IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

EMILY D. ROSS, Plaintiff, vs. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	No. 3:09-cv-0008-JAJ-TJS **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 and this matter is dismissed.

I. PROCEDURAL BACKGROUND

Plaintiff Emily D. Ross (hereinafter "Ross") filed an application for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") on October 18, 2004, alleging an inability to work from January 30, 2002. (Tr. 18, 107-11). The Social Security Administration ("SSA") denied Ross's application initially (Tr. 40-44, 251-55) on February 14, 2005, and again upon reconsideration on May 13, 2005. (Tr. 257-61). On June 21, 2005, Ross filed a Request for Hearing by an Administrative Law Judge ("ALJ"). (Tr. 46). A hearing before ALJ George Gaffaney was held on April 16, 2007. (Tr. 264-89). The ALJ denied Ross's appeal in a decision dated June 27, 2007. (Tr. 15-26). Ross filed a request for review on July 6, 2007. (Tr. 9). The Appeals Council

denied her request for review on December 24, 2008. (Tr. 5-8). Ross filed this action for judicial review on January 15, 2009. (Dkt. No. 1).

II. FACTUAL BACKGROUND

At the time of the hearing, Ross was 37 years old. She was 32 at the time of her alleged disability onset date. Ross has completed twelve years of school. Her vocationally relevant work experience includes work as a nursing assistant. Ross claims she is disabled because of a severe combination of bilateral carpal tunnel syndrome and depression.

A. Medical History

Ross's alleged onset date was January 30, 2002. (Tr. 18, 107-11). Ross's treating physician at all times was Dr. George York. Ross had an employment physical with Dr. York on March 5, 2002 and was described as "generally well appearing." (Tr. 218). Ross did not complain of any symptoms when she saw Dr. York again on September 5, 2002. (Tr. 217). Ross first sought medical treatment for her condition on May 22, 2003, when she complained of numbness and stiffness in her right hand. (Tr. 216). Dr. York referred Ross to a neurological specialist, but Ross cancelled two scheduled neurological consultation appointments. (Tr. 216). On June 17, 2003, Ross consulted with Dr. Oliver Ancheta, a neurologist. (Tr. 214-15). The medical records from the June 17, 2003 consultation indicate that Ross stated her symptoms began approximately three to four months earlier, when she began having recurrent intermittent right hand numbness, stiffness, pain and difficulty gripping and using objects. (Tr. 215). At her June 17, 2003 consultation, Ross denied having any symptoms in her left hand and indicated that she was currently using a wrist splint for her right hand. (Tr. 215). Dr. Ancheta's neurological examination revealed subjective diminished sensation to a light touch and pinprick in the dorsum and palmar aspect of the right hand, with the rest of the sensory modalities intact. (Tr. 215). Dr. Ancheta recommended Ross avoid repetitive use of her right hand. (Tr. 214).

On June 25, 2003, Ross again consulted with Dr. Ancheta. (Tr. 214). Ross presented with decreased symptoms as she had used her hand less since her prior appointment. (Tr. 214). She did wear her splint at night "but she has used it very little because she couldn't tolerate it for long periods." (Tr. 214). Her neurological results were unchanged and an NCV/EMG study revealed a mild to moderately severe right median entrapment neuropathy at the wrist. (Tr. 214). Ross had no focal deficits. (Tr. 214). Dr. Ancheta diagnosed Ross with carpal tunnel syndrome and discussed the treatment options with Ross. (Tr. 214). Ross chose to proceed with a non-surgical approach or otherwise conservative treatment. (Tr. 214).

On July 28, 2003, Ross consulted with Dr. Rajiv Khanna. (Tr. 213). Ross complained of right wrist numbness, especially in the morning, and some pain with use. (Tr. 213). A physical examination revealed a positive Phalen's sign, with a negative Tinel at the wrist. (Tr. 212). Her range of motion in the fingers was normal but sensation in the median nerve was diminished. (Tr. 212). Dr. Khanna recommended surgery to release the carpal tunnel. (Tr. 212). Ross again refused surgical intervention. (Tr. 212).

Ross underwent a physical for work in September 2003 with no mention of her carpal tunnel syndrome discomfort. (Tr. 222). Patient notes indicate that Ross received a written prescription for her carpal tunnel syndrome symptoms on October 18, 2004, but then canceled two appointed in November 2004 because she felt better. (Tr. 211).

A Disability Report was completed on November 3, 2004. Field Officer W. Yoder conducted a telephonic interview in which Ross "just seemed kind of slow." (Tr. 189). Ross had difficulty answering questions although "eventually she did manage to answer everything." (Tr. 189).

Dr. Roger Waller conducted a disability physical in connection with Ross's disability application on January 11, 2005. (Tr. 223). At this appointment, Ross presented with numbness and pain in both the right and left hands. (Tr. 223). Ross

indicated that her right hand had initially been much worse than the left, but both hands were now equally suffering the same symptoms. (Tr. 223). By this point, Ross stated that she suffered pain mainly in her hands and wrists, but that it sometimes radiated up to her shoulders. (Tr. 223). Ross reiterated that she was not interested in any surgical options and that she would continue taking over-the-counter Extra-Strength Tylenol for her pain. (Tr. 223).

Medical records indicate that Ross returned to Dr. Khanna for a surgery to alleviate the carpal tunnel syndrome in her right wrist on August 3, 2006. (Tr. 235). Ross returned for a follow-up visit on September 11, 2006. (Tr. 235). Dr. Khanna opined that her disability was temporary and scheduled Ross for EMG testing to determine if her left wrist also needed surgery. (Tr. 235). The records do not indicate the results of this test. Ross's testimony indicated that surgery did not improve the condition of her right hand, and she subsequently refused the surgical option on her left hand. (Tr. 271).

