

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

AMANDA KING,

Plaintiff,

vs.

Case No. 09-1332-SAC

MICHAEL J. ASTRUE,  
Commissioner of  
Social Security,

Defendant.

MEMORANDUM AND ORDER

This is an action reviewing the final decision of the Commissioner of Social Security denying the plaintiff disability insurance benefits and supplemental security income payments. The matter has been fully briefed by the parties.

**I. General legal standards**

The court's standard of review is set forth in 42 U.S.C. § 405(g), which provides that "the findings of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." The court should review the Commissioner's decision to determine only whether the decision was supported by substantial evidence and whether the Commissioner applied the correct legal standards. Glenn v. Shalala, 21 F.3d 983, 984 (10th Cir. 1994). Substantial evidence requires 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. 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 really constitutes mere conclusion. 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 should 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 substantiality of the evidence test has been met. Glenn, 21 F.3d at 984.

The Social Security Act provides that an individual shall be determined to be under a disability only if the claimant can establish that they have a physical or mental impairment expected to result in death or last for a continuous period of twelve months which prevents the claimant from engaging in substantial gainful activity (SGA). The claimant's physical or mental impairment or impairments must be of such severity that they are not only unable to perform their previous work but cannot, considering their 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 Commissioner has established a five-step sequential evaluation process to determine disability. If at any step a finding of disability or non-disability can be made, the Commissioner will not review the claim further. At step one, the agency will find non-disability unless the claimant can show that he or she is not working at a "substantial gainful activity." At step two, the agency will find non-disability unless the claimant shows that he or she has a "severe impairment," which is defined as any "impairment or combination of impairments which significantly limits [the claimant's] physical or mental ability to do basic work activities." At step three, the agency determines whether the impairment which enabled the claimant to survive step two is on the list of impairments presumed severe enough to render one disabled. If the claimant's impairment does not meet or equal a listed impairment, the inquiry proceeds to step four, at which the agency assesses whether the claimant can do his or her previous work; unless the claimant shows that he or she cannot perform their previous work, they are determined not to be disabled. If the claimant survives step four, the fifth and final step requires the agency to consider vocational factors (the claimant's age, education, and past work experience) and to determine whether the claimant is capable of performing other

jobs existing in significant numbers in the national economy.

Barnhart v. Thomas, 124 S. Ct. 376, 379-380 (2003).

The claimant bears the burden of proof through step four of the analysis. Nielson v. Sullivan, 992 F.2d 1118, 1120 (10<sup>th</sup> Cir. 1993). At step five, the burden shifts to the Commissioner to show that the claimant can perform other work that exists in the national economy. Nielson, 992 F.2d at 1120; Thompson v. Sullivan, 987 F.2d 1482, 1487 (10<sup>th</sup> Cir. 1993). The Commissioner meets this burden if the decision is supported by substantial evidence. Thompson, 987 F.2d at 1487.

Before going from step three to step four, the agency will assess the claimant's residual functional capacity (RFC). This RFC assessment is used to evaluate the claim at both step four and step five. 20 C.F.R. §§ 404.1520(a)(4), 404.1520(e,f,g); 416.920(a)(4), 416.920(e,f,g).

## **II. History of case**

On April 15, 2009, administrative law judge (ALJ) Robert J. Burbank issued his decision (R. at 10-20). Plaintiff is insured for disability insurance benefits through September 30, 2012 (R. at 12). At step one, the ALJ found that plaintiff engaged in substantial gainful activity until February 1, 2007; this is the earliest onset of disability that can be established (R. at 12). At step two, the ALJ found that plaintiff had the following severe impairments: a history of juvenile arthritis and current

osteoarthritis (R. at 12). At step three, the ALJ determined that plaintiff's impairments do not meet or equal a listed impairment (R. at 14). After determining plaintiff's RFC (R. at 15), the ALJ found at step four that plaintiff is unable to perform any past relevant work (R. at 19). At step five, the ALJ found that plaintiff could perform other jobs that exist in significant numbers in the national economy (R. at 20). Therefore, the ALJ concluded that plaintiff was not disabled (R. at 20).

**III. Did the ALJ err by failing to list certain impairments as severe at step two?**

At step two, the ALJ found that plaintiff had severe impairments of a history of juvenile diabetes and current osteoarthritis (R. at 12). Plaintiff argues that the ALJ erred by not listing plaintiff's asthma, difficulty using her hands for prolonged periods due to pain, and depression as severe impairments at step two (Doc. 11 at 12).

