

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

TERRY L. WELCH,)	
)	
Plaintiff,)	
)	CIVIL ACTION
v.)	
)	No. 00-4203-JAR
)	
JO ANNE B. BARNHART,)	
Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

RECOMMENDATION AND REPORT

Plaintiff seeks review of a partially favorable decision of the Commissioner of Social Security (hereinafter Commissioner) denying disability insurance benefits and awarding supplemental security income under sections 216(i), 223, 1602, and 1614(a)(3)(A) of the Social Security Act (hereinafter the Act). 42 U.S.C. §§ 416(i), 423, 1381a, and 1382c(a)(3)(A). The matter has been fully briefed and referred to this court for a recommendation and report. The court recommends the Commissioner's decision be reversed and the case be remanded for further proceedings strictly in accordance with the findings and recommendations in this opinion.

I. BACKGROUND

This is the second suit in which plaintiff has sought review of a decision by the Commissioner regarding plaintiff's allegations of disability beginning March 1, 1979. Plaintiff constructively filed applications, for supplemental security income on January 4, 1994 and for disability insurance benefits on January 19, 1994, alleging he was disabled beginning March 1, 1979. (R. 179-80). The applications were denied initially and on reconsideration. (R. 179). After a hearing, an Administrative Law Judge (hereinafter ALJ) issued a partially favorable decision (hereinafter the first decision) on March 5, 1996 in which he denied disability insurance benefits, but awarded supplemental security income beginning January 4, 1994. (R. 7-18). In the first decision, the ALJ found that plaintiff's date last insured for disability insurance benefits is March 31, 1985 and that plaintiff is not entitled to disability insurance benefits because he "failed to meet his burden of establishing an earlier onset date" (R. 10), and because "the medical evidence does not support the claimant's allegations that he was disabled . . . at any time prior to January 4, 1994." (R. 14). The ALJ determined that plaintiff could not perform his past relevant work but, at some unspecified time prior to

January 4, 1994, could perform other work which exists in significant numbers in the national economy. (R. 17). The Appeals Council denied plaintiff's request for review and plaintiff filed a complaint seeking judicial review (hereinafter the first suit). (R. 3).

In an opinion filed in the first suit on February 26, 1999, the reviewing court found that the Commissioner improperly placed the burden on plaintiff to prove he could not perform other work existing in the national economy during the relevant period before his insured status expired on March 31, 1985. Welch v. Apfel, No. 97-4025-SAC, 1999 WL 318093 (D. Kan. Feb. 26, 1999) (hereinafter the remand order); (R. 202-26).¹ The court, therefore, reversed the first decision and remanded the case "pursuant to sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with [its] order." (R. 226). Judgment was entered pursuant to the remand order (R. 201) and neither party appealed.

Fifteen months later, the Appeals Council vacated the first decision and remanded "the case to an Administrative Law Judge for further proceedings consistent with the order of the court." (R. 227). On remand, the ALJ received more evidence

¹The remand order in the first suit is contained in the record at pp. 202-26. Further citation will be to the record in this case.

and, on September 8, 2000, held a supplemental hearing at which plaintiff, his wife, and a vocational expert testified. (R. 318-59). The ALJ issued a partially favorable decision on October 13, 2000 (hereinafter the decision on remand) which is the subject of this suit . (R. 179-93). In the decision on remand, the ALJ concluded that he should make a de novo decision (R. 180-81), found that plaintiff's insured status expired on December 31, 1983, not March 31, 1985 as found in the first decision (R. 180 & n.1), found that plaintiff was not disabled within the meaning of the Act at the time his insured status expired, but that plaintiff has been disabled since December 10, 1997. (R. 191-93).

The ALJ's findings in the decision on remand include the following:

1. The claimant meets the nondisability requirements for a period of disability and Disability Insurance Benefits set forth in Section 216(i) of the Social Security Act and is insured for benefits through December 31, 1983, but not subsequent thereto.
- . . .
3. From March 1, 1979 through February 11, 1988, the claimant did not have an impairment or combination of impairment [sic] considered "severe" based on the requirements in the Regulations 20 CFR §§ 404.1520(b) and 416.920(b).
4. Since February 12, 1988, the claimant has had a combination of impairments considered "severe"

based on the requirements in the Regulations 20 CFR §§ 404.1520(b) and 416.920(b).

. . .

6. The undersigned finds the claimant's allegations regarding his limitations are not totally credible for the reasons set forth in the body of the decision. The undersigned finds the claimant's wife's allegations regarding the claimant's limitations are not totally credible for the reasons set forth in the body of the decision.

. . .

9. The claimant has no past relevant work (20 CFR §§ 404.1565 and 416.965).

. . .

13. Although the claimant's exertional and non-exertional limitations did not allow him to perform the full range of sedentary work, using Medical-Vocational Rules 201.21 and 201.27 as a framework for decision-making, there are a significant number of jobs in the local and national economies that he could perform between February 12, 1988 and December 9, 1997. Examples of such jobs include work as an information clerk, cashier, and surveillance systems monitor.
14. Based upon an exertional capacity for sedentary work, and the claimant's age, education, and work experience, a finding of disabled is directed by medical-vocational rule 201.09 for the period beginning on December 10, 1997 and continuing at least through the date of this decision.
15. The claimant was not under a "disability" as defined in the Social Security Act, as amended, at any time from March 1, 1979 through December 9, 1997 (20 CFR §§ 404.1520(b) and (f) and 416.920(b) and (f)).

(R. 191-93). The ALJ concluded that plaintiff is disabled, pursuant to Title XVI only, beginning December 10, 1997 and ordered that payment be made for supplemental security income if plaintiff is otherwise eligible. (R. 193).

The Appeals Council did not assert jurisdiction within sixty days and the ALJ's decision became the final decision on remand. 20 C.F.R. §§ 404.984(d), 416.1484(d) (2000); (R. 177-78). Plaintiff thereafter timely filed a complaint seeking judicial review of the decision on remand.

II. LEGAL STANDARD

The Act provides that final decisions of the Commissioner shall be subject to judicial review. 42 U.S.C. §§ 405(g), 1383(c)(3). Section 405(g) provides that "the findings of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." The court shall review the Commissioner's decision to determine only whether the decision is supported by substantial evidence and whether the Commissioner applied the correct legal standards. Glenn v. Shalala, 21 F.3d 983, 984 (10th Cir. 1994); Marshall v. Chater, 75 F.3d 1421, 1425 (10th Cir. 1996). Substantial evidence is more than a scintilla, but less than a preponderance, and is satisfied by such evidence that a reasonable mind might accept to support the conclusion.

Gossett v. Bowen, 862 F.2d 802, 804 (10th Cir. 1988). The determination of whether substantial evidence supports the Commissioner's decision is not simply a quantitative exercise, for evidence is not substantial if it is overwhelmed by other evidence or if it constitutes mere conclusion. Id. at 804-05; Ray v. Bowen, 865 F.2d 222, 224 (10th Cir. 1989).

