of sitting, standing and exposure to environmental extremes. AR 1103-04. The VE stated that the numbers would be eroded a bit by these limitations. *Id.*

The attorney also asked if any of the identified jobs could be performed if there was an additional limitation of no repetitive motion of the upper extremities. AR 1104. The VE answered that the jobs she identified would be precluded. The ALJ asked about the extent of handling that was required in these jobs. *Id.* The VE answered the handling was constant for all three jobs. AR 1105.

Finally, Meyerhoff's attorney asked whether periodic breaks at the worker's discretion were available in any of the three jobs. The VE answered "no." *Id.* She

also asked the VE if any of the jobs allowed sitting and standing to be at the worker's discretion. The VE answered:

That's difficult to answer. I think it depends on the frequency of changing between those two postural positions. In my opinion, as long as the work continues to get done, if they're not changing position every 10 to 15 minutes, if it's, say, 30 to 45 minutes and the work continues to be completed, I believe that that would be tolerated.

Id. The attorney asked specifically if changing position every 10 to 15 minutes would be tolerated. The VE answered, "I don't believe that it would be tolerated at that frequency, and the reason is because, at that frequency, I believe it becomes a distraction to other workers and a distraction to completing the work product." AR 1106. Meyerhoff's attorney then asked if a worker was allowed to have a certain number of unscheduled breaks in general. *Id.* The VE stated that employers for unskilled jobs typically do not tolerate unscheduled breaks for any reason outside of short breaks for the bathroom or water. *Id.* She said that someone normally would not be allowed to take an unscheduled break for pain or fatigue. *Id.*

Summary of ALJ's Decision

The ALJ made the following findings on remand from this court:

- (1) The claimant has not engaged in substantial gainful activity since the alleged onset date (20 CFR 416.971 *et seq.*).
- (2) Since the application date, August 17, 2006, the claimant has had the following severe impairments: degenerative disk disease/arthritis C5-6 and L2-3; fibromyalgia; osteoporosis; depression; anxiety; carpal tunnel syndrome; rotator cuff tear on the left; and headaches (20 CFR 416.920(c)).
- (3) Since the application date, August 17, 2006, the claimant has not had an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 CFR

Part 404, Subpart P, Appendix 1 (20 CFR 416.920(d), 416.925 and 416.926).

- (4) After careful consideration of the entire record, the undersigned finds that since August 17, 2006, the claimant has the residual functional capacity to perform light work as defined in 20 CFR 416.967(b) such that she can lift and carry twenty pounds occasionally, ten pounds frequently; stand and walk four hours in an eight hour workday; sit for four hours in an eight hour workday; she would need the option to alternate between sitting and standing throughout the day at will; she can occasionally climb, balance, stoop, kneel, crouch, and crawl; she can have only occasional exposure to extreme heat or humidity; she is limited to tasks that can be learned in thirty days or less involving no more than simple work related decisions with occasional work place changes; she can have only brief superficial interaction with the public and coworkers; and there can be no work at a production rate pace.
- (5) Since July 1, 1997, the claimant has been unable to perform any past relevant work (20 CFR 416.965).
- (6) Prior to the established disability onset date, the claimant was an individual closely approaching advanced age. Applying the age categories non-mechanically, and considering the additional adversities in this case, on July 24, 2009, the claimant's age category changed to an individual of advanced age (20 CFR 416.963)
- (7) The claimant has a limited education and is able to communicate in English (20 CFR 416.964).
- (8) Prior to July 24, 2009, transferability of job skills is not material to the determination of disability because using the Medical-Vocational Rules as a framework supports a finding that the claimant is "not disabled" whether or not the claimant has transferable job skills. Beginning on July 24, 2009, the claimant has not been able to transfer job skills to other

occupations (See SSR 82-41 and 20 CFR Part 404, Subpart P, Appendix 2).

- (9) Prior to July 24, 2009, the date the claimant's age category changed, considering the claimant's age, education, work experience, and residual functional capacity, there were jobs that existed in significant numbers in the national economy that the claimant could have performed (20 CFR 416.969 and 416.969a).
- (10) Beginning on July 24, 2009, the date the claimant's age category changed, considering the claimant's age, education, work experience, and residual functional capacity, there are no jobs that exist in significant numbers in the national economy that the claimant could perform (20 CFR 416.960(c) and 416.966).
- (11) The claimant was not disabled prior to July 24, 2009, but became disabled on that date and has continued to be disabled through the date of this decision (20 CFR 416.920(g)).

AR 1065-73.

The ALJ found that none of Meyerhoff's physical or mental impairments met or equaled a listing. AR 1065-66. She then conducted an RFC assessment with an analysis that is nearly identical to the one in the ALJ's 2009 decision. The only changes include further reasons supported by case law for giving Dr. Eshelman-Peters' opinion little weight and a discussion of the opinions from the consultative examiner and state agency consultant.

