



May 25, 1993. (Tr. 403-10).<sup>1</sup> Wenzy alleges she is disabled and has been unable to work since September 23, 1991. (Tr. 403-10). After Wenzy's application was denied at the initial and reconsideration levels (Tr. 434, 439), Wenzy requested a hearing before an administrative law judge ("ALJ"), which was held on March 22, 1996. (Tr. 674). The ALJ issued an unfavorable decision, which was upheld by the Appeals Council of the SSA's Office of Hearings and Appeal. (Tr. 674-81). Wenzy then filed a complaint in federal district court, which remanded to the Commissioner pursuant to sentence six of 42 U.S.C. § 405(g), because portions of the hearing transcript were inaudible. (Tr. 698, 700).

The case was assigned to a different ALJ, who held an administrative hearing on September 2, 1998. (Tr. 357-402). In a decision dated December 6, 1999, the ALJ denied Wenzy's application for a period of disability, disability benefits, and SSI benefits, finding that Wenzy was not disabled as defined by the Act. (Tr. 338-49). The Appeals Council approved the ALJ's decision on October 25, 2003, thereby transforming it into the final decision of the Commissioner. (Tr. 321-23). *See Sims v. Apfel*, 530 U.S. 103, 107 (2000).

During the pendency of the proceedings, Wenzy filed a second application for SSI on March 1, 2001, which was approved. (Tr. 321).

**B. Factual History**

Wenzy was forty-six years of age at the time of the hearing. (Tr. 362). She has a general equivalency diploma and has attended two years of junior college. (Tr. 400-01). Wenzy's past relevant work experience includes employment as a computer operator. (Tr. 347-49, 845).

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<sup>1</sup>The transcript of the administrative record will be cited as "Tr. \_\_\_".

The second administrative hearing was held on September 2, 1998. (Tr. 357). Wenzy was present and testified, and was represented by counsel. (Tr. 359-402). At the hearing, the ALJ heard testimony from Dr. Glenn F. Sternes, a medical expert. (Tr. 382-88, 391-97). Dr. Charles R. Poor, a vocational expert, was also present, but did not testify. (Tr. 339, 59).

In her testimony, Wenzy alleged she was disabled primarily due to back pain and depression. (Tr. 367, 372, 376). Wenzy also indicated that she suffers problems with hypertension, side effects from medications for depression and anxiety, a severe skin rash, and that she requires the assistance of a cane and a walker. (Tr. 367-72).

Dr. Sternes reviewed the medical records for the ALJ, and testified that Wenzy's mental impairments did not meet or equal one of the listings. (Tr. 382-86). Dr. Sternes noted that while Wenzy had depression, in his opinion the records suggested a tendency towards "exacerbation" of symptoms. (Tr. 386). In particular, the ALJ asked Dr. Sternes if Wenzy met the criteria for Listing 12.07. (Tr. 386). Dr. Sternes responded in the negative because there were no demonstrable or organic findings or known physiological mechanisms to meet the criteria of Listing 12.07. (Tr. 386). On cross-examination, Dr. Sternes described Wenzy's depression from the early 1990's onward as mild to moderate. (Tr. 387).

After reviewing the evidence, the ALJ determined that Wenzy was not disabled within the meaning of the SSA, using the five-step analysis specified in 20 C.F.R. § 416.920(a). (Tr. 339, 349). At step one, the ALJ found Wenzy had not engaged in substantial gainful activity since her first application for benefits in 1993. (Tr. 340, 348). At step two, the ALJ found her to have severe impairments; in particular, degenerative disc disease, back pain, carpal tunnel syndrome, and hypertension, but held that these impairments did not meet or medically equal one of the listed

impairments in Appendix 1, Subpart P, Regulation No. 4, as is required at step three to be presumed disabled. (Tr. 340, 342-43). Also at step two, the ALJ analyzed Wenzky's problems with depression, anxiety, and poor memory, and held these to be not severe because they had only a minimal affect on her ability to perform work-related activities. (Tr. 340). At the fourth step, the ALJ found Wenzky's impairments did not preclude her ability to perform her past relevant work as a computer operator. (Tr. 347-49). Thus, the ALJ held Wenzky was not disabled without proceeding to step five. (Tr. 348-49).

## **II. APPLICABLE LAW**

### **A. Standard of Review**

In Social Security disability cases, 42 U.S.C. § 405(g) governs the standard of review. *Waters v. Barnhart*, 276 F.3d 716, 718 (5th Cir. 2002). The federal courts review the Commissioner's denial of Social Security benefits to ascertain whether (1) the final decision is supported by substantial evidence, and (2) whether the Commissioner used the proper legal standards to evaluate the evidence. *Masterson v. Barnhart*, 309 F.3d 267, 272 (5th Cir. 2002). "Substantial evidence" means that the evidence must be enough to allow a reasonable mind to support the Commissioner's decision. *See Brown v. Apfel*, 192 F.3d 492, 496 (5th Cir. 1999) (citing *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In applying this standard on review, the court "scrutinize[s] the record to determine whether such evidence is present." *Myers v. Apfel*, 238 F.3d 617, 619 (5th Cir. 2001). If the Commissioner's findings are supported by substantial evidence, they must be affirmed. *Newton v. Apfel*, 209 F.3d 448, 452 (5th Cir. 2000). The court does not reweigh the evidence, try the issues *de novo*, or substitute its judgment for that of the Commissioner. *Myers*, 238 F.3d at 619. "Conflicts in the

evidence are for the Commissioner and not the courts to resolve.” *Masterson*, 309 F.3d at 272. The courts strive for judicial review that is deferential but not so obsequious as to be meaningless. *Brown*, 192 F.3d at 496.

**B. Standard for Determining Disability under the Act**

The Act authorizes payment of disability insurance benefits and supplemental security income to individuals with disabilities. *Barnhart v. Walton*, 535 U.S. 212, 214 (2002). “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 which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A) and 1382c(a)(3)(A).

A physical or mental impairment is defined as “an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.” 42 U.S.C. § 423(d)(3). The mere presence of an impairment does not necessarily establish a disability. *Anthony v. Sullivan*, 954 F.2d 289, 293 (5th Cir. 1992). A claimant is disabled only if she is incapable of engaging in any “substantial gainful activity,” which is defined as “work activity involving significant physical or mental abilities for pay or profit.” *Newton*, 209 F.3d at 452-53.

To determine whether the claimant is, in fact, disabled, the ALJ follows a five-step analysis outlined in 20 C.F.R. § 416.920(a). First, the claimant must not be presently engaged in substantial gainful activity. Second, a claimant must have an impairment or combination of impairments which significantly limits her physical or mental ability to do basic work activities. Third, to secure a finding of disability without consideration of age, education, and work experience, a claimant must establish

that her impairment meets or equals an impairment in the appendix to the regulations. If so, she is presumed disabled and is entitled to benefits without further inquiry. Fourth, a claimant must establish that her impairment prevents her from doing past relevant work. Fifth, the impairment must prevent her from doing any other work. *Waters v. Barnhart*, 276 F.3d 716, 718 (5th Cir. 2002).

The claimant bears the burden of proof under the first four steps. If the claimant successfully carries that burden, the burden shifts to the Commissioner in step five to show that other substantial gainful employment is available in the national economy, which the claimant is capable of performing. If the Commissioner successfully makes that showing, the burden shifts back to the claimant to prove that she cannot perform the alternative work suggested. A finding that a claimant is disabled or is not disabled at any point in the five-step review is conclusive and terminates the analysis. *Masterson*, 309 F.3d at 272.

### **III. ANALYSIS**

Wenzy challenges four findings by the ALJ: (1) that her depression, anxiety, and poor memory were not severe; (2) that her back problems did not meet or equal a listed impairment; (3) that she had the residual functional capacity to perform a full range of light work; and (4) that she could perform her past relevant work.

#### **A. Severity of Mental Impairments**

At step two, the ALJ found that Wenzy's depression, anxiety, and poor memory were not severe because they had only a minimal affect on her ability to perform work-related activities. (Tr. 340). Wenzy argues this finding is in error for three reasons.