Although the court is not to reweigh the evidence, the findings of the Commissioner will not be mechanically accepted. Nor will the findings be affirmed by isolating facts and labeling them substantial evidence, as the court must scrutinize the entire record in determining whether the Commissioner's conclusions are rational. Graham v. Sullivan, 794 F. Supp. 1045, 1047 (D. Kan. 1992). The court shall examine the record as a whole, including whatever in the record fairly detracts from the weight of the Commissioner's decision and, on that basis, determine if the decision is supported by substantial evidence in the record. Glenn, 21 F.3d at 984.

The Act provides that an individual shall be determined to be under a disability only if he can establish that he has a physical or mental impairment which prevents him from engaging in substantial gainful activity and is expected to result in death or to last for a continuous period of twelve

months. Plaintiff's physical or mental impairment or impairments must be of such severity that he is not only unable to perform his previous work, but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy. 42 U.S.C. § 423(d).

The claimant has the burden of proving a disability that prevents him from engaging in his prior work activity. The Commissioner has established a five-step sequential process to evaluate whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920 (2001); Ray, 865 F.2d at 224; Gossett, 862 F.2d at 805. "If a determination can be made at any of the steps that a claimant is or is not disabled, evaluation under a subsequent step is not necessary." Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988). In step one, the Commissioner determines whether the claimant is engaged in substantial gainful activity at the time of the determination. Id. Step two considers whether the claimant has a medically severe impairment or combination of impairments which "significantly limits his ability to do basic work activities." Id. at 750-51.

In step three, the Commissioner "determines whether the impairment is equivalent to one of a number of listed

impairments that the [Commissioner] acknowledges are so severe as to preclude substantial gainful activity." Id. at 751 (quoting Bowen v. Yuckert, 482 U.S. 137, 141 (1987)). If the claimant has a listed impairment or its equivalent, he is conclusively presumed to be disabled and is entitled to benefits. Id. If not, the decision-maker must continue to the fourth step--whether the claimant has shown that the impairment prevents him from performing work he has performed in the past. Id. If the claimant is able to perform work he has performed in the past, he is not disabled. Id. If not, the decision-maker must evaluate step five, whether the claimant has the residual functional capacity (RFC) in light of his age, education, and work experience, to perform other work in the national economy. Id.

At step five, the burden shifts to the Commissioner to show that the claimant retains the ability to do other work activity and that jobs the claimant could perform exist in the national economy. Id. The Commissioner meets this burden if the decision is supported by substantial evidence in the record viewed as a whole. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993); Ray, 865 F.2d at 224; Gossett, 862 F.2d at 805. A claimant is placed in one of five RFC categories depending on his capacity for work activity on a

regular and continuing basis. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984). Significantly, a claimant must be able to perform the full range of such work on a daily basis and must possess physical capacities equal to the strength requirements for most of the jobs in that range in order to be placed in a particular RFC category. Id. at 579-80. A claimant is entitled to benefits if the Commissioner cannot establish that the claimant retains the capacity to perform alternative work activity and that this specific type of job exists in the national economy. Williams, 844 F.2d at 751.

III. DISCUSSION

For his first two allegations of error, plaintiff claims the ALJ applied the incorrect legal standard in making a credibility determination and that substantial evidence in the record does not support that determination. Plaintiff also claims the ALJ did not properly weigh the medical source opinion evidence, erred in determining that plaintiff's impairments were not severe between March 1979 and February, 1988, and did not propound a proper hypothetical question to the vocational expert. In plaintiff's final claim, he asserts that the decision on remand is inequitable because it imposed a thirty-five month deferral of plaintiff's disability onset date after an excessive, nineteen-month delay, resulting in a

potential repayment liability and, in effect, giving the Commissioner "another bite at the apple." (Pl. Br., 58). For reasons of efficiency, the court addresses plaintiff's final argument first and the other arguments as they would arise in the five step sequential evaluation process.

A. The ALJ Erred in Conducting a De Novo Review after Remand

Plaintiff claims that the ALJ's de novo review resulted in "another bite at the apple," a nineteen-month delay before the supplemental hearing, and potential liability to repay any supplemental security income payments received between January 1994 and December 1997. These results, in plaintiff's view, are inequitable in light of the remand order. The court construes plaintiff's brief as arguing that the Commissioner did not give the remand order its proper weight and effect as a final judgment of the court entered in civil litigation between the parties.

In response, the Commissioner argues there is no evidence in the record that plaintiff actually received supplemental security income after January 1994, and any "potential" liability for overpayment is not established. Moreover, in the Commissioner's view, de novo review is appropriate here because the regulations provide for such review, because the ALJ is not bound by the first decision, because the Appeals

Council vacated the entire first decision not just the unfavorable portion thereof, and because the court in its remand order did not limit its consideration to the time period between March 1, 1979 and January 3, 1994. The parties' arguments implicate three distinct but related concepts; (1) administrative res judicata, (2) law of the case doctrine, and (3) the res judicata² effect of a remand order issued pursuant to sentence four of § 405(g) of the Social Security Act.

1. ADMINISTRATIVE RES JUDICATA DOES NOT APPLY HERE

Administrative res judicata rests upon the principle that where an administrative agency, acting in a judicial capacity, resolves issues of fact properly before it, and where the parties have had an adequate opportunity to litigate the issues, res judicata will be applied to enforce finality of the decision. United States v. Utah Const. & Min. Co., 384 U.S. 394, 422 (1966). The regulations provide that an ALJ may apply res judicata to dismiss a request for a hearing where

²Here the court uses res judicata in the traditional sense, referring to both claim preclusion (a valid final adjudication of a claim precludes a second action on that claim or any part of it) and issue preclusion, commonly called "collateral estoppel" (an issue of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a subsequent action, whether on the same or a different claim). Baker by Thomas v. General Motors Corp., 522 U.S. 222, 233 n.5 (1998).

the Commissioner has made a previous decision on the same facts and issues and "that decision has become final by either administrative or judicial action." 20 C.F.R.

§§ 404.957(c)(1), 416.1457(c)(1) (2000). Administrative res judicata does not apply in this situation for the simple reason that the first decision did not become final by either administrative or judicial action because it was reversed, remanded, and vacated.

2. LAW OF THE CASE DOCTRINE DOES NOT APPLY HERE

Law of the case doctrine provides that

"once a court decides an issue, the same issue may not be relitigated in subsequent proceedings in the same case" and there must be compliance with the reviewing court's mandate. Ute Indian Tribe v. Utah, 114 F.3d 1513, 1520 (10th Cir. 1997) (emphasis added). Although primarily applicable between courts of different levels, the doctrine and the mandate rule apply to judicial review of administrative decisions, and "require[] the administrative agency, on remand from a court, to conform its further proceedings in the case to the principles set forth in the judicial decision, unless there is a compelling reason to depart."