The ALJ gave the consultative examiner's opinion "great weight" based on his clinical findings, objective analysis and reasoned basis for his decisions. The state agency consultant's opinion was considered as that of a non-treating specialist and was given significant weight as it was generally consistent with the record as a whole.

The ALJ concluded that Meyerhoff became disabled on July 24, 2009, when she reached advanced age and in accordance with Medical-Vocational Rule 202.02. AR

1071-73. Prior to that date, the ALJ determined there were jobs that existed in significant numbers in the national economy that Meyerhoff could have performed. *Id.* This determination was based on the VE's testimony that Meyerhoff could have performed work as a parking lot attendant, pricer or office helper. *Id.*

Disability Determinations and the Burden of Proof

A disability is defined as the 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 that has lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A); 20 C.F.R. §§ 404.1505, 416.905. A claimant has a disability when the claimant is “not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists . . . in significant numbers either in the region where such individual lives or in several regions of the country.” 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step sequential evaluation process outlined in the regulations. 20 C.F.R. §§ 404.1520, 416.920; *see Kirby v. Astrue*, 500 F.3d 705, 707 (8th Cir. 2007). First, the Commissioner will consider a claimant's work activity. If the claimant is engaged in substantial gainful activity, then the claimant is not disabled. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i).

Second, if the claimant is not engaged in substantial gainful activity, the Commissioner looks to see “whether the claimant has a severe impairment that significantly limits the claimant's physical or mental ability to perform basic work activities.” *Dixon v. Barnhart*, 353 F.3d 602, 605 (8th Cir. 2003). “An impairment is not severe if it amounts only to a slight abnormality that would not significantly limit the claimant's physical or mental ability to do basic work activities.” *Kirby*, 500 F.3d at 707; *see* 20 C.F.R. §§ 404.1520(c), 404.1521(a), 416.920(c), 416.921(a).

The ability to do basic work activities is defined as “the abilities and aptitudes necessary to do most jobs.” 20 C.F.R. §§ 404.1521(b), 416.921(b). These abilities and aptitudes include (1) physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; (2) capacities for seeing, hearing, and speaking; (3) understanding, carrying out, and remembering simple instructions; (4) use of judgment; (5) responding appropriately to supervision, co-workers, and usual work situations; and (6) dealing with changes in a routine work setting. *Id.* §§ 404.1521(b)(1)-(6), 416.921(b)(1)-(6); *see Bowen v. Yuckert*, 482 U.S. 137, 141, 107 S. Ct. 2287, 2291 (1987). “The sequential evaluation process may be terminated at step two only when the claimant’s impairment or combination of impairments would have no more than a minimal impact on her ability to work.” *Page v. Astrue*, 484 F.3d 1040, 1043 (8th Cir. 2007) (internal quotation marks omitted).

Third, if the claimant has a severe impairment, then the Commissioner will consider the medical severity of the impairment. If the impairment meets or equals one of the presumptively disabling impairments listed in the regulations, then the claimant is considered disabled, regardless of age, education, and work experience. 20 C.F.R. §§ 404.1520(a)(4)(iii), 404.1520(d), 416.920(a)(4)(iii), 416.920(d); *see Kelley v. Callahan*, 133 F.3d 583, 588 (8th Cir. 1998).

Fourth, if the claimant’s impairment is severe, but it does not meet or equal one of the presumptively disabling impairments, then the Commissioner will assess the claimant’s RFC to determine the claimant’s “ability to meet the physical, mental, sensory, and other requirements” of the claimant’s past relevant work. 20 C.F.R. §§ 404.1520(a)(4)(iv), 404.1545(a)(4), 416.920(a)(4)(iv), 416.945(a)(4). “RFC is a medical question defined wholly in terms of the claimant’s physical ability to perform exertional tasks or, in other words, what the claimant can still do despite his or her physical or mental limitations.” *Lewis v. Barnhart*, 353 F.3d 642, 646 (8th Cir. 2003) (internal quotation marks omitted); *see* 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1). The claimant is responsible for providing evidence the Commissioner will use to make

a finding as to the claimant's RFC, but the Commissioner is responsible for developing the claimant's "complete medical history, including arranging for a consultative examination(s) if necessary, and making every reasonable effort to help [the claimant] get medical reports from [the claimant's] own medical sources." 20 C.F.R. §§ 404.1545(a)(3), 416.945(a)(3). The Commissioner also will consider certain non-medical evidence and other evidence listed in the regulations. *See id.* If a claimant retains the RFC to perform past relevant work, then the claimant is not disabled. *Id.* §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

