

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

DIANA L. MOCK,
Plaintiff,

No. 4:06-cv-00227-JAJ

vs.

MICHAEL J. ASTRUE,
Commissioner of Social Security,
Defendant.

ORDER

This matter comes before the court pursuant to briefs on the merits of this application for disability insurance benefits. This court finds that the decision of the Social Security Administration is supported by substantial evidence. This case is dismissed.

I. PROCEDURAL BACKGROUND

Plaintiff Diana Mock (hereinafter “Mock”) filed an application for Disability Insurance Benefits on July 29, 2002, alleging an inability to work from November 23, 2001 to September 30, 2003 (Tr. 45-47).¹ The Social Security Administration (“SSA”) denied Mock’s application initially and again upon reconsideration (Tr. 32-34, 36-38). Administrative Law Judge (“ALJ”) Jean M. Ingrassia conducted a hearing on Mock’s claim on April 6, 2005 (Tr. 248-284). The ALJ denied Mock’s appeal on August 26, 2005 (Tr. 10-12). Mock filed a request for review on October 19, 2005 (Tr. 8-9). The Appeals Council denied her request for review on March 14, 2006 (Tr. 4-6). Mock filed this action for judicial review on May 17, 2006 (docket number 1).

¹Mock initially alleged an onset date of March 23, 2001. In a letter dated October 17, 2003, Mock’s attorney amended the onset date to November 23, 2001 and alleged a closed period of disability from November 23, 2001 to September 30, 2003 (Tr. 61).

II. FACTUAL BACKGROUND

At the time of the hearing, Mock was fifty years-old. She was forty-seven at the time of her alleged disability onset date. Mock has completed two years of college and has special training in cytotechnology and realty. Her vocationally relevant work experience includes work as a realtor, cytotechnologist, dog bather and dog groomer (Tr. 71).

A. Relevant Medical History

Mock alleges disability due to severe dysthymia and poor impulse control. Mock received treatment from Dr. Kathryn Curdue six times during the period of alleged disability for those disorders.² On November 5, 2001, shortly before the alleged date of disability, Dr. Curdue treated Mock, finding that she was feeling a “little better” than previous visits, largely due to an increase in her prescription of Effexor (Tr. 141). At that time, Mock was thinking about changing jobs (Tr. 141).

On December 6, 2001, Mock had her first appointment with Dr. Curdue after the alleged onset of disability (Tr. 140). Dr. Curdue wrote, “Mood is better. Energy is improved. Irritability is just occasional” (Tr. 140). Dr. Curdue noted that Mock “quit her job after Thanksgiving and feels better, although she needs to find a job” (Tr. 140). She determined that Mock was “fairly stable” and diagnosed dysthymic disorder (Tr. 140).

On February 27, 2002, Jeri Owens, M.D., evaluated Mock at the Amen Clinic for Behavioral Medicine (Tr. 147-160). Dr. Owens performed a brain SPECT study, which revealed several abnormalities (Tr. 153). Dr. Owens found the abnormalities were consistent with prior toxic exposure, Attention Deficit Disorder (“ADD”), temporal lobe

²Dr. Curdue started treating Mock on January 9, 1998 and saw her seventeen times between that date and the date of her alleged disability onset, November 23, 2001. Mock originally sought treatment after enraged episodes at work (Tr. 130).

During this time, Dr. Curdue consistently found that her mood was “mildly dysthymic” and diagnosed Mock with a dysthymic disorder (Tr. 146). Dr. Curdue treated Mock with a combination of Paxil, Remeron, Konopin and Celexa.

dysfunction and brain trauma (Tr. 154). Dr. Owens diagnosed Major Depression, Post-Traumatic Stress Disorder, Temporal Lobe Dysfunction, Agoraphobia, Attention Deficit Hyperactivity Disorder, Premenstrual Dysphoric Disorder, Brain Trauma, and Sexual Dysfunction (Tr. 155). Dr. Owens stated that “there is hope for a significant improvement with a combination of medication, diet, and exercise to properly optimize brain function” (Tr. 155). He prescribed Neurontin and Effexor (Tr. 155).

On May 5, 2002, Mock had an appointment with Dr. Curdue (Tr. 175). They discussed her employment opportunities and whether she should apply for social security disability (Tr. 175). Dr. Curdue wrote that “it would be better that she is working. I agree that she might not be able to stand going back to the cytology job as she was bored and frustrated, but I think that she could find gainful employment” (Tr. 175). Dr. Curdue wrote that Mock has “a chronic dysthymic picture” as well as ADD (Tr. 175). Dr. Curdue continued Mock on Neurontin and Effexor and started her on Ritalin (Tr. 176).