Ross also began developing problems in terms of her mental health in March 2007. (Tr. 236). Ross saw her primary care physician, Dr. George York, on March 7, 2007. (Tr. 236). Dr. York diagnosed Ross with acute and chronic depression, caused by multiple stressors, and started her on the medication Cymbalta. (Tr. 236, 241). Dr. York opined that her prognosis was "good" (Tr. 236) and referred her to a psychiatrist for further treatment.

On April 10, 2007, Ross received a psychiatric evaluation and consultation from Dr. Venugopal Vatsavayi. (Tr. 241-42). The medical record indicates that Ross had been on the Cymbalta for four weeks with "minimal benefit." (Tr. 241). Ross stated that she had never been treated for depression previously because of the associated "stigma," and that she currently had multiple stressors, poor self-esteem, decreased concentration, initial/middle insomnia, and poor appetite, among other indicators. (Tr. 241). Ross denied any acute medical issues at the psychiatric evaluation. (Tr. 241). Significantly,

"[s]he reports that she is able to function at home; however, she reports that she has troubles at times to keep up with the household chores." (Tr. 241). Dr. Vatsavayi's mental status examination revealed the following pertinent facts:

> Patient is casually dressed, well kept with no signs of neglect. Patient is calm, cooperative with poor eye contact. No abnormal movements noted. Speech is not spontaneous, low in volume; otherwise within normal limits. Mood is depressed with a restricted affect. Thought process logical, goal directed. Thought content; no delusions, no suicidal/homicidal ideation, and no perceptual disturbances noted. Cognition; alert, awake, oriented X3; otherwise grossly intact. Insight and judgment are fair.

(Tr. 242). Based upon this consultation, Dr. Vatsavayi diagnosed Ross with dysthymia and ruled out major depressive disorder that was moderate and recurrent. (Tr. 242). Dr. Vatsavayi determined Ross's current Global Assessment of Functioning ("GAF") to be 50/55. (Tr. 242). Dr. Vatsavayi conducted the "Assessment for Social Security Disability Request: Based on Multnomah Community Balance Scale" to arrive at his diagnosis. (Tr. 243).

In this test, Ross had low general intellectual functioning, moderately abnormal mood based on crying, and an inability to problem-solve in response to stress and anxiety, because, as notes in the margin indicate, she "loss [sic] thinking process, just want to be." (Tr. 243). Ross stated that she almost always has independence in her daily life and that her deterioration in personal habits was slight. (Tr. 243). In terms of social skills, Ross had low marks because she had fairly infrequently social interaction with others, was ineffective in socializing with others, and seldom was involved in any meaningful activities. (Tr. 243). Her main problem with the restriction of daily activities had notes in the margin indicating, "Do not go anywhere; I have had too many people take advantage of me." (Tr. 244). Again, in terms of work habits, Ross stated that she had marked difficulty in remembering instructions, work-like procedures, and the ability to carry out

instructions. (Tr. 244). Ross marked "extreme" for the ability to be punctual because, "I have always been late getting to a job. I try, I just lose focus on time & [sic] am late." (Tr. 244). Notes also indicate that she had difficulty completing a normal day's work because she was "too depressed" and that she did not respond well to supervisors because she would "start crying." (Tr. 245). Based upon this questionnaire, Dr. Vatsavayi determined that Ross's duration of impairment had lasted or could be expected to last for twelve months. (Tr. 245). Dr. Vatsavayi signed the assessment on April 12, 2007; there was no corresponding SSA psychiatric evaluation or review of Ross's condition as the ALJ hearing occurred on April 16, 2007.

B. Employment History

From 1987 to 1990, Ross worked at Walnut Manor, Inc., as a nursing assistant at a nursing home. (Tr. 116). From 1992 to 2002, Ross worked at a variety of elderly care and nursing homes: Norwalk Manor; Mapleside Manor, Inc.; Spherion of Rockford; Amboy Rehabilitation & Nursing Center, Ltd.; Franklin Grove Nursing Center, Inc.; Dixon Old Peoples Home Fund; Grancare, Inc.; Colonial Acres Healthcare Center; Mercy Medical Center - Clinton, Inc.; Senior Living Properties, L.L.C.; Covenant Care Midwest, L.L.C.; and Medical Staffing Network, Inc. (Tr. 118-19). Ross worked for two non-nursing care employers in 1997, Peak Personnel, Inc. and the Office of County Treasurer. (Tr. 118). In 2002, Ross worked for Parochetti Enterprises as a crew member at Taco Bell. (Tr. 131, 137). Ross worked for MSL L.L.C., a McDonald's franchise, as a cashier in 2003. (Tr. 120, 137). Finally, in 2004, Ross worked for LA Leasing, Inc. (Tr. 120). As determined by the Social Security Administration, Ross has had no significant gainful employment ("SGA") since 2002. (Tr. 120, 142).

During Ross's employment history, she stated that she never received any vocational rehabilitation to acquire services or training she needed to resume employment. (Tr. 140).

Ross's earnings varied widely, from a yearly low of $185.52 in 2003 to a yearly high of $7,784.77 in 2001. (Tr. 115). Ross had no earnings in 1986 or 1991. (Tr. 115).

C. Plaintiff's Subjective Complaints

On November 19, 2004, Ross completed a Personal Pain/Fatigue Questionnaire. She wrote that, "[t]he pain can be dull B.ut [sic] it gets worse. My right hand and my left hand are numb," and that she experienced pain/fatigue with "any type of pressure on them." (Tr. 143). Ross did not specify in her response whether the pain/fatigue occurred every day or per week, just stating, "two or 3 but what makes it hard is the numbness and droping [sic] things." (Tr. 143). She indicated that she did not know how long her pain lasted, but that the pain/fatigue was the same throughout the day. (Tr. 143). She also did not describe how her symptoms had worsened over the past twelve months. (Tr. 143). Ross wrote that she was taking Tylenol for her pain, but repeatedly wrote it wasn't so much "the pain, it [sic] that things are numb." (Tr. 144-46).