Grigsby v. Barnhart, 294 F.3d 1215, 1218 (10th Cir. 2002) (quoting Wilder v. Apfel, 153 F.3d 799, 803 (7th Cir. 1998), and citing Brachtel v. Apfel, 132 F.3d 417, 419-20 (8th Cir. 1997)); see also Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988) (doctrine also applies to decisions of a coordinate court made in the same case).

The Tenth Circuit has recognized three "exceptionally narrow" reasons not to apply law of the case doctrine: "(1) when the evidence in a subsequent trial is substantially different; (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues; or (3) when the decision was clearly erroneous and would work a manifest injustice.'" Id., 294 F.3d at 1219, n.4 (quoting Huffman v. Saul Holdings Ltd. P'ship, 262 F.3d 1128, 1133 (10th Cir.2001)).

Because the Grigsby court stated that law of the case applies to judicial review of administrative decisions, it might be argued that the doctrine applies here. However, for reasons discussed herein, the court finds that the general rule stated in Grigsby does not apply here. In Grigsby the Tenth Circuit applied exception number two to law of the case doctrine. It is not clear whether Grigsby is similar to this case because that opinion does not state whether the prior remand was pursuant to sentence four of § 405(g) of the Social Security Act or pursuant to sentence six of that section. Nor does the Grigsby opinion consider the relevant differences between sentence four and six remands.

Supreme Court precedent has demonstrated the difference between remand pursuant to sentence four and remand pursuant

to sentence six of § 405(g) of the Act. Sullivan v. Finkelstein, 496 U.S. 617 (1990); Shalala v. Schaefer, 509 U.S. 292 (1993); Forney v. Apfel, 524 U.S. 266 (1998). In 1989 the Supreme Court held that "where a court orders a remand to the [Commissioner of Social Security] in a benefits litigation and retains continuing jurisdiction over the case pending a decision from the [Commissioner] . . . , the proceedings on remand are an integral part of the 'civil action' for judicial review." Sullivan v. Hudson, 490 U.S. 877, 892 (1989) (emphasis added). The Court has since clarified its holding.

The Court, in 1990, noted that the language of § 405(g) suggests that "each final decision of the [Commissioner] will be reviewable by a separate piece of litigation." Sullivan v. Finkelstein, 496 U.S. 617, 625 (1990). The Court found that a remand order pursuant to the fourth sentence of § 405(g) is a final judgment in a civil action within the meaning of § 405(g), is a judgment which "terminate[s] the civil action challenging the [Commissioner's] final determination," and is a final decision of the district court within the meaning of 28 U.S.C. § 1291. Id. Therefore, the Court held that a sentence four remand order is immediately appealable by the Commissioner pursuant to 28 U.S.C. § 1291. Id.

Three years later, the Court explained the difference between remand pursuant to sentence four and remand pursuant to sentence six of § 405(g). Shalala v. Schaefer, 509 U.S. 292 (1993). A sentence four remand terminates the civil action and makes a subsequent judicial review a separate piece of litigation, whereas in a sentence six remand the district court retains jurisdiction pending completion of the agency proceedings. Id., 509 U.S. at 299-300, 301. The Court held, therefore, that a sentence four remand is a "final judgment" for purposes of the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(B), and stated "the sentence-four, sentence-six distinction is crucial to the structure of judicial review established under § 405(g)." Id., 509 U.S. at 300-01.

In 1998, the Court again addressed the issue of finality of a sentence four remand order and reiterated its holding that the language of § 405(g) "means what it says." Forney v. Apfel, 524 U.S. 266, 269 (1998). Consequently, the Court held that a sentence four remand is a final judgment for purposes of 28 U.S.C. § 1291, and is appealable by the claimant in whose favor remand is ordered if he does not receive all of the relief requested. Id., 524 U.S. at 271-72.

In accordance with these Supreme Court decisions, a sentence four remand is a final judgment which terminates the

case and makes judicial review of a decision after remand a separate piece of litigation. Schaefer, 509 U.S. at 299. Moreover, "the sentence-four, sentence-six distinction is crucial to the structure of judicial review established under § 405(g)." Id., 509 U.S. at 300-01. Therefore, "[a]s is perhaps so obvious as to be difficult to perceive, [a sentence four] order of remand issued in [an] earlier action [is] a final judgment; [the subsequent] action is not 'the same litigation' subject to the doctrine of the law of the case." Hollins v. Apfel, 160 F. Supp. 2d 834, 840 (S.D. Ohio 2001).

Grigsby involved judicial review of a social security decision after what may have been a sentence four remand. Id., 294 F.3d at 1217-18. The appellate court did not identify the type of remand. The district court remanded "to the ALJ for a supplemental hearing so that Plaintiff can testify as to his current situation with alcohol and to submit additional medical evidence concerning current status, treatment, etc. for this alleged alcohol problem." Grigsby, 294 F.3d at 1217. Such language is consistent with a sixth sentence remand for "additional evidence to be taken." 42 U.S.C. § 405(g) (sixth sentence). However, the opinion also indicates that after a new decision, Grigsby filed a complaint for judicial review. Grigsby, 294 F.3d at 1218. This is

inconsistent with the court retaining jurisdiction as in a sixth sentence remand.

In Grigsby, after remand and before the Commissioner's decision on remand, Congress passed legislation requiring an outcome different than that anticipated by the remand order, and the ALJ followed the new legislation rather than the court's order. Id. at 1219. The Tenth Circuit found that the legislation was a contrary decision of the law applicable to the issue, made by a controlling authority, and could properly be applied retroactively. Therefore, the appellate court refused to apply law of the case doctrine and upheld the Commissioner's decision despite the contrary remand order. Id. Hence, although Grigsby states that law of the case doctrine applies, it does not present a situation in which the doctrine was actually applied.

The Grigsby court did not consider the Supreme Court's precedents discussed above. The opinion does not address the precedents. There is no indication that the parties briefed the precedents. The court did not acknowledge any difference between a sentence four or sentence six remand nor state which type of remand the case involved. The court did not determine whether the prior remand was pursuant to sentence four or sentence six and did not, after making that determination,

consider whether law of the case doctrine should apply. Rather, the court found an exception and refused to apply law of the case doctrine. Moreover, because the court found an exception to law of the case, there was no need for the court to investigate whether Grigsby involved a fourth or a sixth sentence remand or whether the doctrine applies to a fourth sentence remand.

The Grigsby court cited recent Seventh and Eighth Circuit cases involving Social Security remands for the general proposition that law of the case doctrine applies on remand to an administrative agency. Grigsby, 294 F.3d at 1218 (quoting Wilder v. Apfel, 153 F.3d 799, 803 (7th Cir. 1998); and citing Brachtel v. Apfel, 132 F.3d 417, 419-20 (8th Cir. 1997)).