From June 27, 2002 until September 19, 2002, Mock saw therapist Kathy Solko, LISW, at Broadlawns Medical Center nine times. Solko’s intake notes on June 27 indicate that Mock worried that she was “falling into another major depressive episode” and felt overwhelmed and immobilized (Tr. 174). Solko worked with Mock throughout this time on developing coping skills and improving her concentration and follow-through (Tr. 172). On July 10, 2002, Solko wrote that Mock exhibited symptoms of “anxiety, depression [and] feeling overwhelmed” (Tr. 172). She discussed at length with Solko her difficulty making decisions, specifically, whether to break up with her partner who had drug and alcohol addiction issues (Tr. 170). On August 29, 2002, Solko wrote that Mock was rather excited and hopeful about applying for a job at Mercy Hospital (Tr. 166). Solko noted that her “affect appears brighter as she talks about the possibility of returning to work” (Tr. 166). On September 29, 2002, Mock stated she “is lying on the couch for much of the day and can’t seem to get organized to do anything” (Tr. 163).

On December 27, 2002, state psychologist Dr. Robert A. Straight, Ph.D., evaluated Mock (Tr. 181-183). Dr. Straight diagnosed her with Major Depressive Disorder, premenstrual dysphoric disorder, and “work and interpersonal difficulties due to mood dyscontrol” (Tr. 183). Dr. Straight assigned a GAF of 60 to 65 (Tr. 183). He stated, “I believe she would have sufficient concentration and attention to acquire job skills” (Tr. 183).

On February 27, 2003, Mock saw Dr. Curdue who noted she is “a bit more organized and better able to concentrate” (Tr. 240). She thought it was because Mock changed medications from Ritalin to Aderall (Tr. 240).

From April 2, 2003 until September 23, 2003, therapist Sandra Clark at Broadlawns Medical Center treated Mock nine times (Tr. 225-239). In her intake notes, Clark indicated target symptoms as “anxiety, depression, feeling overwhelmed” (Tr. 239). Throughout Clark’s treatment of Mock, Clark worked with her at “identify[ing] unhealthy and ineffective cognitions,” goal-setting, follow-through, and maintaining employment (Tr. 239). On April 11, 2003, Clark worked with Mock to develop a plan to gradually restart work as a realtor (Tr. 238). The next week, on April 18, 2003, Clark writes that Mock was feeling “very anxious and overwhelmed” and that she had not followed-through with her plan to get back into realty work (Tr. 237). Mock was “questioning her decision to go into this work” (Tr. 237).

By May 20, 2003, Clark wrote that Mock had some “good responses in her real estate work but is feeling so overwhelmed that she doesn’t know if she can follow through” (Tr. 236). On May 29, 2003, Mock had an appointment with Dr. Curdue where she wrote that Mock was feeling better and “trying hard with the realty company” (Tr. 234). She noted that Addreall was helping Mock maintain her concentration (Tr. 234).

Throughout the next few months, Clark often noted that Mock was having problems with prioritizing and moving beyond the preparation phase in her realty work (Tr. 232-34).

She often felt “pulled in all directions” and had difficulty making decisions (Tr. 231). On September 9, 2003, Clark noted that Mock was “not following through with her real estate plans” (Tr. 226). She instead started doing some dog grooming (Tr. 226). On September 23, 2003, Clark wrote that she was feeling better due to new medications (Tr. 225). Clark helped Mock set new goals for her realty business (Tr. 225). Mock also saw Dr. Curdue on September 23, 2003 (Tr. 224). Dr. Curdue wrote that she is frustrated with her work and her medications (Tr. 224).

B. Plaintiff’s Subjective Complaints

On September 7, 2002, Mock completed a Disability Report (Tr. 69-81). In the report, she stated that her illnesses make her “easily stressed and frustrated, have difficulty concentrating, easily anxious and get disoriented, shakey [sic] and irritated because I can’t think, crying, angry, hostile, social isolation” (Tr. 70). Mock stated that she had become unable to work because of her disabilities on November 1, 2000 (Tr. 70). Due to her illnesses, she had lost many of her job duties, which included training, overseeing, and preparing procedures and manuals (Tr. 70). She also had to “leave work at times because [she] could not manage [to] handle it” (Tr. 70). She stopped working on November 26, 2001, because she had “difficulty completing tasks and getting along with co-workers” (Tr. 70). She also had “self-control problems” and would fall asleep during work (Tr. 70).

On September 27, 2002, Mock’s fiancé, John Melheim, completed a Daily Activities Questionnaire for Mock (Tr. 82-85). He wrote that she rarely bathes, dresses, shaves, or performs hair care (Tr. 82). He said the only household chores she does regularly are laundry and preparing meals 2-3 nights per week (Tr. 82-83). He stated that “[i]t is a big chore for Diana to go to the store alone” (Tr. 83). Mock visits relatives and friends every one to two months (Tr. 84). She has problems getting along with others, including forgetting conversations (Tr. 84). “[V]oice inflection and facial expressions can

be condescending” (Tr. 84). Melheim wrote that Mock also has memory problems, “forget[ting] what she is doing midstream” (Tr. 84). He wrote that she does not deal with change well (Tr. 85). “One year ago became very depressed and unmotivated” (Tr. 85). Mock has “constant rashes on the back,” her “face and scalp break[] out” and she has “gained weight” (Tr. 85). Melheim wrote that she has “[m]ore mood swings. Lows are very low and last up to 2 weeks. Mood can go from happy to scared and angry at the drop of a hat” (Tr. 85).

