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

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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IA

DARLENE M. MILLER,	*	
	*	3-99-CV-90166,
Plaintiff,	*	
	*	
v.	*	
	*	
KENNETH S. APFEL, Commissioner of Social Security,	*	
	*	
	*	ORDER
Defendant.	*	
	*	

Plaintiff, Darlene M. Miller, filed a Complaint in this Court on September 29, 1999, seeking review of the Commissioner's decision to deny her claim for Social Security benefits under Title II and Title XVI of the Social Security Act, 42 U.S.C. §§ 401 *et seq*. and 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 reversed.

BACKGROUND

Plaintiff filed an applications for Social Security Disability Benefits on November 1, 1994, claiming to be disabled since August 17, 1994. Tr. at 111-14 & 115-17. After the applications were denied, initially and on reconsideration, Plaintiff requested a hearing before an Administrative Law Judge. A hearing was held before Administrative Law Judge John P. Johnson (ALJ) on May 9, 1996. Tr. at 55-109. The ALJ issued a Notice Of Decision – Unfavorable on June 28, 1996. Tr. at 20-44. After the decision was affirmed by the Appeals Council on September 13, 1996, (Tr. at 5-6), Plaintiff filed a Complaint in this Court on October 4, 1996. On

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November 4, 1996, Plaintiff filed a new application for benefits. Tr. at 599-601. After obtaining additional medical information for the new application, the Social Security Administration, on its initial determination, found that Plaintiff was disabled as of January 1, 1997. Tr. at 582. On July 18, 1997, this Court remanded the case with instructions for the ALJ to issue a new decision consistent with the order of remand. Tr. at 474-82. A remand hearing was held on May 6, 1998. Tr. at 485-532. On July 18, 1998, the ALJ issued a Notice Of Administrative Law Judge Decision – Denial. Tr. at 439-60. On July 20, 1999, the Appeals Council affirmed the ALJ's decision. Tr. at 432-33. The new Complaint was filed in this Court on September 29, 1999. On January 13, 2000, the Commissioner moved to remand the case because the Commissioner was unable to prepare a record of the administrative proceedings. On October 6, 2000, the Commissioner informed the Court that the administrative record had been located and moved to reopen the case. The motion was granted October 6, 2000, and the case was brief by the parties and fully submitted to the Court on February 6, 2001.

In the Court's Order of July 18, 1997, the following was written: "The Commissioner shall also instruct the ALJ to pose a hypothetical question to the vocational expert which includes all of Plaintiff's impairments and limitations, including the limitations expressed by Dr. Bhasker, on pages 327-238 of the transcript. The Commissioner shall, thereafter, issue a new decision consistent with the opinion of this Court." The ALJ was also instructed to make credibility findings in accordance with *Polaski v. Heckler*, 739 F.2d 1320 (8th Cir. 1984). Tr. at 482.

At the hearing of May 6, 1998, the ALJ asked a series of hypothetical questions, one of which included the limitations identified by Dr. Bhasker, the treating psychiatrist. Tr. at 526-27. In response, the vocational expert testified that no work would be possible because of Plaintiff's

moderate inability to complete a normal work day and work week without interruptions from psychologically based symptoms, and because of the moderate inability to work in coordination with others without being distracted by them. Tr. at 528-29.

In his decision, the ALJ explained that he did not rely on the hypothetical which was based on Dr. Bhasker's opinion because, in the opinion of two doctors who reviewed the records for Disability Determination Services in connection with the second application, the medical evidence supported a finding that Plaintiff became disabled in January of 1997. The ALJ held that Dr. Bhasker's opinion was contradicted by the opinions of the state agency doctors as well as by Dr. Bhasker's treatment records and the records of a psychotherapist at Dr. Bhasker's clinic. For that reason the ALJ stated that he did not give controlling weight to Dr. Bhasker's opinion. Tr. at 451.

In *Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir. 1998), Judge Posner, writing for the Court, stated:

> The law of the case doctrine, which requires "the trial court to conform any further proceeding on remand to the principles set forth in the appellate opinion unless there is a compelling reason to depart," is applicable to judicial review of administrative decisions. It requires the administrative agency, on remand from a court, to conform its further proceedings in the case to the principles set forth in the judicial decision, unless there is a compelling reason to depart.
>
> A ruling that evidence was insufficient to support some finding is the type of ruling that established the law of the case. New evidence can furnish compelling grounds for departure from a previous ruling. But if there is no new evidence, or if, as here, the evidence does not undermine the previous ruling on sufficiency, then that previous ruling must stand.

(Internal citations omitted.) *See also Steahr v. Apfel*, 151 F.3d 1124, 1125-26 (8th Cir. 1998) and

cases cited therein. (The District Court is best able to determine whether its mandate has been violated by an ALJ on remand.)

In the prior decision from this Court, it was the holding that the hypothetical question relied on by the ALJ was insufficient to support the denial of benefits because it did not include the limitations enunciated by Dr. Bhasker. Thus, the law of the case was established. The instructions of this Court were very clear. The ALJ was to ask a hypothetical question which contained the limitations expressed by Dr. Bhasker in his report of April 6, 1995. Unless there was some compelling reason to do otherwise, therefore, the ALJ was bound to follow the order of the Court. The Court has very carefully considered the two reports of Dr. Bhasker. They are virtually identical. There is nothing in the second report which undermines the doctor's opinion regarding Plaintiff's limitations at the time of the original proceedings. No other treating or examining physician expressed an opinion regarding Plaintiff's residual functional capacity. Time and time again, the Court of Appeals for the Eighth Circuit has held that the opinions of physicians who have never examined or treated a claimant do not constitute substantial evidence upon which to base a denial of benefits. *Jenkins v. Apfel*, 196 F.2d 922, 925 (8th Cir. 1999) (The opinion of a consulting physician who examines a claimant once or not at all does not generally constitute substantial evidence). The fact that the non-treating, non-examining doctors opined that Dr. Bhasker's January 3, 1997 report supported an award of benefits at a later date, is immaterial to Court's instructions to include the limitations of the April 6, 1995 report in the hypothetical. By refusing to rely on the hypothetical question which contained those limitations, the ALJ violated the law of the case and thus committed reversible error.

Because the vocational expert's response to the hypothetical question which comported

with the Order of this Court is substantial evidence supporting an award of benefits, it is not necessary to address the other element of the mandate of this Court, namely to make credibility findings which comply with the agreement reached in the case of *Polaski v. Heckler*, 739 F.2d 1320 (8th Cir. 1984). Likewise, because the vocational expert testified that the limitations expressed in Dr. Bhasker's report are sufficiently severe to preclude employment, there is no need to remand to obtain additional evidence.

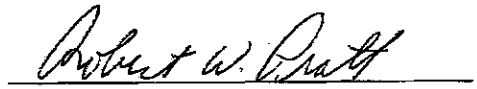
CONCLUSION AND DECISION

The Court holds that Commissioner's decision is not supported by substantial evidence on the record as a whole. The Court finds that the evidence in this record is transparently one sided against the Commissioner's decision. *See Bradley v. Bowen*, 660 F.Supp. 276, 279 (W.D. Arkansas 1987). The medical and vocational evidence establish that Plaintiff does not have the residual functional capacity to work either at her past relevant work, or any other work in the national economy. A remand to take additional evidence would only delay the receipt of benefits to which Plaintiff is clearly entitled. Therefore, reversal with an award of benefits is the appropriate remedy. *Parsons v. Heckler,* 739 F.2d 1334, 1341 (8th Cir. 1984).

Defendant's motion to affirm the Commissioner is denied. **This cause is remanded to the Commissioner for computation and payment of benefits with an onset date of August 17, 1994.** The judgment to be entered will trigger the running of the time in which to file an application for attorney's fees under 28 U.S.C. § 2412 (d)(1)(B) (Equal Access to Justice Act). *See Shalala v. Schaefer*, 509 U.S. 292 (1993) and LR 54.2(b).

IT IS SO ORDERED.

Dated this 21st day of February, 2001.



ROBERT W. PRATT
U.S. DISTRICT JUDGE