On February 25, 2005, Ross completed a Disability Report - Appeal questionnaire, in which she stated that her symptoms had gotten worse since November 1, 2004. (Tr. 147). She stated that it "hurts more" and that she was only using a brace and continuing to take Tylenol to alleviate the pain. (Tr. 147, 149). Ross gave information about her activities, indicating that carpal tunnel syndrome had effected her ability to care independently for herself: "I can But I drop a lot it hurts when I lift to much I drop thing my hands are numb a lot they could go numb even when I write." (Tr. 151). Ross completed another Disability Report - Appeal on March 28, 2005, stating that since her last appeal report, things were "a lot harder" and that she could no longer even lift "not hevy [sic] things." (Tr. 154, 158).

Ross submitted another Personal Pain/Fatigue Questionnaire on May 5, 2005, this time indicating that the pain was "aching," "just about anything" made the pain worse, and

that her pain/fatigue was worse in the afternoon. (Tr. 161). Her response clarified that the pain was located in her shoulders, hands, and wrists. (Tr. 161). Overall, Ross's hands hurt and to alleviate pain she was "rubing [sic] it [with] hot rags and other." She stated that she was not involved in any rehabilitation with the goal of returning to work and that "it depends" on how the pain limited her activities. (Tr. 162). In a typical day, Ross would "clean dishes ect [sic] if I can." (Tr. 164).

Ross completed a Disability Report - Appeal on May 20, 2005, stating that her symptoms had again worsened since March 1, 2005. (Tr. 165). Ross stated that she was not taking any medications and had no diagnostic work completed for assessment of the carpal tunnel syndrome. (Tr. 168). There were no changes in her daily activities since her last report, but that in terms of her personal needs, "[w]hen my hand goes numb or it starts hurting I can't do half the thing [sic] I used to do. I drop things I hurt I can't lift things." (Tr. 169).

In an undated Function Report - Adult, Ross described her daily activities:

> I get up I get my kid up I do what I can I [sic] depends on how my hands are if they a [sic] numb or not or I [sic] they hurt so I really can't say sometimes I do dishes sometime I sit on the couch. . . . Sometimes I cook a lot of difffrent [sic] things sometime my husband cooks. [In terms of since her symptoms changed] Sometime when my hands are numb or hurting I can't lift or take something out of oven.

(Tr. 172). For house/yardwork and shopping, Ross stated that it took her longer to complete those tasks. (Tr. 174, 175). For hobbies and interests, Ross would watch t.v., take walks, and sometimes go fishing when she wasn't in pain. (Tr. 176). Ross wrote that she did these things "OK." (Tr. 176). Ross spent time with others and talked on the phone daily although she regularly stayed at home instead of going out. (Tr. 176). For information about abilities, she stated that she was limited from lifting, reaching, completing tasks, and using her hands, especially when her hands were numb or hurting.

(Tr. 177). In another undated Disability Report - Adult, Ross wrote that she stopped working because "I was dropping things and unable to do the job." (Tr. 181). While working as a Nursing Assistant, Ross used the assistance of a lift when moving patients in and out of bed. (Tr. 182).

D. Residual Functional Capacity

On January 20, 2005, Dr. J. Wilson completed a Physical Residual Functional Capacity Assessment (Tr. 224-31) to assess the carpal tunnel syndrome bilaterally, which was reviewed by Dr. Claude H. Koons on January 30, 2005. (Tr. 231). Dr. Michael F. Perll confirmed the assessment in all respects on February 5, 2005, in a Medical Consultant's Review of Physical Residual Functional Capacity Assessment. (Tr. 232-33).

Dr. Wilson's evaluation noted that Ross had only been previously treated for her right hand and that her last appointment for her symptoms was in July 2003. (Tr. 227). As Dr. Wilson notes,

> The clmt alleges pain due to the carpal tunnel in which she only takes tylenol and has not sought ongoing treatment for this condition. The clmt alleged that she had the symptoms two years ago and then was not seen for this until June 2003. The clmt states her symptoms go away if she does not use her hands repetitively. The clmt states she is able to do her self care and household care. She complains of numbness in her hands that restricts her activities. The clmts [sic] credibility is somewhat eroded due to not receiving ongoing treatment for her condition and the fact she had a short period of time when she sought treatment.

(Tr. 229). Dr. Wilson concluded that Ross's current evaluation confirmed that she "should not perform constant hand use and therefore the restriction is noted." (Tr. 227). Dr. Wilson also found that Ross could 1) occasionally lift and/or carry twenty pounds; 2) frequently lift and/or carry ten pounds; 3) stand and/or walk (with normal breaks) for a

total of about six hours in an eight-hour workday; 4) sit (with normal breaks) for a total of about six hours in an eight-hour workday; and 5) unlimited in her extremities for her ability to push and/or pull. (Tr. 225). For postural limitations, Ross could occasionally climb, balance, stoop, kneel, crouch, and crawl. (Tr. 226). In terms of manipulative limitations, Dr. Wilson found that Ross had limited abilities for both handling (gross manipulation) and fingering (fine manipulation). (Tr. 227).

E. Hearing Testimony

ALJ George Gaffaney held Ross's hearing on April 16, 2007. At the time of the hearing, Ross was thirty-seven years old. Vocational expert ("VE") Elizabeth Albrecht was present and testified at the hearing. Ross was represented by an attorney, Michael Depree. (Tr. 266). The court established that her nurse aide job would be her only employment to satisfy the SGA requirements. (Tr. 267-68). Depree asked the court to clarify that Ross's symptoms had changed since her initial disability filing, expanding from carpal tunnel syndrome bilaterally to also include depression that was expected to last or has lasted twelve months or more. (Tr. 269).

Ross testified that she has a husband and four children, with the family's sources of income consisting of Supplemental Security Income ("SSI") and Public Aide checks. (Tr. 269-70). Ross's last job was working for a fast food restaurant for a short time in 2004, whereupon she was forced to quit because she was under "a lot of stress [because her] father was dying." (Tr. 271). She had not resumed employment because of her carpal tunnel syndrome and her depression that she had "been having for a long time." (Tr. 271).

Ross said she suffered from medical problems with her hands and these problems went back about "six or seven years." (Tr. 277). Ross testified that she had surgery on her right hand in August of 2006. (Tr. 271). The surgery did not improve the overall functioning but she stated her left hand was "the same as what the right was before the surgery." (Tr. 272). Ross stated that she decided not to have surgery on her left hand,

despite a doctor's recommendation "that I should but the right didn't work so why try it on the left." (Tr. 277). Because of her pain,

> It's just, it hurts, it goes numb. I can't lift anything without dropping it. I can't even pick up a glass of tea without dropping the glass of tea. I can't grip or pick up a phone or anything with it. It just, it hurts, it bothers me. It goes numb. That's about it.

(Tr. 272). Ross's medical records indicated that "repetitive use" of her hands was problematic, and Ross interpreted repetitive use as meaning "you have to constantly be using your hands." (Tr. 272). She was limited in lifting things because the pain "shoots all the way up to my shoulder" and lifting/carrying would be limited to five pounds or less. (Tr. 273). There did not appear to be any specific triggers for the pain, because Ross "could just be sitting on the couch and my hand will go numb or shoot pain." (Tr. 278). Ross was currently taking Ibuprofen for pain management. (Tr. 278).

Ross also testified that she had been experiencing recurrent symptoms of depression and that it had gotten increasingly worse since 2002. (Tr. 274). She testified that she had no energy, could not sleep at night, could not do anything "without losing concentration." (Tr. 275). The depression, in combination with her carpal tunnel syndrome, made her unable to do her nursing assistant job, because,

> Well, when you get up out of bed and don't want to go to work you can't really do the job. I mean I'm depressed. I go in to work without being depressed. My hands are numb. I can't feel to do the work. I can't lift the people because I can't lift over five pounds and there's nobody that's under five pounds in a nursing home. I can't do anything without my hands going numb and shooting pain. The depression is I want to call off work. I don't want even really be [sic] there.

(Tr. 275). Ross took Cymbalta to manage her depression, and at the time of the hearing, had been on the medication for approximately four weeks. (Tr. 275). She testified that

she had not noticed an appreciable difference in her depression since starting the Cymbalta, but that her doctor would prescribe stronger medication if she did not improve. (Tr. 275).

Ross testified that the depression affected not only her mood, but also her ability to complete and manage household chores. Since 2002, her children and husband had to do dishes and vacuum because she had been unable to do these tasks. (Tr. 276, 282). Ross continued to sometimes cook, make beds, change sheets, and do the laundry. (Tr. 282). The depression also seemed to affect Ross's ability to be around other people.

> I don't really go out in the public. I just basically stick with my husband and my kids. . . . Stress, I just don't see anybody because I don't, I don't know who to trust. . . . I've had a lot of problems with people and I don't, I just have a lot of problems with people. . . . I'm just nervous around people. I don't go out very much. I'm just nervous around people.

(Tr. 278-79). The depression also hampered Ross's ability to remember things and concentrate on specific tasks. (Tr. 279-81). Despite concentration problems, Ross was still able to watch t.v., listen to music, read, fish with her husband, and take walks with her daughter. (Tr. 282-83). Ross testified that for her psychiatric assessment on April 10, 2007, Dr. Vatsavayi "asked me a couple of questions but mostly they filled it out on their own." (Tr. 284). She indicated that some portions of the assessment were not filled out in her presence and that they wrote down some of her responses verbatim.[1] (Tr. 284).

The ALJ posed the following hypothetical questions to the vocational expert (VE), and the VE responded as follows:

> Q: The first one I would assume lifting 20 pounds occasionally, 10 pounds frequently. Stand and sit six hours each in an eight hour workday. I'll make all the non

[1]The assessment included notes in the margin, such as "I would start crying" or "I stay by myself." (Tr. 245).

exertional limits occasional. And frequent handling and fingering bilaterally. And I'll limit to simple routine tasks. If this was a residual functional capacity could past relevant work be performed?

A: Under that hypothetical with the lifting and carrying occasionally 20 pounds, frequently 10 pounds, sitting and standing 6 of an 8 hour day that limits the individual to light work and then simple repetitive work. So based on that the past job of nurse aide is eliminated because that is semi-skilled. Medium, per the DOT and very heavy the way she performed it.

. . .

Q: If we had an individual the same age, education, and work experience of the claimant are there any jobs that could be performed given this profile?

A: Under that hypothetical the individual could [do] some light, unskilled jobs. . . .A sampling would be housekeeping/cleaner. . . And that's in the category of maid, janitor, cleaner.

. . .

Q: My second hypothetical I'm going to keep everything the same except go to ten pounds occasional and five frequent so this would put us in the sedentary exertional category.

A: Yes, if you want ten pounds occasional, five pounds frequent it would make it sedentary.

Q: Could our hypothetical individual perform any jobs then with this residual functional capacity?

A: There would be some sedentary unskilled. A sampling of that would be final assembler . . . [a]ddresser . . . [and] [c]harge account clerk . . . .

Q: My third hypothetical is the same as number two but I'll make handling and fingering occasional bilateral. With that change could our hypothetical individual do any job on a full

> time competitive basis?
>
> A: If you made the change in hypothetical two with handling and fingering both occasional that would preclude those jobs.

(Tr. 286-88). When questioned by Ross's attorney, the VE clarified that the change in hypothetical two with "handling and fingering both occasional" would preclude all the jobs she had indicated. (Tr. 288).