While those cases support the proposition that law of the case doctrine is applicable to remand of an administrative agency decision, they do not clearly establish that law of the case doctrine applies in a remand pursuant to the fourth sentence of § 405(g) of the Social Security Act. The Eighth Circuit, in Brachtel, refused to apply law of the case because the district court before remand did not make the finding asserted by plaintiff. Brachtel, 132 F. 3d at 420. Although the Seventh Circuit applied law of the case doctrine, Wilder, 153 F.3d at 803, neither opinion states that the remand at issue

was pursuant to the fourth sentence of § 405(g). Neither opinion considered the Supreme Court's precedents regarding fourth sentence remands, and neither opinion provides any indication that the Court's precedents were argued or briefed to the court.

The Grigsby court refused to apply law of the case doctrine. The Grigsby court's statement of the law is applicable to judicial review of administrative decisions other than those reached after a sentence four remand. The remand in Grigsby was at least potentially a sixth sentence remand. That court did not consider the real issue--whether law of the case doctrine applies to judicial review of the Commissioner's decision after a sentence four remand. And, controlling Supreme Court precedent leads to a conclusion different than would be reached by extending the application of Grigsby to the facts of this case. The court finds that the Grigsby court's statement that "the doctrine and the mandate rule apply to judicial review of administrative decisions," Grigsby, 294 F.3d at 1218, while true as a general statement of the law, is dictum with regard to judicial review of the Commissioner's decisions after a sentence four remand.

Therefore, the court finds that law of the case doctrine does not apply in the circumstances presented here.³

3. CLAIM PRECLUSION DOES NOT APPLY HERE

Res judicata in its traditional sense includes claim preclusion and issue preclusion or "collateral estoppel." General Motors Corp., 522 U.S. at 233 n.5; see also Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984) (res judicata may encompass both claim preclusion and issue preclusion or may refer solely to claim preclusion). Claim preclusion and issue preclusion are principles whereby courts enforce finality of judgment and preclude re-litigation of claims or issues previously decided. Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 398-399 (1981); Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 (1979).

The doctrine of claim preclusion prevents parties from re-litigating issues which were, or could have been, raised in

³Moreover, if, out of an abundance of caution, the court were to apply law of the case doctrine here, it would reach the same conclusions for the same reasons discussed hereinafter regarding issue preclusion. No exceptions to the doctrine apply here because (1) there was no substantial difference in evidence presented during the proceedings on remand, (2) there is no evidence that the Commissioner has made a subsequent contrary decision regarding calculation of the date last insured, and (3) the ALJ did not explain in what way calculation of the date last insured in the first decision was clearly erroneous nor how continuing to apply the allegedly erroneous calculation would work a manifest injustice in this case.

a prior suit. Wilkes v. Wyoming Dept. of Employment Div. of Labor Standards, 314 F.3d 501, 503-04 (10th Cir. 2002). Three elements are necessary to trigger claim preclusion: (1) A final judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits. Id. at 504. The Tenth Circuit has adopted the transactional approach to determining identity of the cause of action. Id. This approach applies "with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Id. "'Under [the transactional] approach, a cause of action includes all claims or legal theories of recovery that arise from the same transaction, event, or occurrence. All claims arising out of the transaction must therefore be presented in one suit or be barred from subsequent litigation.'" Id. (quoting Nwosun v. General Mills Rest., Inc., 124 F.3d 1255, 1257 (10th Cir. 1997)).

The court finds that claim preclusion does not apply to this case. This case satisfies the first two elements of claim preclusion but not the third--identity of cause of action. As previously discussed, a remand order pursuant to sentence four of the Social Security Act is a final judgment on the merits (the first element). The parties before the

court are identical to those before the court in the first judicial review (the second element). There is, however, no identity of cause of action between this judicial review and the first suit.

Perfunctory application of the transactional approach might lead one to believe that there is identity of cause of action between this case and the first suit because both cases involve consideration of plaintiff's alleged disability within the meaning of the Social Security Act during approximately the same period of time. In that sense, the cases involve the same transaction or series of transactions. The decision of the Commissioner in each case involved issues surrounding plaintiff's disability allegations since March of 1979 and, as such, involve a single transaction or series of transactions.

However, the cause of action for judicial review pursuant to § 405(g) is whether the Commissioner applied the correct legal standard and whether the decision is supported by substantial evidence in the record as a whole. The decision being reviewed in the first suit was a decision issued on March 5, 1996. The court determined whether that decision applied the correct legal standard and was supported by substantial evidence in the record. Here, the decision being reviewed was issued by a different ALJ on October 13, 2000 and

the court must determine whether the October 13, 2000 decision applied the correct legal standard and is supported by substantial evidence in the record. The claims and legal theories at issue in a judicial review action are directed at the decision, not at determining or weighing the facts. The focus in a judicial review is on what the Commissioner did and decided. Viewed in that light, the 1996 decision is a separate transaction or occurrence from the 2000 decision.

It might nevertheless be argued that the decisions are a series of transactions. Nevertheless, both § 405(g) of the Act and the remand order in the first suit contemplate at least the possibility of further review after the decision on remand. It would be anomalous to use claim preclusion to prevent a claim contemplated by both the statute and the court. Finally, it was impossible for the 2000 decision to be considered by the district court in 1999, therefore, it cannot be considered the same transaction as the 1996 decision. For these reasons the court finds no identity of cause of action in judicial review of the two separate and distinct decisions, and claim preclusion will not be applied in this case.

4. ISSUE PRECLUSION APPLIES IN THIS CASE

Pursuant to the doctrine of issue preclusion or "collateral estoppel," "[w]hen an issue of ultimate fact has

once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" United States v. Botefuhr, 309 F.3d 1263, 1282 (10th Cir. 2002) (quoting Ashe v. Swenson, 397 U.S. 436, 443 (1970)). Four elements are necessary to trigger issue preclusion: "(1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been fully adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.'" Botefuhr, 309 F.3d at 1282 (quoting Dodge v. Cotter Corp., 203 F.3d 1190, 1197 (10th Cir. 2000)).

a. Identical Issue

"[O]nce a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." Spradling v. City of Tulsa, 198 F.3d 1219, 1222 (10th Cir. 2000) (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980)). In its remand order in the first suit, the court construed the first decision "as finding that the plaintiff could not perform his

past relevant work prior to the expiration of his insured status." (R. 223). The court held that it was the "Commissioner's 'burden to show that [the] point at which claimant became fully disabled was after . . . [March 31, 1985], not the claimant's [burden] to show that that point pre-dated . . . [March 31, 1985].'" (R. 223-24 (quoting Miller v. Chater, 99 F.3d 972, 976 (10th Cir. 1996) (ellipses and dates in the remand order))).

