

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RAGENIA G. SHORT,

Plaintiff,

vs.

Case No. 14-4075-SAC

CAROLYN W. COLVIN,
Acting 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 (10th 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 (10th 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 March 1, 2013, administrative law judge (ALJ) Robert J. Burbank issued his decision (R. at 15-26). Plaintiff alleges that she had been disabled since June 11, 2009 (R. at 15). Plaintiff meets the insured status requirements for social security disability benefits through June 30, 2012 (R. at 17).

At step one, the ALJ found that plaintiff did not engage in substantial gainful activity since June 11, 2009, the alleged onset date (R. at 17). At step two, the ALJ found that plaintiff had severe impairments of status post right femur surgery, degenerative disc disease of the lumbar spine and obesity (R. at 17). At step three, the ALJ determined that plaintiff's impairments do not meet or equal a listed impairment (R. at 18). After determining plaintiff's RFC (R. at 19), the ALJ determined at step four that plaintiff was unable to perform past relevant work (R. at 24). At step five, the ALJ found that plaintiff can perform other jobs that exist in significant numbers in the national economy (R. at 25-26). Therefore, the ALJ concluded that plaintiff was not disabled (R. at 26).

III. Are the ALJ's credibility findings supported by substantial evidence?

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 (10th 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 (10th Cir. 2002); Qualls v. Apfel, 206 F.3d 1368, 1372 (10th 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 (10th 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 (10th 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 (10th Cir. 2005); White v. Barnhart, 287 F.3d

903, 905, 908, 909 (10th 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 (10th 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 (10th Cir. 2007).

In his decision, the ALJ, when discussing treatment notes in 2012, indicated that "there was no mention of the claimant utilizing a cane or other assistance device in physician's treatment notes" (R. at 21). Later, after noting plaintiff's assertion that she must utilize a cane when she leaves the house, the ALJ stated "there is very little mention of the need for assistance devices in treatment records" (R. at 23).

However, the treatment records indicate the following:

(1) March 9, 2010: Pt [plaintiff] ambulates with spc [single point cane (R. at 520)] (R. at 448).

(2) March 30, 2010: Plaintiff walks with cane (R. at 441).

(3) August 26, 2010: Plaintiff does not have difficulty with walking, but does use a single point cane (R. at 520).

(4) September 24, 2010: Plaintiff is supposed to walk with a cane but does not always use it and will hold on periodically to her husband or another object (R. at 412).

(5) July 15, 2011: Plaintiff can walk only about 300 feet with a cane, and she does use a cane (R. at 518).

(6) June 11, 2012: A cane is listed under medications to use as directed when ambulating (R. at 584).

(7) October 31, 2012: A cane is listed under medications to use as directed when ambulating (R. at 578).

(8) December 11, 2012: A cane is listed under medications to use as directed when ambulating (R. at 566).

Thus, contrary to the ALJ's assertion, when referencing treatment notes in 2012 (Exhibit 25F), that there was no mention of plaintiff utilizing a cane, the last three entries set forth above from 2012 are from Exhibit 25F, and list a cane as a current medication to use as directed when ambulating. Contrary to the ALJ's assertion that there is very little mention of the need for assistance devices in the treatment records, the treatment records in fact indicate that plaintiff uses a cane, is supposed to walk with a cane, can only walk about 300 feet with a cane, and that a cane is listed as a medication to use as directed when ambulating. Despite according minimal weight to the opinions of Dr. Veloor, the medical records are in fact consistent with the opinion of Dr. Veloor that plaintiff needs

an assistive device for ambulation (R. at 525). These findings by the ALJ are not supported by substantial evidence.

When evaluating plaintiff's credibility, the ALJ also stated that "no source has suggested that the claimant is chair or bed-ridden and needs extra assistance" (R. at 23). However, it is well-settled law that a claimant need not prove she is bedridden or completely helpless to be found disabled. Reed v. Barnhart, 399 F.3d 917, 923 (8th Cir. 2005). One does not need to be utterly or totally incapacitated in order to be disabled. Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir. 2001); Jones v. Sullivan, 804 F. Supp. 1398, 1405 (D. Kan. 1992). Plaintiff does not allege that she is chair or bed-ridden.

Furthermore, the mere fact that plaintiff's physicians recommend physical activity and that plaintiff can handle some activity (R. at 23-24) does not indicate that plaintiff is able to work. According to the regulations, activities such as taking care of yourself, household tasks, hobbies, therapy, school attendance, club activities or social programs are generally not considered to constitute substantial gainful activity. 20 C.F.R. § 404.1572(c) (2014 at 399).

The ALJ further noted that plaintiff testified that she cares for her children, cares for her personal needs with the assistance of her husband, folds the laundry, and does dishes sitting down. She also indicated she goes to the store with her

family, rides a bike, and attends church on occasion. The ALJ concluded that plaintiff's allegations are not entirely credible (R. at 23).

Although the nature of daily activities is one of many factors to be considered by the ALJ when determining the credibility of testimony regarding pain or limitations, Thompson v. Sullivan, 987 F.2d 1482, 1489 (10th Cir. 1993), the ALJ must keep in mind that the sporadic performance of household tasks or work does not establish that a person is capable of engaging in substantial gainful activity. Krauser v. Astrue, 638 F.3d 1324, 1332-1333 (10th Cir. 2011); Thompson, 987 F.2d at 1490.

In the case of Draper v. Barnhart, 425 F.3d 1127, 1130-1131 (8th Cir. 2005), the ALJ noted that the claimant engaged in household chores, including laundry, grocery shopping, mowing, cooking, mopping and sweeping. The ALJ concluded that claimant's allegations of disabling pain were inconsistent with her reports of her normal daily activities and were therefore not deemed credible. The court found that substantial evidence did not support this conclusion, holding as follows:

The fact that Draper tries to maintain her home and does her best to engage in ordinary life activities is not inconsistent with her complaints of pain, and in no way directs a finding that she is able to engage in light work. As we said in McCoy v. Schweiker, 683 F.2d 1138, 1147 (8th Cir.1982) (en banc), the test is whether the claimant has "the ability to perform the requisite physical

acts day in and day out, in the sometimes competitive and stressful conditions in which real people work in the real world." In other words, evidence of performing general housework does not preclude a finding of disability. In Rainey v. Dep't of Health & Human Servs., 48 F.3d 292, 203 (8th Cir.1995), the claimant washed dishes, did light cooking, read, watched TV, visited with his mother, and drove to shop for groceries. We noted that these were activities that were not substantial evidence of the ability to do full-time, competitive work. In Baumgarten v. Chater, 75 F.3d 366, 369 (8th Cir.1996), the ALJ pointed to the claimant's daily activities, which included making her bed, preparing food, performing light housekeeping, grocery shopping, and visiting friends. We found this to be an unpersuasive reason to deny benefits: **"We have repeatedly held...that 'the ability to do activities such as light housework and visiting with friends provides little or no support for the finding that a claimant can perform full-time competitive work.'"** Id. (quoting Hogg v. Shalala, 45 F.3d 276, 278 (8th Cir.1995)). Moreover, we have reminded the Commissioner

that to find a claimant has the residual functional capacity to perform a certain type of work, the claimant must have the ability to perform the requisite acts day in and day out, in the sometimes competitive and stressful conditions in which real people work in the real world...The ability to do light housework with assistance, attend church, or visit with friends on the phone does not qualify as the ability to do substantial gainful activity.

Thomas v. Sullivan, 876 F.2d 666, 669 (8th Cir.1989) (citations omitted).

Draper, 425 F.3d at 1131 (emphasis added).

In Hughes v. Astrue, 705 F.3d 276 (7th Cir. 2013), the court stated:

[The ALJ] attached great weight to the applicant's ability to do laundry, take public transportation, and shop for groceries. We have remarked the naiveté of the Social Security Administration's administrative law judges in equating household chores to employment. "The critical differences between activities of daily living and activities in a full-time job are that a person has more flexibility in scheduling the former than the latter, can get help from other persons (... [her] husband and other family members), and is not held to a minimum standard of performance, as she would be by an employer. The failure to recognize these differences is a recurrent, and deplorable, feature of opinions by administrative law judges in social security disability cases [citations omitted]."

705 F.3d at 278. Therefore, the fact that she cares for her children and her personal needs, shops, rides a bike and attends church does not demonstrate that plaintiff can perform full-time competitive work, and is not inconsistent with plaintiff's allegation of disability. This is especially true in light of her testimony that she needs the assistance of her husband when caring for her personal needs (bathing and putting on shoes (R. at 20)), and that she does dishes sitting down.

The ALJ noted that objective evidence does not support the degree of limitation alleged by plaintiff, noting a number of

test results, including a Doppler study which was found to be normal (R. at 22). A right lower extremity venous Doppler study on March 24, 2010 was negative (R. at 500, 515). However, the ALJ failed to mention a second such test performed on June 16, 2011. This test indicated that "there is venous insufficiency with reflux in the right lower extremity. This could potentially cause a variety of symptoms including swelling, discomfort, and varicose veins (R. at 495). The medical report states that the indication is edema¹ and pain in the right foot and ankle, which is improved with supine² position (R. at 496). This report is consistent with the opinion of Dr. Veloor that plaintiff would need to lie down 2-3 times a day (R. at 524).

Although an ALJ is not required to discuss every piece of evidence, the ALJ must discuss significantly probative evidence which he rejects. Mays v. Colvin, 739 F.3d 569, 576 (10th Cir. 2014). Given the fact that the ALJ relied on a negative Doppler study in 2010, the ALJ should have considered the positive 2011 Doppler study indicating a variety of symptoms (including swelling and pain), and indicating that the symptoms improved if plaintiff was lying down.

The court has found a number of errors by the ALJ when evaluating plaintiff's credibility and looking at the medical

¹ Edema is defined as the swelling of soft tissues as a result of excess fluid accumulation. Webster's New World Medical Dictionary (3rd ed. 2008 at 134).

² Supine is defined as lying face up. Webster's New World Medical Dictionary (3rd ed. 2008 at 407).

evidence. Furthermore, the medical evidence regarding plaintiff's use of a cane when ambulating and the 2011 Doppler study support the opinions expressed by Dr. Veloor on July 15, 2011 that plaintiff needs an assistive device for ambulating and needs to lie down 2-3 times a day to alleviate edema and pain in the right foot and ankle. In light of these errors, the court finds that the ALJ's credibility determination was flawed because many of the ALJ's credibility findings were not closely and affirmatively linked to substantial evidence. Furthermore, on remand, the ALJ will need to reevaluate the medical opinion evidence in light of the errors noted above which provide some support to the opinions expressed by Dr. Veloor on July 15, 2011 (R. at 523-526). Finally, the ALJ shall make new RFC findings after the ALJ has reevaluated plaintiff's credibility and the medical opinion evidence.

IV. Did the ALJ err at step two in finding that regional pain syndrome was a non-medically determined impairment?

On May 27, 2010, Dr. Dick stated that he suspected that plaintiff has a fragment of RSD (complex regional pain syndrome). Dr. Dick then stated that plaintiff's pain, which does not meet the criteria for complex regional pain syndrome, would be chronic limb pain (R. at 624). The ALJ relied on this report to find that regional pain syndrome is a non-medically determined impairment.

The ALJ stated that "there was no diagnosis of regional pain syndrome in the record" (R. at 18). However, in her evaluation of June 22, 2010, Dr. Veloor stated that it was her impression that plaintiff had "right foot pain, possible due to complex regional pain syndrome" (R. at 516). Dr. Veloor went on to say that it is possible that plaintiff has developed complex regional pain syndrome as a result of this traumatic injury (R. at 516). Again, on July 15, 2011, Dr. Veloor stated that plaintiff had right foot numbness, tingling and swelling, possibly due to complex regional pain syndrome (R. at 518). On remand, the ALJ should consider these findings by Dr. Dick and Dr. Veloor.

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 28th day of August 2015, Topeka, Kansas.

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