The issue before the court is whether it is reversible error if the ALJ fails to list all the severe impairments at step two. In Brescia v. Astrue, 287 Fed. Appx. 626, 628-629 (10<sup>th</sup> Cir. July 8, 2008), the claimant argued that the ALJ improperly determined that several of her impairments did not qualify as severe impairments. The court held that once an ALJ has found that plaintiff has at least one severe impairment, a failure to

designate another as "severe" at step two does not constitute reversible error because, under the regulations, the agency at later steps considers the combined effect of all of the claimant's impairments without regard to whether any such impairment, if considered separately, would be of sufficient severity. In Hill v. Astrue, 289 Fed. Appx. 289, 291-292 (10<sup>th</sup> Cir. Aug. 12, 2008), the court held that once the ALJ finds that the claimant has any severe impairment, he has satisfied the analysis for purposes of step two. The ALJ's failure to find that additional alleged impairments are also severe is not in itself cause for reversal. However, the ALJ, in determining plaintiff's RFC, must consider the effects of all of the claimant's medically determinable impairments, both those he deems "severe" and those "not severe."

The ALJ stated that in making his RFC findings he considered all symptoms and the extent to which these symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence. The ALJ also indicated that he considered the opinion evidence (R. at 15). The ALJ limited plaintiff to sedentary work because of plaintiff's asthma and arthritis (R. at 19). Furthermore, in making his RFC findings, the ALJ discussed the evidence relating to the use of her hands, and noted that plaintiff indicated in a report that she had denied problems using her hands (R. at 18). At step two, the ALJ

found that plaintiff did not have a severe mental impairment, relying on a consultative examination from Dr. Schwartz and a state agency assessment by Dr. Blum and Dr. Schulman indicating that plaintiff did not have a severe mental impairment (R. at 13-14, 248-249, 257-274). In light of the fact that the ALJ found other severe impairments at step two, and considered all symptoms and evidence in the subsequent steps of the sequential evaluation process, the court finds no reversible error by the ALJ at step two.

**IV. Are the ALJ's RFC findings supported by substantial evidence?**

According to SSR 96-8p, the RFC assessment "must include a narrative discussion describing how the evidence supports each conclusion, citing specific medical facts...and nonmedical evidence." The ALJ must explain how any material inconsistencies or ambiguities in the evidence in the case record were considered and resolved. The RFC assessment must always consider and address medical source opinions. If the RFC assessment conflicts with an opinion from a medical source, the ALJ must explain why the opinion was not adopted. SSR 96-8p, 1996 WL 374184 at \*7. SSR rulings are binding on an ALJ. 20 C.F.R. § 402.35(b)(1); Sullivan v. Zebley, 493 U.S. 521, 530 n.9, 110 S. Ct. 885, 891 n.9, 107 L. Ed.2d 967 (1990); Nielson v. Sullivan, 992 F.2d 1118, 1120 (10<sup>th</sup> Cir. 1993). When the ALJ fails to provide a narrative

discussion describing how the evidence supports each conclusion, citing to specific medical facts and nonmedical evidence, the court will conclude that his RFC conclusions are not supported by substantial evidence. See Southard v. Barnhart, 72 Fed. Appx. 781, 784-785 (10<sup>th</sup> Cir. July 28, 2003). The ALJ's decision must be sufficiently articulated so that it is capable of meaningful review; the ALJ is charged with carefully considering all of the relevant evidence and linking his findings to specific evidence. Spicer v. Barnhart, 64 Fed. Appx. 173, 177-178 (10<sup>th</sup> Cir. May 5, 2003). It is insufficient for the ALJ to only generally discuss the evidence, but fail to relate that evidence to his conclusions. Cruse v. U.S. Dept. of Health & Human Services, 49 F.3d 614, 618 (10<sup>th</sup> Cir. 1995). When the ALJ has failed to comply with SSR 96-8p because he has not linked his RFC determination with specific evidence in the record, the court cannot adequately assess whether relevant evidence supports the ALJ's RFC determination. Such bare conclusions are beyond meaningful judicial review. Brown v. Commissioner of the Social Security Administration, 245 F. Supp.2d 1175, 1187 (D. Kan. 2003).