Thus, the court remanded the case "for further proceedings consistent with th[e remand] order." (R. 226 (emphasis added)). The court cautioned the Commissioner that an absence or paucity of evidence may not be used to meet the Commissioner's burden at step five. (R. 224). The inference to be drawn from these facts is that on remand the ALJ was to make the step-five determination whether the Commissioner met her burden to show that plaintiff was able to perform other work activity existing in the national economy at any or all times before March 31, 1985. Issues regarding plaintiff's date last insured, the onset date of plaintiff's disability under Title XVI, whether plaintiff met his step-four burden to show that he is unable to perform his past relevant work, and whether (on his date last insured) plaintiff had past relevant work within the meaning of the Act are issues which arose in

the first suit. To the extent they arise in this suit (or arose in the decision on remand), they are identical to issues previously decided. The first element is met.

b. Fully Adjudicated on the Merits

An issue may be precluded only where the issue was fully adjudicated on the merits. Murdock v. Ute Indian Tribe, 975 F.2d 683, 687 (10th Cir. 1992). "Fully adjudicated on the merits" applies to a determination that was necessary to the judgment in the prior adjudication. Id. (citing Block v. Comm'rs, 99 U.S. 686, 693 (1878) ("[A] judgment of a court of competent jurisdiction is [as between the parties or their privies] everywhere conclusive evidence of every fact upon which it must necessarily have been founded.") (emphasis added); Ins. Co. of N. Am. v. Norton, 716 F.2d 1112, 1115 (7th Cir. 1983) ("It is axiomatic that a party will be precluded by collateral estoppel from relying on an argument only where the determination as to the argument relied on was essential to the judgment in a prior action."); and Segal v. Am. Tel. & Tel. Co., 606 F.2d 842, 845 & n. 2 (9th Cir. 1979) ("For the purpose of issue preclusion (collateral estoppel) . . . relitigation of an issue presented and decided in a prior case is not foreclosed if the decision of the issue was not necessary to the judgment . . ."))).

The issues mentioned above were necessary to the court's judgment in the first suit. Had the court not decided, in its review of the ALJ's step four determination, that plaintiff had past relevant work which he was unable to perform at the expiration of his insured status on March 31, 1985, it could not have found that the analysis must continue at step five and that the burden shifted to the Commissioner to show that plaintiff was able to perform other work before that date. Therefore, the court finds that the following issues were fully adjudicated on the merits in the prior case:

(1) plaintiff's date last insured was March 31, 1985, (2) as of March 31, 1985, plaintiff had past relevant work as that term is defined under the Act and, (3) plaintiff met his burden to establish that, before March 31, 1985, he was unable to perform his past relevant work.

Whether the onset date of plaintiff's disability is an issue necessary to the judgment in the first suit is a closer question. The court in the first suit held that the timing of plaintiff's disability is dispositive of his claim for benefits. (R. 221). The court quoted with favor that portion of the first decision in which the ALJ found that "the debilitating nature of [plaintiff's] condition was present as early as claimant's protected filing date of January 4, 1994."

(R. 222 (emphasis added)). The implication of that quote is that plaintiff was disabled within the meaning of the Act at least by January 4, 1994, but that plaintiff was likely disabled at some unspecified earlier date. Otherwise there would be no need to remand for consideration of step five at any earlier date. The court also quoted the discussion in which the ALJ found that plaintiff could not perform his past relevant work prior to January 4, 1994. Id. The court concluded that the Commissioner had the burden to show that plaintiff was able to perform other work before March 31, 1985 but that the ALJ had failed to decide that question. (R. 223-24). In this context, the remand order reveals that the court agreed with the first decision that plaintiff was disabled, at the latest, by January 4, 1994 and remanded for consideration whether the Commissioner met her burden to prove that plaintiff was able to perform other work activities in the national economy at all relevant times before March 31, 1985. Id. The court finds that the first suit necessarily decided that plaintiff was disabled within the meaning of the Act at least by January 4, 1994. The second element is met.

c. Identical Party

The Commissioner, the party against whom plaintiff seeks to invoke the doctrine of issue preclusion, was a party in the

first suit. The third element is met.

d. Full and Fair Opportunity to Litigate

The court will find that a party has not had a full and fair opportunity to litigate where "there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." Phelps v. Hamilton, 122 F.3d 1309, 1322 (10th Cir. 1997) (quoting Montana v. United States, 440 U.S. 147, 164 n. 11 (1979)). Here, the Commissioner presents no reason to doubt the procedures followed in the first suit.

The Commissioner might argue that she did not have the opportunity to litigate the onset date of plaintiff's disability or plaintiff's date last insured because those findings were made in the first decision and plaintiff did not object to them in his suit for judicial review. However, the reason those issues were not contested in the first suit is that the Commissioner accepted the findings and did not assert jurisdiction to review the ALJ's decision. That decision, therefore, became the position of the Commissioner.

The Commissioner had a full and fair opportunity to litigate those issues. Although the issues were not contested in the first suit, they were, as discussed above, fully adjudicated on the merits. Where the potential preclusive effect of the previous decision is foreseeable, the fact that

a party did not pursue her claims as aggressively as she might have done will not support a finding that she did not have a full and fair opportunity to litigate. Matosantos Commercial Corp. v. Applebee's Intern., Inc., 245 F.3d 1203, 1212 (10th Cir. 2001). Therefore, the fourth element is met. The court finds that the elements of issue preclusion are met and will apply the doctrine in this case.

5. APPLICATION OF ISSUE PRECLUSION TO THIS CASE

Because the doctrine of issue preclusion applies here, the Commissioner may not assert a finding contrary to those findings necessarily decided by the first court without an intervening change in legal conditions.

The doctrines of collateral estoppel and res judicata . . . apply only in cases where controlling facts and law remain unchanged. Commissioner v. Sunnen, 333 U.S. 591, 599-600, 68 S. Ct. 715, 92 L. Ed. 898 (1948). Consequently, res judicata and collateral estoppel are inapplicable where, between the first and second suits, an intervening change in the law or modification of significant facts create new legal conditions. Id.

Spradling v. City of Tulsa, 198 F.3d 1219, 1223 (10th Cir. 2000) (emphasis in original). The Commissioner points to no change in the facts or the law affecting this case which would justify conclusions regarding the issues discussed above different than those reached by the first court. The ALJ in the decision on remand came to conclusions different than the

remanding court but does not point to any change in the controlling law or facts which required reaching those conclusions.

In deciding to make a de novo decision the ALJ made the following analysis:

In its Order of Remand, the United States District Court for the District of Kansas did not restrict itself to just the period from March 1, 1979 (the alleged disability onset date) to January 3, 1994 (the day prior to Judge Krumpke's established onset date [in the first decision]). The Appeals Council vacated all of Judge Krumpke's March 1996 decision, not just the unfavorable part. Counsel submitted additional medical evidence as to both the period prior to January 4, 1994 and since that date. Accordingly, the undersigned will address the whole period from March 1, 1979 through the date of this decision. This is a de novo decision.

(R. 180-81). Although the ALJ mentioned new evidence on remand, the court's review of the decision reveals only three references to evidence not presented before the first decision. The three references are: Plaintiff's complaints of left upper extremity numbness and decreased strength, and diagnosis with a herniated disc in 1998. (R. 183) (apparently referring to R. 302-04, 308-09).⁴ Plaintiff's evaluation by a chiropractor in January 1983 at which straight leg raising was

⁴The court notes that the decision contains no citation whatsoever to the medical records. Nonetheless, the court has made a search of the record and identified the apparent source for each of the ALJ's references to medical evidence.

restricted without additional pain, and range of motion was mildly limited. (R. 184) (apparently referring to R. 280). And, the fact that, in March 1999, plaintiff told his physician that he was drinking a 12-pack of beer each evening and was, therefore, refused neck surgery. Id. (apparently referring to R. 312). Nowhere does the ALJ or the Commissioner explain how these additional facts constitute a change in controlling law or facts sufficient to create new legal conditions and justify a refusal to apply the judgment of the court in the first suit.

In a footnote to his decision, the ALJ explained that the date last insured found by the court in the first suit was based upon the first decision's "erroneous use of the 'annual reporting of earnings' procedure for the period prior to 1978." (R. 180 n.1). Therefore, the ALJ found that plaintiff's date last insured is December 31, 1983. (R. 180). However, even accepting the ALJ's assertion that the first decision was erroneous, an erroneous legal conclusion in the first suit will not prevent application of issue preclusion where there has been no intervening change in the law. Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981); see also Goss v. Goss, 722 F.2d 599, 605 (10th Cir. 1983) (applying Moitie to collateral estoppel). Moreover, the

ALJ did not show what calculation was made in the first decision, how that calculation was erroneously applied, what the correct calculation is, and how that calculation was applied. In short, the assertion is also unreviewable.

The argument that the Appeals Council vacated the first decision and the regulations provide for de novo review is likewise unavailing with regard to issues decided by the court in the first suit. The Appeals Council has authority to vacate the Commissioner's decision but it does not have authority to vacate or modify the decision of the district court. The Council acknowledge this fact when it vacated and remanded the case "for further proceedings consistent with the order of the court." (R. 227).

In her brief, the Commissioner did not cite to the regulations which she believes provide for de novo review after a fourth sentence remand. However, the court's review of the regulations regarding court remand cases reveals some support for the Commissioner's argument. The regulations provide that, in cases remanded by a federal court, the ALJ or the Appeals Council may consider any issues relating to plaintiff's claim "whether or not they were raised in the administrative proceedings leading to the final decision in

[plaintiff's] case." 20 C.F.R. §§ 404.983, 404.984(a), 416.1483, 416.1484(a) (2000).

The regulations, however, do not have the effect of vesting the Commissioner with power to ignore or modify the judgment of the district court. The Act provides that, "The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions." 42 U.S.C. § 405(g) (eighth sentence). The Supreme Court has construed sentence eight to require that if the Commissioner does not appeal a sentence four remand she may not disobey the court's remand order. Finkelstein, 496 U.S. at 625-26.⁵ Moreover, in promulgating the regulations at issue, the Commissioner acknowledged her responsibility to comply with the court's remand order: "Certain court remand orders may specifically direct the [Commissioner] to consider only a particular issue or to follow a procedure other than the procedures specified in these regulations. We may seek to have such orders vacated or modified. If an order is not vacated or modified, we will comply with it." Federal Old-Age, Survivors, and Disability Insurance; Supplemental Security Income for the Aged, Blind, and Disabled; Decisions

⁵The court does not here address the issue of whether the regulations may allow de novo review after a sixth sentence remand.

by Administrative Law Judges in Cases Remanded by the Courts, 54 Fed. Reg. 37789, 37789 (Sept. 13, 1989). The Commissioner did not appeal after the first suit nor seek to have the remand order vacated or modified. She may not now seek to assert findings contrary to the judgment in the first suit.

The basis of the ALJ's argument that de novo review is justified because the district court in the first suit did not restrict itself to the period between March 1, 1979 and January 4, 1994 is mystifying to the court. The court made a judicial review of the first decision pursuant to § 405(g) of the Act. That decision determined plaintiff was not disabled within the meaning of the Act despite his allegations of disability since March 1, 1979, but that plaintiff became disabled within the meaning of the Act on January 4, 1994. (R. 15). The decision covered the period until the date of the decision. (R. 18). The period from March 1, 1979 through the date of the first decision was the period the court was required to, and did, review. The fact that the court considered the entire record and all of the evidence regarding plaintiff's alleged disability throughout the period supports the decision to preclude re-litigation of the issues actually decided. On remand, the ALJ and the Commissioner may not modify or ignore the court's judgment.

The court, therefore, recommends that the district court find that the following issues were decided in the first suit and may not now or on further remand be contested by the Commissioner: (1) Plaintiff's date last insured was March 31, 1985. (2) As of March 31, 1985 plaintiff had past relevant work. (3) Plaintiff met his burden to establish that, before March 31, 1985, he was unable to perform his past relevant work. And, (4) plaintiff was disabled for Title XVI purposes within the meaning of the Act at least by January 4, 1994.

B. The ALJ Erred at Step Two in Finding that Plaintiff Had No Severe Impairments Until February 12, 1988

Plaintiff argues that the ALJ erred in finding that plaintiff had no severe impairments until February 12, 1988. Plaintiff implies that the ALJ refused to acknowledge plaintiff's impairments were severe because there are no laboratory findings to establish severity and argues that medical evidence of spinal problems considered with evidence of intent to perform surgery in February 1976 and consideration of surgery in February 1988 meet the de minimis standard to show severity of impairments. The Commissioner argues, as the ALJ found, that the record fails to reveal a severe impairment or combination of impairments before February 1988.

An impairment is not considered severe if it does not significantly limit claimant's ability to do basic work activities such as walking, standing, sitting, carrying, understanding simple instructions, responding appropriately to usual work situations, and dealing with changes in a routine work setting. 20 C.F.R. §§ 404.1521, 416.921 (2001). The Tenth Circuit has interpreted the regulations and determined that to establish a "severe" impairment at step two of the sequential evaluation process, claimant must make only a "de minimis" showing. Hinkle v. Apfel, 132 F.3d 1349, 1352 (10th Cir. 1997). Claimant need only show that an impairment would have more than a minimal effect on his ability to do basic work activities. Williams, 844 F.2d at 751. However, he must show more than the mere presence of a condition or ailment. Id. (citing Yuckert, 482 U.S. at 153). If an impairment's medical severity is so slight that it could not interfere with or have a serious impact on claimant's ability to do basic work activities, it could not prevent claimant from engaging in substantial work activity and will not be considered severe. Hinkle, 132 F.3d at 1352.

Plaintiff's argument that medical evidence of spinal problems and consideration for surgery prove that his impairments are severe is unavailing because the mere presence

of a condition is insufficient to establish that the condition is a severe impairment. However, the first decision and the first suit establish that plaintiff met his step four burden to prove that he was unable to perform his past relevant work before March 31, 1985. A fortiori, in accordance with the sequential evaluation process, he must have had severe impairments before that date. Therefore, the Commissioner may not assert that plaintiff did not have severe impairment until after that date.

Moreover, the ALJ in the decision on remand found that plaintiff's work activities between 1980 and 1987, giving plaintiff the benefit of the doubt, were unsuccessful work attempts. (R. 181). The regulations provide that the Commissioner "will generally consider work that you are forced to stop after a short time because of your impairment as an unsuccessful work attempt." 20 C.F.R. § 404.1574 (2000).

Because the ALJ found that plaintiff's work activities were unsuccessful work attempts, he necessarily found that plaintiff stopped those work activities because of plaintiff's impairments. See also, (R. 181 ("With one exception, [the work activities from 1980 - 1987] allegedly ended due to the claimant's low back pain.")). If plaintiff's impairments were severe enough to force plaintiff to cease work activities,

they have more than a minimal effect on plaintiff's ability to do basic work activities and, hence, meet the de minimis standard to be classified as "severe impairments." Further, the record reveals without contradiction that plaintiff also quit jobs in 1978 and 1979 due to pain. (R. 98, 298). Therefore, the court finds that plaintiff's impairments were "severe" within the meaning of the regulations throughout the relevant time period since March 1, 1979.

C. The ALJ Applied the Correct Legal Standard to His Credibility Determination, But the Determination Must Be Reconsidered on Remand

Plaintiff claims that the ALJ applied the incorrect legal standard in making his credibility determination and that the evidence in the record does not support the determination. The court will first consider the legal standard applied.

1. THE ALJ APPLIED THE CORRECT LEGAL STANDARD TO HIS CREDIBILITY DETERMINATION

Plaintiff claims the ALJ applied a more stringent legal standard than required at phase two of the Luna analysis and erred in considering factors relating to credibility. Plaintiff claims the ALJ failed to consider the credibility factors required by Luna and considered factors not approved by the Tenth Circuit. Specifically, plaintiff claims the ALJ considered the improper factors "lack of alleged support in medical records, reports from examining physicians and a

tendency to exaggerate." (Pl. Br., 26). The Commissioner argues that the credibility analysis was performed in accordance with the regulations and the requirements of Luna.

a. Standard Regarding Credibility Determination

The Tenth Circuit has explained the analysis for considering subjective testimony regarding symptoms. Thompson v. Sullivan, 987 F.2d 1482, 1488 (10th Cir. 1993) (dealing specifically with pain).

A claimant's subjective allegation of pain is not sufficient in itself to establish disability. Gatson v. Bowen, 838 F.2d 442, 447 (10th Cir. 1988). Before the ALJ need even consider any subjective evidence of pain, the claimant must first prove by objective medical evidence the existence of a pain-producing impairment, Luna v. Bowen, 834 F.2d 161, 163 (10th Cir. 1987) (citing Frey [v. Bowen], 816 F.2d [508,] 515 [(10th Cir. 1987)]); Nieto v. Heckler, 750 F.2d 59 (10th Cir. 1984)), that could reasonably be expected to produce the alleged disabling pain. Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). This court has stated: The framework for the proper analysis of Claimant's evidence of pain is set out in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). We must consider (1) whether Claimant established a pain-producing impairment by objective medical evidence; (2) if so, whether there is a "loose nexus" between the proven impairment and the Claimant's subjective allegations of pain; and (3) if so, whether, considering all the evidence, both objective and subjective, Claimant's pain is in fact disabling. Musgrave v. Sullivan, 966 F.2d 1371, 1375-76 (10th Cir. 1992) (citing Luna, 834 F.2d at 163-64).

Thompson, 987 F.2d at 1488.

In evaluating symptoms, the court has recognized a non-exhaustive list of factors which should be considered. Luna, 834 F.2d at 165-66; see also 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3) (2001). These factors include:

the levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995) (quoting Thompson, 987 F.2d at 1489.

An ALJ's credibility determinations are generally treated as binding on review. Talley v. Sullivan, 908 F.2d 585, 587 (10th Cir. 1990). "Credibility determinations are peculiarly the province of the finder of fact." Diaz v. Sec'y of Health & Human Serv., 898 F.2d 774, 777 (10th Cir. 1990). Therefore, in reviewing the ALJ's credibility determinations, the court will usually "defer to the ALJ as trier of fact, the individual optimally positioned to observe and assess witness credibility." Casias v. Sec'y of Health & Human Serv., 933 F.2d 799, 801 (10th Cir. 1991). However, "[f]indings as to credibility should be closely and affirmatively linked to substantial evidence and not just a conclusion in the guise of

findings." Huston v. Bowen, 838 F.2d 1125, 1133 (10th Cir. 1988).

b. The ALJ's Analysis in the Decision on Remand

The decision on remand does not follow the pattern to which the court has become accustomed in disability decisions pursuant to the Act. Therefore, the court has scrutinized the decision in an effort to ensure that no explanation or finding of the ALJ is overlooked merely because it was not located where the court expected to find it. The ALJ discussed the standard to be applied in a step-two "severity" determination early in the decision (R. 181-82), but reached his step-two conclusions much later. (R. 188).

In the intervening portion of the decision, the ALJ discussed plaintiff's allegations of disabling symptoms (R. 181-82), the legal standard for credibility determination, the factors used to evaluate credibility (R. 182), a summary of the medical evidence (R. 182-83), laboratory findings, clinical signs (R. 183-84), and plaintiff's mental status (R. 184-85). The ALJ stated approximately eighteen distinct reasons for discounting the credibility of plaintiff's allegations of disabling symptoms intermixed with a discussion of the weight given to medical source opinions. (R. 185-88). He concluded that the testimony of both plaintiff and his wife

as to symptoms of disabling severity is not credible. (R. 188). Based upon his analysis of the evidence, the ALJ then concluded that plaintiff's impairments were "severe" after February 11, 1988 but not before.

The ALJ related plaintiff's testimony of low back pain which radiates down his legs and produces limitations in sitting, standing, and walking. (R. 182). The ALJ acknowledged that plaintiff has spinal impairments and impairment of his left shoulder. (R. 188). In stating the standard applicable to his credibility determination, the ALJ cited to Luna and stated that he must consider "all symptoms," "objective medical evidence and other evidence," and "medical opinions." (R. 182). The ALJ summarized the evidence in the record including the testimony of plaintiff and his wife. (R. 182-88).

c. Analysis

Although the ALJ did not specifically lay out the three-phase analysis required by Luna, a fair reading of the opinion reveals that he made the analysis. As mentioned above, he found that plaintiff has established pain-producing impairments by medical evidence, he found a "loose nexus" between the impairments and the allegations of pain, and, therefore, he evaluated all of the evidence to determine

whether plaintiff's allegations were credible. That is the Luna analysis and the court will not require more.

The thrust of plaintiff's argument is that the ALJ did not do a factor-by-factor analysis of the credibility factors required by the regulations and Luna and that he considered factors other than those "approved" by the Tenth Circuit. In the first place, as the court said in Luna, "no such list can be exhaustive." Luna, 834 F.2d at 166. Therefore, the ALJ's use of other factors is not prohibited so long as the factors used are probative of the credibility of plaintiff's allegations. The three factors objected to by plaintiff are factors which might properly indicate that plaintiff's allegations are not credible: lack of support in medical records, reports of examining physicians, and a tendency to exaggerate.