On November 5, 2002, Mock completed a Daily Activities Questionnaire (Tr. 86-89). She indicated that she rarely does household chores nor cooks (Tr. 87). She is able to shop, but does not usually go alone (Tr. 87). She has trouble remembering to take her medications (Tr. 87). She wrote that she has memory difficulties: “I forget what I am supposed to do. It makes me mad” (Tr. 89). Mock indicated that she reacts to stress by yelling or crying (Tr. 89). She has trouble completing tasks (Tr. 89).

On June 17, 2003, Mock completed a Reconsideration Disability Report (Tr. 90-93). She indicated that her limitations include “clumsiness, severe mood swings, difficulty with memory, can’t remember details, short[-]term memory” (Tr. 90). She wrote that she goes days without showering (Tr. 92). Mock does not cook and has a low appetite resulting in a twenty-pound weight loss (Tr. 92). Since filing her initial claim, Mock reported that “everything has changed,” “[I] can’t remember things[,] feel tired all of the time[,] can’t think” (Tr. 92).

On October 23, 2003, Mock completed a Daily Activities Questionnaire (Tr. 96-99). She has trouble with sleeping habits: “sometimes [I] can’t sleep for long periods, other times [I] sleep too much” (Tr. 96). She indicated that she regularly does laundry, dishes, and vacuum/sweeps (Tr. 96). Mock stated that she often gets behind on chores and becomes overwhelmed with “too much to do” (Tr. 96). She stated that she does not go out much, only for special occasions (Tr. 97). She gets nervous before she goes out and

often feels disoriented (Tr. 97). Mock said she has problems getting along with others because she is “very irritable” (Tr. 97). She snaps at people and verbalizes her anger (Tr. 97). She characterizes herself as “unpredictable” and “rageful”(Tr. 97). She stated that she continues to be forgetful (Tr. 98). She got lost on the way to her parents house (Tr. 98). She also has trouble remembering to take her medications and getting prescriptions refilled (Tr. 98). She says she reacts to stress by running away or avoiding it (Tr. 99).

On October 23, 2003, Mock completed a Personal Pain/Fatigue Questionnaire (Tr. 100-03). She wrote that she has an “[a]ching of upper back, shoulder and neck” which “can cause headaches, numbing of fingers, and ability to clutch” (Tr. 100). She noted that stress, sitting at her desk, and the winter months increase her fatigue (Tr. 100). She treats her pain with “ice packs, exercise, heat packs, massage, [and] chiropractic” (Tr. 101). She stated that she had lost around 10-15 pounds (Tr. 102). She has “no energy” to care for her personal needs (Tr. 102). In a typical day, Mock wrote that she,

“Makes coffee, make[s] lists of things to be done . . . some days get overwhelmed by list . . . pick up things on main floor of house . . . try to do one or two things on list such as mostly go to or make appointments, pick up meds, pay bills, or do laundry”

(Tr. 103).

C. Residual Functional Capacity

On January 24, 2003, Dr. John Garfield, Ph.D., completed a Psychiatric Review Technique (Tr. 184). Dr. Garfield found that Mock’s impairment(s) were not severe (Tr. 184). He found that Mock had affective disorders (Tr. 184). Dr. Garfield indicated that she had disturbance of mood with depressive syndrome characterized by “appetite disturbance with change in weight,” “sleep disturbance,” “decreased energy,” and “difficulty concentrating or thinking” (Tr. 187). Dr. Garfield wrote that Mock had “MDD” (Tr. 187). In rating her functional limitations, Dr. Garfield marked that she has a “mild” restriction on daily living activities; “mild” difficulties maintaining social

interactions; “mild” difficulties “maintaining concentration, persistence or pace” and no episodes of decompensation (Tr. 194).

On January 14, 2003, Dr. Garfield reviewed Dr. Straight’s evaluation (Tr. 198). He accepted Dr. Straight’s diagnosis of MDD (Tr. 198). Dr. Garfield found that it was a non-severe impairment (Tr. 198).

On October 14, 2003, Dr. Curdue responded to a form letter from Mock’s attorney regarding Mock’s ability to function at work. She marked “yes” to a question about whether her impairments would have affected her concentration and attention during the alleged time of disability, November 2001 to September 2003 (Tr. 201). She also indicated that Mock would require four unscheduled breaks during the day, each for twenty minutes (Tr. 201). Dr. Curdue said that Mock would miss work three or more times per month (Tr. 201).