The ALJ's RFC findings limited plaintiff to "perform the full range of sedentary work" (R. at 15). The ALJ discussed the RFC opinions set forth by Dr. Shaver, a treatment provider, and set forth reasons for not giving his opinions either controlling



or substantial weight except to the extent that those opinions would limit plaintiff to sedentary work (R. at 17-18). Although the ALJ acknowledged that Dr. Shaver had noted limitations for the plaintiff in the use of her hands, he also noted that plaintiff had denied problems using her hands and engaged in a wide range of activities using her hands (R. at 17-18). In two function reports filled out by the plaintiff, on April 18, 2007, and again on September 21, 2007, plaintiff indicated that her impairments did not impact the use of her hands (R. at 149, 151, 193, 195). The court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Hackett v. Barnhart, 395 F.3d 1168, 1173 (10<sup>th</sup> Cir. 2005); White v. Barnhart, 287 F.3d 903, 905, 908, 909 (10<sup>th</sup> Cir. 2002).

The ALJ also mentioned the opinion of the state agency assessment approved by Dr. Parsons (R. at 296-305). In that assessment, Dr. Parsons indicated that, under postural limitations, that plaintiff was limited to only occasional climbing, balancing, stooping, kneeling, crouching and crawling (R. at 298). Under environmental limitations, Dr. Parsons indicated that plaintiff needed to avoid concentrated exposure to extreme cold, vibration and fumes, odors, dusts, gases, poor ventilation, etc. (R. at 300). The ALJ noted these limitations by Dr. Parsons, but stated that:

...these factors are not generally present in

sedentary work (Social Security Rulings 83-14 and 85-15).

(R. at 19). For this reason, these limitations were not included by the ALJ in plaintiff's RFC. Dr. Shaver also included postural and environmental limitations for the plaintiff (R. at 309, 326). Dr. Shaver agreed with Dr. Parsons that plaintiff was limited to occasional balancing (R. at 309, 326). Dr. Parsons also indicated that plaintiff should avoid either concentrated, moderate or any exposure to various environmental factors (R. at 309, 326). Therefore, the undisputed medical opinion evidence was that plaintiff had some postural and environmental limitations. Plaintiff alleges error by the ALJ because he did not include these limitations in plaintiff's RFC (Doc. 11 at 22-23).

The ALJ asserts that occasional limitations in postural maneuvers and the need to avoid concentrated exposure to extreme cold, vibration and airborne irritants (fumes, odors, dusts, gases, poor ventilation, etc.) are factors that are not generally present in sedentary work. It is true that few occupations in the unskilled sedentary base require work in environments with extreme cold, extreme heat, wetness, humidity, vibrations, or unusual hazards. Even a need to avoid all exposure to these conditions would not, by itself, result in a significant erosion of the sedentary occupational base. SSR 96-9p, 1996 WL 374185 at 9. Regarding exposure to fumes, dust, gases, poor ventilation,

etc., both Dr. Shaver and Dr. Parsons limited plaintiff to concentrated exposure (R. at 300, 309). However, when a person has a medical restriction to avoid excessive amounts of dust, etc., the impact on the broad world of work would be minimal because most job environments do not involve great amounts of dust, etc. SSR 85-15, 1985 WL 56857 at \*8. Therefore, the court finds that the ALJ's conclusion that the need to avoid concentrated exposure to cold, vibration and airborne irritants would not have a significant impact on the ability to perform sedentary work is supported by the applicable Social Security Rulings.

However, the ALJ has failed to consider the relevant Social Security Ruling regarding the impact on balancing limitations on plaintiff's ability to perform sedentary work. Balancing limitations are specifically addressed in SSR 96-9p. It indicates, in relevant part, the following:

Postural limitations...would not usually erode the occupational base for a full range of sedentary work significantly because those activities are not usually required in sedentary work...However, if an individual is limited in balancing only on narrow, slippery, or erratically moving surfaces, this would not, by itself, result in a significant erosion of the unskilled sedentary occupational base. However, if an individual is limited in balancing even when standing or walking on level terrain, there may be significant erosion of the unskilled sedentary occupational base. It is important to state in the RFC assessment what is meant by limited balancing in order to determine

the remaining occupational base.  
Consultation with a vocational resource may  
be appropriate in some cases.

SSR 96-9p, 1996 WL 374185 at \*7 (emphasis added).

