

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

THATH THEVATHATH,

Plaintiff,

vs.

JO ANNE B. BARNHART, Commissioner of
the Social Security Administration,

Defendant.

No. 4:02-cv-40384

O R D E R

Plaintiff seeks review of the Social Security Commissioner's decision denying disability insurance benefits under Title II of the Social Security Act ("the Act"), 42 U.S.C. §§ 401 et seq. The Court reviews the final decision of the Social Security Commissioner pursuant to section 205(g) of the Act, 42 U.S.C. § 405(g) (providing for judicial review of final decision on disability insurance benefits).

PROCEDURAL HISTORY

Plaintiff, Thath Thevathath ("Thevathath" or "Claimant"), protectively filed an application for disability insurance benefits on March 13, 1999. The Social Security Administration ("SSA") denied the applications on both the initial determination and the reconsidered determination.

Claimant then sought a hearing with an administrative law judge. The requested hearing was held in front of Administrative Law Judge Jean M. Ingrassia ("ALJ") on September 13, 2001. On November 13, 2001, the ALJ issued a decision denying

disability insurance benefits. On November 19, 2001, Claimant requested review of the ALJ's decision from the Social Security Administration Appeals Council. The Appeals Council denied the request for review on June 6, 2002. Consequently, the ALJ's decision of November 13, 2001, stands as the final decision of the Commissioner. Claimant commenced the present action, seeking review by the United States District Court for the Southern District of Iowa, Central Division, on August 5, 2002.

BACKGROUND

A. Facts¹

Thevathath, born in Laos, came to the United States in 1986 as a twenty-one year old refugee. She has difficulty speaking and being understood in English; and, as a result, Claimant used a translator at the administrative hearing. Thevathath was 41 years old at the time of her last administrative hearing. She received some education in Laos prior to locating to the United States.² At the time of the hearing, Thevathath lived with her husband and two teenage sons. Thevathath's past work was all unskilled and ranged from light to medium in exertion. The ALJ found her severe impairments

¹ The Court has thoroughly reviewed the record in this case and finds the factual summary in the ALJ's opinion both accurate and exhaustive; therefore, the Court finds it unnecessary to repeat that summary in this Order.

² The ALJ found Claimant had graduated from high school based on Claimant's responses in a disability report. Thevathath contends this is incorrect as she only had six years of schooling in Laos, and the error in the disability report resulted from her problems with the English language. In any event, if a mistake was made by the ALJ on this point, it was harmless.

consisted of status post discectomy and laminectomy at L4-5 and major depression. Thevathath was previously denied benefits in 1998, from which denial she did not appeal.

B. Findings of the Commissioner

In determining whether Claimant is disabled, the ALJ employed the five-step sequential evaluation pursuant to 20 C.F.R. § 404.1520. After consideration of the entire record and the testimony from the hearing, the ALJ made the following findings:

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, 2002.
2. The claimant has not engaged in substantial gainful activity since the alleged onset of disability.
3. The claimant's status post discectomy and laminectomy at L4-5 is a severe impairment, and major depression and dysthymic disorder are severe impairments based upon the requirements in the Regulations (20 CFR §§ 404.1521).
4. This medically determinable impairment does not meet or medically equal one of the listed impairments in Appendix 1, Subpart P, Regulation No. 4.
5. The undersigned finds the claimant's allegations regarding her limitations are not totally credible for the reasons set forth in the body of the decision.
6. The undersigned has carefully considered all of the medical opinions in the record regarding the severity of the claimant's impairment (20 C.F.R. § 404.1527).

7. The claimant has the following residual functional capacity: She can occasionally lift and carry 20 pounds and can frequently lift and carry 10 pounds. She can sit about six hours in an eight-hour day and can stand and/or walk about six hours in an eight-hour day. She should never climb ladders or scaffolds but can occasionally climb stairs and ramps, balance, stoop, kneel, crouch, and crawl. She should avoid concentrated exposure to temperature extremes, wetness, humidity, noise, vibration, and fumes, gases, odors, and poor ventilation.
8. The claimant's past relevant work as sandpaper machine operator and food server/kitchen helper did not require the performance of work-related activities precluded by her residual functional capacity (20 C.F.R. §§ 404.1565).
9. The claimant's medically determinable status post discectomy and laminectomy at L4-5 does not prevent the claimant from performing her past relevant work.
10. The claimant was not under a "disability" as defined in the Social Security Act, at any time through the date of this decision (20 C.F.R. §§ 404.1520(e)).

(Tr. at 25.) In conclusion, the ALJ stated her Decision as follows:

It is the decision of the Administrative Law Judge that, based on the applications protectively filed on March 13, 1999, the claimant is not entitled to a Period of Disability or Disability Insurance Benefits under Sections 216(i) and 223, respectively, of the Social Security Act.

(Tr. at 26.)

ANALYSIS

To establish entitlement to benefits, a claimant must show that he or she is unable to engage in any substantial gainful activity by reason of a medically determinable impairment which has lasted, or can be expected to last, for a continuous

period of at least twelve months. See 42 U.S.C. §§ 423(d); Wiseman v. Sullivan, 905 F.2d 1153, 1155 (8th Cir. 1990); see also Barnhart v. Walton, 535 U.S. 212, 221-24 (2002) (upholding the Commissioner's interpretation of this statutory definition, which requires that the disability, and not only the impairment, must have existed or be expected to exist for twelve months). An individual that can perform past relevant work or other work which exists in significant numbers in the national economy is not disabled. See 20 C.F.R. §§ 404.1520 (2002).

Title 20 C.F.R. § 404.1520 sets forth the five-step sequential evaluation process which the ALJ must use in assessing the claimant's disability claim. 20 C.F.R. § 404.1520. A claimant has the burden of establishing that he is entitled to disability benefits by proving the existence of a disability. Roth v. Shalala, 45 F.3d 279, 282 (8th Cir. 1995) (citing Locher v. Sullivan, 968 F.2d 725, 727 (8th Cir. 1992)). If the Claimant is able to prove that she is unable to perform her past relevant work, the burden of proof shifts to the SSA to demonstrate that she can perform other jobs available in the national economy. See Lowe v. Apfel, 226 F.3d 969, 974 (8th Cir. 2000) (citing Cox v. Apfel, 160 F.3d 1203, 1206 (8th Cir. 1998)).

A. Standard of Review

A court must affirm the decision of the Commissioner if substantial evidence in the record as a whole supports the decision. 42 U.S.C. § 405(g); Pena v. Chater, 76 F.3d 906, 908 (8th Cir. 1996); Smith v. Shalala, 31 F.3d 715, 717 (8th Cir. 1994)

(citing Richardson v. Perales, 402 U.S. 389, 401 (1971)). “Substantial evidence is less than a preponderance, but enough evidence that a reasonable mind might find it adequate to support the conclusion.” Moad v. Massanari, 260 F.3d 887, 890 (8th Cir. 2001). Stated another way, substantial evidence is that level of evidence sufficient that a reasonable mind might accept it as adequate to support the conclusion reached. Pickney v. Chater, 96 F.3d 294, 296 (8th Cir. 1996). In determining whether the existing evidence is substantial, the Court considers “evidence that detracts from the Commissioner’s decision as well as evidence that supports it.” Young v. Apfel, 221 F.3d 1065, 1068 (8th Cir. 2000) (citing Prosch v. Apfel, 201 F.3d 1010, 1012 (8th Cir. 2000)).

A court may not reverse merely because substantial evidence would have supported a contrary decision. Craig v. Apfel, 212 F.3d 433, 436 (8th Cir. 2000). Moreover, a court may not reverse merely because it would have decided the case differently. Krogmeier v. Barnhart, 294 F.3d 1019, 1022 (8th Cir. 2002) (citing Woolf v. Shalala, 3 F.3d 1210, 1213 (8th Cir. 1993)); Gaddis v. Chater, 76 F.3d 893, 895 (8th Cir. 1996) (quoting Shannon v. Chater, 54 F.3d 484, 486 (8th Cir. 1995)). “If, after reviewing the record, the Court finds that it is possible to draw two inconsistent positions from the evidence and one of those positions represents the Commissioner’s findings, the court must affirm the commissioner’s decision.” Pearsall v. Massanari, 274 F.3d 1211, 1217 (8th Cir. 2001); see also Young, 221 F.3d at 1068.

A reviewing court must also ascertain whether the ALJ's decision is based on legal error. Berger v. Apfel, 200 F.3d 1157, 1161 (8th Cir. 2000); Keller v. Shalala, 26 F.3d 856, 858 (8th Cir. 1994). The Court may reverse the Commissioner's decision if the ALJ applies an erroneous legal standard. Ingram v. Chater, 107 F.3d 598, 601 (8th Cir. 1997) (citing Nettles v. Schweiker, 714 F.2d 833, 835-36 (8th Cir. 1983)).

If the reviewing court determines that there does not exist substantial evidence to support the Commissioner's decision, ordinarily the appropriate remedy is to remand for further administrative proceedings rather than to award benefits. See Buckner v. Apfel, 213 F.3d 1006, 1011 (8th Cir. 2000); see also Cox, 160 F.3d at 1210 (remanding for further proceedings because of court's "abundant deference to the ALJ"). In fact, an immediate finding of disability is appropriate only if the record "overwhelmingly supports" such a finding. Thompson v. Sullivan, 957 F.2d 611, 614-15 (8th Cir. 1992). In short, the court is to "defer heavily to the findings and conclusions of the SSA." Howard v. Massanari, 255 F.3d 577, 581 (8th Cir. 2001).

B. Discussion

Thevathath alleges two points of error which she argues necessitate remand. First, Thevathath argues the ALJ improperly discounted the opinion of her treating psychiatrist. Second, Thevathath contends the ALJ's conclusions as to her residual functional capacity are not supported by substantial evidence in the record.

1. Weighing the Evidence in the Record from Physicians

Under the Commissioner's regulations, the opinions of treating sources are generally given more weight due to their unique position. See 20 C.F.R. § 404.1527(d)(2); Cunningham v. Apfel, 222 F.3d 496, 502 (8th Cir. 2000) (recognizing the opinions of a treating physician are entitled to substantial weight); Chamberlain v. Shalala, 47 F.3d 1489, 1494 (8th Cir. 1995) (same). The treating physician's continuing relationship with the claimant makes the treating physician especially qualified to evaluate reports from other examining doctors, to integrate medical information provided, and to form an overall conclusion as to the functional capacities and limitations of the claimant. Lester v. Chater, 81 F.3d 821, 833 (9th Cir. 1996); see also Hancock v. Sec'y of Dept. of Health, Educ. & Welfare, 603 F.2d 739, 740 (8th Cir. 1979). However, such an opinion is not conclusive and must be supported by other evidence. See 20 C.F.R. § 404.1527(d)(2). Indeed, "[a] treating physician's opinion is afforded less deference when the medical evidence in the record as a whole contradicts the opinion itself." Haggard v. Apfel, 175 F.3d 591, 595 (8th Cir. 1999).

The regulations set out a framework for analyzing a treating source's opinion. See 20 C.F.R. § 404.1527(d)(2); Vonbisch v. Apfel, 132 F. Supp. 2d 785, 796-98 (D. Neb. 2001). If the ALJ determines the treating physician's opinion as to the nature and severity of the claimant's impairment is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence," then the ALJ must give it controlling weight. 20 C.F.R. § 404.1527(d)(2);

see also Holmstrom v. Massanari, 270 F.3d 715, 720 (8th Cir. 2001); Prosch, 201 F.3d at 1012-13. However, the ALJ may discredit the opinions of a treating physician which are inconsistent with the other medical evidence on the record. Weber v. Apfel, 164 F.3d 431, 432 (8th Cir. 1999). Moreover, when a physician's opinion is internally inconsistent, the ALJ is entitled to give little weight to the opinion. See Cruze v. Chater, 85 F.3d 1320, 1325 (8th Cir. 1996).

Even when the ALJ determines the treating physician's opinion is not entitled to controlling weight, the opinion is not simply disregarded. See SSR 96-2p (July 2, 1996) ("In many cases, a treating source's medical opinion will be entitled to the greatest weight and should be adopted, even if it does not meet the test for controlling weight."). Rather, the ALJ looks at the factors delineated in 20 C.F.R. § 404.1527(d)(2)-(6) to determine how much weight should be given to that opinion. 20 C.F.R. § 404.1527(d).³ Furthermore, "[w]hether the weight accorded the treating physician's opinion by the ALJ is great or small, the ALJ must give good reasons for that weighting." Meinders v. Barnhart, 195 F. Supp. 2d 1136, 1144 (S.D. Iowa 2002); 20 C.F.R. § 404.1527(d)(2) (requiring the ALJ to "always give good reasons . . . for the weight [he gives the] treating source's opinion"); see also Singh v. Apfel, 222 F.3d 448, 452 (8th Cir. 2000).

³ The factors outlined in 20 C.F.R. § 404.1527(d)(2)-(6) include the following: treatment relationship, including length of the relationship, frequency of examination, and the nature and extent of the relationship; supportability; consistency; specialization; and other factors.

Thevathath argues the ALJ improperly discounted the opinion of her treating psychiatrist, Dr. Damini Perulekar. Dr. Perulekar was Claimant's sole treating source for mental and emotional problems at the time of the administrative hearing. Based on Dr. Perulekar's assessment of Claimant's communication problems, social withdrawal, intolerance to loud noises, forgetfulness, and need for frequent rest, Dr. Perulekar felt Claimant would be unable to maintain a job. Thevathath argues the vocational expert also opined that the limitations expressed by Dr. Perulekar would preclude Claimant from working.

Thevathath contends Dr. Perulekar's opinions are supported by other evidence in the record, including Dr. Perulekar's own examination notes and the examination performed by Dr. Konar. Thevathath further contends the ALJ improperly relied on the testimony of Dr. Scholten, a psychiatrist who saw Claimant once some two years prior to the administrative hearing. Additionally, Thevathath maintains the reasons given by the ALJ for discrediting the opinions of Dr. Perulekar and Dr. Konar are not supported by the evidence in the record.

The ALJ discounted Dr. Konar's findings on the bases that Dr. Konar did no objective testing, admitted to a difficulty in communicating with the Claimant, and his findings were both internally inconsistent and inconsistent with other medical evidence on the record. The record contains substantial evidence to support the ALJ's reasons for discrediting Dr. Konar's opinion.⁴

⁴ See Tr. at 329-31, 339, 340, 341.

The ALJ discounted the opinions expressed by Dr. Parulekar in a letter regarding Claimant's limitations because Dr. Parulekar opined about matters beyond his expertise, his opinion was inconsistent with the overall evidence of record, including the medical evidence related to Claimant's chronic back pain, treatment, medications, and past ability to work, as well as the ALJ's own assessment of the Claimant.

Indeed, Dr. Parulekar's testimony regarding Claimant's ability to find work or be gainfully employed is beyond his expertise. See Smallwood v. Chater, 65 F.3d 87, 89 (8th Cir. 1995) (finding opinion as to whether a claimant can find gainful employment is beyond the province of medical doctors; rather, this determination is reserved for vocational experts to make) (discussing the decisions in Nelson v. Sullivan, 946 F.2d 1314, 1316-17 (8th Cir. 1991), and Turley v. Sullivan, 939 F.2d 524, 527 (8th Cir. 1991)). Furthermore, there is substantial evidence in the record to support the ALJ's determination regarding the weight to assign Dr. Parulekar's opinions as inconsistent with the medical record as a whole, see Haggard, 175 F.3d at 595 (finding opinion of treating physicians is afforded less deference when contradicted by the medical evidence on the record), (Tr. at 329-31, 341, 374-75), and as inconsistent with the ALJ's own observations of Claimant's demeanor and ability to function. See Johnson v. Chater, 240 F.3d 1145, 1147-48 (8th Cir. 2001) ("The ALJ's personal observations of the claimant's demeanor during the hearing is completely proper in making credibility determinations.") (citing Smith v. Shalala, 987 F.2d 1371, 1375 (8th Cir. 1993)).

The Court finds the ALJ's consideration of the medical evidence in the record was consistent with applicable standards. The Court further finds substantial evidence in the record as a whole to support the ALJ's determination of the weight to assess the opinions of the physicians on the record and her resolution of conflicts among the various treating and examining physicians.

2. ALJ Assessment of Residual Functional Capacity

The residual functional capacity ("RFC") of a claimant is a medical question. Lauer v. Apfel, 245 F.3d 700, 704 (8th Cir. 2001) (quoting Singh, 222 F.3d at 451). RFC "is 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." McCoy v. Schweiker, 683 F.2d 1138, 1147 (8th Cir. 1982), abrogated on other grounds, 524 U.S. 266 (1988); see also Nevland v. Apfel, 204 F.3d 853, 858 (8th Cir. 2000). The RFC determination is to be based on all of the evidence in the record. Pearsall, 274 F.3d at 1217-18 (citing Anderson v. Shalala, 51 F.3d 777, 779 (8th Cir. 1995)); see also 20 C.F.R. § 404.1545; SSR 96-8p (July 2, 1996).

As part of the RFC determination, the ALJ should obtain medical evidence that addresses the claimant's "ability to function in the workplace," Nevland, 204 F.3d at 858, as at least some medical evidence must support the determination of the claimant's RFC. Dykes v. Apfel, 223 F.3d 865, 867 (8th Cir. 2000). The RFC determination must address both the physical and mental limitations of the claimant. Pfitzner v. Apfel, 169 F.3d 566, 568 (8th Cir. 1999). Thus, while the ALJ is not limited to

considering medical evidence, McKinney v. Apfel, 228 F.3d 860, 863 (8th Cir. 2000) (finding the ALJ must determine the RFC of a claimant based on all of the relevant evidence, including, medical records, observations of treating physicians and others, and the claimant's own description of limitations), the ALJ is required to at least consider some supporting evidence from a professional and medical evidence to establish how claimant's impairments affect the RFC. See Lauer, 245 F.3d at 704; Nevland, 204 F.3d at 858.

The ALJ determined the Claimant's RFC was as follows: she can occasionally lift and carry 10 pounds; she can sit about six hours in an eight-hour day and can stand and/or walk about six hours in an eight-hour day; she should never climb ladders or scaffolds but can occasionally climb stairs and ramps, balance, stoop, kneel, crouch, and crawl; she should avoid concentrated exposure to temperature extremes, wetness, humidity, noise, vibration, and fumes, gases, odors, and poor ventilation. (Tr. at 23.) Based on this RFC and taking into account the Claimant's diagnosis of major depression and dysthemic symptoms as noted by her treating psychiatrist of social withdrawal, slow work place, forgetfulness, and need of frequent rest, the ALJ found Claimant could perform her past relevant work as a sandpaper machine operator and as a food server/kitchen helper. (Tr. at 24.)

While the ALJ need not rely on a vocational expert upon finding Claimant can perform past relevant work, see Gaddis, 76 F.3d at 896 (finding that if the ALJ finds the claimant is able to return to past relevant work, the ALJ need not *rely* on the

testimony of a vocational expert), the ALJ did accept the testimony of the vocational expert that Claimant could perform other unskilled light and sedentary jobs that exist in significant numbers in the national economy. As a result of these findings, the ALJ held Claimant was not disabled as defined in the Act and was therefore ineligible for disability insurance benefits.

Thevathath contends the ALJ erred in her determination of Thevathath's RFC, as the RFC determination of the ALJ is unsupported by the record. Thevathath contends the RFC assigned to her is inconsistent with the reports of Dr. Bird, the Claimant's treating physician in 1998 and 1999, and the report of Dr. Timboe, a physician who performed a consultative examination of the Claimant in 2000. Specifically, Thevathath claims these opinions contradict the ALJ's determination that Claimant could sit for six hours out of an eight-hour day and that she could occasionally lift and carry objects weighing twenty pounds, and frequently lift and carry objects weighing ten pounds. Thevathath contends the opinions of Dr. Bird and Dr. Timboe illustrate that she could only sit for "short times without difficulty", that sitting for a "prolonged period of time exacerbates her pain" (Tr. at 302), that she could sit for only two to three hours at a time, and that she should not ambulate while carrying objects.

There is ample evidence in the record inconsistent with the isolated determinations of Dr. Bird and Dr. Timboe relied upon by the Claimant. This other medical

evidence provides ample support for the ALJ's determination of Claimant's RFC,⁵ as does the Claimant's own testimony about her daily activities. In addition, the record indicates her chronic back pain had been controlled by treatment and medications, see Estes v. Barnhart, 275 F.3d 722, 725 (8th Cir. 2002) (finding that an impairment that can be controlled by medication or treatment is not considered disabling), and that she currently takes no pain medication. See Hall v. Chater, 109 F.3d 1255, 1258 (8th Cir. 1997) (finding the failure to take pain medication is inconsistent with complaints of severe pain); Ostrinski v. Chater, 94 F.3d 413, 419 (8th Cir. 1996) (same). Moreover, several physicians recommended that Claimant return to work and otherwise increase her level of activity. See Brown v. Chater, 87 F.3d 963, 965 (8th Cir. 1996) (finding lack of significant restrictions imposed by treating physicians supported ALJ's determination of no disability). (Tr. at 17, 18, 266, 268, 284.) Thus, the Court finds the ALJ's determinations regarding Thevathath's physical limitations are supported by substantial evidence. The Court has already discussed and determined the ALJ's assessment of Claimant's mental limitations is supported by substantial evidence.

The Court finds the ALJ's determination of RFC is supported by substantial evidence. The ALJ based her determination of Thevathath's RFC on all of the relevant evidence. The Court has already found the ALJ properly weighed the opinions of Dr.

⁵ See Tr. at 15-23 238, 244, 245, 249-50, 253, 267, 268, 272-78, 284, 286-87, 302, 342.

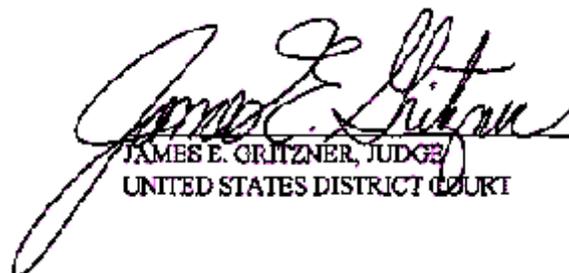
Konar and Dr. Parulekar, and Thevathath does not contest the ALJ's assessment of the other physicians and medical evidence on the record. This medical evidence provides substantial support for the ALJ's RFC determination. In addition, the ALJ properly evaluated the subjective complaints and the credibility of the Claimant. See Polaski v. Heckler, 739 F.2d 1320, 1322 (8th Cir. 1984); 20 C.F.R. § 404.1529. (Tr. at 15-23.) As discussed, there is substantial evidence on the record to support the ALJ's findings as to both the mental and physical impairments and limitations of the Claimant as included in the ALJ's RFC determination, and the ALJ was warranted in finding Claimant could return to her past relevant work based on this RFC. Thus, the RFC determination supports the ALJ's finding of no disability in the present case.

CONCLUSION

The Court finds the decision of the Commissioner is supported by substantial evidence, and remand is not warranted in this case. The decision of the Commissioner is **affirmed**, and the case is **dismissed**. The Clerk of Court is directed to enter judgment for the Defendant and against the Plaintiff.

IT IS SO ORDERED.

Dated this 30th day of March, 2004.



JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT