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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

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

WILLIAM PINAULT,	*	
	*	3-99-CV-90162
Plaintiff,	*	
	*	
v.	*	
	*	
KENNETH S. APFEL, Commissioner of Social Security,	*	
	*	ORDER
Defendant.	*	
	*	

Plaintiff, William Pinault, filed a Complaint in this Court on September 14, 1999, seeking review of the Commissioner's decision to deny his claim for Social Security benefits under Title II[1] and Title XVI of the Social Security Act, 42 U.S.C. §§ 401 *et seq.*, 1381 *et seq.* This Court may review a final decision by the Commissioner. 42 U.S.C. § 405(g). For the reasons set out herein, the decision of the Commissioner is affirmed.

Plaintiff filed applications for benefits on June 7, 1994. Tr. at 167-70 and 171-74. After the applications were denied initially and upon reconsideration, Plaintiff requested a hearing before an Administrative Law Judge. A hearing was held before Administrative Law Judge John P. Johnson (ALJ) on May 8, 1996. Tr. at 61-124. The ALJ issued a Notice of Decision – Unfavorable on June 27, 1996. Tr. at 409-35. On February 24, 1997, the Appeals Council of the Social Security Administration remanded the case to the ALJ for further evaluation of Plaintiff's

1. Plaintiff is not insured for Title II disability benefits. He is, however, insured for medicare purposes. According to the Appeals Council, "Although the claimant is insured for medicare purposes, he is not insured for cash benefits. The claimant's earnings from 1984 through 1992 are covered for medicare purposes only and do not give insured status for disability benefits (cash benefits)." Tr. at 446

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By:
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subjective complaints, and for further consideration of Plaintiff's residual functional capacity in light of the treating physician's opinion. A remand hearing was held December 10, 1997. Tr. at 125-64. The ALJ issued a Notice of Decision – Unfavorable on April 24, 1998. Tr. at 12-41. The ALJ's decision was affirmed by the Appeals Council on August 16, 1999. Tr. at 7-9. A Com-plaint was filed in this Court September 14, 1999.

MEDICAL EVIDENCE
FIRST HEARING

On April 28, 1994, Plaintiff saw Ananda Reddy, M.D. because of chest pain, mostly while at rest, for the previous 2-3 days. In addition to the chest pain, Plaintiff's wife told the doctor that Plaintiff sleeps a lot and has apnea spells and a chronic cough. It was noted that Plaintiff does not exercise and that he smokes a lot. Dr. Reddy diagnosed probable angina, sinusitis and sleep apnea. Tr. at 393. Plaintiff was hospitalized at Mercy Hospital in Davenport from April 30 to May 2, 1994 because of an inferior wall myocardial infarction. Tr. at 255-69. Plaintiff had been having chest pain for a few days and saw his doctor who started him on Cardizem. On the day of hospitalization, the chest pain was not relieved after three Nitroglycerins so he went to the emergency room where he was found to have the infarction. Tr. at 255. Plaintiff's past medical history included a 1993 inferior myocardial infarction for which he underwent an angioplasty. Tr. at 257. On May 2, 1994, Plaintiff was transferred to St. Luke's hospital in Davenport, where he underwent bypass surgery on May 4, 1994. Plaintiff was discharged on May 11, 1994. Tr. at 271. Plaintiff underwent cardiac rehabilitation between June 27, and July 27, 1994. Tr. at 314-44. Plaintiff saw Dr. Reddy on August 1, 1994, following the completion of the cardiac rehabilitation. Tr. at 394.

Plaintiff saw Joseph S. Maciejko, Ph.D. on September 20, September 28, and October 5, 1994 because of some problems with depression. Dr. Maciejko opined that Plaintiff was able to care for himself, capable of managing his funds, able to understand and carry out instructions and able to interact appropriately with others. Tr. at 347. In a letter dated April 11, 1996, Dr. Maciejko, referring to the 1994 encounters with Plaintiff, wrote: "His depression was significant and chronic, as was his anxiety related to an almost overwhelming number of life problems that he as experiencing." Dr. Maciejko stated that although he was not able to comment on Plaintiff's 1996 condition, in 1994 "I would note that his emotional difficulties at the time, which appeared to be chronic, did interfere significantly with normal functioning." Tr. at 377. The psychologist stated that Plaintiff, in 1994, displayed depressed mood, loss of interest in life, decreased appetite with a little weight loss, disturbed sleeping, increased irritability, ongoing fatigue and loss of energy, guilt feelings and inferiority feelings, diminished sexual interest, difficulty with concentration and decision making, and very low self-esteem. The doctor also pointed to symptoms of anxiety. Tr. at 376. An office note dated October 9, 1995, from Dr. Reddy, states that Plaintiff was referred by Dr. Maciejko for medication for depression. Dr. Reddy prescribed Zoloft. Tr. at 397.