Contrary to the ALJ's assertion that limitations in balancing is not a limitation that would impact the ability to perform sedentary work, SSR 96-9p clearly states that limited balancing may result in significant erosion of the sedentary base. SSR 96-9p, 1996 WL 374185 at \*7; Gilmore-Williams v. Astrue, Case No. 09-1276-SAC (Doc. 19 at 8-9), 2010 WL 2952406 at \*4 (D. Kan. July 26, 2010); Sexton v. Barnhart, Case No. 05-1192-JTM (Doc. 15 at 12 n.2), 2006 WL 4045984 at \*5 (D. Kan. June 29, 2006). Therefore, it is important to state in the RFC assessment what is meant by limited balancing in order to determine the remaining occupational base. SSR 96-9p, 1996 WL 374185 at \*7; Sexton, (Doc. 15 at 12 n.2), 2006 WL 4045984 at \*5.

As noted above, the undisputed medical opinion evidence is that plaintiff is limited to occasional balancing. The ALJ made a conclusory statement that a limitation to occasional balancing would not impact the ability to perform sedentary work. The court finds that the ALJ's conclusory statement that a limitation in balancing is not a limitation that would impact the ability to perform sedentary work is not supported by substantial evidence, and clearly conflicts with SSR 96-9p. As noted above, SSR rulings are binding on an ALJ. Therefore, this case shall be

remanded in order for the ALJ to consider the impact of this limitation on plaintiff's ability to perform sedentary work in accordance with SSR 96-9p.

Furthermore, the record does not provide any medical evidence that clearly supports the ALJ's RFC finding. The ALJ found that the opinions of Dr. Shaver were "not entitled to substantial weight in any area except to document the claimant's restriction to sedentary employment" (R. at 18). However, nothing in Dr. Shaver's assessments supports a finding that plaintiff can perform sedentary work on a full-time basis. The ALJ also stated that the opinions expressed by Dr. Parsons "have not been given substantial weight" (R. at 19). Thus, the ALJ did not rely on any medical opinion evidence in making his RFC findings.

Dr. Shaver opined on two occasions that plaintiff would need to lie down or recline every 2 hours in order to alleviate symptoms during an 8 hour workday (R. at 309, 326). Plaintiff testified that she has to lay down or sit with her feet propped up to prevent swelling and pain and to help with circulation (R. at 28, 30, 34). The two function reports filled out by the plaintiff did not ask her if she needed to lie down during the day or keep her feet raised up while sitting (R. at 144-151, 188-195). However, in one of the reports, plaintiff did indicate that she sat on the couch in the evening and kept her foot raised

up (R. at 144). Thus, nothing in the function reports disputes either the opinion of Dr. Shaver or plaintiff's testimony regarding her need to recline or lie down or raise her feet while sitting. Although the state agency assessment by Dr. Parsons did not indicate that plaintiff needed to lie down, recline, or keep her feet raised up, the ALJ found that the opinions of Dr. Parsons have not been given substantial weight. Thus, the ALJ points to no substantial evidence that plaintiff does not need to lie down, recline or raise her legs and feet while sitting.

The ALJ must make every effort to ensure that the file contains sufficient evidence to assess RFC. Without evidence to support his findings, the ALJ is not in a position to make an RFC determination. Fleetwood v. Barnhart, 211 Fed. Appx. 736, 740 (10<sup>th</sup> Cir. Jan. 4, 2007). In Fleetwood, the court stated that the ALJ should consider contacting the treating doctor(s) in order to obtain sufficient evidence upon which to base an RFC finding; if that option does not provide sufficient evidence, the ALJ may order a consultative examination. 211 Fed. Appx. at 741.

In the case of Lamb v. Barnhart, 85 Fed. Appx. 52, 55-57 (10<sup>th</sup> Cir. Dec. 11, 2003), the court held that the ALJ must ensure that a sufficient record exists to evaluate the claimant's exertional and nonexertional limitations. The court noted that while the ALJ is not limited to considering only medical evidence, the ALJ's duty to develop the record may include

obtaining additional evidence from a treating physician or ordering a consultative examination if the record does not otherwise contain sufficient evidence upon which to base an RFC finding.

In the case before the court, there is no competent medical evidence to support the ALJ's determination that plaintiff can perform a full range of sedentary work. Neither Dr. Shaver nor Dr. Parsons indicated that plaintiff could perform a full range of sedentary work; furthermore, the ALJ did not give substantial weight to either opinion. The undisputed medical evidence is that plaintiff is limited to occasional balancing. The ALJ must state what is meant by limited balancing in order to determine the remaining occupational base. This will likely require additional medical opinion evidence. Furthermore, in light of the opinion of Dr. Shaver that plaintiff needs to recline or lie down every two hours, and the testimony of plaintiff that she needs to either lie down or elevate her feet when sitting, the ALJ should consider obtaining additional medical opinion evidence on this issue as well.