III. 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 Baker v. Barnhart, 457 F.3d 882, 892 (8th Cir. 2006). "Substantial evidence is less than a preponderance, but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion." McKinney v. Apfel, 228 F.3d 860, 863 (8th Cir. 2000). The Court must take into account evidence that fairly detracts from the ALJ's findings, as well as evidence that supports it. Id. (citing Craig v. Apfel, 212 F.3d 433, 436 (8th Cir. 2000). 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). The Court will not reverse a decision "merely because substantial evidence would have supported an opposite decision. Eichelberger v. Barnhart, 390 F.3d 584, 589 (8th Cir. 2004). "If, after review, we find it possible to draw two inconsistent positions from the evidence and one of those positions represents the Commissioner's findings, we must affirm the denial of benefits." Finch v. Astrue, 547 F.3d 933, 935 (8th Cir. 2008) (quoting Mapes v. Chater, 82 F.3d 259, 262 (8th Cir. 1996)).

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 Ross had not engaged in substantial gainful activity since Ross's alleged onset date of January 30, 2002. (Tr. 18, 20). At the second step, the ALJ determined that Ross had a severe impairment, that being bilateral carpal tunnel syndrome and depression. (Tr. 21). At the third step, the ALJ determined that Ross's impairments or combination of impairments did not meet or equal one of the listed impairments. (Tr. 21). The ALJ found that Ross's mental disorder consisted of mild restriction of activities of daily living; mild difficulties in maintaining social functioning; moderate difficulties in maintaining concentration, persistence, or pace; and no episodes of decompensation. (Tr. 21). At the fourth step, the ALJ determined that Ross could lift twenty pounds occasionally and ten pounds frequently; stand six hours in an eight hour work day; sit six hours in an eight hour work day; occasionally climb stairs, climb ladders, balance, stoop, kneel, crouch, and crawl; frequently finger and handle bilaterally; and perform simple, routine, tasks. (Tr. 21). Based on these limitations, and having found no evidence of past relevant work experience, the ALJ determined that Ross could perform other jobs in the national economy, such as housekeeper/cleaner, small products assembler, and marker. (Tr. 25). Therefore, the ALJ found that Ross was not disabled within the meaning of the Social Security Act at any time from June 30, 2002 through the date of the decision. (Tr. 25).

C. Residual Functional Capacity Determination

Ross argues that the ALJ's residual functional capacity ("RFC") was not supported by substantial evidence. Ross asserts that in reaching his determination of Ross's RFC,

the ALJ improperly weighed her treating physician's and psychiatrist's opinions, and substituted his own opinion instead. Specifically, Ross contends that the RFC does not reflect her limitations from carpal tunnel syndrome and her difficulty with depression. Defendant contends that the ALJ properly evaluated Ross's medical treatment. Additionally, Defendant asserts that no treating physician ever imposed limitations on Ross such that she was unable to perform substantial gainful activity.

It is proper for an ALJ to consider the opinion of a treating physician, who is a "physician, psychologist, or other acceptable medical source" with whom the claimant has an "ongoing treating relationship." 20 C.F.R. § 416.902. An ongoing treatment relationship is such that medical evidence establishes that the physician has treated the patient with a frequency "consistent with accepted medical practice for the type of treatment and/or evaluation required" for the patient's medical condition. Id. There is not an ongoing treatment relationship present when the doctor has insufficient knowledge of the patient's medical condition in order to formulate an opinion. Randolph v. Barnhart, 386 F.3d 835, 840 (8th Cir. 2004) ("When she filled out the checklist, Vega had only met with Randolph on three prior occasions."). Generally, the ALJ will accord weight to the opinion of a treating source depending on the length and frequency of the treatment relationship. Cf. 20 C.F.R. §§ 404.1527(d)(2)(i) & 416.927(d)(2)(i).

There must be good reasons for whether the ALJ gives great or small weight to the opinions of treating physicians. See Hamilton v. Astrue, 518 F.3d 607, 610 (8th Cir. 2008); 20 C.F.R. § 404.1527(d)(2). If the ALJ discounts a treating physician's opinion, then the ALJ must justify his reasons for doing so. Davidson v. Astrue, 501 F.3d 987, 990 (8th Cir. 2007) (quoting Dolph v. Barnhart, 308 F.3d 876, 878 (8th Cir. 2002)). Ordinarily, an ALJ must grant the opinion of a treating physician substantial weight. Davidson, 501 F.3d at 990. The ALJ must defer to the opinion of the treating physician and cannot substitute his own opinion. Finch, 547 F.3d at 938 (citing Ness v. Sullivan,

904 F.2d 423, 435 (8th Cir. 1990)). However, the ALJ does not have to defer to a treating physician's medical opinions "unless they are well-supported by medically acceptable clinical and laboratory diagnostic techniques and [are] not inconsistent with the other substantial evidence in the record. Juszczyk v. Astrue, 542 F.3d 626, 632 (8th Cir. 2008) (citing Ellis v. Barnhart, 392 F.3d 988, 995 (8th Cir. 2005)). Furthermore, the ALJ may consider inconsistent opinions from the treating physician. Hogan v. Apfel, 239 F.3d 958, 961 (8th Cir. 2001). The ALJ must evaluate the medical record as a whole and "is charged with the responsibility of resolving conflicts among medical opinions." Wagner v. Astrue, 499 F.3d 842, 848 (8th Cir. 2007).

A disability claimant then has the burden of proving a disabling impairment. Masterson v. Barnhart, 363 F.3d 731, 737 (8th Cir. 2004). The RFC is "the most you can still do despite your limitations." 20 C.F.R. § 404.1545. Determining a claimant's residual functional capacity is a medical question. Lauer v. Apfel, 245 F.3d 700, 704 (8th Cir. 2001); Singh v. Apfel, 222 F.3d 448, 451 (8th Cir. 2000). "The Commissioner must determine a claimant's RFC based on all of the relevant evidence, including the medical records, observations of treating physicians and others, and an individual's own description of [her] limitations." McKinney v. Apfel, 228 F.3d 860, 863 (8th Cir. 2000); 20 CFR § 404.1545 ("We will assess your residual functional capacity based on all the relevant evidence in your case record."). However, the record "must include some medical evidence that supports the ALJ's residual functional capacity finding." Dykes v. Apfel, 223 F.3d 865, 867 (8th Cir. 2000) (citing Anderson v. Shalala, 51 F.3d 777, 779 (8th Cir. 1995)); Lauer, 245 F.3d at 704 (noting that while the ALJ was not "limited to considering medical evidence," the ALJ was "required to consider at least some supporting evidence from a professional").