On December 29, 2003, clinical psychologist Herbert L. Notch, Ph.D., completed a Residual Functional Capacity Assessment (“RFC”) (Tr. 202-05). In most areas, the doctor found that Mock was not significantly limited (Tr. 202). He found Mock moderately limited in her “ability to carry out detailed instructions” and “ability to maintain attention and concentration for extended periods” (Tr. 202). Dr. Notch also indicated that she is moderately limited in her “ability to work in coordination with or proximity to others without being distracted by them” and “ability to complete a normal workday and workweek without interruptions” (Tr. 202-03). Dr. Notch indicated that she has moderately limited abilities to “set realistic goals or make plans independently of others” (Tr. 203).

Dr. Notch also completed a Psychiatric Review Technique on December 29, 2003 (Tr. 206-19). Dr. Notch indicated that Mock had an organic mental disorder—ADD; an affective disorder—RD Bipolar II; and Dysthmic Disorder (Tr. 209). Dr. Notch assigned a GAF of 45-50 (Tr. 209). Dr. Notch found that Mock had a moderate degree of

limitation in daily activities, social functioning, and “maintaining concentration, persistence, or pace” (Tr. 216).

Dr. Notch also completed a Medical Consultant Review Summary on December 29, 2003 (Tr. 220-21). Dr. Notch discussed the treatment and evaluations conducted by physicians and therapists: Dr. Curdue, Sandra Clark, Dr. Garfield, and Dr. Straight (Tr. 220-21). Dr. Notch concluded that Dr. Curdue’s findings should be given controlling weight as she is a treating physician (Tr. 221). Dr. Notch concluded, “Based on the findings, the claimant does appear able to do simple one-or-two-step work-like activities on a consistent basis without significant interference from her mental impairments” (Tr. 221).

D. Hearing Testimony

ALJ Jean Ingrassia held Mock’s hearing on April 6, 2005. At the time of the hearing, Mock was fifty years-old. Psychologist Dr. Phillip Ascherman testified as a medical expert. Vocational expert (“VE”) Julie Svec also testified.

Mock testified that she began working at Iowa Lutheran Hospital after she left her previous cytotechnologist job because of rage and depression problems (Tr. 252-53). She had trouble in her position at Iowa Lutheran Hospital because she “had to sit for eight solid hours a day. I couldn’t handle that. It was very difficult. I was falling asleep” (Tr. 253). She then got her real estate license and worked as a realtor in 2001 (Tr. 253).

Mock testified that in 2001 she started to have more psychological issues stemming from sexual abuse and incest during her childhood (Tr. 254). She had difficulty at work and at one point, a co-worker found her asleep on the floor of her office (Tr. 254). She took time off from her realty job to deal with her depression but when she returned, her job was unavailable (Tr. 255).

She then worked at Petco as a bather/brusher and then as a groomer at All Pets (Tr. 255). She testified that she “had trouble coping with the frustrations” (Tr. 255). She said

she had “a tendency to lose my temper and vent verbally which tended to upset the people in the area” (Tr. 255). She began selling real estate for Caldwell Banker in December of 2002 and worked there until 2005 (Tr. 256). She testified that she sold two houses in 2003 and none in 2004 (Tr. 257).

Mock discussed that she went off her medications before she went to the Amen clinic in California (Tr. 259). She said it had a “severe” impact on her (Tr. 259). “I had physical symptoms like headaches and nausea. . . . I couldn’t think right. I was just crying all the time. I couldn’t, I couldn’t function very well at all. I had trouble sorting things out. I was apparently rather hostile” (Tr. 259).

The ALJ then questioned Mock about her drug use. She testified that at the time she went to the Amen Clinic, in February 2002, she and her partner John had been using alcohol and cocaine (Tr. 260). She stated that she no longer uses cocaine, but drinks alcohol about once a week (Tr. 260). Between 2001 and 2003, she did drugs “[o]nce, twice a year, maybe three times” (Tr. 262).

At the time of the hearing, she was working for White Glove Service, a cleaning service (Tr. 262). She worked one to three half-days per week at \$10 an hour, which was not enough money to support herself (Tr. 262).

Medical expert Dr. Phillip Ascheman then testified, basing his testimony on Mock’s entire file. In his medical opinion, Mock had a non-severe impairment (Tr. 265). The ALJ then asked about Dr. Curdue’s assessment that Mock’s mental impairments would interfere with her attention and concentration (Tr. 265).³ He said based on Dr. Curdue’s clinic notes, they would not (Tr. 266). He found Dr. Curdue’s assessment that Mock would need to take four unscheduled breaks per day unsupported by a medical basis (Tr.

³Throughout Dr. Ascheman’s discussion of Dr. Curdue’s treatment and reports, he refers to her as “Dr. Perdue.” Based on the treatment notes he references, the court finds that he misspoke and meant Dr. Curdue. Mock was never treated by anyone with the last name “Perdue.”

266). “In fact, Dr. [Curdue] had indicated that the patient needed to go to work” (Tr. 266). Dr. Ascherman concluded that Mock “might have some difficulty in interacting appropriately with ah, supervisors particularly, but there’s nothing to indicate that . . . would be particularly problematic, perhaps some mild limitations in that area” (Tr. 266).

When asked what the difference between depressive disorders was, Dr. Ascherman explained that dysthymic disorder “is a low-grade depressive disorder. . . . On the other extreme is a major depressive disorder typically with acute onset [which] may last for any given period of time [and] typically remits to a lower level of depression” (Tr. 267). Dr. Ascherman discredited Dr. Straight’s diagnosis of major depressive disorder and found that Dr. Curdue’s diagnosis of dysthymia was more accurate (Tr. 267-68). “Dr. Straight had to rely on a single visit with the individual” while Dr. Curdue had seen Mock over a long period of time (Tr. 268).

The ALJ then asked Dr. Ascherman about the effect of Depo-Provera. He responded that it does not typically cause mental breakdowns but can increase irritability (Tr. 267).

When asked whether the DSM-IV “make[s] the same distinction between major depressive order and dysthemia,” he responded that it does not (Tr. 268). However, he testified that it is generally accepted within the practice that dysthymic disorder is a “low[-]grade, longstanding disorder” (Tr. 268).

Dr. Ascherman testified that axis five, a GAF of 45 to 50, means that Mock has serious symptoms (Tr. 269). Dr. Ascherman then testified that the GAF scores “fluctuate too readily . . . they tend to be relative to each other ah, within the clinician, rather than being consistent across clinicians” (Tr. 270).

The ALJ asked Dr. Ascherman about his opinion of the Amen Clinic report. He responded, “I think that at best it’s highly speculative . . . it is my opinion very problematic that the patient was evaluated immediately after discontinuing an anti-depressant medication, ah, which is in fact likely to trigger a depressive episode” (Tr.

271). He felt that the diagnostic techniques used to determine that Mock had ADD were “at best, very questionable” and that Mock’s history was inconsistent with ADD (Tr. 271).

Mock then returned to the stand. When asked whether she could go back to her old job as a cytologist, Mock replied that she could but at a smaller hospital where there were less PAP smears (Tr. 273). She had recently applied for a cytologist job at Emory University in Atlanta (Tr. 274). She testified that she would have been unable to return to her job between 2001 and 2003 because of her poor memory and state of confusion (Tr. 274). “[T]he side effects of the Neurontin. . . made me stupid” (Tr. 274).

When asked about therapist Sandra Clark’s treatment, Mock said she started treatment with Clark in January or February of 2003 (Tr. 277). She had 45-minute to one-hour sessions with Clark and 15-minutes sessions with Dr. Curdue (Tr. 277-78).

VE Julie Svec then testified. Mock’s attorney presented the following hypothetical:

“[Mock] has the following impairments of ongoing diagnosis with dysthemia, also carries a diagnoses of major depressive disorder from Social Security’s consultative examiner. Has the ability to essentially do light level work, can lift 20 pounds occasionally, 10 pounds frequently, can sit six hours out of an eight hour workday, can stand ah, six hours out of an eight hour workday. However, according to Exhibit 12F, she would have moderate restrictions of daily living and difficulties maintaining social functioning and moderate difficulties in maintaining concentration and pace. Would such an individual be able to perform their past relevant work?”

(Tr. 281). The VE responded, “I don’t think so” (Tr. 281). The VE testified that Mock would have no transferrable skills and would not be able to perform any other unskilled work in the national economy (Tr. 282).

Mock’s attorney then modified the hypothetical:

“I’d like you just to assume the same criteria other than what I had given you from Exhibit 12F, the moderate restrictions and so on, ah, so essentially could do light work physically but would require . . . four unscheduled work breaks a day

each of 20 minutes' [sic] duration. Would such an individual be able to do any of her past relevant work?"

(Tr. 282). The VE responded that such an individual would not be able to perform her past relevant work, nor any other unskilled work in the national economy (Tr. 282).

Mock's attorney again modified the hypothetical:

"Same hypothetical except . . . we would not have the unscheduled work breaks but . . . would miss three or more days of work per month. Ah, and is unable to get along with co-workers and supervisors. Would such an individual be able to perform their past relevant work?"

(Tr. 282). The VE again testified that such an individual would not be able to perform her past relevant work and would not be able to perform skilled or unskilled work in the national economy (Tr. 282).

The ALJ then posed a hypothetical to the VE:

"If we did find that she had a dysthemic disorder as defined by Dr. Ascherman at the hearing today, he defined it as non-severe, but if we indicated that that impairment would mildly affect her ability to function independent[ly], appropriately, and effectively in the competitive job market on a sustained bases, and would only mildly interfere with her ability to understand, carry out, and remember simple instructions and basically would not at all interfere with her ability to follow . . . instructions that were more than three step[s]. In other words, she has the capability of doing skilled and semi-skilled work, that it would not interfere with her ability to use judgment, or respond appropriately to supervision, co-workers in the usual work setting or deal with changes in the routine work setting, would she be able to do her past work?"

(Tr. 283). The VE responded affirmatively, finding that she "[w]ould be able to do all of her past work" and that she would have no physical restrictions (Tr. 283).

IV. CONCLUSIONS OF LAW

A. Scope of Review

In order for the court to affirm the ALJ's findings of fact, those findings must be supported by substantial evidence appearing in the record as a whole. See Lochner v. Sullivan, 968 F.2d 725, 727 (8th Cir. 1992); Cruse v. Bowen, 867 F.2d 1183, 1184 (8th Cir. 1989). Substantial evidence is more than a mere scintilla. It means relevant evidence a reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1997); Cruse, 867 F.2d at 1184; Taylor v. Bowen, 805 F.2d 329, 331 (8th Cir. 1986). The court must take into account evidence that fairly detracts from the ALJ's findings. Cruse, 867 F.2d at 1184; Hall v. Bowen, 830 F.2d 906, 911 (8th Cir. 1987). Substantial evidence requires "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." Cruse, 867 F.2d at 1184 (quoting Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 620 (1966)). The court must consider the weight of the evidence appearing in the record and apply a balancing test to contradictory evidence. Gunnels v. Bowen, 867 F.2d 1121, 1124 (8th Cir. 1989); Gavin v. Heckler, 811 F.2d 1195, 1199 (8th Cir. 1987).

B. ALJ's Disability Determination

Determining whether a claimant is disabled involves a five-step evaluation. See 20 C.F.R. § 404.1520(a)-(f); Bowen v. Yuckert, 482 U.S. 137, 140 (1987).

The five steps are:

- (1) If the claimant is engaged in substantial gainful activity, disability benefits are denied.
- (2) If the claimant is not engaged in substantial gainful activity, her medical condition is evaluated to determine whether her impairment, or combination of impairments, is medically severe. If the impairment is not severe, benefits are denied.

- (3) If the impairment is severe, it is compared with the listed impairments the Secretary acknowledges as precluding substantial gainful activity. If the impairment is equivalent to one of the listed impairments, the claimant is disabled.
- (4) If there is no conclusive determination of severe impairment, then the Secretary determines whether the claimant is prevented from performing the work she performed in the past. If the claimant is able to perform her previous work, she is not disabled.
- (5) If the claimant cannot do her previous work, the Secretary must determine whether she is able to perform other work in the national economy given her age, education, and work experience.

Trenary v. Bowen, 898 F.2d 1361, 1364 n.3 (8th Cir. 1990) (citing Yuckert, 482 U.S. at 140–42); 20 C.F.R. § 404.1520(a)–(f).

“To establish a disability claim, the claimant bears the initial burden of proof to show that he is unable to perform his past relevant work.” Frankl v. Shalala, 47 F.3d 935, 937 (8th Cir. 1995) (citing Reed v. Sullivan, 988 F.2d 812, 815 (8th Cir. 1993)). If the claimant meets this burden, the burden of proof then shifts to the Commissioner to demonstrate that the claimant retains the physical residual functional capacity (RFC) to perform a significant number of other jobs in the national economy that are consistent with the claimant’s impairments and vocational factors such as age, education and work experience. Id.

At the first step, the ALJ found that Mock had not engaged in substantial gainful activity since her alleged onset date (Tr. 14). At the second step, the ALJ determined that Mock had a severe impairment, that being dysthymia (Tr. 15). At the third step, the ALJ determined that Mock’s impairments did not meet or equal one of the listed impairments (Tr. 15). At the fourth step, the ALJ determined that Mock could perform her past relevant work as a cytotechnologist, realtor, dog bather or dog groomer (Tr. 19).

C. Improper Hypothetical

Mock asserts that the ALJ improperly relied on the VE's testimony in response to a flawed hypothetical. In the hypothetical, the ALJ stated that Mock's impairment was non-severe, but later, in her decision, the ALJ found it was severe (Tr. 15). As the hypothetical mis-characterized the nature of the claim, Mock argues the ALJ should not have relied on the VE's testimony. The Commissioner responds that the ALJ was simply reiterating the medical expert's assessment that the impairment was non-severe. The Commissioner argues that the hypothetical provided sufficient functional restrictions on which the VE could base her opinion.

An improper hypothetical cannot serve as substantial evidence. Whitmore v. Bowen, 785 F.2d 262, 263-64 (8th Cir. 1986). The hypothetical should precisely describe the claimant's impairments in order for the expert to properly evaluate the availability of jobs the claimant can perform. Newton v. Chater, 92 F.3d 688, 694-95 (8th Cir. 1996). However, the question need only include impairments supported by substantial evidence and not impairments rejected by the ALJ as untrue. See Long v. Chater, 108 F.3d 185, 188 (8th Cir. 1997). "Likewise, the testimony of a vocational expert who responds to a hypothetical based on such evidence is not substantial evidence upon which to base a denial of benefits." Singh v. Apfel, 222 F.3d 448, 452 (8th Cir. 2000) ("These assessments alone [of non-treating physicians] cannot be considered substantial evidence in the face of the conflicting assessment of a treating physician.") Id. (citing Henderson v. Sullivan, 930 F.2d 19, 21 (8th Cir. 1991)); Baker v. Apfel, 159 F.3d 1140, 1144 (8th Cir. 1998) ("If a hypothetical question does not include all of the claimant's impairments, limitations, and restrictions, or is otherwise inadequate, a vocational expert's response cannot constitute substantial evidence to support a conclusion of no disability.").