**V. Did the ALJ err in his credibility analysis?**

Plaintiff argues that the ALJ erred in his credibility analysis (Doc. 11 at 26). Credibility determinations are peculiarly the province of the finder of fact, and a court will not upset such determinations when supported by substantial

evidence. However, findings as to credibility should be closely and affirmatively linked to substantial evidence and not just a conclusion in the guise of findings. Kepler v. Chater, 68 F.3d 387, 391 (10<sup>th</sup> Cir. 1995). Furthermore, the ALJ cannot ignore evidence favorable to the plaintiff. Owen v. Chater, 913 F. Supp. 1413, 1420 (D. Kan. 1995).

When analyzing evidence of pain, the court does not require a formalistic factor-by-factor recitation of the evidence. So long as the ALJ sets forth the specific evidence he relies on in evaluating the claimant's credibility, the ALJ will be deemed to have satisfied the requirements set forth in Kepler. White v. Barnhart, 287 F.3d 903, 909 (10<sup>th</sup> Cir. 2002); Qualls v. Apfel, 206 F.3d 1368, 1372 (10<sup>th</sup> Cir. 2000). Furthermore, the ALJ need not discuss every relevant factor in evaluating pain testimony. Bates v. Barnhart, 222 F. Supp.2d 1252, 1260 (D. Kan. 2002). An ALJ must therefore explain and support with substantial evidence which part(s) of claimant's testimony he did not believe and why. McGoffin v. Barnhart, 288 F.3d 1248, 1254 (10<sup>th</sup> Cir. 2002). It is error for the ALJ to use standard boilerplate language which fails to set forth the specific evidence the ALJ considered in determining that a claimant's complaints were not credible. Hardman v. Barnhart, 362 F.3d 676, 679 (10<sup>th</sup> Cir. 2004). On the other hand, an ALJ's credibility determination which does not rest on mere boilerplate language, but which is linked to



specific findings of fact fairly derived from the record, will be affirmed by the court. White, 287 F.3d at 909-910.

The court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Hackett v. Barnhart, 395 F.3d 1168, 1173 (10<sup>th</sup> Cir. 2005); White v. Barnhart, 287 F.3d 903, 905, 908, 909 (10<sup>th</sup> Cir. 2002). Although the court will not reweigh the evidence, the conclusions reached by the ALJ must be reasonable and consistent with the evidence. See Glenn v. Shalala, 21 F.3d 983, 988 (10<sup>th</sup> Cir. 1994)(the court must affirm if, considering the evidence as a whole, there is sufficient evidence which a reasonable mind might accept as adequate to support a conclusion). The court can only review the sufficiency of the evidence. Although the evidence may support a contrary finding, the court cannot displace the agency's choice between two fairly conflicting views, even though the court may have justifiably made a different choice had the matter been before it de novo. Oldham v. Astrue, 509 F.3d 1254, 1257-1258 (10<sup>th</sup> Cir. 2007).

The ALJ stated in his decision that plaintiff's work history showed that plaintiff only worked sporadically prior to the alleged onset of disability (the ALJ determined that the earliest date for an onset of disability was February 1, 2007), which raised a question as to whether plaintiff's continuing unemployment is actually due to medical impairments (R. at 17).

The ALJ also questioned plaintiff's assertion that she stopped working due to pain, stating that her delay in seeking medical treatment suggested that her symptoms were not as limiting as she alleged (R. at 16). Not mentioned by the ALJ is the fact that the record includes a questionnaire filled out by plaintiff's supervisor in a job she held at White's Foodliner from July 31, 2006 through April 20, 2007 (R. at 141-143). The questionnaire included the following questions and answers:

3. Were there any limitations or impairments in the employee's ability to perform the job duties? If so, please describe.

(answer): Yes, limped around on ankle (slow)

5. Did the employee have problems performing their expected duties in a timely and satisfactory manner? If so, please explain.

(answer): Yes, slow speed

7. Was the employee able to concentrate adequately? If not, please describe.

(answer): No, said she was in pain.

11. Were there any noticeable changes in the employee's performance during the employment (e.g. absenteeism, tardiness)? If so, please describe them.

(answer): Absent, had trouble walking

12. If the employee is no longer employed here, was the job terminated on a voluntary or non-voluntary basis? What were the reasons for termination?