First, Wenzy contends that the second ALJ's finding that Wenzy's mental impairments were not severe cannot be reconciled with the first ALJ's finding that her depression was severe. (Tr. 675, 680). However, when a case is remanded, there is no rule of issue preclusion. *See Muse v. Sullivan*, 925 F.2d 785, 790 (5th Cir. 1991); *see also Houston v. Sullivan*, 895 F.2d 1012, 1015 (5th Cir. 1989) (explaining that "[o]nce the case was remanded to the ALJ to gather more information about the extent of [the claimant's] disability, the ALJ was free to reevaluate the facts"). Once a matter is remanded, an ALJ must take any action specified by the Appeals Council that is ordered and may take any additional action that is not inconsistent with the Appeals Council's remand order. *See* 20 C.F.R. §§ 404.977(b) and 416.1477(b). In its remand order, the Appeals Council vacated the decision of the prior ALJ. (Tr. 698-99). Thus, the second ALJ was not bound by the first ALJ's finding that Wenzy's depression was severe. *See, e.g., Oyervides v. Shalala*, 1994 WL 809114 at \*7 (W.D. Tex. 1994) (noting that the ALJ's redetermination of disability was not inconsistent with the Appeals Council's order and that the Appeals Council's order did not bind the second ALJ to the earlier decision).

Wenzy next claims the ALJ erred by not reciting the Fifth Circuit's severity standard set forth in *Stone v. Heckler*, 752 F.2d 1099 (5th Cir. 1985). In determining whether a claimant's impairment is severe, *Stone* requires an ALJ apply the following standard: "[A]n impairment can be considered as not severe only if it is a slight abnormality [having] such minimal effect on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education or work experience." *Stone*, 752 F.2d at 1101 (alterations in original). The *Stone* court added that

we will in the future assume that the ALJ and Appeal Council have applied an incorrect standard to the severity requirement unless the correct standard is set forth by reference to this opinion or another of the same effect, or by an express statement

that the construction we give to 20 C.F.R. § 404.1520(c) (1984) is used. Unless the correct standard is used, the claim must be remanded to the [Commissioner] for reconsideration.

*Id.* at 1106. The ALJ did not set forth the standard as it was construed in *Stone*, refer to *Stone* or another decision to the same effect, or expressly state that the construction given to 20 C.F.R. § 404.1520(c) by the Fifth Circuit was used. See *Loza v. Apfel*, 219 F.3d 378, 393 (5th Cir. 2000). In his decision, the ALJ repeatedly uses the “significant limitations” language of 20 C.F.R. § 404.1520(c),<sup>2</sup> without adding the “slight abnormality” or “slight impairment” standard of *Stone* as required.<sup>3</sup> The case law makes clear that the court must “read the opinion of the ALJ carefully to ensure he or she used the ‘slight impairment’ standard in the nonseverity determination.” *Hampton v. Bowen*, 785 F.2d 1308, 1311 (5th Cir. 1986). The Fifth Circuit has explained that a literal application of 20 C.F.R. § 404.1520(c) (i.e., simply analyzing whether an impairment significantly limits the ability to do basic work activity) is inconsistent with the Act and its legislative history. See, e.g., *Loza*, 219 F.3d at 391.

The Commissioner counters that remand is not required for failure to apply the *Stone* standard where the sequential analysis proceeds past step two. The court agrees. “*Stone* merely reasons that the regulation [20 C.F.R. § 404.1520(c)] cannot be applied to summarily dismiss, without consideration of the remaining steps in the sequential analysis, claims of those whose impairment is

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<sup>2</sup>20 C.F.R. § 404.1520(c) treats a “severe impairment” as one which “significantly limits [a claimant’s] physical or mental ability to do basic work activity.”

<sup>3</sup>In his decision the ALJ uses the following language: “The objective medical evidence as a whole does not show that these impairments significantly affect her ability to perform work activities” (Tr. 340); “This is evidence that her mental impairments do not significantly limit her ability to perform work-related activities”; (Tr. 340-41); “The claimant’s daily activities contradict a finding that her mental impairments significantly limit her abilities to perform work-related activities” (Tr. 342); “This evidence reflects an ability to perform without significant limitations work-related activities such as concentrating and following directions” (Tr. 342).

more than a slight abnormality.” *Anthony v. Sullivan*, 954 F.2d 289, 294 (5th Cir. 1992). In *Stone*, the Fifth Circuit was dealing with a situation where in a number of cases, “the administrative determination was made against disability at step two on grounds of nonseverity.” *Stone*, 752 F.2d at 1101. Here, although the wrong standard was applied at step two, it was not used to dismiss Wenzly’s claim without proceeding to the following steps of the evaluation process. *Cf. Chaparro v. Bowen*, 815 F.2d 1008, 1011 (5th Cir. 1987) (noting that although there was a failure to cite to *Stone*, the case did not turn on whether the claimant’s impairment was severe, but on a later step in the evaluation process). Thus, while the importance of correctly applying the “slight abnormality” or “slight impairment” standard of *Stone* must be stressed, remand on this issue is not appropriate since Wenzly’s claim proceeded past step two.

Wenzly’s final contention at step two is that the ALJ did not give proper weight to the medical findings of Drs. Paul B. Damin and Dr. Pam Conyne in determining the severity of her impairments. The opinions, diagnoses, and medical evidence of a treating physician who is familiar with the claimant’s condition should ordinarily be accorded considerable weight. *See Myers v. Apfel*, 238 F.3d 617, 621 (5th Cir. 2001). However, when good cause is shown, a physician’s opinions and diagnoses may be given little or no weight. *Id.* Good cause exists where the physician’s statements are brief and conclusory, not supported by medically acceptable clinical laboratory diagnostic techniques, or otherwise unsupported by the evidence. *Id.*

The ALJ declined to give controlling weight to the assessments of Drs. Damin and Conyne, on the grounds that they were unsupported by, and inconsistent with, other evidence. As Wenzly acknowledges, Drs. Damin and Conyne were “non-treating psychologist[s] who examined the claimant on 1 occasion and rendered an assessment.” (Pl.’s Br. at 31). The ALJ gave greater weight

to the Brief Psychiatric Rating Scales made by the mental health professionals who treated Wenzly, as well as the evidence of Wenzly's daily activities.

According to the Brief Psychiatric Rating Scales, Wenzly herself regarded her depression and anxiety as being very mild to moderate. (Tr. 936, 938, 974, 1068, 1087). The Brief Psychiatric Rating Scales indicate that a claimant's rating for conditions such as depression and anxiety are based on the claimant's self-reporting during mental health interviews. (Tr. 936, 938, 974, 1068, 1087). The ALJ also analyzed Wenzly's daily activities and found them to be inconsistent with severe mental impairments. (Tr. 342). He noted that she frequently visited family and went to church, and that she attributed her shopping difficulties to physical problems rather than mental. (Tr. 342). Consideration of Wenzly's daily activities was appropriate. *See Leggett v. Chater*, 67 F.3d 558, 565 n.12 (5th Cir. 1995). Moreover, both Drs. Damin and Conyne reported that Wenzly tended to exaggerate her symptoms. (Tr. 623, 1160). Thus, good cause existed for giving Drs. Damin and Conyne's evaluations less weight than other evidence in the record suggesting that Wenzly's mental impairments were not severe.

#### **B. The Impairment Listing Claim**

Wenzly alleges the ALJ erred at step three of the evaluation process in not finding her back condition met or equaled one of the listed impairments of 20 C.F.R. Pt. 404, Subpt. P., App. 1.; in particular, Listing 1.04 B, which lists the condition of "spinal arachnoiditis."<sup>4</sup> If a claimant establishes that her impairment meets or equals an impairment in the appendix to the regulations, she is presumed

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<sup>4</sup>"Arachnoiditis" is defined as "[i]nflammation of the arachnoid membrane and subarachnoid space." *The American Heritage Stedman's Medical Dictionary* (2002) at 61. The "arachnoid membrane" is "[a] delicate fibrous membrane forming the middle of three coverings of the brain and spinal cord, closely attached to the dura mater, from which it is separated only by the subdural cleft, but separated from the pia mater by the subarachnoid space." *Id.*

disabled, and is entitled to benefits without further inquiry. *See Sullivan v. Zebley*, 493 U.S. 521, 532 (1990); *Loza v. Apfel*, 219 F.3d 378, 390 (5th Cir. 2000); 20 C.F.R. §§ 404.1520(d), 416.920(d). An MRI of Wenzly's back was taken on March 4, 1996. (Tr. 989). The notes taken with the MRI state that "[t]here is persist[ent] peripheral clumping of the nerve roots of the cauda equina in the distal thecal sac. Findings are most likely related to arachnoiditis." (Tr. 989). Medical records thereafter repeat that an "MRI on 3/4/96 shows arachnoiditis." (Tr. 997, 1128), and in the sections labeled "Diagnosis," simply note, "arachnoiditis." (Tr. 996-97, 1001, 1128). In his functional capacity assessment, Dr. Randall S. Rosenberg also mentions arachnoiditis. (Tr. 1058, 1062).

Listing 1.04 B requires that spinal arachnoiditis must be confirmed by "an operative note or pathology report of tissue biopsy, or by appropriate medically acceptable imaging, manifested by severe burning or painful dysesthesia, resulting in the need for changes in position or posture more than once every 2 hours." 20 C.F.R. Pt. 404, Subpt. P., App. 1, § 1.04 B. For Wenzly to show that her impairment matches a listing, it must meet all of the specified medical criteria. *See Sullivan*, 493 U.S. at 530. An impairment that satisfies only some of the criteria, no matter how severely, does not qualify. *Id.* Wenzly points to an MRI that show findings "most likely related to arachnoiditis." (Tr. 989). An MRI is medically acceptable imaging. *See* 20 C.F.R. Pt. 404, Subpt. P., App. 1, § 1.00 C(1). However, Wenzly does not even argue that she meets the additional criteria of Listing 1.04 B. In a "brief" of more than fifty single-spaced pages, Wenzly makes no claim that she suffered the symptoms of severe burning or painful dysesthesia, nor does she cite evidence demonstrating that she was required to change her posture or position more than once every two hours. Thus, the ALJ committed no error in failing to find that Wenzly's back condition met or equaled a listed impairment.

### C. The Residual Functional Capacity Claim

The ALJ determined that Wenzly has the “residual functional capacity to lift and carry 10 pounds frequently and 20 pounds occasionally,” and that “[s]he can sit, stand, and/or walk each for at least six hours in an eight-hour day.” (Tr. 347). The ALJ concluded that Wenzly has the residual functional capacity to perform a full range of light work. (Tr. 347). Wenzly argues these findings are erroneous for essentially three reasons: (1) the ALJ’s assessment fails to comply with the requirements of Social Security Ruling (“SSR”) 96-8p; (2) the ALJ failed to consider a functional capacity evaluation from October 8, 1992; and (3) the ALJ relied on a mental residual functional capacity assessment by Dr. Stephen D. Drake that was internally inconsistent.

SSR 96-8p<sup>5</sup> provides guidance in determining how to assess a claimant’s residual functional capacity. “The RFC assessment must first identify the individual’s functional limitations or restrictions and assess his or her work-related abilities on a function-by-function basis, including the functions in paragraphs (b), (c), and (d) of 20 CFR 404.1545 and 416.945.” SSR 96-8p, at \*1. A residual functional capacity assessment encompasses a claimant’s exertional and nonexertional capacities. *See* SSR 96-8p, at \*5-\*6. SSR 96-8p provides:

Exertional capacity addresses an individual’s limitations and restrictions of physical strength and defines the individual’s remaining abilities to perform each of seven strength demands: Sitting, standing, walking, lifting, carrying, pushing, and pulling. Each function must be considered separately (e.g., “the individual can walk for 5 out of 8 hours and stand for 6 out of 8 hours”), even if the final RFC assessment will combine activities (e.g., “walk/stand, lift/carry, push/pull”).

*Id.* at \*5. *Myers v. Apfel*, 238 F.3d 617, 620-21 (5th Cir. 2001) echoes the provisions of SSR 96-8p, requiring an ALJ to adequately address a claimant’s functional limitations.

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<sup>5</sup>While Social Security Rulings are not binding on this court, they must be applied by the ALJ. *See Myers v. Apfel*, 238 F.3d 617, 620 (5th Cir. 2001); 20 C.F.R. § 402.35(b)(1).

SSR 96-8p and 20 C.F.R. §§ 404.1545 and 416.945 appear to require an analysis of seven functions: sitting, standing, walking, lifting, carrying, pushing, and pulling. While the ALJ's opinion mentions the first five functions listed, it does not discuss Wenzky's residual functional capacity to push or pull. However, Wenzky does not challenge the ALJ's lack of analysis of her capacity to push or pull, but instead contends the ALJ failed to address her ability to stand. (Pl.'s Br. at 43). This is incorrect. The ALJ specifically found that Wenzky has the residual functional capacity to stand for six hours out of an eight-hour day. (Tr. 347). Moreover, the ALJ based his assessment of Wenzky's residual functional capacity, in part, on a functional capacity evaluation that did include a function-by-function analysis of her exertional limitations, including pushing and pulling. (Tr. 347). This functional capacity evaluation performed by Dr. Randall S. Rosenburg on June 3, 1997, determined that Wenzky was unrestricted in her ability to push and pull. (Tr. 1058). This meets the legal standard set forth in *Myers* and SSR 96-8p. See *Onishea v. Barnhart*, No. 03-21028, 2004 WL 1588294, at \*1 (5th Cir. 2004) (noting that an ALJ's reliance on a state examiner's function-by-function analysis satisfied the requirements of *Myers* and SSR 96-8p).

The court recognizes that the ALJ's decision does not perfectly comply with SSR 96-8p and *Myers*. The ALJ's analysis of Wenzky's residual functional capacity lumps functions together; i.e., it states that Wenzky "can sit, stand, and/or walk each for at least six hours in an eight-hour day." (Tr. 347). SSR 96-8p states that "[e]ach function must be considered separately." Thus, it would have been preferable for the ALJ to state that Wenzky can sit for at least six hours in an eight-hour day and that she can stand for at least six hours in an eight-hour day, and so on. Remanding on this point, however, would be a waste of time and resources. Procedural perfection in administrative proceedings is not required. See *Mays v. Bowen*, 837 F.2d 1362, 1364 (5th Cir. 1988). Remand for

procedural imperfections is not appropriate unless the substantial rights of a party have been affected. *See Anderson v. Sullivan*, 887 F.2d 630, 634 (5th Cir. 1989) (declining to reverse where ALJ failed to make findings as to claimant's daily activities as required by SSR 88-13).

Wenzy next argues that in determining her residual functional capacity the ALJ failed to take into account the results of a functional capacity evaluation from October 8, 1992 which placed her residual functional capacity to work at "below a sedentary work level." (Tr. 594). The 1992 functional capacity evaluation was considered at the original administrative hearing in 1996. (Tr. 735-36). As previously discussed, once the case was remanded, the second ALJ was free to reevaluate the facts. *See Muse v. Sullivan*, 925 F.2d 785, 790 (5th Cir. 1991); *see also Houston v. Sullivan*, 895 F.2d 1012, 1015 (5th Cir. 1989). The second ALJ placed greater weight on evidence from other more recent physical examinations of Wenzy; specifically, an examination performed by Dr. Aaron M. Levine on October 5, 1998 (Tr. 1165-70); a functional capacity assessment by Dr. Randall S. Rosenberg from June 3, 1997 (Tr. 1057-64); and an evaluation from Dr. Henry D. Wilde, Jr. conducted on February 8, 1993 (Tr. 553-55). Dr. Levine concluded that there were no real physical problems that would significantly affect Wenzy's ability to stand, walk, or sit. (Tr. 1166). Likewise, Dr. Wilde explicitly stated there was no real physical explanation to account for Wenzy's complaints of back and right leg pain and concluded that she did not require any additional orthopedic treatment. (Tr. 553-55). Dr. Rosenberg determined that Wenzy could occasionally lift and/or carry twenty pounds, frequently ten pounds; that she could sit, stand and/or walk about six hours in an eight-hour workday; and that she was unrestricted in her ability to push and pull. (Tr. 1058). The second ALJ was free to reevaluate the facts on remand and place greater weight on the evidence from

these evaluations than on the 1992 evaluation in determining Wenzky's physical residual functional capacity.

Wenzky further argues that the ALJ should not have relied on the assessment of Dr. Stephen D. Drake in determining her mental residual functional capacity, maintaining Dr. Drake's reports were internally inconsistent. Wenzky points to a psychiatric review evaluation completed by Dr. Drake on May 27, 1997. (Tr. 1044-52). In that form Dr. Drake posited that Wenzky suffered from a mood disorder resulting in her often experiencing deficiencies of concentration. (Tr. 1051). In a mental residual function capacity assessment form prepared the same day, Dr. Drake indicated that Wenzky was not significantly, or only moderately limited, in her ability to concentrate on various work related tasks. (Tr. 1053-55). Wenzky also points to a December 6, 1999 Psychiatric Review Technique Form signed by the ALJ noting that Wenzky suffers from a mood disorder, but that the mood disorder seldom results in Wenzky experiencing deficiencies of concentration. (Tr. 350-52).

The ALJ's opinion acknowledges these inconsistencies. (Tr. 347). The ALJ notes that his determination of Wenzky's mental residual functional capacity is in general conformity with that of Dr. Drake's. (Tr. 347). But the ALJ adds that his assessment is somewhat different because "[t]he residual functional capacity determined by the undersigned has considered the record as a whole, including all medical evidence as well as the testimony presented at the hearing and is thus based upon evidence which was not available to State agency medical consultants [Dr. Drake]." (Tr. 347). Such a conflict in the evidence is for the Commissioner and not the court to resolve. *See Masterson v. Barnhart*, 309 F.3d 267, 272 (5th Cir. 2002). This court does not re-weigh the evidence or try the question *de novo*. *Id.*

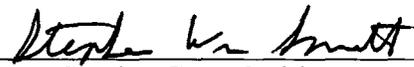
**D. The Past Relevant Work Claim**

Wenzy contends the ALJ did not apply the proper legal standards in determining whether she could perform her past relevant work. In particular, Wenzy argues the ALJ's decision does not conform to the requirements of SSR 82-62, which requires specific findings of fact as to (1) the individual's residual functional capacity; (2) the physical and mental demands of the past job/occupation; and (3) whether the individual's residual functional capacity would permit a return to her past job or occupation. *See* SSR 82-62 at \*4. There is no real dispute that the ALJ made the requisite findings for 1 and 3. (Tr. 347-48). As to the second part, Wenzy points to SSR 82-61 to argue that the ALJ may not rely on generic classifications of previous jobs in determining the physical and mental demands of her past job as a computer operator; in effect Wenzy challenges the ALJ's use of the Dictionary of Occupational Titles ("DOT") to classify her past relevant work as a computer operator under the light, skilled category. However, SSR 82-61 clearly allows an ALJ to rely on the DOT to classify an applicant's past relevant work, even where the DOT's description of the job is more generic than that actually performed by the claimant. *See* SSR 82-61 at \*2. Thus, the ALJ's analysis complies with the demands of SSR 82-62.

**IV. CONCLUSION**

For these reasons, Wenzy's Motion for Summary Judgment (Dkt. No. 22) is DENIED, the Commissioner's Motion for Summary Judgment (Dkt. No. 24) is GRANTED, and the ALJ's decision denying benefits is AFFIRMED.

Signed on October 23<sup>rd</sup>, 2004, at Houston, Texas.

A handwritten signature in cursive script, appearing to read "Stephen Wm. Smith", is written over a horizontal line.

Stephen Wm. Smith  
United States Magistrate Judge