

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

CYNTHIA PERRY,

Plaintiff,

vs.

Case No. 10-1006-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 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 June 23, 2008, administrative law judge (ALJ) Michael R. Dayton issued his decision (R. at 16-24). At step one, the ALJ found that plaintiff has not engaged in substantial gainful activity since September 27, 2005, the application date (R. at 18). At step two, the ALJ found that plaintiff had the following severe impairments: degenerative disc disease of the cervical spine, mild arthritic changes to the left knee, history of right ankle fracture with multiple surgeries and fusion, history of

right leg fracture, hypertension, and possible seizure disorder (R. at 18). At step three, the ALJ determined that plaintiff's impairments do not meet or equal a listed impairment (R. at 19). After determining plaintiff's RFC (R. at 19), the ALJ found at step four that plaintiff is unable to perform any past relevant work (R. at 23). At step five, the ALJ found that plaintiff could perform other jobs that exist in significant numbers in the national economy (R. at 23-24). Therefore, the ALJ concluded that plaintiff was not disabled (R. at 24).

**III. Did the ALJ err in his finding that plaintiff's impairments did not meet listed impairment 1.02A?**

At step three, plaintiff has the burden of demonstrating, through medical evidence, that his/her impairments meet all of the specified medical criteria contained in a particular listing. Riddle v. Halter, 10 Fed. Appx. 665, 667 (10<sup>th</sup> Cir. March 22, 2001). An impairment that manifests only some of those criteria, no matter how severely, does not qualify. Sullivan v. Zebley, 493 U.S. 521, 530, 110 S. Ct. 885, 891 (1990). Because the listed impairments, if met, operate to cut off further inquiry, they should not be read expansively. Caviness v. Apfel, 4 F. Supp.2d 813, 818 (S.D. Ind. 1998).

The ALJ is required to discuss the evidence and explain why he found that the plaintiff was not disabled at step three. This court should not properly engage in the task of weighing evidence

in disability cases. The court's function is only to review the Commissioner's decision to determine whether his factual findings are supported by substantial evidence and whether he applied the correct legal standards. In the absence of ALJ findings supported by specific weighing of the evidence, the court cannot assess whether relevant evidence adequately supports the ALJ's conclusion that the plaintiff did not meet or equal any listed impairment. Clifton v. Chater, 79 F.3d 1007, 1009 (10<sup>th</sup> Cir. 1996).

Listed impairment 1.02A states as follows:

*Major dysfunction of a joint(s) (due to any cause):* Characterized by gross anatomical deformity (e.g., subluxation, contracture, bony or fibrous ankylosis, instability) and chronic joint pain and stiffness with signs of limitation of motion or other abnormal motion of the affected joint(s), and findings on appropriate medically acceptable imaging of joint space narrowing, bony destruction, or ankylosis of the affected joint(s). With:

A. Involvement of one major peripheral weight-bearing joint (i.e., hip, knee, or ankle), resulting in inability to ambulate effectively, as defined in 1.00B2b.

1.00B2b *What we mean by Inability to Ambulate Effectively*

(1) *Definition.* Inability to ambulate effectively means an extreme limitation of the ability to walk; i.e., an impairment(s) that interferes very seriously with the individual's ability to independently initiate, sustain, or complete activities. **Ineffective ambulation is defined generally as having insufficient lower extremity**

**functioning (see 1.00J) to permit independent ambulation without the use of a hand-held assistive device(s) that limits the functioning of both upper extremities...**

(2) *To ambulate effectively*, individuals must be capable of sustaining a reasonable walking pace over a sufficient distance to be able to carry out activities of daily living. They must have the ability to travel without companion assistance to and from a place of employment or school. Therefore, examples of ineffective ambulation include, but are not limited to, the inability to walk without the use of a walker, two crutches or two canes, the inability to walk a block at a reasonable pace on rough or uneven surfaces, the inability to use standard public transportation, the inability to carry out routine ambulatory activities, such as shopping and banking, and the inability to climb a few steps at a reasonable pace with the use of a single hand rail. The ability to walk independently about one's home without the use of assistive devices does not, in and of itself, constitute effective ambulation.