(answer): Had trouble staying on shift until 6:00 & absent too much

13. Has this person ever worked a fulltime schedule for you? Was there a need to adjust or reduce this schedule due to performance?

(answer): Several months ago Amanda volunteered to take an extra day off because she thought it would make her ankle feel better

(R. at 142-143). The supervisor indicated that he would not rehire plaintiff because she was not dependable (R. at 143).

In Blea v. Barnhart, 466 F.3d 903 (10<sup>th</sup> Cir. 2006), the ALJ failed to discuss or consider the lay testimony of the claimant's wife; the ALJ's decision failed to mention any of the particulars of the testimony of claimant's wife, and in fact, never even mentioned the fact that she did testify regarding the nature and severity of her husband's impairments. The court held as follows:

In actuality, the ALJ is not required to make specific written findings of credibility only if "the written decision reflects that the ALJ considered the testimony." Adams, 93 F.3d at 715. "[I]n addition to discussing the evidence supporting his decision, the ALJ also must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects." Clifton v. Chater, 79 F.3d 1007, 1009 (10th Cir.1996).

Here, the ALJ made no mention of Mrs. Blea's testimony, nor did he refer to the substance of her testimony anywhere in the written decision. Thus, it is not at all "clear that the ALJ considered [Mrs. Blea's] testimony in making his decision." Adams, 93 F.3d at 715. Additionally, Mrs. Blea's testimony regarding her husband's suicidal thoughts is not only uncontroverted; it serves to corroborate Dr.

Padilla's psychiatric examination of Mr. Blea, where he stated that Mr. Blea has been dysthymic for years. [citation to record omitted] Thus, the ALJ's refusal to discuss why he rejected her testimony violates our court's precedent, and requires remand for the ALJ to incorporate Mrs. Blea's testimony into his decision. "Without the benefit of the ALJ's findings supported by the weighing of this relevant evidence, we cannot determine whether his conclusion[s] ... [are] supported by substantial evidence." Threet, 353 F.3d at 1190; see also Baker v. Bowen, 886 F.2d 289, 291 (10th Cir.1989) ("[W]here the record on appeal is unclear as to whether the ALJ applied the appropriate standard by considering all the evidence before him, the proper remedy is reversal and remand.").

Blea, 466 F.3d at 915.

The statement of plaintiff's former employer is uncontroverted and provides at least some corroboration for the allegations by the plaintiff of limitations that prevent her from working on a full-time basis. Plaintiff raised as an issue in her brief the failure of the ALJ to consider this statement (Doc. 11 at 26-27). Although defendant argues that this statement has little relevance to the issue of performing sedentary work, an ALJ's decision should be evaluated based solely on the reasons stated in the decision. Robinson v. Barnhart, 366 F.3d 1078, 1084 (10<sup>th</sup> Cir. 2004). A decision cannot be affirmed on the basis of appellate counsel's post hoc rationalizations for agency action. Knipe v. Heckler, 755 F.2d 141, 149 n.16 (10<sup>th</sup> Cir. 1985). A reviewing court may not create post hoc rationalizations to explain the Commissioner's treatment of

evidence when that treatment is not apparent from the Commissioner's decision. Grogan v. Barnhart, 399 F.3d 1257, 1263 (10<sup>th</sup> Cir. 2005). By considering legal or evidentiary matters not considered by the ALJ, a court risks violating the general rule against post hoc justification of administrative action. Allen v. Barnhart, 357 F.3d 1140, 1145 (10<sup>th</sup> Cir. 2004). The ALJ never mentioned the statement and therefore offered no explanation for why it should be accorded little or no weight. Furthermore, even sedentary work requires a certain amount of walking and standing. 20 C.F.R. § 404.1567(a).

In light of: (1) the ALJ's failure to mention this statement, (2) the ALJ's statement questioning whether plaintiff stopped work due to pain, and (3) the ALJ's statement that her sporadic work history prior to the alleged onset date of disability raises a question as to whether the plaintiff's continuing unemployment is actually due to medical impairments, the statement by the former employer should be considered when this case is remanded. The ALJ shall make new credibility findings in light of all the evidence, and should determine what weight, if any, should be accorded to this statement as part of the credibility determination.

IT IS THEREFORE ORDERED that the judgment of the Commissioner is reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with

this memorandum and order.

Dated this 22<sup>nd</sup> day of October, 2010, Topeka, Kansas.

s/ Sam A. Crow

Sam A. Crow, U.S. District Senior Judge