Fifth, if the claimant's RFC as determined in Step Four will not allow the claimant to perform past relevant work, then the burden shifts to the Commissioner to prove that there is other work that the claimant can do, given the claimant's RFC as determined at Step Four, and his or her age, education, and work experience. *See Bladow v. Apfel*, 205 F.3d 356, 358-59 n.5 (8th Cir. 2000). The Commissioner must prove not only that the claimant's RFC will allow the claimant to make an adjustment to other work, but also that the other work exists in significant numbers in the national economy. *Eichelberger v. Barnhart*, 390 F.3d 584, 591 (8th Cir. 2004); 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). If the claimant can make an adjustment to other work that exists in significant numbers in the national economy, then the Commissioner will find the claimant is not disabled. If the claimant cannot make an adjustment to other work, then the Commissioner will find that the claimant is disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). At Step Five, even though the burden of production shifts to the Commissioner, the burden of persuasion to prove disability remains on the claimant. *Stormo v. Barnhart*, 377 F.3d 801, 806 (8th Cir. 2004).

The Substantial Evidence Standard

The Commissioner's decision must be affirmed "if it is supported by substantial evidence on the record as a whole." *Pelkey v. Barnhart*, 433 F.3d 575, 577 (8th Cir.

2006); *see* 42 U.S.C. § 405(g) (“The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive . . .”). “Substantial evidence is less than a preponderance, but enough that a reasonable mind might accept as adequate to support a conclusion.” *Lewis*, 353 F.3d at 645. The Eighth Circuit explains the standard as “something less than the weight of the evidence and [that] allows for the possibility of drawing two inconsistent conclusions, thus it embodies a zone of choice within which the [Commissioner] may decide to grant or deny benefits without being subject to reversal on appeal.” *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994).

In determining whether the Commissioner’s decision meets this standard, the court considers “all of the evidence that was before the ALJ, but it [does] not re-weigh the evidence.” *Wester v. Barnhart*, 416 F.3d 886, 889 (8th Cir. 2005). The court considers both evidence which supports the Commissioner’s decision and evidence that detracts from it. *Kluesner v. Astrue*, 607 F.3d 533, 536 (8th Cir. 2010). The court must “search the record for evidence contradicting the [Commissioner’s] decision and give that evidence appropriate weight when determining whether the overall evidence in support is substantial.” *Baldwin v. Barnhart*, 349 F.3d 549, 555 (8th Cir. 2003) (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Sec’y of Health & Human Servs.*, 879 F.2d 441, 444 (8th Cir. 1989). The court, however, does not “reweigh the evidence presented to the ALJ,” *Baldwin*, 349 F.3d at 555 (citing *Bates v. Chater*, 54 F.3d 529, 532 (8th Cir. 1995)), or “review the factual record de novo.” *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (citing *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it “possible to draw two inconsistent positions from the evidence and one of those positions represents the Commissioner’s findings, [the court] must affirm the [Commissioner’s] denial of benefits.” *Kluesner*, 607 F.3d at 536 (quoting *Finch v.*

Astrue, 547 F.3d 933, 935 (8th Cir. 2008)). This is true even in cases where the court “might have weighed the evidence differently.” *Culbertson*, 30 F.3d at 939 (quoting *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)). The court may not reverse the Commissioner’s decision “merely because substantial evidence would have supported an opposite decision.” *Baker v. Heckler*, 730 F.2d 1147, 1150 (8th Cir. 1984); see *Goff v. Barnhart*, 421 F.3d 785, 789 (8th Cir. 2005) (“[A]n administrative decision is not subject to reversal simply because some evidence may support the opposite conclusion.”).

Discussion

Meyerhoff argues she has been disabled since August 17, 2006, not July 24, 2009, as the ALJ determined. She argues the ALJ’s decision of disability since July 24, 2009, is not supported by substantial evidence in the record for two primary reasons: (1) the ALJ did not conduct further inquiry into the frequency of alternating between sitting and standing as the court instructed and (2) the ALJ failed to include the previous limitation of her inability to repetitively handle with only occasional bilateral handling. Meyerhoff argues the VE’s testimony cannot constitute substantial evidence because she testified an individual would not be able to perform the work she identified if the individual had to alternate positions every 10 to 15 minutes and if he or she could not repetitively handle.

A. Development of Record on Remand

In remanding the case for further administrative proceedings, Judge Bennett wrote:

On the other hand, the court cannot find that there is “substantial evidence” supporting the Commissioner’s determination that Meyerhoff is not disabled. *See Page*, 484 F.3d at 1042. This is so, because health professionals other than Meyerhoff’s primary treating physician recognized

varying frequencies with which Meyerhoff would be required to take “periodic breaks” (Dr. Trimble), or to change position, from sitting to standing, for example, or merely “shift” positions, and what health professionals meant by her need to do so within her pain “tolerances” (Dr. Dankle). These inconsistencies make the record inadequate to support any conclusion that Meyerhoff can stand or sit for six hours out of an eight-hour day or any other period of time that would make her employable and beg for further clarification. However, these same inconsistencies also make the record inadequate to support any conclusion that Meyerhoff cannot stand or sit for six hours out of an eight-hour day or would otherwise make her unemployable. The ALJ must re-contact medical sources if the evidence “is inadequate for [the ALJ] to determine whether [the claimant] is disabled.” 20 C.F.R. § 404.1512(e). In that case, the ALJ must “first re-contact [the claimant’s] treating physician . . . to determine whether the additional information [the ALJ] needs is readily available.” *Id.* The ALJ is required to “seek additional evidence or clarification from [the claimant’s] medical source[s] when the report from [the] medical source[s] 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.” *Id.* The court believes that circumstances here required further inquiry by the ALJ into Meyerhoff’s need for periodic breaks or the opportunity to shift or change positions, particularly from Dr. Dankle and Dr. Trimble. *Id.*

Similarly, the court believes that the hypothetical questions posed to the vocational expert may have been inadequate. Testimony from a vocational expert is “substantial evidence” only when the testimony is based on a correctly-phrased hypothetical question that captures the concrete consequences of a claimant’s deficiencies. *Roberts v. Apfel*, 222 F.3d 466, 471 (8th Cir. 2000). Here, the hypothetical questions posed to the vocational expert may not have constituted substantial evidence that Meyerhoff is not disabled, in that they did not adequately account for any

limitations on Meyerhoff's ability to sit or stand for sustained periods of time without breaks or the opportunity to shift or change positions within the limits of her pain tolerances. Meyerhoff's attorney did pose a hypothetical question including limitations on sitting and standing. However, the limitations included in the hypothetical asked by Meyerhoff's attorney were only the limitations provided by Meyerhoff's subjective opinions and the opinion of her treating physician, which may, for reasons discussed above, not adequately reflect the concrete consequences of Meyerhoff's actual deficiencies regarding her ability to sit or stand.

Meyerhoff v. Astrue, No. C09-3067-MWB, 2011 WL 1233185, at *23 (N.D. Iowa Mar. 31, 2011). Thus, it is clear that Judge Bennett instructed the ALJ to further develop the record on the issue of how often Meyerhoff needed to alternate between sitting and standing and how often she needed to take breaks.

Unfortunately, it is also clear that the ALJ did not do so. Indeed, during the administrative hearing on remand the ALJ acknowledged this additional evidence had not been obtained. She noted the administrative record contained additional medical evidence, but also commented that most of it came with the subsequent application and would be deemed duplicative and combined with this action. AR 1087. The ALJ read the instructions from Judge Bennett's opinion and remarked:

And that is actually a key in my mind, because I was never convinced from the evidence that a shift in 15, every 15 minutes was needed. That, I needed some more clarification on that because I was absolutely never convinced at what point a change in position is needed. I'm not sure, but it was actually the frequency of the need for change that still remains troublesome to me, in that I could actually use clarification on, because I did find some inconsistencies in the record on that particular point, a little bit of ambiguity.

AR 1089-90. Meyerhoff's attorney then added:

I think there is significantly more evidence to support the contention of, you know, the 15 minutes standing and

sitting, et cetera, because you – the physicians that are a little vague on it do indicate that it's at her tolerance and guided by her pain and tolerance. So the physicians would not be able to clarify probably any more than that. They may have allowed her to make the decision.

Then the other physicians say 15 minutes sit, stand, et cetera, change on a regular basis, all – Dr. Lovick, the neurosurgeon, says guided by pain and tolerance. That's the record at 18. Dr. Dankle says stand, move about, walk at her tolerance, the record at 8/30. And then we have the treating physician, Dr. Peters-Eshelman, who substantially limits the activities and indicates the sit/stand difficulty.

I think there really is only one physician that has a contrary view, and I think he even changed his mind a little bit on the restrictions. So, yes, Dr. Eshelman-Peters is very strong of that. Dr. Trimble is the one that referred her to the neurosurgeon and he – and the neurosurgeon is the one that gave those restrictions. But then everybody else, all the other doctors, are in agreement that there are limitations such as the 15 minutes and the standing/sitting at will, et cetera. And even Dr. Dankle, record 8/28 to 33, who says she could stand, move about, walk and sit at her tolerance, but he adds, will likely need changing – to change positions on a regular basis.

AR 1089-91.

Just as before, the standard of review is whether the ALJ's decision is supported by substantial evidence. *Kluesner*, 607 F.3d at 536. Substantial evidence is defined as “less than a preponderance but . . . enough that a reasonable mind would find it adequate to support the conclusion.” *Id.* (internal quotations and citations omitted). This court found that the ALJ's previous decision was not supported by substantial evidence and specifically indicated which findings required greater support.

“Deviation from the court's remand order in the subsequent administrative proceedings is itself legal error, subject to reversal on further judicial review.” *Sullivan v. Hudson*, 490 U.S. 877, 886 (1989). “Failing to develop the record is

reversible error when it does not contain enough evidence to determine the impact of a claimant's impairment on his ability to work." *Byes v. Astrue*, 687 F.3d 913, 916 (8th Cir. 2012) (citing *Cox v. Apfel*, 160 F.3d 1203, 1209-10 (8th Cir. 1998)). The regulations provide that treating physicians will be recontacted by the Commissioner when the medical evidence received from them is inadequate to determine a claimant's disability. *Cox v. Astrue*, 495 F.3d 614, 619 (8th Cir. 2007) (citing 20 C.F.R. § 416.912(e)).

I have reviewed the entire record, and find no additional evidence to support the ALJ's subsequent RFC determination. As the ALJ acknowledged before the hearing, there was some ambiguity as to how often Meyerhoff needed to alternate between sitting and standing. However, the ALJ obtained no additional evidence on this limitation and most of the evidence collected on remand was duplicative and came from Meyerhoff's subsequent SSI application filed on June 8, 2009, which was joined with this claim. None of the additional evidence addresses Meyerhoff's need to alternate between sitting and standing during the day. All that has changed is (a) the ALJ's RFC determination, which reduced the standing and sitting limitations to four hours each day based solely on her reasoning to "split the baby," and (b) the addition that Meyerhoff would need the option to alternate positions "at will." The ALJ failed to further develop the record as required, and therefore, remand is appropriate on this basis alone. Nonetheless, I will further explain why the ALJ's current decision is not supported by substantial evidence and what is specifically required on remand this time.

B. RFC Determination

Meyerhoff argues the ALJ's RFC determination is not supported by substantial evidence. First, she argues that instead of obtaining additional medical evidence with regard to the amount of time Meyerhoff could be expected to sit or stand in an eight-hour workday and the frequency with which she needed to change positions, the ALJ compromised by stating:

What I'm looking for would be jobs that could be performed either sitting or standing. So I'm going to even out the time. I know a full range of light work requires standing and walking for six hours, but I'm more interested in someone – is – are jobs that the individual could sit or stand, perform them in either sitting or standing. So I'm going to split the baby on this one, standing and walking four hours, sitting four hours, with kind of a sit/stand option throughout the day where they could sit or stand at will.

AR 1101. Second, Meyerhoff argues the ALJ erred by failing to include a handling limitation that she included in the previous RFC determination. In 2009, the ALJ found that Meyerhoff was limited in her ability to repetitively handle, and could only occasionally handle, bilaterally. AR 15. No such limitation is identified in the ALJ's most recent decision. AR 1066. Meyerhoff points out that the record contains no additional evidence on this limitation, and the VE indicated that handling is constant in the jobs she identified that Meyerhoff could perform. AR 1104-05. Meyerhoff suggests the doctrine of law of the case applies to this situation and the ALJ was required to include this limitation in her subsequent RFC determination. *See Brachtel v. Apfel*, 132 F.3d 417, 419 (8th Cir. 1997) (“The law of the case doctrine prevents the relitigation of a settled issue in a case and requires courts to adhere to decisions made in earlier proceedings . . .”).

The Commissioner argues the record supports the ALJ's determination that Meyerhoff needed to sit and stand at will. The Commissioner also argues the ALJ was not required to include the same limitations that were identified in the 2009 decision. She states that because the district court did not decide whether the handling limitation was properly included in the RFC determination, the ALJ was free to re-evaluate the evidence in determining Meyerhoff's RFC. She argues the ALJ's decision to exclude the handling limitation is supported by substantial evidence.

“RFC is a medical question, and an ALJ's finding must be supported by some medical evidence.” *Guilliams v. Barnhart*, 393 F.3d 798, 803 (citing *Masterson v.*

Barnhart, 363 F.3d 731, 738 (8th Cir. 2004)). “An ALJ must not substitute his opinions for those of the physician.” *Finch*, 547 F.3d at 938 (quoting *Ness v. Sullivan*, 904 F.2d 432, 435 (8th Cir. 1990)). “An ALJ should recontact a treating or consulting physician if a critical issue is undeveloped. However, the ALJ is required to order medical examinations and tests only if the medical records presented to him do not give sufficient medical evidence to determine whether the claimant is disabled.” *Johnson v. Astrue*, 627 F.3d 316, 320 (8th Cir. 2010) (citing *Barrett v. Shalala*, 38 F.3d 1019, 1023 (8th Cir. 1994) (internal quotations and citations omitted)).

The ALJ provided the following RFC in the most recent decision:

After careful consideration of the entire record, the undersigned finds that since August 17, 2006, the claimant has the residual functional capacity to perform light work as defined in 20 CFR 416.967(b) such that she can lift and carry twenty pounds occasionally, ten pounds frequently; stand and walk four hours in an eight hour workday; sit for four hours in an eight hour workday; she would need the option to alternate between sitting and standing throughout the day at will; she can occasionally climb, balance, stoop, kneel, crouch, and crawl; she can have only occasional exposure to extreme heat or humidity; she is limited to tasks that can be learned in thirty days or less involving no more than simple work related decisions with occasional work place changes; she can have only brief superficial interaction with the public and coworkers; and there can be no work at a production rate pace.

AR 1066. The ALJ’s previous RFC was not supported by substantial evidence because the record contained inconsistencies as to how frequently Meyerhoff would need to alternate positions. These inconsistencies made the record inadequate to support either a conclusion that she could stand or sit for six hours out of an eight-hour work day or that she could not stand or sit for this long. *Meyerhoff*, 2011 WL 1233185, at *23. Indeed, Judge Bennett found that the record was “inadequate to support any conclusion that Meyerhoff can stand or sit for six hours out of an eight-hour day or any other

period of time that would make her employable.” *Id.* [emphasis added]. In other words, the problem was not just that the record failed to support a finding of six hours. The record failed to support a finding of *any* particular period of time.

Because the ALJ did not obtain additional evidence on this issue, as directed, her subsequent RFC determination, with a limitation of four hours sitting and four hours standing/walking, is likewise not supported by substantial evidence. The ALJ simply substituted a new unsupported guess for her earlier one. The new guess is no more supportable than the old one.

The limitation of Meyerhoff’s need to alternate positions “at will” is also troublesome. The ambiguity of the frequency with which she needed to alternate positions is precisely a reason the case was remanded. *See Meyerhoff*, 2011 WL 1233185, at *23 (“The court believes that circumstances here required further inquiry by the ALJ into Meyerhoff’s need for periodic breaks or the opportunity to shift or change positions, particularly from Dr. Dankle and Dr. Trimble.”). Leaving the frequency to the discretion of Meyerhoff could have eliminated the need to obtain additional evidence if the VE had testified that Meyerhoff could perform work while alternating positions at will, no matter what the frequency. However, as discussed below, the VE testified that an individual who needed to alternate positions every 10 to 15 minutes could not perform light work. This is the frequency with which Meyerhoff claims she needs to alternate positions. Therefore, the ALJ should have obtained additional medical evidence on how long Meyerhoff could be expected to sit or stand before needing to change positions.² I have no choice but to recommend remand, again, in order for the ALJ to obtain evidence as to (a) the frequency with which

² Alternatively, because the RFC must be based on all the information in the record, the ALJ could have discredited the frequency of 10 to 15 minutes alleged by Meyerhoff. This would have required her to provide explicit reasons for discrediting this frequency and she would have had to amend the at-will limitation to something like “at will, but no more than every 30 to 45 minutes,” as an example. *See Howe v. Astrue*, 499 F.3d 835, 841 (8th Cir. 2007) (where claimant’s allegation that he could not sit for more than fifteen minutes at a time was discredited based on his testimony that he could drive continuously for an hour and a half).

Meyerhoff needed to alternate between sitting and standing and (b) how long she could be expected to sit and stand in an eight-hour work day between August 17, 2006, and July 24, 2009.

With regard to the handling limitation, courts differ on whether the ALJ is limited to considering only the issue for which the case was remanded or whether the ALJ may reconsider all issues . *See Almarez v. Astrue*, No. EDCV 09-00140-MAN, 2010 WL 3894646, at *3-6 (C.D. Cal. Sept. 30, 2010) (finding the ALJ erred by exceeding the scope of the remand order by excluding previously-identified limitations that were unrelated to the remand instructions); *but see Hamlin v. Barnhart*, 365 F.3d 1208, 1224 (10th Cir. 2004) (noting “[i]t was certainly within the ALJ’s province, upon reexamining [the claimant]’s record, to revise his RFC category” when the case was remanded for the purpose of establishing the alleged onset date of plaintiff’s application for disability.)

The scope of remand is guided by the remand instructions from the Appeals Council. The regulations provide that the ALJ “shall take any action that is ordered by the Appeals Council and may take additional action that is not inconsistent with the Appeals Council’s remand order.” 20 C.F.R. § 416.1477(b). The Appeals Council in this case remanded the case to an ALJ “for further proceedings consistent with the order of the court” and directed the ALJ to hold a hearing and issue a new decision on the remanded claim and Meyerhoff’s subsequent SSI claim. AR 1182. While these instructions are vague, they incorporate Judge Bennett’s opinion which, as noted above, contains more precise instructions. The issue here is whether the ALJ’s elimination of the handling limitation is inconsistent with this court’s prior order and violates the law of the case doctrine.

“The law of the case doctrine prevents the relitigation of a settled issue in a case and requires courts to adhere to decisions made in earlier proceedings” *Brachtel*, 132 F.3d at 419 (quoting *United States v. Bartsh*, 69 F.3d 864, 866 (8th Cir. 1995)). It also applies to administrative agencies on remand. *Id.* “This principle [of law of the

case] applies to all matters decided by necessary implication as well as those addressed directly.” *Calderon v. Astrue*, 683 F. Supp. 2d 273, 276 (E.D.N.Y. 2010) (quoting *Carrillo v. Heckler*, 599 F. Supp. 1164, 1168 (S.D.N.Y. 1984)). This is particularly important in Social Security appeals “because a district court is never called upon to address issues resolved in the claimant’s favor; the claimant obviously cannot challenge such determinations, and the Commissioner cannot challenge them because they were made by him or his delegate in the first place.” *Calderon*, 683 F. Supp. 2d at 276-77.

The Eighth Circuit has suggested that the district court is best able to determine whether its previous order has been violated. *See Steahr v. Apfel*, 151 F.3d 1124, 1126 (8th Cir. 1998) (deferring to the district court’s interpretation of its remand order). Nothing in Judge Bennett’s order remanding the case suggested a need to re-evaluate or gather more evidence about the handling limitation.

Exclusion of the handling limitation is certainly inconsistent with the previous administrative decision, which was written by the same ALJ. The ALJ previously determined, “[s]he is limited in her ability to repetitively handle, and can only occasionally handle, bilaterally.” AR 15. The ALJ did not explain why the previously identified handling limitation was left out of the current RFC. Meyerhoff emphasizes the significance of this omission by referencing the VE’s testimony that handling is constant in the jobs she identified and a limitation on repetitive movement of the upper extremities would preclude employment in these jobs. AR 1104-05.

The ALJ included the same evaluation of Meyerhoff’s carpal tunnel syndrome in both decisions. She noted that Meyerhoff had early carpal tunnel syndrome in her left wrist and she had alleged difficulty holding on to items. AR 16, 1067. She also stated that treating records indicated Meyerhoff had only mild carpal tunnel. *Id.* The Commissioner now points to other evidence in the record that would support a finding of no handling limitation. This evidence was in the record at the time of the ALJ’s first decision and was relied upon to reach the finding that Meyerhoff was limited in her ability to repetitively handle.

Based on this history, I find that it was implied in both the ALJ's 2009 decision and Judge Bennett's order remanding the case that substantial evidence supported the handling limitation. Because Judge Bennett made no reference to the handling limitation in his remand instructions and the handling limitation is unrelated to the reason for remand, I find that the ALJ erred by excluding this limitation from the current RFC in the absence of additional evidence or an explanation. On remand, the ALJ shall either (a) include the limitation in the RFC or (b) include a thorough explanation of why a handling limitation is no longer supported by substantial evidence in the record.

C. Hypothetical Question to the VE

Meyerhoff argues the VE's testimony does not constitute substantial evidence to support a finding that she can perform other work available in the national economy based on the limitations identified by the ALJ. Social Security Ruling 83-12 provides:

In some disability claims, the medical facts lead to an assessment of RFC which is compatible with the performance of either sedentary or light work except that the person must alternate periods of sitting and standing. The individual may be able to sit for a time, but must then get up and stand or walk for awhile before returning to sitting. Such an individual is not functionally capable of doing either the prolonged sitting contemplated in the definition of sedentary work (and for the relatively few light jobs which are performed primarily in a seated position) or the prolonged standing or walking contemplated for most light work. (Persons who can adjust to any need to vary sitting and standing by doing so at breaks, lunch periods, etc., would still be able to perform a defined range of work.)

There are some jobs in the national economy--typically professional and managerial ones--in which a person can sit or stand with a degree of choice. If an individual had such a job and is still capable of performing it, or is capable of transferring work skills to such jobs, he or she would not be

found disabled. However, most jobs have ongoing work processes which demand that a worker be in a certain place or posture for at least a certain length of time to accomplish a certain task. Unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand at will. In cases of unusual limitation of ability to sit or stand, a VS should be consulted to clarify the implications for the occupational base.

Social Security Ruling 83-12, 1983 WL 31253, at *4 (Jan. 1, 1983). Social Security Ruling 96-9p also addressed a claimant's need to alternate between sitting and standing.

It states:

An individual may need to alternate the required sitting of sedentary work by standing (and, possibly, walking) periodically. Where this need cannot be accommodated by scheduled breaks and a lunch period, the occupational base for a full range of unskilled sedentary work will be eroded. The extent of the erosion will depend on the facts in the case record, such as the frequency of the need to alternate sitting and standing and the length of time needed to stand. The RFC assessment must be specific as to the frequency of the individual's need to alternate sitting and standing. It may be especially useful in these situations to consult a vocational resource in order to determine whether the individual is able to make an adjustment to other work.

Social Security Ruling 96-9p, 1996 WL 374185, at *7 (July 2, 1996) [emphasis added].