Here, the ALJ merely repeated the medical expert's assessment that Mock's impairment was not severe (Tr. 283). He began the hypothetical with, "If we did find that

she had a dysthemic disorder as defined by Dr. Ascheman at the hearing today, he defined it as non-severe . . . ” (Tr. 283). This statement was not central to the ALJ’s hypothetical. The core of the hypothetical was the ALJ’s listing of Mock’s impairments and restrictions. He stated Mock has mild restrictions “to function independent[ly], appropriately, and effectively in the competitive job market” (Tr. 283). Mock would have mild difficulty following instructions. Last, he said that her restrictions would “[n]ot interfere with her ability to use judgment, or respond appropriately to supervision, co-workers in the usual setting or deal with changes in the routine work setting” (Tr. 283). It was these restrictions that the VE relied upon, not the repetition of Dr. Ascheman’s assessment that Mock’s dysthymia is “non-severe.”

The court finds that the restrictions that the ALJ included in the hypothetical are supported by evidence in the record, specifically, the notes of Mock’s treating physician. Dr. Curdue often noted that Mock would have some concentration problems but felt that she should “find a job” and was confident that she could find gainful employment (Tr. 140, 175). Further support for the ALJ’s hypothetical comes from the evaluations of agency psychiatrists, Drs. Notch and Garfield. Dr. Notch noted in his RFC that Mock would have “moderate limitations” in her ability to carry out instructions, maintain attention, and make plans and goals independently of others. (Tr. 202). He found that her social limitations would not be significantly limited. Dr. Notch stated that Mock is “able to do simple one-or-two-step work-like activities” (Tr. 220). Dr. Garfield found that Mock would have mild daily living restrictions, mild difficulties with social functioning, and mild difficulties “maintaining concentration, persistence, or pace” (Tr. 194).

The court finds that the hypothetical precisely described Mock’s impairments and was supported by substantial evidence in the record. See Newton v. Chater, 92 F.3d at 694-95; Baker v. Apfel, 159 F.3d at 1144. The ALJ’s use of “non-severe” was not a central part of the hypothetical and not of significance to the VE’s response. The ALJ,

therefore, properly relied on the VE's testimony.

D. Treating Physician

Mock next argues that the ALJ failed to give reasons for rejecting a treating physician's assessment. The Commissioner responds that the ALJ gave reasons for rejecting, and appropriately rejected, Dr. Curdue's opinion. The Commissioner claims that Dr. Curdue's opinion was unsupported by the evidence and inconsistent with prior statements and treatment notes.

“A treating physician's opinion should not ordinarily be disregarded and is entitled to substantial weight. A treating physician's opinion regarding an applicant's impairment will be granted controlling weight, provided the opinion is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the record.”

Singh v. Apfel, 222 F.3d 448, 452 (8th Cir. 2000) (citation omitted). The regulations require the ALJ to give reasons for giving weight to or rejecting the statements of a treating physician. See 20 C.F.R. § 404.1527(d)(2). Whether the ALJ gives great or small weight to the opinions of treating physicians, the ALJ must give good reasons for giving the opinions that weight. Holmstrom v. Massanari, 270 F.3d 715, 720 (8th Cir. 2001). “The ALJ may discount or disregard such an opinion if other medical assessments are supported by superior medical evidence, or if the treating physician has offered inconsistent opinions.” Hogan v. Apfel, 239 F.3d 958, 961 (8th Cir. 2001). Moreover, a treating physician's opinion does not deserve controlling weight when it is nothing more than a conclusory statement. Piegras v. Chater, 76 F.3d 223, 236 (8th Cir. 1996); see also Thomas v. Sullivan, 928 F.2d 255, 259 (8th Cir. 1991) (holding that the weight given a treating physician's opinion is limited if the opinion consists only of conclusory statements).

Here, the ALJ gave good reasons for rejecting Dr. Curdue's October 14, 2003 medical evaluation. First, the ALJ found that Dr. Curdue's findings were conclusory.

The court agrees; the check-marked form did not include any explanation or narrative comments, only conclusions. The form, which was sent to Dr. Curdue by Mock's attorney, was simply a series of questions with spaces to check "yes" or "no." See Thomas, 928 F.2d at 259 (finding conclusory a statement that "consist[ed] of a two page form provided by an insurance company"). The only writing beyond check marks was Dr. Curdue's response to a question about how many breaks Mock would need to take per day and for how long. She responded "4/day," each lasting "20 min." (Tr. 201). There was no explanation of how Mock's alleged disabilities would affect her work, only the conclusions that she would have difficulty concentrating, need to take breaks, and have difficulty with co-workers and superiors. See Piegras v. Chater, 76 F.3d 233, 236 (disregarding a treating physician's statements as conclusory because they "provided no explanation" about how the claimant's impairments would affect his abilities). There was no discussion of her dysthymic disorder, its symptoms, and how those symptoms would manifest in the workplace.