20 C.F.R. Pt. 404, Subpt. P, App. 1 (2010 at 458, 454, emphasis added).

The ALJ provided the following explanation for his finding that plaintiff's impairments did not meet listed impairment 1.02:

Although the claimant has musculoskeletal impairments, she does not have an "extreme" limitation in the ability to walk or perform fine and gross movements effectively as defined in section 1.02...The claimant has a history of right ankle and right leg fracture with these injuries determined to be stable. She does have mild degenerative disease of the left knee and cervical spine. However, there is no history of extreme limitation as required by this listing.

(R. at 19). Plaintiff, citing to 1.02A, argues that the ALJ did not make sufficient findings and failed to adequately explain the findings he made (Doc. 11 at 9-10).

The ALJ found that plaintiff does not have an extreme limitation in the ability to walk, which is required to demonstrate that a claimant's impairment meets listed impairment 1.02A. Ineffective ambulation, or an extreme limitation in the ability to walk, is generally defined as having insufficient lower extremity functioning to permit independent ambulation without the use of a hand-held assistive device that limits the use of both upper extremities (e.g., the inability to walk without the use of a walker, two crutches or two canes). Other examples of ineffective ambulation include the inability to use standard public transportation.

As noted above, plaintiff has the burden of proving that her impairments meet or equal a listed impairment. However, plaintiff fails to cite to any medical opinion evidence that her impairments meet listed impairment 1.02A. Furthermore, Dr. Daily, her treating physician, released her to work on May 1, 2007, noting only that she may need frequent breaks to rest the right leg and ankle (R. at 416). He stated on April 30, 2007 that he was releasing her to "full activities today" (R. at 415). He further indicated that she is ambulating without any assistive devices, but he wrote her a prescription for a cane that she can



use at times (R. at 415).

As noted above, ineffective ambulation is defined generally as having insufficient lower extremity functioning to permit independent ambulation without the use of a hand-held assistive device(s) that limits the use of both upper extremities. The evidence in this case is that plaintiff sometimes uses one cane; there is no evidence that she requires the use of a hand-held assistive device that limits the use of both upper extremities.

Another definition of ineffective ambulation is the inability to use standard public transportation. At the hearing, plaintiff testified that she had to walk six blocks to catch the bus that day (R. at 657, 656).

The ALJ found that there is no evidence of extreme limitation in her ability to walk. The court finds that plaintiff has failed to point to substantial evidence of her inability to ambulate effectively, or an extreme limitation in her ability to walk. Furthermore, the evidence in this case, including from her treatment providers, also does not support plaintiff's assertion that she is unable to ambulate effectively. The court finds that the ALJ's step three finding that plaintiff's impairment does not meet listed impairment 1.02A is supported by substantial evidence.

#### **IV. Did the ALJ err in making his RFC findings?**

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).

The ALJ made the following RFC findings:

After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to perform a range of work with the ability to lift and carry 20 pounds occasionally and 10 pounds frequently, stand/walk (with normal breaks) for a total of at least 2 hours in an 8 hour workday 30 minutes maximum at one time. Sit (with normal breaks) about 6 hours in an 8 hour workday, push and pull same restrictions as lift and carry. Occasionally climb ramps/stairs, but never use ladders/ropes/scaffolds. Balancing, stooping, kneeling, crawling are all limited to occasional, never on crouching. Overhead reaching limited to occasionally due to the neck. The claimant should avoid even moderate exposure to extreme cold, fumes, odors, dusts, gases, poor ventilation. The claimant has slight limitations in her ability to understand, remember and carry out short, simple and detailed instructions. The claimant has slight limitations in her ability to respond to work pressures in a

usual work setting, as well as respond appropriately to changes in a routine work setting. Slight is defined as some mild limitations in the area but the individual can function well.

(R. at 19).

First, plaintiff argues that the ALJ erred by failing to mention the opinions of Dr. Daily, a treating physician. As noted above, Dr. Daily stated on April 30, 2007 that plaintiff was released to "full activities" that day. He indicated that she is ambulating without any assistive devices, but that he had prescribed a cane for plaintiff "that she can use at times" (R. at 415). He stated that she may return to work on May 1, 2007, but may need frequent breaks to rest the right leg and ankle (R. at 416). The ALJ did not expressly mention these medical reports by Dr. Daily.

The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence. Rather, in 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 that he rejects. Clifton v. Chater, 79 F.3d 1007, 1009-1010 (10<sup>th</sup> Cir. 1996). An ALJ must evaluate every medical opinion in the record, although the weight given to each opinion will vary according to the relationship between the disability claimant and the medical professional.

When an ALJ rejects a treating physician's opinion, he must articulate "specific, legitimate reasons for his decision." An ALJ must also consider a series of specific factors in determining what weight to give any medical opinion. Hamlin v. Barnhart, 365 F.3d 1208, 1215 (10<sup>th</sup> Cir. 2004). Even on issues reserved to the Commissioner, including plaintiff's RFC and the ultimate issue of disability, opinions from any medical source must be carefully considered and must never be ignored. Social Security Ruling (SSR) 96-5p, 1996 WL 374183 at \*2-3. It is clear legal error to ignore a medical opinion. Victory v. Barnhart, 121 Fed. Appx. 819, 825 (10<sup>th</sup> Cir. Feb. 4, 2005).

According to SSR 96-8p:

If the RFC assessment conflicts with an opinion from a medical source, the adjudicator must explain why the opinion was not adopted.

1996 WL 374184 at \*7. Furthermore, according to SSR 96-5p:

Adjudicators must weigh medical source statements under the rules set out in 20 CFR 404.1527 and 416.927, providing appropriate explanations for accepting or rejecting such opinions.

1996 WL 374183 at \*5.

The key question is therefore whether the RFC assessment conflicts with the opinion of Dr. Avery. The ALJ's RFC findings indicate that plaintiff can only stand/walk for a total of 2 hours in an 8 hour workday, 30 minutes maximum at one time (R. at 19). The ALJ noted that plaintiff had testified that she could

stand for 25-30 minutes at a time (R. at 21, 651). The ALJ found that plaintiff credibly experienced pain in the right ankle and leg with prolonged standing or walking, but further found that the evidence did not establish an inability to do a range of sedentary work (R. at 22-23). With the RFC limitations provided by the ALJ, the vocational expert (VE) limited plaintiff to sedentary work (R. at 160). Sedentary work is defined as work that involves sitting, but that also requires the ability to occasionally stand and walk. 20 C.F.R. § 404.1567(a).

Thus, plaintiff is limited to work that primarily involves sitting. Plaintiff only has to stand/walk for a maximum of 2 hours in an 8 hour workday, and consistent with her testimony, she only has to stand/walk for no more than 30 minutes at a time. Dr. Daily released plaintiff on April 30, 2007 to "full activities," noting that she was ambulating without any assistive device, but prescribed for her a cane that she could use at times. He released her to work, noting that she would need frequent breaks to rest the right leg and ankle. When plaintiff is seated, her right leg and ankle are at rest. The ALJ's finding that plaintiff can stand/walk for 2 hours in an 8 hour day is not clearly inconsistent with the opinion of Dr. Daily, and the ALJ's further finding that she only had to stand/walk for no more than 30 minutes at a time is consistent with plaintiff's own testimony. On these facts, the court finds that the RFC

assessment does not clearly conflict with the opinions of Dr. Daily.

Furthermore, plaintiff provides no evidence that the opinions of Dr. Daily clearly conflict with the RFC assessment. For example, plaintiff could have provided the VE with the information from Dr. Daily's reports in order to determine from the VE if this information would impact plaintiff's ability to perform the jobs that had been identified by the VE. However, even when plaintiff's counsel was given the opportunity to present further questions to the VE, plaintiff's counsel chose not to question the VE further regarding the statements by Dr. Daily, and their impact, if any, on plaintiff's ability to perform the jobs that had been identified (R. at 164-167). Because the RFC assessment does not clearly conflict with the opinions of Dr. Daily, including the lack of any evidence that the opinions of Dr. Daily would impact the ability of plaintiff to perform the jobs that had been identified by the VE, the ALJ did not err by failing to expressly discuss his opinions.

Second, plaintiff argues that the ALJ did not consider her impairments of headaches, side effects of medication, and her use of a cane. Although the ALJ did mention that plaintiff had headaches (R. at 21), plaintiff argues that the ALJ erred because he did not provide any analysis of how the headaches affected the plaintiff. However, plaintiff does not cite to any evidence that

plaintiff's headaches have any impact on her ability to work. The ALJ is not required to discuss every piece of evidence; he is only required to discuss uncontroverted evidence he chooses not to rely on or significantly probative evidence that he rejected. Clifton, 79 F.2d at 1009-1010. Given the plaintiff's failure to cite to any evidence that plaintiff's impairments had some impact on plaintiff's ability to work, the court finds no error by the ALJ in his analysis of plaintiff's headaches.

Plaintiff also claims error by the ALJ in his consideration of plaintiff's medication. The ALJ noted that plaintiff testified that she takes pain medication which makes her sleepy (R. at 21). However, the ALJ found that plaintiff's statements and testimony were not fully credible. The ALJ's credibility findings will be addressed later in this order.

Finally, plaintiff claims error by the ALJ because he did not consider plaintiff's use of a cane. In his decision, the ALJ did not mention plaintiff's use of a cane. According to SSR 96-9p, cited to by the plaintiff:

Medically required hand-held assistive device: To find that a hand-held assistive device is medically required, there must be medical documentation establishing the need for a hand-held assistive device to aid in walking or standing, and describing the circumstances for which it is needed...

Since most unskilled sedentary work requires only occasional lifting and carrying of light objects such as ledgers and files and a maximum lifting capacity for only 10 pounds,

an individual who uses a medically required hand-held assistive device in one hand may still have the ability to perform the minimal lifting and carrying requirements of many sedentary unskilled occupations with the other hand...On the other hand, the occupational base for an individual who must use such a device for balance because of significant involvement of both lower extremities...may be significantly eroded.

SSR 96-9p, 1996 WL 374185 at \*7. According to Dr. Daily, plaintiff in April 2007 was able to ambulate without any assistive devices, although a cane was prescribed that plaintiff can use at times. There is no medical evidence that plaintiff needed hand-held assistive devices in both hands. In light of the undisputed medical evidence that indicated that plaintiff would only occasionally need a hand-held assistive device in one hand, SSR 96-9p states that such a person may still have the ability to perform the minimal lifting and carrying requirements of many sedentary unskilled occupations with the other hand. On these facts, the court finds no error by the ALJ in his failure to address the medical evidence that plaintiff was prescribed a cane to be used at times.

Third, plaintiff argues that the ALJ did not adequately link his RFC findings with the evidence. The ALJ stated that his findings are in agreement with the medical opinions of the state agency medical consultants (R. at 22). The court has reviewed the physical RFC assessment (R. at 213-222) and a psychological evaluation by Dr. Moeller (626-642), and finds that the ALJ's RFC



findings are nearly identical to the opinions expressed in these assessments. There is no other medical opinion evidence that provides opinions regarding plaintiff's RFC, other than Dr. Daily's statements, which were previously noted and found not to clearly conflict with the RFC findings of the ALJ. It is therefore abundantly clear that the ALJ's RFC findings rest on the opinions expressed in these two uncontroverted assessments.

There are in fact only two variations between the two assessments and the ALJ's RFC findings. Although the state agency physical RFC assessment found that plaintiff should avoid even moderate exposure to vibrations, the ALJ did not include that limitation in his RFC findings. On the other hand, the ALJ included a limitation that plaintiff avoid even moderate exposure to fumes, odors, dusts, gases, poor ventilation, etc. even though this limitation was not in the state agency assessment (R. at 19, 217). No explanation was provided by the ALJ for these variations. The court therefore does not know if these variations were intentional or accidental; the court would note that the two categories are next to each other on the assessment form (R. at 217).

According to SSR 96-9p, few occupations in the unskilled sedentary occupational base require work in environments with vibrations. Even a need to avoid all exposure to this and other environmental conditions would not, by itself, result in a

significant erosion of the occupational base. SSR 96-9p, 1996 WL 374185 at \*9. Therefore, the failure of the ALJ to either include a limitation to avoid moderate exposure to vibrations or provide an explanation for not including this limitation, on the facts of this case, is harmless error.

Furthermore, the addition of a limitation by the ALJ which is not in the state agency physical RFC assessment is not error because a finding of additional limitations cannot make it more difficult to find that a claimant is disabled, but can only help or assist the claimant in a finding that he is disabled. Even plaintiff conceded that the inclusion of this limitation was reasonable based on the evidence (Doc. 11 at 15-16).

In summary, the court finds no error by the ALJ in his RFC findings. The ALJ's RFC findings are based on the state agency assessments and they do not clearly conflict with any medical opinion evidence.

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

The framework for the proper analysis of evidence of pain is that the Commissioner 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.

Kepler v. Chater, 68 F.3d 387, 390-91 (10th Cir. 1995); Thompson v. Sullivan, 987 F.2d 1482, 1488-89 (10th Cir. 1993); Luna v. Bowen, 834 F.2d 161, 163-65 (10th Cir. 1987). If an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence. For example, an impairment likely to produce some back pain may reasonably be expected to produce severe back pain in a particular claimant. Luna, 834 F.2d at 164. Symptoms can sometimes suggest a greater severity of impairment than is demonstrated by objective and medical findings alone. Direct medical evidence of the cause and effect relationship between the impairment and the degree of claimant's subjective complaints need not be produced. Luna, 834 F.2d at 165. The absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot justify disregarding those allegations. When determining the credibility of pain testimony the ALJ should consider 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. Thompson, 987 F.2d at 1489.<sup>1</sup>

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,

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<sup>1</sup>The factors listed in the regulations are similar to the factors noted in Thompson. They are: objective medical evidence; daily activities; location, duration, frequency, and intensity of pain or other symptoms; precipitating and aggravating factors; type, dosage, effectiveness, and side effects of medications taken to relieve pain or other symptoms; treatment, other than medication, for pain or other symptoms; measures plaintiff has taken to relieve pain or other symptoms; and other factors concerning limitations or restrictions resulting due to pain or other symptoms. 20 C.F.R. §§ 404.1529(c)(2),(3)(i-vii), 416.929(c)(2),(3)(i-vii).

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).

In discounting plaintiff's credibility, the ALJ noted that this was plaintiff's eighth application for disability; all previous applications had been denied (R. at 22). The court finds no error when this is considered as one of many factors, as the ALJ did in this case. The ALJ also found that plaintiff was not particularly work-motivated, with lifetime earnings (1976-2006) of under \$30,000.00 (R. at 22, 80-81). One factor that the ALJ can properly consider when determining plaintiff's credibility is plaintiff's earnings and work record. Bean v. Chater, 77 F.3d 1210, 1213 (10<sup>th</sup> Cir. 1995)(claimant's prior work record can be considered as one of several factors bearing on claimant's credibility). Courts have found that substantial evidence supports an ALJ's conclusion that plaintiff lacks motivation to work when her work record is poor and/or her wages are low. Yeates v. Barnhart, 187 F. Supp.2d 1318, 1333 (D. Kan. 2002). Therefore, the court finds that the ALJ did not err by considering plaintiff's prior work record as one of several factors bearing on plaintiff's credibility.

The ALJ also clearly relied on the medical evidence, including the fact that no doctor who treated or examined the plaintiff found that plaintiff was disabled (R. at 22). There is no medical opinion evidence in the record which clearly conflicts with the ALJ's RFC findings. The ALJ, in making his RFC findings, gave great weight to the medical opinion evidence and discounted plaintiff's allegations of disability or limitations that were greater than the medical opinion evidence.

Furthermore, as the ALJ noted, Dr. Moeller, as a result of psychological testing, found that plaintiff appeared to be over-endorsing her degree of current impairment (R. at 22, 631). It is not unreasonable for the ALJ to give greater weight to the medical opinion evidence, especially in light of the opinion of Dr. Moeller that plaintiff appeared to be over-endorsing her degree of current impairment. Furthermore, the court will not reweigh the evidence.

The court finds no error by the ALJ in his credibility analysis. The ALJ set forth the specific evidence he relied on in finding that plaintiff was not as limited as she alleged; the ALJ linked his credibility determination to specific findings of fact fairly derived from the record. The court finds that the ALJ's credibility findings are reasonable; there is sufficient evidence which a reasonable mind might accept as adequate to support the ALJ's credibility findings.

IT IS THEREFORE ORDERED that the judgment of the  
Commissioner is affirmed pursuant to the fourth sentence of 42  
U.S.C. § 405(g).

Dated this 21st day of December, 2010, Topeka, Kansas.

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