W. Jerome, M.D. wrote a report to Disability Determination Services on November 17, 1994. Tr. at 349-51. Dr. Jerome reviewed the history of Plaintiff's medical condition since January of 1993. At the conclusion of his report Dr. Jerome wrote:

> Historically, Mr. Pinault is doing quite well at the present time and in view of his activity tolerance as described, i.e. able to ambulate 30 minutes on level plane without dyspnea or angina, I presently see no absolute restrictions in the patients (sic) physical capacity or any limitations on standing or moving about, walking or sitting for eight

> hour days. Lifting and carrying in view of the patients (sic) sternotomy and established coronary artery disease probably should be restricted to 50 lb or less on an intermittent basis. There is no restriction as far as handling objects or work environment are concerned.

Tr. at 350.

At the request of Disability Determination Services, Plaintiff was seen for a psychiatric evaluation by D.V. Domingo, M.D. on March 6, 1995. Tr. at 353-55. Among other things, Plaintiff told Dr. Domingo that his first marriage had ended because he had been a cocaine addict. After he married a second time and had a daughter, he quit using cocaine and has not used it since 1985. The doctor's only psychiatric diagnosis was "History of cocaine addiction which has been in remission for years by history." Tr. at 354. Dr. Domingo concluded his report:

> As far as work is concerned, I would consider him able to work and function, be able to remember and understand instructions, procedures and locations, be able to maintain attention, interact appropriately with supervisors, use good judgment and respond appropriately to changes at work on the basis of his mental status, not on the basis of his physical problems.

Tr. at 355.

Plaintiff was seen for a physical examination by Arthur R. Searle, M.D. on March 9. 1995. Tr. at 357-60. Dr. Searle wrote:

> Social History: The client's father took medication for manic depressive disease. The father was not very involved in raising the client because he was busy at his job as a physician. The client's mother was not very involved in child rearing because she had a busy social life. The client was mostly raised by a nanny. The client had two years of college studying data processing and management and later, two years of college in television and radio production. The client was employed at the Rock Island Arsenal for ten years until September 1993, when he left that job to become self employed as a photographer. Most of his photography jobs required him to travel to

> the site and set up his equipment. He felt he couldn't continue this work after his second heart attack in May 1994, because of the exertion involved with carrying the equipment. Since childhood the client has enjoyed hobbies of hunting and trapping. As recently as November 1993, he did a lot of lifting and carrying furniture because his family was moving. Recently he has been doing a lot of work such as scraping off old wallpaper and painting his home.

Tr. at 357. After a review of the medical history and a physical examination, Dr. Searle diagnosed, among other things, coronary artery disease, status post at least one myocardial infarction, coronary artery bypass grafting and balloon angioplasty. "He currently has exertional angina, but there are no signs of heart failure." The doctor also diagnosed recurrent low back pain with no objective findings. Dr. Searle opined that Plaintiff can lift and carry 25 pounds frequently, and 40 pounds occasionally. The doctor also said that Plaintiff would have no difficulty standing, moving about, walking or sitting. Plaintiff, said the doctor, is able to stoop, climb, kneel and crawl, occasionally. Tr. at 359.

On March 13, 1995, Plaintiff called Dr. Reddy to report that the previous night, he felt pain in his leg at the site of the surgery to remove veins for the bypass surgery. Tr. at 395. On June 16, 1995, Plaintiff complained of low back pain that radiated around to his left lower quadrant and down his left leg. Dr. Reddy prescribed Tylenol # 3 and Motrin 600. Tr. at 396. On November 7, 1995, Plaintiff saw Dr. Reddy for low back pain in the right kidney area. He also complained of chest pain from the sternum radiating to the right shoulder. On physical examination, the lumbar spine was tender at L4-5, however straight leg raising was negative. Tr. at 398. On February 5, 1996, Plaintiff complained of pain in his sternum. He said that it felt as though his ribs were not in alignment since his surgery. Tr. at 399.

On February 19, 1996, Thomas M. Mabee, M.D. wrote that he had seen Plaintiff on

February 13. An x-ray showed that the lower end of Plaintiff's sternum was separated and painful, exacerbated by strenuous activities. Dr. Mabee opined that Plaintiff should limit his lifting to 10 pounds. Tr. at 368.

On April 24, 1996, Dr. Reddy completed a Medical Assessment of Residual Functional Capacity form. Tr. at 382-86. Dr. Reddy opined that Plaintiff is capable of lifting 20 pounds occasionally as well as frequently. Tr. at 382. Dr. Reddy also opined that Plaintiff is able to work 4 hours per day. Tr. at 386.

An audiometric evaluation dated April 30, 1996, showed some bilateral hearing loss and the need for hearing aids. Tr. at 404.

ADMINISTRATIVE HEARING
MAY 8, 1996

Plaintiff appeared with counsel and testified at a hearing on May 8, 1996. Tr. at 61-124. At the time of the hearing Plaintiff was 48 years old. Tr. at 65. Plaintiff testified that he last worked as a computer operator loading tapes into a computer. Tr. at 66-67. Plaintiff also worked as a photographer, which required him to lift and carry 60 pounds of equipment. Tr. at 68. Plaintiff also said he worked as a supply technician which required him to lift 40 to 45 pounds. Tr. at 69. Finally, Plaintiff said that he had worked as a records administrator traveling from office to office inspecting files to make sure they were filed correctly. Tr. at 70.