Here, the ALJ found that Ross appeared completely normal and did not present with symptoms when seen by her treating physician, Dr. George York, on both March 2002 and

September 2002. (Tr. 22). In May 2003, Ross sought treatment for her right hand's numbness and stiffness. The ALJ found that Dr. Ancheta only examined Ross twice in June 2003, where diagnostic tests indicated Ross had "mild to moderate right median entrapment neuropathy." (Tr. 22). Ross was noncompliant with Dr. Ancheta's prescription to use a wrist splint. (Tr. 22-23). In July 2003, Ross refused to undergo corrective surgery for her carpal tunnel syndrome in the right hand. (Tr. 23). The ALJ further noted that Ross canceled two appointments in November 2004. (Tr. 23). When Dr. Roger Waller examined Ross on January 11, 2005 at the request of Disability Determination Services, he found her physical examination to be normal "despite reported bilateral hand pain and numbness and the claimant reiterated her lack of interest in carpal tunnel release." (Tr. 23). Ross finally underwent right carpal tunnel release in August 2006. (Tr. 22).

In terms of Ross's depression, the ALJ found that Dr. George York's checklist on March 7, 2007, indicated that Ross had started treatment and had a "good" prognosis. (Tr. 23). Dr. York did not "provide an opinion with respect to quantifying limitations, as the majority of the questionnaire was left unanswered." (Tr. 23). The ALJ noted that Ross had no previous history of any psychiatric problems and when she saw Dr. Venugopal Vatsavayi, a psychiatrist, she had been on prescription Cymbalta for approximately one month. (Tr. 23). Dr. Vatsavayi's diagnosis of dysthymia on April 10, 2007, had some conflicting accounts; while Ross said she could not keep up with household chores, she did say she could function in her home. (Tr. 23). Additionally, although Ross had poor eye contact, depressed mood, and restricted affect, her thought process was logical and insight and judgment were fair. (Tr. 23). The ALJ found that the checklist Dr. Vatsavayi provided to the claimant's representative on April 12, 2007, "contradict findings of clinical evaluation performed just two days earlier." (Tr. 23). The opinions also "appeared to be based primarily on the subjective complaints of the

claimant" because some of the items were referenced in the first person. (Tr. 23).

Furthermore, the ALJ found that some of Ross's physical activities were "not limited to the extent one would expect, given the complaints of disabling symptoms and limitations." (Tr. 24). Ross had relatively infrequent medical appointments and cancelled medical appointments on several occasions. (Tr. 24). Ross had alternated between using Tylenol and Ibuprofen to alleviate her symptoms, and had never resorted to narcotics for her "allegedly disabling symptoms." (Tr. 24). The ALJ thus considered the opinions of the treating physicians in making his final determination.

> As for the opinion evidence, given the claimant's allegations of totally disabling symptoms, one might expect to see some indication in the treatment records of restrictions placed on the claimant by the treating doctor. Yet, a review of the record reveals no such restrictions recommended by the treating doctor. The undersigned accords little weight to the opinion of the treating psychiatrist as the treatment history was extremely brief, consisting of only one session. Additionally, the psychiatrist appeared to rely quite heavily on the subjective complaints of the claimants.

(Tr. 24). The ALJ also considered the administrative findings of fact made by Dr. Waller and gave his opinion "great weight" as a non-examining expert source. (Tr. 24). Based upon the medical evidence before him and examining the entire record, the ALJ determined that Ross could lift 20 pounds occasionally and 10 pounds frequently; stand six hours in an eight hour work day; sit six hours in an eight hour work day; occasionally climb stairs, climb ladders, balance, stoop, kneel, crouch, and crawl; frequently finger and handle bilaterally; and perform simple, routine, tasks. (Tr. 21).

In sum, there is substantial evidence in the record for the Court to conclude that the ALJ considered the conflicting medical records of Ross's treating physicians for carpal tunnel syndrome before making his RFC determination. The ALJ properly evaluated Ross's medical record as a whole and correspondingly balanced conflicting, incomplete,

and inconsistent opinions from her treating physicians. Juszczyk, 542 F.3d at 632. It was also proper for the ALJ to consider Ross's willingness to undergo treatment in order to determine the sincerity of her allegations. Gray v. Apfel, 192 F.3d 799, 804 (8th Cir. 1999). See also Dixon v. Barnhart, 353 F.3d 602, 605 (8th Cir. 2003). Dr. Khanna initially recommended surgical intervention to relieve her right wrist in July 2003, but she did not seek surgical intervention until August 2006. During this same time period, Ross had one physical with her treating physician where she did not complain of pain or stiffness, cancelled two appointments, and had a physical examination by a SSA doctor who stated that she had only slight restriction in her wrists. The lack of medical treatment for a prolonged period of time undermines Ross's allegation that her impairments prevented her from working. Gwathney v. Chater, 104 F.3d 1054, 1045 (8th Cir. 1997). Ross also stated that she only took over-the-counter medication to alleviate pain and that she voluntarily chose to forego wearing her wrist splint. Based on Dr. Ancheta's advice that Ross should not perform frequent "repetitive" hand motions, the ALJ properly determined that Ross's RFC would be limited to only "frequent"[2] hand motions.

Similarly, it was proper for the ALJ to discount the psychiatrist's opinion. Substantial evidence supports the ALJ's conclusion that one consultation with a treating physician followed by one consultation with a psychiatrist is insufficient to reverse the ALJ's finding. Randolph, 386 F.3d at 840. Dr. York determined Ross's depression prognosis was "good" and there is no evidence in Ross's medical record to indicate that Dr. Vatsavayi performed any tests to confirm dysthymia. It is also troubling that many handwritten notes on the questionnaire submitted to the SSA consisted of statements in the first person. Without diagnostic testing, such a questionnaire indicates Dr. Vatsavayi

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[2] "Frequently: activity or condition exists from 1/3 to 2/3 of the time." Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles, App. C, Physical Demands, http://www.occupationalinfo.org/appendxc_1.html.

wrote down Ross's subjective complaints, without corresponding independent medical analysis and diagnosis. "Medical equivalence [for RFC] must be supported by medical findings; symptoms alone are insufficient." Finch, 547 F.3d at 938 (citing 20 C.F.R. § 404.1526; Social Security Ruling 86-8). Thus, substantial evidence supports the ALJ's finding that Ross did not suffer from a mental impairment that meets or medically equals one of the listed mental disorders listed in 20 C.F.R. Part 404, Subpart P, Appendix 1.

In conclusion, the Court will not disturb the ALJ's RFC finding.

D. Credibility

Ross next argues that the ALJ's credibility finding is not supported by substantial evidence because the ALJ failed to cite to Polaski v. Heckler, 739 F.2d 1320, 1322 (8th Cir. 1984), and also failed to consider Ross's past work experience in assessing her credibility. (Pl.'s Br. at 23-24). Devoting several paragraphs to the issue of credibility, the ALJ made the following findings relating to credibility:

> (1) Although the claimant reported daily activities of dusting, making beds, changing sheets, doing laundry, watching television, listening to music, reading, walking, fishing, and some shopping, she maintained she could lift only five pounds.
>
> (2) She stated she could not pick up a telephone. The claimant testified she felt nervous around people and preferred to spend time with her family; yet, she indicated in a questionnaire that she spent time with others and talked on the telephone daily.
>
> (3) The record reveals the claimant was seen for an employment physical in March 2002 at which time she had no complaints. Physical examination was completely normal.
>
> (4) The claimant stated she was noncompliant with use of the wrist splint because she could not tolerate it and she chose to continue with conservative treatment as she was not interested in surgical intervention. . . . She cancelled two appointments

> in November 2004.
>
> (5) George L. York, M.D., the claimant's treating physician, submitted a checklist for the representative on March 7, 2007, indicating the claimant "started treatment today" with respect to depression for which prognosis was noted to be "good." The treating physician did not provide an opinion with respect to quantifying limitations, as the majority of the questionnaire was left unanswered. (Exhibit 5F)
>
> (6) Despite reported difficulty with keeping up with household chores, the claimant related she was able to function in her home. Mental status examination revealed poor eye contact, depressed mood, and restricted affect; however, thought process was logical and insight and judgment were fair. Diagnoses included dysthymia as well as rule [sic] out major depressive disorder, recurrent, moderate.
>
> (7) Dr. Vatsavayi submitted a checklist for the claimant's representative on April 12, 2007; however, the opinions provided contradict findings of clinical evaluation performed just two days earlier. Moreover, some items referenced the first person, such as, "I have always been late getting to a job. I try, I just lose focus on time and am late." The opinions appeared to be based primarily on the subjective complaints of the claimant.

(Tr. 22-23).

When evaluating the credibility of a claimant's subjective complaints, the ALJ may not disregard them "solely because the objective medical evidence does not fully support them." Polaski v. Heckler, 739 F.2d 1320, 1322 (8th Cir. 1984). In evaluating a claimant's credibility, Polaski dictates that the ALJ must give full consideration to past relevant work experience and the claimant's subjective complaints. The ALJ should also consider "observations by third parties and treating and examining physicians" based on the following factors: (1) the applicant's daily activities; (2) the duration, frequency and intensity of pain; (3) precipitating and aggravating factors; (4) dosage, effectiveness and

side effects of medication; (5) functional restrictions; (6) non-treatment measures the individual uses for pain relief or other symptoms; and (7) any other restrictions or functional limitations due to pain or other symptoms. Id. at 1321-22; SSR 96-7p, *available at* Social Security Administration, http://www.ssa.gov/OP_Home/rulings/di/01/SSR96-07-di-01.html (July 2, 1996). The ALJ can only discount subjective complaints "if there are inconsistencies in the evidence as a whole," and not "solely on the basis of personal observations." Id.

Also, the decision need not "include a discussion of how every Polaski 'factor' relates to the claimant's credibility." Samons v. Astrue, 497 F.3d 813, 820 (8th Cir. 2007) (citing Tucker v. Barnhart, 363 F.3d 781, 783 (8th Cir. 2004)). "The ALJ need only acknowledge and consider those factors before discounting a claimant's subjective complaints." Eichelberger, 390 F.3d at 590. The ALJ should look to whether the claimant has the RFC ability to perform the acts on a daily basis, including "the sometimes competitive and stressful conditions in which real people work in the real world." Forehand v. Barnhart, 364 F.3d 984, 988 (8th Cir. 2004) (citing McCoy v. Schweiker, 583 F.2d 1138, 1147 (8th Cir. 1982)).

Where an ALJ seriously considers but for good reasons explicitly discredits a plaintiff's subjective complaints, the court will not disturb the ALJ's credibility determination. Johnson v. Apfel, 240 F.3d 1145, 1147 (8th Cir. 2001). "The credibility of a claimant's subjective testimony is primarily for the ALJ to decide, not the courts." Pearsall v. Massanari, 274 F.3d 1211, 1218 (8th Cir. 2001); see also Finch, 547 F.3d at 935 (internal citations omitted) ("Questions of credibility are for the ALJ in the first instance. If an ALJ explicitly discredits a claimant's testimony and gives a good reason for doing so, we will normally defer to that judgment.").

Here, the ALJ stated the Polaski requirements and he noted Ross's daily activities, including dusting, making beds, changing sheets, doing laundry, watching television,

listening to music, reading, walking, fishing, and some shopping. (Tr. 23). He also stated that Ross was not taking narcotics medication and that she had "relatively infrequent trips to the doctor." (Tr. 24). Her range of activities was "not limited to the extent one would expect, given the complaints of disabling symptoms and limitations." (Tr. 24). The ALJ noted contradictions between her hearing testimony, forms in her application, and medical records. Last, while limited medical evidence demonstrates that Ross has issues relating to depression, there is little objective evidence aside from Ross's own complaints to support a claim that she suffers from debilitating depression. The ALJ thus found "the claimant has been less than credible regarding her allegation of total disability." (Tr. 24). Although Ross's impairments could be expected to result in the alleged symptoms, her "statements concerning the intensity, persistence, and limiting effects of these symptoms are not entirely credible." (Tr. 23). He properly considered that Ross "admitted certain abilities" and based his RFC conclusion on the limitations that he did find credible.

Additionally, the ALJ considered Ross's past relevant work experience as a nursing aide in his RFC determination. (Tr. 286). However, considering the Polaski factors and Ross's limitations, the ALJ eliminated the nursing aide position in his analysis of work Ross could resume. The ALJ properly followed the VE's recommendation that Ross's disability would prevent her from returning to work as a nursing assistant with heavy lifting "the way she performed it." (Tr. 286-87). The ALJ instead considered Ross's limitations in conjunction with the unskilled light occupational base in determining that she could perform the jobs of housekeeper/cleaner, small products assembler, and marker.

The Court finds no merit to Ross's argument disputing the ALJ's credibility finding because, although not explicitly, the ALJ sufficiently addressed the Polaski considerations. He provided good reasons supported by substantial evidence for not fully accepting her subjective complaints. See Pirtle v. Astrue, 479 F.3d 931, 935 (8th Cir. 2007). Ross's medical records indicate sporadic treatment, prolonged periods between treatment, vague

allegations of pain, over-the-counter medications for her alleged disabling pain, noncompliance with treatment, and daily activity that undercuts Ross's allegations of the severity of her pain and numbness. "The ALJ may properly consider both the claimant's willingness to submit to treatment and the type of medication prescribed in order to determine the sincerity of the claimant's allegations of pain." Gray, 192 F.3d at 802 (quoting Thomas v. Sullivan, 928 F.2d 255, 259 (8th Cir. 1991)). Ross stopped working in 2004 due to her alleged pain and propensity to "drop things," but medical records reveal that she canceled appointments in 2004 because she was "feeling better." She did not have surgery on her right hand until 2006. It was proper for the ALJ to consider the inconsistency in her alleged pain and willingness to work in determining the credibility of her subjective pain allegations. See id. The ALJ also found that Ross's treating doctor never placed restrictions on her except to not use "repetitive" motions, despite Ross's alleged totally disabling symptoms. Eichelberger, 390 F.3d at 590 (citing Brown v. Chater, 87 F.3d 963, 965 (8th Cir. 1996) (holding that a claimant's failure to comply with prescribed medical treatment and a lack of significant medical restrictions is inconsistent with complaints of disabling pain)). A review of Ross's records also indicate that she is mentally capable of working and has transferable vocational skills. See Gray, 192 F.3d at 802.

Additionally, although the ALJ did not make "explicit findings" as to the past relevant work experience, a remand would not be appropriate because no prejudice resulted from the error. See Lowe v. Apfel, 226 F.3d 969, 972 (8th Cir. 2000). The ALJ properly determined that Ross would be unable to return to work as a nursing aide because of her disability. He instead considered her physical impediments and limitations in his hypothetical for vocational occupations. Correspondingly, the ALJ found that there were other jobs that would better suit Ross's exertion levels based on her limitations. (Tr. 25).

The Court finds that the ALJ properly considered the Polaski factors and his credibility finding was supported by substantial evidence.

E. Hypothetical

Last, Ross argues that the ALJ should have included Ross's depression in his findings of RFC and in the hypothetical to the vocational expert ("VE").

For the reasons discussed in the preceding sections, this argument also fails. The ALJ asked the VE whether jobs existed for a person who could lift 20 pounds occasionally and 10 pounds frequently; stand 6 hours in an 8 hour workday; sit six 6 hours in an 8 hour workday; occasionally climb ladders, balance, stoop, kneel, crouch, and crawl; frequently finger and handle bilaterally; and perform simple, routine, tasks.

Although there is evidence in the record that could support a different finding, the ALJ's determination is supported by substantial evidence. Additionally, the ALJ was not required to present any mental limitations to the VE. The ALJ specifically found that Ross's mental impairments only mildly restricted her daily activities and social functioning and moderately restricted her concentration. (Tr. 21). The ALJ's hypothetical question properly included all impairments that were accepted by the ALJ as true and excluded other alleged impairments that the ALJ had reason to discredit. Pearsall v. Massanari, 274 F.3d 1211, 1220 (8th Cir. 2001). In fashioning an appropriate hypothetical question for a VE, the ALJ must only include all impairments that are supported by substantial evidence in the record as a whole. Finch, 547 F.3d at 947 (quoting Swope v. Barnhart, 436 F.3d 1023, 1025 (8th Cir. 2006)). A hypothetical need not include impairments that the ALJ found were not credible. See Guilliams v. Barnhart, 393 F.3d 798, 804 (8th Cir. 2005) ("Discredited complaints of pain, however, are properly excluded from a hypothetical question so long as the ALJ had reason to discredit them."); Haynes v. Shalala, 26 F.3d 812, 815 (8th Cir. 1994) ("A hypothetical question need only include those impairments

that the ALJ accepts as true.”).

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 13th day of October, 2009.

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