Plaintiff also implies that the ALJ did not consider factors which appear in the regulations and in case law in evaluating plaintiff's credibility. Although plaintiff listed a number of factors, he does not state which factors were not considered and he did not explain how evidence in the record would support the use of those factors. The court's review of the decision and the record reveals that the ALJ considered many of the regulatory factors and that the factors relied

upon by the ALJ relate to evaluation of the credibility of plaintiff's allegations. The court finds, therefore, that the ALJ applied the correct legal standard to his credibility determination.

2. THE ALJ'S CREDIBILITY DETERMINATION MUST BE REMANDED IN LIGHT OF HIS ERRONEOUS FINDING THAT PLAINTIFF'S IMPAIRMENTS WERE NOT SEVERE BEFORE FEBRUARY 12, 1988

If plaintiff's impairments were not severe before February 12, 1988, then his testimony that his symptoms were of disabling severity before that date cannot be credible. The court found, contrary to the ALJ's finding, that plaintiff's impairments were severe at all relevant times since March 1, 1979. Therefore, remand is necessary for the ALJ to consider the credibility of plaintiff's allegations in light of the severity of plaintiff's impairments.

Although the court perceives that much of the ALJ's argument and analysis regarding plaintiff's credibility is appropriate, the court is concerned that the ALJ improperly considered portions of the medical evidence. In the decision on remand, the ALJ implied that plaintiff's allegations are incredible because certain medical records do not record certain of plaintiff's complaints. Yet there is no medical evidence or expert testimony that plaintiff's complaints, if true, would necessarily be recorded in those records.

For example, the ALJ made the following statement in the decision on remand:

When being treated for a left shoulder injury in 1983, during a 1984 consultative examination by Joseph W. Huston, M.D., and when being treated for back pain in 1988, the claimant made no mention of a right hand condition and no right upper extremity abnormalities were recorded. During an April 30, 1994 consultative examination by John Chamberlin, M.D., there were no right hand complaints.

(R. 182).

The "left shoulder injury in 1983" was a broken clavicle. The records do not reveal that any questions regarding any other complaints were asked at that time (R. 89, 129-30), and there is no medical evidence from which one could infer that plaintiff should have mentioned a right hand condition or right upper extremity abnormality when being treated for a broken clavicle. In his report of the 1984 consultative examination, Dr. Huston noted that plaintiff "is being seen today concerning chronic complaints of his lower back." (R. 152). Although the physician does mention other medical problems, such as a scar and a prominence over the right tibial tubercle, these seem to be observations of obvious physical conditions. (R. 153). There is no indication the physician asked about plaintiff's other complaints and no medical evidence from which one might infer plaintiff should have mentioned them in the circumstances. In 1988, plaintiff

was treated for back pain complaints (R. 85-88, 125-26), but there is no indication the physicians asked about plaintiff's other complaints and no medical evidence from which one might infer that plaintiff should have volunteered them.

The report of plaintiff's 1994 consultative examination reveals that Dr. Chamberlin sought a medical history from plaintiff. (R. 80-83). The report indicates that plaintiff's chief complaints are "Back and arthritis," and that other past medical history is "noncontributory." (R. 80). One might properly infer that plaintiff did not report any right hand complaints to Dr. Chamberlin and that he would have done so if the symptoms were of disabling severity.

As this example indicates, in two sentences of the decision, the ALJ made four statements, all literally true, but only one of which leads to the inference which the ALJ seems to have reached.

In the same paragraph from which the court quoted above, the ALJ stated, "During an October 18, 1994 consultative examination by Sharon L. McKinney, D.O., the claimant made no complaints as to his upper right extremity." (R. 182). While this statement is also literally true, it does not reveal Dr. McKinney's statement that plaintiff "was not able to give a very coherent history but I think I have most of it." (R.

77). Moreover, Dr. McKinney's report reveals that plaintiff's grip and pinch strength are both less on the left than on the right. Dr. McKinney's report might thus be viewed as supporting the inference that there is an impairment in plaintiff's right upper extremity.

On pages four through six of the decision (R. 182-84), there are six additional instances where the ALJ stated that plaintiff failed to express certain symptoms when being treated for complaints relating to other symptoms. While each statement is literally true, in none of the record to which the ALJ refers is there any indication the physician asked about plaintiff's other complaints. Nor is there medical evidence in the record from which one might infer plaintiff should have voluntarily mentioned the other symptoms in the circumstances presented. The court is left with the distinct impression that the ALJ was forcing the evidence farther than it will go. On remand, the ALJ may not draw inferences which are unsupported in the record. The ALJ may not impermissibly ignore the evidence as a whole while choosing to abstract pieces of evidence favorable to his position. O'Connor v. Shalala, 873 F. Supp. 1482, 1491 (D. Kan. 1995); Jones v. Sullivan, 804 F. Supp. 1398, 1406 (D. Kan. 1992); Claassen v. Heckler, 600 F. Supp. 1507, 1511 (D. Kan. 1985).

Plaintiff also complains that the ALJ improperly evaluated the credibility of his wife's testimony. The ALJ appears to have applied much of his analysis regarding plaintiff's testimony to that of plaintiff's wife. Because he must re-evaluate plaintiff's testimony on remand, the ALJ must also re-evaluate his consideration of plaintiff's wife's testimony.

D. Remaining Issues

Plaintiff claims that the ALJ improperly evaluated the medical source opinions and propounded an improper hypothetical question to the vocational expert. Although the court is inclined to agree with the ALJ's analysis of the medical source opinions, the opinions should be considered on remand in light of the court's findings regarding the severity of plaintiff's impairments. The hypothetical question will no doubt be affected by this court's order and the further findings of the Commissioner on remand. Therefore, it is inappropriate for the court, in the first instance, to evaluate or propose hypothetical questions at this time.

IT IS THEREFORE RECOMMENDED that the district court find that the following issues were decided in the first suit and that the Commissioner is precluded from asserting otherwise: (1) Plaintiff's date last insured was March 31, 1985. (2) As

of March 31, 1985 plaintiff had past relevant work.

(3) Plaintiff met his burden to establish that, before March 31, 1985, he was unable to perform his past relevant work.

And, (4) plaintiff was disabled for Title XVI purposes within the meaning of the Act at least by January 4, 1994.

IT IS FURTHER RECOMMENDED that this case be remanded pursuant to the fourth sentence of 42 U.S.C. § 405(g) for further proceedings consistent with this Recommendation and Report to make the step five determination whether, between March 1, 1979 and March 31, 1985, plaintiff was able to perform other work existing in significant numbers in the local or national economies.

Copies of this recommendation and report shall be mailed to counsel of record for the parties. Pursuant to 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72(b), and D. Kan. Rule 72.1.4, the parties may serve and file written objections to this recommendation within ten days after being served with a copy.

Dated this 27th day of March 2003, at Wichita, Kansas.

S/John Thomas Reid

JOHN THOMAS REID
United States Magistrate Judge