The ALJ provided the VE with a hypothetical in which the individual could sit for four hours each day and stand and/or walk for four hours each day, but needed to be able to alternate positions at will. These limitations are included in Meyerhoff's RFC. The VE identified three light, unskilled jobs with a sit/stand option. When asked to explain the sit/stand option in more detail, the VE stated:

Well, Your Honor, those are light, so they do typically, as you had indicated, require standing for six out of eight hours per day. In my experience, however, those positions sometimes might have a stool available, for example, the parking lot attendant. The office helper, oftentimes, has a

chair available. And the pricer or tagger, I've seen that position usually have a chair or a stool available. So I suppose, if you're asking my opinion, it would depend on the employer, but in my experience, those three light, unskilled jobs do have the option of sitting on occasion.

AR 1102. Meyerhoff's attorney asked the VE about a person who needed to alternate between standing and sitting positions every 10 to 15 minutes. AR 1102-03. The VE did not believe that person could perform light, unskilled work. *Id.*

A hypothetical question need not frame the claimant's impairments in specific diagnostic terms, but should "capture the concrete consequences of those impairments." *Lacroix v. Barnhart*, 465 F.3d 881, 889 (8th Cir. 2006) (internal quotations omitted). It should "precisely describe a claimant's impairments so that the vocational expert may accurately assess whether jobs exist for the claimant." *Newton v. Chater*, 92 F.3d 688, 694-95 (8th Cir. 1996) (citing *Smith v. Shalala*, 31 F.3d 715, 717 (8th Cir. 1994)).

The VE's testimony here cannot be considered substantial evidence to support a finding that Meyerhoff can perform other work available in the national economy under this RFC. The RFC provided that Meyerhoff needed to alternate positions at will, and the VE testified that a person who needed to alternate positions every 10 to 15 minutes would not be able to perform the work she identified. The ALJ's RFC in no way limits the frequency with which Meyerhoff needs to alternate positions at will. According to Meyerhoff, she needed to alternate positions every 10 to 15 minutes. If Meyerhoff was unable to perform other work while alternating positions every 10 to 15 minutes, but could perform other work with a lesser frequency of alternating positions, the ALJ should have obtained additional medical evidence and reasoning to support that. As it stands, the VE has testified that Meyerhoff cannot perform other work if the limitation is truly "at will" as the ALJ provided. Such testimony does not support the ALJ's finding that Meyerhoff was not disabled prior to July 24, 2009.

The "at will" limitation did not alleviate the original shortcoming of the ALJ's decision. The record still remains ambiguous as to how often Meyerhoff needed to

alternate positions. The importance of this information is emphasized by the VE's testimony that at a certain frequency of alternating positions, Meyerhoff would be unable to perform work. On remand, the ALJ shall obtain additional medical evidence from either a treating physician or a consultative examiner on the frequency with which Meyerhoff needed to alternate positions during the period from August 17, 2006, to July 24, 2009. The ALJ may also need to obtain additional testimony from a VE depending on the nature of this evidence and in accordance with Social Security Ruling 83-12.

Recommendation

For the reasons discussed above, I RESPECTFULLY RECOMMEND that the Commissioner's decision be **reversed**, this case be **remanded** again for further proceedings consistent with this report, with the additional request that administrative proceedings on remand be expedited as much as possible. Judgment shall be entered in favor of Meyerhoff and against the Commissioner. On remand, the ALJ should:

- 1) obtain additional medical evidence either from a treating source or a consultative examiner on the frequency with which Meyerhoff needed to alternate between sitting and standing from August 17, 2006, to July 24, 2009, and the total number of hours she could be expected to do each in an eight-hour workday for the same time period. The treating physician or consultative examiner should be asked to review the medical evidence from the relevant time period and complete a physical evaluation if necessary to determine Meyerhoff's sitting and standing limitations during the relevant time period.
- 2) include the previously identified handling limitation in the new RFC, or provide a thorough explanation as to why the handling limitation as previously described is no longer supported by substantial evidence in the record.

- 3) obtain additional vocational expert testimony as necessary depending on the additional medical evidence regarding Meyerhoff's need to alternate between sitting and standing and how long she could be expected to do each of these in an eight-hour workday.

Objections to this Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b) must be filed within fourteen (14) days of the service of a copy of this Report and Recommendation. Objections must specify the parts of the Report and Recommendation to which objections are made, as well as the parts of the record forming the basis for the objections. *See* Fed. R. Civ. P. 72. Failure to object to the Report and Recommendation waives the right to *de novo* review by the district court of any portion of the Report and Recommendation as well as the right to appeal from the findings of fact contained therein. *United States v. Wise*, 588 F.3d 531, 537 n.5 (8th Cir. 2009).

IT IS SO ORDERED.

DATED this 2nd day of May, 2013.



LEONARD T. STRAND
UNITED STATES MAGISTRATE JUDGE
NORTHERN DISTRICT OF IOWA