Plaintiff was questioned about his hearing loss. He said that the hearing loss was caused by standing too close to a Howitzer when he was in Vietnam. The hearing loss is worse in the right ear than in the left. Plaintiff said that he owned hearing aids but that he needed new ones. Tr. at 71.

Plaintiff testified that on April 28, 1994, his onset of disability date, he started having chest pain, and when the pain was not relieved with nitroglycerin, he went to the hospital. Tr. at 72. Plaintiff said that after his surgery, his cardiologist gave him a 40 pound restriction and told him to go back to work. Plaintiff said that whenever he interviewed for a job, after the employer found out about his heart surgery, he was told "don't call us, we'll call you." He was never called back. Tr. at 73. Plaintiff said that he tried to do his photography work, but that lifting the equipment aggravated the pain in his sternum and caused angina. Tr. at 74.

Plaintiff said that when he needs to take nitroglycerin he must rest for about a half hour because his blood pressure drops and he gets lightheaded and dizzy. Plaintiff said that he can not lift more than 15 pounds and not for more than 20 minutes. Tr. at 75. Plaintiff testified that he also has pain in his chest because his sternum did not heal properly after the bypass surgery. Tr. at 77. Plaintiff described pain on the right side of his low back which radiates to both legs. He said that he has low back pain daily cause by sitting too long. Tr. at 79. He said that if he sits for more than 30 minutes, or if he walks to his mail box and back, his back starts to hurt. Tr. at 80. Plaintiff said that he gets tension headaches three or four times a month for which he takes Darvocet. Tr. at 82. Plaintiff said that on the advice of Dr. Reddy, he takes a nap every day for a half hour to two hours. He said that both the Darvocet and the Nitroglycerin makes him sleepy. Tr. at 85. Plaintiff testified that in the past he had undergone carpal tunnel surgery on his right arm. When asked if his arm bothered him, he responded: "Very rarely." Tr. at 87.

Plaintiff told the ALJ that he is five feet, ten inches tall, and that he weights 252 pounds. Tr. at 90. When asked to describe his chest pain, Plaintiff said: "Well, it starts off in the center of the chest, and it's kind of like a burning sensation and it runs up into the neck and sometimes

down one or both arms." Tr. at 97-98. Plaintiff said that he gets chest pain two or three times a month if he gets "over-exerted", but that if he stays within his limits he does not. Plaintiff said that he is able to distinguish between angina and the pain in his sternum, but that in the beginning, he was not able to tell the difference. Tr. at 98.

Plaintiff said that he can walk 15 to 20 minutes before he has to stop because of numbness in his legs, and that after 20 minutes he needs to stop. He said that he can stand the same amount of time. Plaintiff said that bending and stooping aggravate the pain in his sternum and that stooping makes it difficult for him to breathe. Tr. at 101. When asked to describe his mood, Plaintiff responded: "In general kind of depressed, frustrated, angry, anxious." Tr. at 103. Plaintiff said that the Zoloft prescribed by his doctor was really helping with the depression. When asked how depression affects him, Plaintiff responded: "Well, lately it's been to the point where I just don't care. ... Lost interest in just about everything. You know, it's just like, you know, I'll wake up in the morning, okay, here's another day." Tr. at 104. Plaintiff said that he spends most of his day taking care of his grandchild while his daughter works. He also does some of the house work, but said that running the vacuum cleaner puts stress on his sternum. Tr. at 108-13.

The ALJ called Allen C. Vikdal to testify as a vocational expert. Tr. at 114. The ALJ asked two hypothetical questions, the first of which was:

> My first assumption is we have an individual who is currently 48 years old. He was 46 years old as of the alleged onset date of disability. He's a high school graduate with additional college training, none of which was completed, and past relevant work as you've indicated, in Exhibit 44, and has the following impairments. He has coronary heart disease status post coronary artery bypass graft with complaints of chest pain and dihesis (phonetic) of the sternum,

> obesity, hearing loss, history of carpal tunnel syndrome, degenerative joint disease with complaints of low back pain, history of tension headaches and dysthymia, and as a result of a combination of those impairments, he has the physical and mental – or a combination of those impairments or treatment and/or medication prescribed for those impairments, he has the residual functional capacity to perform basic work activities as follows. He can lift no more than 20 pounds, routinely lift 10 pounds, no sitting of more than 60 minutes at a time with no repetitive bending, stooping, squatting, kneeling, crawling or climbing, no repetitive pushing or pulling. This individual should not work in the presence of excessive heat, humidity, or cold. He should not work at unprotected heights or around hazardous moving machinery. He should perform no work requiring fine hearing acuity and the presence of background noise. He is not able to do very complex or technical work, but is able to do more than simple, routine repetitive work. He should not work at more than a regular pace using three speeds of pace being fast, regular and slow, and he should not work at more than a mild to moderate level of stress. Would this individual be able to perform any job he previously worked at either as he performed it or as it is generally performed within the national economy, and if so, would you please specify which job?

Tr. at 117-18. In response, the vocational expert testified that Plaintiff would be able to return to his past work as an audit clerk, and as a photographer in a normal studio setting. Tr. at 118. Next, the ALJ asked:

> My next hypothetical would be an individual of the same age, sex, education, past relevant work and impairments as previously stated, and this would be an individual who would have the physical and mental capacity to perform work related activities except for lifting of no more than 10 to 15 pounds, routinely lifting 5 to 10 pounds, no standing of more than 15 to 20 minutes at a time, no sitting of more than 30 minutes at a time, and no walking of more than two to three blocks at a time with no repetitive bending, stooping or squatting, no repetitive or no continuous climbing, no repetitive pushing or pulling, and no repetitive work with the arms overhead. This individual should not work in the presence of excessive heat, humidity or cold. He should not work at unprotected heights or around hazardous moving machinery. He should perform no work requiring fine hearing acuity in the presence of background noise. He is not able to do very

> complex or technical work, but is able to do more than simple, routine, repetitive work. He does require occasional supervision. He should not work at more than a regular pace, and should not work at more than a mild level of stress. Would this individual be able to perform any job he previously worked at either as he performed it or as it is generally performed within the national economy?

Tr. at 118-19. In response the vocational expert said that Plaintiff might still be able to do his past work as an audit clerk, but that he was unsure about the stress restriction. The vocational expert also said that Plaintiff has transferable skills to such jobs as computer terminal or peripheral equipment operator. Tr. at 119. In response to questions from Plaintiff's counsel, the vocational expert testified that the need for rest periods to lie down, and the inability to concentrate because of headaches would both eliminate the possibility of work. Tr. at 121-23.

ALJ'S AND APPEALS COUNCIL'S DECISIONS

The ALJ issued a Notice of Decision – Unfavorable on June 27, 1996. Tr. at 409-35. Following the familiar five step sequential evaluation, the ALJ found that Plaintiff has not engaged in substantial gainful activity since April 28, 1994. Tr. at 423. At the second step, the ALJ found that Plaintiff has severe impairments consisting of coronary artery disease status post triple coronary bypass with complaints of chest pain, lower sternal dehiscence, obesity, degenerative joint disease with complaints of pain, history of tension headaches, dysthymia, and hearing loss. The ALJ found that none of the impairments, alone or in combination, meet or equal a listed impairment found in 20 C.F.R. Appendix 1, Subpart P, Regulations No. 4. At the fourth step, the ALJ found that Plaintiff is able to return to his past relevant work as an audit clerk, and is therefore, not disabled. Tr. at 424.

On February 24, 1997, the Appeals Council remanded the case to the ALJ for three

reasons: 1) To ensure that the ALJ's decision was clear regarding Plaintiff's insured status for medicare benefits under Title II of the Act and not for cash disability benefits; 2) To further evaluate Plaintiff's subjective complaints and to provide rationale in accordance with the disability regulations pertaining to evaluation of symptoms; and 3) To give further consideration to Plaintiff's residual functional capacity with consideration of the treating physician's opinion. Tr. at 447.

MEDICAL EVIDENCE
SECOND HEARING

In a report dated April 1, 1997, Dr. Maciejko stated that he saw Plaintiff on March 13, 1997, at which time Plaintiff reported symptoms of anxiety and depression. Plaintiff reported disturbed sleep, increased appetite, although he was not suicidal. Plaintiff had been working as a part time motel clerk and had been given the opportunity to "get into product distribution for a company trying to break into the Midwest. As he described this, however, he appeared to be somewhat overwhelmed with the task and had not progressed very far." Tr. at 452. Dr. Maciejko wrote that the plan was to secure appropriate evaluation for resumption of some form of psychotropic medication to assist Plaintiff with mood and anxiety problems. Tr. at 453.

Dr. Reddy's office note dated July 22, 1996, states that Plaintiff complained of low back pain. Physical examination revealed tenderness at the L5-S1 juncture. The diagnoses included lumbar joint pain. Tr. at 457. On August 2, 1996, Plaintiff's pain was easing, but not completely gone. Plaintiff reported that he could walk 15 minutes without pain. Tr. at 458. On September 26, 1996, Plaintiff complained of sharp chest wall pain following deep cough. Tr. at 459. Plaintiff complained of right sided headaches with loss of balance on March 18, 1997. Tr. at 460.

Plaintiff saw Cynthia E. Hoover, M.D. for a psychiatric evaluation on May 20, 1997. Tr. at 494-98. Plaintiff was taking Prozac, Xanax and Propranolol as well as Nitroglycerin for chest pain. In reviewing Plaintiff's history, Dr. Hoover discovered that Plaintiff had spent 13 months in Viet Nam as a truck driver. During that time, while he was riding in the back of a truck, a "buddy was sitting directly across from him and was shot through the head by a sniper" when his friend removed his helmet to wipe off his head. Plaintiff described numerous symptoms which Dr. Hoover stated supported a diagnosis of post traumatic stress syndrome. Tr. at 494. In addition to post traumatic stress disorder, Dr. Hoover diagnosed major depression with anxious and compulsive features, history of cocaine dependence, in full remission, and marijuana dependence in partial remission. Dr. Hoover concluded her report:

> Based on today's evaluation, the client demonstrated adequate judgment, concentration, and pace to work with coworkers and the public. His depressive symptoms are currently not significant to the point where he could not concentrate or carry out complicated to complex instructions. He seems to be of average to above average intelligence and was socially very appropriate. His PTSD symptoms have never interfered with work. The client says employers won't look at him because of his medical history.

Tr. at 497.

Plaintiff underwent a physical examination by Paul Hartmann, M.D. on May 29, 1997. Tr. at 499-504. Plaintiff complained of chest discomfort due to his sternum. Plaintiff told Dr. Hartmann that he was working about 16 hours a week. He said that he was riding a bike 4 to 5 miles per week and that he can get his heart rate to 135 beats per minute before developing shortness of breath and back discomfort. Plaintiff said that he limits his lifting to 20 pounds because of his back. Tr. at 499. After his examination Dr. Hartmann wrote that Plaintiff was

primarily restricted in his lifting by his back discomfort and by the condition of his sternum. Tr. at 500. Dr. Hartmann, on a Medical Assessment Of Ability To Do Work-Related Activities (Physical), opined that Plaintiff is capable of lifting 20 pounds, standing and walking two to three hours a day and one hour without interruption (Tr. at 501), sitting for six hours and two hours without interruption. Dr. Hartmann also said that Plaintiff can occasionally climb, stoop, crouch, kneel, and crawl. Tr. at 502.

On October 27, 1997, Plaintiff went to the emergency room complaining of chest pain which began while he was sitting at a desk while working at a motel. By the time he got to the emergency room, the pain had stopped and did not reoccur. Prakash R. Bontu, M.D., who saw Plaintiff at the hospital, wrote:

> Since his surgery, he has been doing well, except last spring, he was getting his car out of a ditch, and when he went home, he had to take one nitroglycerin. Since then, he has not had any further problems until recently. He does not have chest pain on exertion. He went mushroom hunting and walked up and down inclines without having any difficulty, except for mild shortness of breath. He has seen a psychiatrist and a psychologist and was given medications of Xanx, Wellbutrin, and also Propranolol by Dr Naryan. He sees Dr. Ananda Reddy, his internist, periodically and last saw him about four months ago.

Tr. at 509. Dr. Bontu noted that Plaintiff worked at the motel as security and also checking in the guests. Tr. at 510. Dr. Bontu's impression was that Plaintiff's chest pain was musculoskeletal in origin due to the sternal wire dehiscence. Tr. at 511.

ADMINISTRATIVE HEARING
DECEMBER 10, 1997

Plaintiff appeared at an administrative hearing on December 10, 1997. Tr. at 125-63. Plaintiff testified that he had worked as a second shift audit clerk at the motel, checking in

guests, assisting with luggage, helping handicapped people to their rooms, doing security and fire checks, doing light maintenance and light housekeeping. Tr. at 129-30. Plaintiff said that he started working 40 hours per week but had to cut back to 16 hours per week due to the side effects of his medication. Plaintiff said that he lost the job the night he needed to go to the hospital with chest pain. Tr. at 130. Plaintiff testified that he had recently obtained a part time job as a "sales associate at Best Buy." He said that he was working 24 hours per week. Tr. at 131.

Plaintiff testified that the chest pain from the sternum is, on a scale of one to ten, an eleven. Tr. at 132. Plaintiff said that if he lifts over 20 pounds, he will have pain, and occasionally, lifting less than 20 pounds causes the pain. Tr. at 133. Plaintiff said that he limits his lifting to between 10 and 15 pounds so that he can avoid having the pain. Tr. at 134.

Plaintiff testified that he gets headaches that cause him to need to take medication, go to a dark room and lie down, two or three times a month. Plaintiff said that the headaches last, on average, four to five hours. He said that he was having a headache as he was testifying. Tr. at-134-35.

Plaintiff said that depending on the type of activity he was doing, his low back becomes "very painful" and that the pain runs down into his legs. "On occasion my legs would go numb. Very uncomfortable." Tr. at 135. When asked what aggravates his back pain, Plaintiff responded: "Any heavy lifting, sitting for long periods, walking for extended periods. Walking will tend to bring it out." Plaintiff said that his medication makes him very drowsy, and causes him to lay down. He said this happens two or three times a week. Tr. at 136.

Responding to questions from the ALJ, Plaintiff said that he began working at the motel in October, 1996. He said that for two and a half or three months, he worked 40 to 45 hours per

week. Tr. at 141. Plaintiff said that he quit his job about two weeks after the October 1997 hospitalization. Plaintiff said that the job required him to lift 40 or 50 pounds "four or five times a night depending on how many guests we had." Tr. at 142. In addition, Plaintiff said: "We'd have to keep track of the money that came in, the charge sales, do all the – I guess you'd call it accounting for the daily sheet and daily logs."

Plaintiff said that he can walk "probably 10 minutes of continuous walking" after which his legs become very stiff and he gets low back pain. Tr. at 143. Likewise, Plaintiff said that he can stand 10 or 15 minutes before he develops the same low back pain. Plaintiff said that he can sit for two hours after which he needs to get up and walk around. Tr. at 144.

The ALJ asked Plaintiff how he reacts to stress to which Plaintiff responded: "My blood pressure goes up, and I start getting headaches, and unable to concentrate, and get very angry." Plaintiff said that he was feeling depressed because his wife is working two jobs and he feels that he is not pulling his share of the load. Plaintiff said that he quit seeing the psychiatrist when his insurance ended and he was no longer able to pay for the appointments. Tr. at 147. Plaintiff said that when he told his doctor that xanax caused him to be sleepy and unable to concentrate, the doctor said that it was to be expected. Tr. at 148.

Speaking of his daily activities, Plaintiff said that most of his day was spent napping. He said that he no longer takes care of a grandchild and that he may do some dusting or straightening up of his house. Tr. at 150. Plaintiff testified that he stopped fishing because he could not tolerate the walk to his favorite spots. Plaintiff said that he attends veterans meetings once a month. Tr. at 151.

The ALJ called Roger Marquardt to testify as a vocational expert. Tr. at 152. Thereafter,

the ALJ asked the following hypothetical question:

> My first assumption will be of an individual who is currently 50 years old. He was 46 years old as of the alleged onset date of disability. He's a male. He has a high school education plus additional training in data processing management and radio and television broadcasting, has the past relevant work, as you've indicated, in Exhibit 75, and has the following impairments. He has chronic – or coronary heart disease status post coronary artery bypass graft with complaints of chest pain, with separation of the sternum, obesity, bilateral sensory neuro hearing loss, history of carpal tunnel syndrome with status post release on the right, degenerative joint disease with complaints of low back and lower extremity pain, history of tension headaches, dysthymia, a history of a substance abuse, a major depressive disorder, and a history of post traumatic stress disorder, and as a result of a combination of those impairments and medication or other treatment with respect to those impairments, he has the residual functional capacity as follows. He should not lift more than 20 pounds, routinely lift 10 pounds, no standing of more than one hour at a time, no sitting of more than two hours at a time, no walking of more than 60 minutes at a time with no repetitive bending, stooping squatting, kneeling, crawling or climbing, no repetitive pushing or pulling, and no repetitive work with the arms overhead. This individual should not be exposed to excessive heat, humidity, or cold, should perform no work which would require fine hearing acuity and the presence of background noise. He is not able to do very complex or technical work, but is able to do more than simple, routine or repetitive work. He does require occasional supervision, and should not work at more than a mild to moderate level of stress. Would this individual be able to perform any job that he previously worked at either as he performed it or as it is generally performed within the national economy, and if so, would you please specify which job?

Tr. at 155-57. In response the vocational expert testified that Plaintiff would be able to do the past job as motel clerk/night auditor as it is performed nationally, and the auditing duties as performed by Plaintiff. Tr. at 157. The vocational expert also said that Plaintiff would have transferable skills to such jobs as data entry clerk (a sedentary, semiskilled job), computer peripheral equipment operator (a light, semiskilled job), and check writer (a sedentary, semiskilled job). Tr.

at 157-58. The ALJ asked a second hypothetical

> ... He cannot lift more than 20 pounds, routinely lift 10 pounds with no standing of more than 10 to 15 minutes at a time, no sitting of more than two hours at a time, and no walking of more than 10 minutes at a time with no repetitive bending and stooping, and no continuous climbing, no repetitive pushing or pulling or repetitive work with the arms overhead. This individual could not continuously use the left hand for tactile sensation or continuously perform gross or fine manipulation with the left hand, and this would be an individual who is a left handed individual. This individual should not be exposed to excessive heat, humidity or cold. He should perform no work which requires fine hearing acuity in the presence of background noise. This individual is not able to do very complex or technical work, but is able to do more than simple routine, repetitive work. He does require occasional supervision and should not work at more than a mild to moderate level of stress. Would this individual be able to perform any job he previously worked at either as he performed it or as it is generally performed within the national economy?

Tr. at 158-59. In response, the vocational expert testified that such an individual would not be able to do Plaintiff's past work and would have no transferable skills. Tr. at 159. Finally, the vocational expert pointed to examples of unskilled sedentary work that could be performed within the limits of the hypothetical such as telephone quotation clerk, surveillance monitor and escort vehicle driver. Tr. at 160.

Under cross examination, the vocational expert said that the need to lie down because of headaches or side effects of medication would eliminate the ability to engage in competitive work. Tr. at 161.

ALJ'S AND APPEALS COUNCIL'S SECOND DECISIONS

On April 12, 1998, the ALJ issued a Notice Of Decision – Unfavorable. Tr. at 12-41. In this decision, the ALJ found that Plaintiff has not engaged in substantial gainful activity since

April 28, 1994. The ALJ found that the severe impairments consist of coronary artery disease status post bypass with complaints of chest pain and separation of the sternum, obesity, hearing loss, history of carpal tunnel syndrome, degenerative joint disease with complaints of low back pain, history of tension headaches, dysthymia, history of substance abuse (in remission), major depressive disorder and post traumatic stress disorder. The ALJ found that none of these impairments, alone or in combination, meet a listed impairment. Tr. 29. The ALJ found that Plaintiff is unable to do his past relevant work, but that he has the residual functional capacity consistent with his first hypothetical question to vocational expert Marquadt which was set out above. The ALJ found that Plaintiff has transferable skills and can perform the jobs identified by the vocational expert. Tr. at 30. The ALJ found that Plaintiff was not disabled nor entitled to the benefits for which he applied. Tr. at 31.

The ALJ's decision was affirmed by the Appeals Council on August 16, 1999. Tr. at 7.

DISCUSSION

> The scope of this Court's review is whether the decision of the Secretary in denying disability benefits is supported by substantial evidence on the record as a whole. 42 U.S.C. § 405(g). *See Lorenzen v. Chater*, 71 F.3d 316, 318 (8th Cir. 1995). Substantial evidence is less than a preponderance, but enough so that a reasonable mind might accept it as adequate to support the conclusion. *Pickney v. Chater*, 96 F.3d 294, 296 (8th Cir. 1996). We must consider both evidence that supports the Secretary's decision and that which detracts from it, but the denial of benefits shall not be overturned merely because substantial evidence exists in the record to support a contrary decision. *Johnson v. Chater*, 87 F.3d 1015, 1017 (8th Cir. 1996)(citations omitted). When evaluating contradictory evidence, if two inconsistent positions are possible and one represents the Secretary's findings, this Court must affirm. *Orrick v. Sullivan*, 966 F.2d 368, 371 (8th Cir. 1992)(citation omitted).

Fenton v. Apfel, 149 F.3d 907, 910-11 (8th Cir. 1998).

In short, a reviewing court should neither consider a claim de novo, nor abdicate its function to carefully analyze the entire record. *Wilcutts v. Apfel*, 143 F.3d 1134, 136-37 (8th Cir. 1998) citing *Brinker v. Weinberger,* 522 F.2d 13, 16 (8th Cir. 1975).

The ALJ found that Plaintiff is unable to do his past relevant work. The burden of proof, therefore, was on the Commissioner to prove, with medical evidence, that he has a residual functional capacity and that other jobs exist that he is capable of performing. *Nevland v. Apfel,* 204 F.3d 853, 857 (8th Cir. 2000) citing *McCoy v. Schweiker,* 683 F.2d 1138, 1146-47 (8th Cir. 1982)(en banc), and *O'Leary v. Schweiker*, 710 F.2d 1334, 1338 (8th Cir. 1983). *See also Cunningham v. Apfel,* 222 F.3d 496, 503 (8th Cir. 2000), citing *Nevland.*

In the case at bar, the Commissioner met his burden of proving both prongs of his burden. Medical evidence which supports the ALJ's finding that Plaintiff has the residual functional capacity to work can be found in the opinion of Dr. Hartmann who opined that Plaintiff is capable of lifting 20 pounds, standing and walking two to three hours a day and one hour without interruption, sitting for six hours and two hours without interruption. When Plaintiff was seen at the hospital because of the chest pain on October 27, 1997, he told the doctor that he had done well with chest pain except on an occasion when he "was getting his car out of a ditch." On that occasion he had to take one nitroglycerin. He also told the doctor that he had been mushroom hunting, walking up and down hills without any difficulty outside of mild shortness of breath. Plaintiff told doctors several times that he is careful not to lift more than 20 pounds. This is consistent with the residual functional capacity found by the ALJ. Dr. Searle opined that Plaintiff is able to lift 25 pounds frequently and has no difficulty standing, walking or sitting. Although Dr. Mabee set Plaintiff's lifting limit at 10 pounds, as will be shown below, the jobs

identified by the vocational expert to which Plaintiff's skills transfer, were all at the sedentary exertion level.

Medical evidence of Plaintiff's mental residual functional capacity is found in the opinion of Dr. Hoover who wrote that Plaintiff's depressive symptoms are currently not significant to the point where he could not concentrate or carry out complicated to complex instructions. She also opined that any symptoms of post traumatic stress disorder "have never interfered with work." The finding is also supported by Dr. Domingo's opinion that Plaintiff's mental status did not interfere with his ability to work and function.

The Court has considered the evidence which detracts from the ALJ's finding that Plaintiff has the residual functional capacity to work but does not find it persuasive enough to say the ALJ's decision is not supported by substantial evidence on the record as a whole. Plaintiff's treating physician opined that Plaintiff would only be able to work 4 hours per day. In *Smallwood v. Chater*, 65 F.3d 87, 89 (8th Cir. 1995), the Court, quoting 20 C.F.R. § 404.1527(d)(2), wrote that the opinion of a treating physician "controls if it 'is well-supported by medically acceptable ... diagnostic techniques and is not inconsistent with the other substantial evidence' in the record." In *Smallwood*, a treating cardiologist filled out a form similar to the one used in the case at bar. In holding that the physician's opinion was not substantial evidence sufficient to reverse the Commissioner's final decision, the Court wrote: "It is simply not clear what factors Dr. Lemon relied on in deriving his four-hour workday opinion. Dr. Lemon's opinion is the kind of conclusory statement that cannot be accorded the deference to which well-supported treating physician determinations are entitled." *Id.* In the case at bar, the Court is of the opinion that the ALJ was justified in viewing Dr. Reddy's 4 hour limitation as a conclusory statement

which is inconsistent with other medical information in the record. Likewise, while Dr. Maciejko opined that Plaintiff's depression was significant in 1994, his opinion was rendered in 1996. Although Dr. Maciejko stated in 1997 that Plaintiff was still suffering from anxiety and depression, as pointed out above, two other psychiatric examinations establish that Plaintiff's mental disorders do not interfere with his ability to work.

The second prong of the Commissioner's burden was met with the testimony of the vocational expert that Plaintiff gained skills from his work with computers that transfer to other work. Two of the three jobs mentioned by the vocational expert as examples of work that can be done within the residual functional capacity found by the ALJ require only sedentary exertion.

Plaintiff argues that the ALJ did not adequately evaluate Plaintiff's subjective complaints in a manner that will pass muster under *Polaski v. Heckler,* 739 F.2d 1320 (8th Cir. 1984. *Polaski* and its progeny clearly hold that subjective complaints may not be disregarded solely because the objective medical evidence does not fully support them. *Polaski* does hold, however, that subjective complaints can be discounted if there are inconsistencies in the evidence as a whole. In the opinion of the Court, this case is awash with inconsistencies. On the one hand, Plaintiff claims that he can only work for 4 hours a day. On the other hand he attempts to work at jobs, such as at the motel, where he is required to engage in physical exertion clearly above his ability. On one hand Plaintiff claims that he spends his days at home napping, while on the other hand he tells the doctors that he engages in such activities as mushroom hunting, and bicycling, not to mention the incident in which he was pulling a car from the ditch. Plaintiff also told Dr. Searle that he enjoyed hunting and trapping, and that he had been lifting

and carrying furniture as well as "scraping off old wallpaper and painting his home." On one hand Plaintiff claims that he cannot work because of headaches, but he also told the ALJ that he was having one of the headaches during his testimony. The headache, apparently, did not interfere with his ability to attend to the proceedings and answer the questions that were put to him by the ALJ and his attorney. The Court is not unmindful of the condition of Plaintiff's sternum, but here again the evidence shows that if Plaintiff keeps himself within the restrictions given to him by the doctors that he is able to function in a satisfactory manner.

In the opinion of the Court, the ALJ did not err in finding Plaintiff's testimony less than fully credible. As the Court of Appeals has said many times, "there is no doubt that the claimant is experiencing pain; the real issue is how severe that pain is." *Haggard v. Apfel*, 175 F.3d 591, 594 (8th Cir. 1999). Where an ALJ considers, but for good cause expressly discredits, a claimant's subject complaints, the Court will not disturb the decision. *Id.* Such is the situation in the case at bar. The Court finds no error in the ALJ's credibility finding.

CONCLUSION AND DECISION

In *Bradley v. Bowen*, 660 F.Supp. 276, 279 (W.D. Arkansas 1987), Circuit Judge Richard Arnold, sitting by designation, wrote: "While this Court will not second-guess a reasonable choice between two fairly conflicting views of the evidence (even if the Court, proceeding de novo, would have preferred the other choice), it will canvass the entire record to ensure that the ALJ in fact made such a reasonable choice." In the case at bar, the Court has canvassed the entire record and is convinced that the ALJ did make a reasonable choice between arguably conflicting views of the evidence.

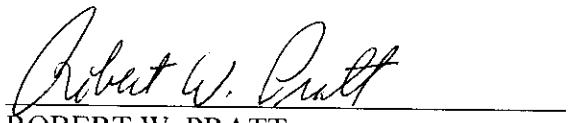
It is the holding of this Court that Commissioner's decision is supported by substantial

evidence on the record as a whole. The Court has considered the evidence which supports the decision as well as evidence which detracts therefrom. While the evidence supports the ALJ's finding that Plaintiff is unable to return to his past relevant work, the ALJ required the Commissioner to come forward with medical evidence which establishes Plaintiff's residual functional capacity to engage in work activity. The ALJ also required vocational expert testimony to establish the existence of other work in which Plaintiff is able to engage in spite of his impaired condition. Thus the Commissioner met both prongs of his burden of proof. The Commissioner's decision, therefore, is affirmed.

Defendant's motion to affirm the Commissioner is granted. Plaintiff's motion to reverse the Commissioner's decision is denied. The case is hereby dismissed.

IT IS SO ORDERED.

Dated this 13th day of November, 2000.



ROBERT W. PRATT
U.S. DISTRICT JUDGE