The ALJ further explained his rejection of Dr. Curdue's October 14, 2003 statement, saying that the opinion was "inconsistent with the signs and findings in her treatment notes" (Tr. 18). The court finds substantial evidence in the record to support the ALJ's conclusion. On two different occasions, Dr. Curdue encouraged Mock to find a job or return to work. At Mock's first appointment after the alleged onset date, Dr. Curdue wrote that she recently quit her job and "needs to find a job" (Tr. 140). On May 5, 2002 Mock discussed with Dr. Curdue whether she should apply for social security disability. Dr. Curdue thought "it would be better" if Mock was working (Tr. 175). She expressed some doubt about Mock returning to her cytology job "as she was bored and frustrated" with it, but did not express doubt about her ability to return to her realty job, nor her positions as a dog brusher and dog groomer (Tr. 175). Dr. Curdue wrote, "I think that she could find gainful employment" (Tr. 175).

Additional inconsistent evidence includes Dr. Curdue's statements that Adderall was helping Mock's concentration (Tr. 234, 240). On February 27, Dr. Curdue wrote that the Adderall made Mock "more organized and better able to concentrate" (Tr. 240). On May 29, 2003, Dr. Curdue wrote that "[t]he Adderall is somewhat better than the Ritalin. She is a bit more organized and better able to concentrate" (Tr. 240). See Roth v. Shalala, 45 F.3d 279, 282 (8th Cir. 1995) (finding that if medication can control an impairment, the claimant will not be found disabled).

In addition, the ALJ wrote that Dr. Curdue's October 14, 2003 opinion was inconsistent with Mock's history of drug abuse, the fact that she was looking for work, and "other medical opinions" (Tr. 18). The court finds that there is substantial evidence in the record to support these findings. At Mock's hearing, she testified that she drank alcohol weekly and used cocaine occasionally during the period of alleged disability (Tr. 260). When she was evaluated at the Clinic, she told the physician there that she and her boyfriend drank and abused drugs together.⁴

Other medical reports were inconsistent with Dr. Curdue's October 14, 2003 report. Dr. Straight wrote in his report that "[w]hile concentration was reported to be mildly problematic, I believe she would have sufficient concentration and attention to acquire job skills" (Tr. 183). Dr. Garfield found that she would only have mild restrictions in the workplace and no episodes of decompensation (Tr. 194). Dr. Ascherman testified that Dr. Curdue's statement that Mock's medical impairment would interfere with her concentration and attention was unfounded based on her clinic notes (Tr. 266). He also found that there was no medical basis to support Dr. Curdue's assertion that Mock would need four unscheduled breaks per day (Tr. 266).

⁴Mock contends that Dr. Owens at the Amen Clinic misinterpreted her comments about alcohol and drug use. "They misinterpreted so much of what I said . . . [M]y drug abuse wasn't abuse in most people's opinion. . . it was a rare thing" (Tr. 259). Mock then confirmed that she used cocaine during the period of alleged disability (Tr. 260).

The ALJ gave good reasons for the weight he gave to Dr. Curdue's evaluation and the court finds substantial evidence in the record as a whole to support those reasons. See 20 C.F.R. § 404.1527(d)(2) ("We will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion."); Lochner v. Sullivan, 968 F.2d at 727 ("We will uphold the Secretary's final decision if it is supported by substantial evidence on the record as a whole.").

E. Evidence of Medical Improvement

Mock next argues that because the ALJ found medical improvement as of October 1, 2003, the date of alleged disability, that must mean that the ALJ found Mock disabled *prior* to October 1, 2003. As Mock requests disability for a closed period between November 23, 2001 and September 30, 2003, Mock argues that the ALJ must have found disability during that period. The Commissioner responds that the statement is taken out of context and asks the court to look at the preceding sentence when the ALJ stated Mock was "not under a disability as defined in the Social Security Act, at any time during the alleged closed period of disability . . ." (Tr. 19, Def. Brief 10).

The court agrees with the Commissioner and finds that Mock misinterpreted the ALJ's statement that she improved as of October 1, 2003. The ALJ clearly found that Mock was not disabled. Simply because the ALJ found improvement does not negate her finding that Mock was not disabled during the alleged disability period. See Forte v. Barnhart, 377 F.3d 892, 896 ("This court has stated that an arguable deficiency in opinion-writing technique is not a sufficient reason for setting aside an administrative finding where the deficiency probably no practical effect on the outcome of the case.") (citations and internal quotations omitted).

Upon the foregoing,

IT IS ORDERED that the decision of the Commissioner of Social Security is hereby affirmed. This matter is dismissed. The Clerk of Court shall enter judgment accordingly.

DATED this 28th day of September, 2007.



JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA