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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
CENTRAL DIVISION

PHILLIP PATTON,	*	
	*	4-99-CV-90147
Plaintiff,	*	
v.	*	
KENNETH S. APFEL, Commissioner of Social Security,	*	
	*	ORDER
Defendant.	*	

Plaintiff, Phillip Patton, filed a Complaint in this Court on March 18, 1999, seeking review of the Commissioner's decision to deny his claim for Social Security benefits under Title II of the Social Security Act, 42 U.S.C. §§ 401 *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.

Plaintiff filed an application for benefits on April 25, 1995. Tr. at 164-67. After the application was 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 November 26, 1997. Tr. at 49-101. The ALJ issued a Notice of Decision – Unfavorable on January 31, 1997. Tr. at 15-41. The ALJ's decision was affirmed by the Appeals Council of the Social Security Administration on January 22, 1999. Tr. at 7-9. Plaintiff filed his Complaint in this Court on March 18, 1999.

At the outset, the Court would note that the record of this case consists of 673 pages of

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Pleading # 17

medical and administrative documents. The Court has reviewed each and every page, but because of the volume, only those documents material to this decision will be fully discussed below.

At the time of his hearing, Plaintiff was 36 years old. Tr. at 54. Plaintiff's most recent work was for the State of Iowa, administering driver's license tests. Tr. at 57. *See also* Tr. at 620 for a complete list of Plaintiff's past relevant work. Plaintiff was involved in an automobile accident in 1988, following which he had a two-level cervical fusion because of discogenic disease. In June, 1994, he was involved in a second accident at which time, while working as an examiner, he was struck by a pickup truck and was thrown about in the car. The second accident resulted in a cervical fusion in September of 1994. Tr. at 533. Plaintiff underwent a third cervical surgery in November of 1994. Tr. at 534. In a report dated September 19, 1995, neurologist David L. Friedgood, D.O. wrote: "He has not gotten any significant benefit from either of these last two surgeries." Id. Plaintiff consulted with Dr. Friedgood because of headaches. Plaintiff described a constant pain in the back of his head. On occasion, the pain would become worse: "... he will note a shooting sensation in his head. He can become disoriented for up to ten seconds and may lose his vision. He never actually goes blind but notes that his vision is quite distorted. He describes these as blackout spells. He does not lose consciousness or fall to the ground with these. After ten seconds, he is back to his normal state. At no time has he had any tonoclonic activity. ... He has been having these spells intermittently for the last nine months." Tr. at 533.

A medical report dated March 8, 1995, from the University of Iowa Hospitals and clinics, where Plaintiff sought treatment, states:

> His worst symptoms are in his neck and going down into the uppermost region between his shoulder blades. Pain here is often sharp and stabbing. He also at times will have pain that spreads out across his shoulders. He experiences aching in his arms, particularly in the axilla and the elbows. This clearly more prevalent on the left than the right. He also notes numbness in the little and ring fingers on the left hand, more prominently in the ring finger. When the pain is severe he will have numbness and tingling around his ears as well.

Tr. at 374.

Plaintiff underwent functional capacity evaluation at the University of Iowa in March of 1995 (Tr. at 370), and at Iowa Methodist Medical Center in September of 1995 (Tr. at 599). Based upon these studies, Calvin J. Hansen, M.D. opined that Plaintiff should lift no more than 12 to 15 pounds. Tr. at 537.

Karen Kienker, M.D., of the department of physical Medicine and rehabilitation at Iowa Methodist Medical Center, opined on September 15, 1995, that Plaintiff would need a job which allows him to sit, stand, and walk as desired, and that if sitting or standing would allow him to take a five-minute break every 30 minutes. Dr. Kienker also opined that Plaintiff should avoid repetitive head movement or working with his head in an awkward position, and that he should avoid overhead work and twisting. "These are expected to be permanent restrictions," wrote Dr. Kienker. Tr. at 514.

In a treatment note dated July 5, 1995, Ted Wernimont, M.S.W., from the University of Iowa, noted that Plaintiff said that he had "been significantly depressed" and Plaintiff was encouraged to continue involvement with local mental health resources. Tr. at 474. On October 20, 1995, psychiatrist Joseph E. Bender, D.O. wrote that he saw Plaintiff September 7 and October 19, 1995 at which time he diagnosed a major depressive disorder. Plaintiff, however, did not

follow up thereafter with Dr. Bender. Tr. at 585.

On July 30, 1997, attorney Kenneth A. Johnsen submitted additional medical records, from Broadlawns Medical Center, to the Appeals Council on behalf of Plaintiff. Tr. at 621. On March 11, 1997, Plaintiff was seen for an intake interview by Ann Burnham, M.S.W. Tr. at 651-55. During this interview, it was revealed that eleven years prior thereto, Plaintiff's 11 month old daughter died of an inflammation of the heart. Tr. at 653. Plaintiff also reported that his relationship with his wife and surviving daughter was strained due to his pain and inability to function. At the conclusion of the interview, Ms. Burnham's provisional diagnostic impression was:

> 1. 309.31, post-traumatic stress disorder. The patient has been exposed to a number of traumatic events in his life. His 11 month old daughter died 11 years ago and he has had two very serious car accidents on the job – the last one is recently 1992. His responses have included intense fear, helplessness, and horror, as well as disorganized and agitated behavior. He makes efforts to avoid thoughts, feelings or conversations or people that arouse recollection of the traumatic events. He has markedly diminished interest in participation in significant activities especially in regards to activities of family and working. He has a sense of detachment and estrangement from others. Unable to express loving feelings and is very restricted in his range of affect along with his sense of shortened future. Especially, he does not expect to have a career and is concerned that he will lose his wife and daughter. He reports having difficulty falling asleep and staying asleep, extreme outbursts of anger and irritability, difficulty concentrating.

Tr. at 654. Plaintiff was seen by Broadlawns psychiatrist Kirpal Singh, M.D. on July 18, 1997. Tr. at 627-28. Dr. Singh's diagnosis was mood disorder due to trauma of the neck, oblique

spine. Dr. Singh's Axis V (global assessment of functioning (GAF)) diagnosis was 35[1].

Plaintiff was seen for a psychiatric evaluation by Michael J. Taylor, M.D. on July 24, 1997. Plaintiff admitted to a number of significant depressive symptoms. Dr. Taylor noted sleep and appetite disturbance. He also noted difficulty concentrating and remembering. Plaintiff admitted to decreased energy level and a marked increase in anxiety. Plaintiff reported that he continues to have frequent nightmares about the automobile accidents with which he was involved. Dr. Taylor's diagnoses were major depressive disorder and post traumatic stress disorder. Dr. Taylor concluded his report:

> In his current condition, there would be a marked impairment of his ability to remember and understand instruction, procedures, and locations and a marked impairment of his ability to maintain attention, concentration, and pace. There would be a marked impairment of his ability to interact appropriately with supervisors, co-workers, and the public, and a marked impairment of his ability to use good judgment and respond appropriately to changes in the work place. He appears capable of managing benefit payments in his own behalf.

Plaintiff appeared and testified at an administrative hearing on November 26, 1996. Tr. at 49-101. When asked why he cannot work, Plaintiff responded that because of his surgeries, he has constant pain. He said that he has headaches and blackouts as well as pain in his arms and hands. Tr. at 62-63. Plaintiff said that he has pain "in my arms, on my elbows, under my armpits, and it moves up to my shoulders, back of my neck, and then into my head. ... I constantly

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1. A patient's Global Assessment of Functioning is rated on a scale between 1 and 100. A GAF between 31 and 40 indicates: "Some impairment in reality testing or communication (e.g., speech is at times illogical, obscure, or irrelevant) OR major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood (e.g., depressed man avoids friends, neglects family, and is unable to work; child frequently beats up younger children, is defiant at home, and is failing at school). Diagnostic and Statistical Manual of Mental Disorders Fourth Edition (DSM-IV) page 32.

have headaches. The headaches never go away...." Tr. at 67. Plaintiff testified that he was taking Zoloft for depression, and Tylenol #3 and Darvocet for pain. Tr. at 68. Plaintiff said that even though he takes medication for depression, he had not seen Dr. Bender more than twice because that was all Dr. Bender wanted to see him. "Dr. Bender had told me that I was supposed to see him again a year after my last visit, but he had passed away." Tr. at 76. When asked how the depression affected him, Plaintiff responded: "I just feel like giving up. I just don't have any – I just feel like I don't have any will. I've just given up. It just seems like it's so hard to constantly – I'm constantly trying to get my point across about my condition." Tr. at 76.

After Plaintiff and his wife testified, the ALJ called Roger Marquardt to testify as a vocational expert. Tr. at 91. The ALJ asked two hypothetical questions which are set out below:

> Mr. Marquardt, before proceeding, let me caution you that I'll be posing various hypothetical questions to you. I'd like you to respond directly to the case picture and not allow any extemporaneous matter to influence you. My first assumption is that we have an individual who is currently 36 years old. He was 33 years old as of the alleged onset date of disability. He's a male. He has a high school education, plus one year of college, and additional training in the Military Service. And he has past relevant work as you've indicated in Exhibit number 71, and he has the following impairments: He has status post-multiple surgical procedures with fusions of the third through seventh cervical vertebra with complaints of neck and upper back pain, pain in the arms, headaches, and history of blackout spells, bilateral ulnar neuropathy, history of major depressive disorder, and a history of substance abuse. And as a result of a combination of those impairments, he has the residual functional capacity to perform basic work activities as follows: he can lift no more than 12 to 15 pounds, routinely lift six to eight pounds; with no standing of more than 30 to 60 minutes at a time; no walking of more than 30 to 60 minutes at a time – or no sitting of more than 30 to 60 minutes at a time and no walking of more than 30 minutes at a time; with no repetitive bending, stooping, twisting, squatting, kneeling, or crawling; no repetitive climbing; no repetitive pushing or pulling; no repetitive reaching with the arms fully

> extended; and no more than occasional work with the arms above the shoulder level or work requiring bending and/or turning of the neck. This individual should not work at unprotected heights or around hazardous moving machinery. He should not be exposed to more than moderate levels of vibration. He is not able to do very complex or technical work but is able to do more than simple routine repetitive work which does not require constant attention to detail. He does require occasional supervision, and he should not work at more than a regular pace using three speeds of pace being fast, regular, and slow. 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 95-96. In response, the vocational expert testified that such an individual would not be able to do any of Plaintiff's past relevant work, but that unskilled jobs such as counter clerk, rental clerk, and information clerk would be possible. Tr. at 97-98. Thereafter, the ALJ asked a second hypothetical:

> My next hypothetical would be an individual of the same age, sex, education, past relevant work, and impairments as previously specified, and this would be an individual who would have the residual functional capacity to perform basic work activities as follows: this individual should not lift more than five to ten pounds; with no standing of more than ten to 15 minutes at a time; no sitting of more than ten to 15 minutes at a time; and no walking of more than ten to 15 minutes at a time; with no repetitive bending, stooping, twisting of the neck or squatting; no repetitive climbing; no repetitive pushing or pulling; no repetitive strong gripping; no repetitive reaching of the arms to head level or work which requires continuous fine manipulation; no repetitive work with the arms above the shoulder level. This individual should not work at unprotected heights or around hazardous moving machinery. He is able to do only simple routine repetitive work which does not require close attention to detail. He should have no more than occasional contact with the public. 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. I assume this individual could not perform past relevant work, transfer or acquire work skills, or perform the full and/or wide range of unskilled would. Would that

be correct?

Tr. at 98-99. In response, the vocational expert testified that all work would be eliminated. The vocational expert also testified that the blackout spells to which Plaintiff testified as well as the side effects of his medication would prevent Plaintiff from doing any kind of work. Tr. at 99.

In his decision of January 31, 1997, the ALJ, following the familiar five step sequential evaluation found at 20 C.F.R. § 404.1520(a)-(f), found that Plaintiff has not engaged in substantial gainful activity since July 26, 1994. The ALJ found that Plaintiff suffers from severe impairments: "Severe residuals from multiple surgical procedures to the cervical spine with fusion from C3 to C7 with complaints of pain in the neck and upper back, headaches, weakness, history of blackout spells and limited motion in the right shoulder and arm, and bilateral neuropathy in the arms, as well as problems with depression and substance [abuse] which are not severe." Tr. at 29. The ALJ found that Plaintiff is unable to do his past relevant work but that he has a residual functional capacity for work as in the first hypothetical and he found that Plaintiff is able to do jobs such as those identified by the vocational expert. Tr. at 29-30. The ALJ found Plaintiff is not disabled nor entitled to the benefits for which he applied. Tr. at 31.

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).

It is well settled law in the Eighth Circuit that when a claimant meets the burden of proving the inability to do past relevant work, the burden of proof shifts to the Commissioner to prove, first, with medical evidence that the claimant has a residual functional capacity to work, and second, that other jobs exist which the claimant can perform in the impaired condition. *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); *Weiler v. Apfel*, 179 F.3d 1107, 1109 (8th Cir. 1999). *See also Singh v. Apfel*, --- F.3d---, 99-2366 slip op. at 5 (8th Cir. June 20, 2000).

In the case at bar, in addition to the evidence before the ALJ, medical records were sent to the Appeals Council which were considered in denying review. "Evaluating such evidence requires us to determine how the ALJ would have weighed the newly submitted evidence if it had been presented at the original hearing." *Jenkins v. Apfel*, 196 F.3d 922, 924 (8th Cir. 1999).

The ALJ found that Plaintiff's impairments included depression, but he found that the depression was not a severe impairment at the second step of the sequential evaluation. In the opinion of the court, that finding is not supported by substantial evidence which was in the rec-

ord at the time of the ALJ's decision. The evidence which was submitted to the Appeals Council further detracts from the ALJ's decision. At the hearing, Plaintiff's testified that he was taking Zoloft, an anti-depression medication. When asked how his depression affected him, he said that the depression made him "feel like giving up." He also said that he felt as though he had no will. Tr. at 76. Plaintiff testified that his depression made it hard for him to concentrate. Tr. at 74. Plaintiff told the ALJ that he had begun treatment at Boradlawns Medical Center, and that although he had not received a referral to a psychologist or psychiatrist, his doctor was prescribing medication. Tr. at 76. Plaintiff's testimony is supported by the medical evidence noted above. Furthermore, the ALJ has a duty to fully and fairly develop the record, even if the claimant is represented by an attorney. *Warner v. Heckler*, 722 F.2d 428, 431 (8th Cir. 1983). Plaintiff's testimony regarding the effects of his depression, the fact that he was taking medicine, and the fact that he was beginning a new medical relationship with the doctors at Broadlawns Medical Center, should have alerted the ALJ to the necessity of a consultative examination to determine the severity of the mental impairment. The Commissioner's regulations provide that when a claimant's medical sources cannot or will not give sufficient medical evidence about an impairment, a consultative examination is appropriate. 20 C.F.R. § 404.1517. Failure to order consultative examinations when such are necessary to make an informed decision, is reversible error. *Freeman v. Apfel,* 208 F.3d 687, 692 (8th Cir. 2000) (citing *Dozier v. Heckler*, 754 F.2d 274, 276 (8th Cir. 1985)). Additionally, if the ALJ would have had the opportunity to review the evidence submitted to the Appeals Council regarding the depression and post traumatic stress disorder, there would have been no doubt that his step two finding would have included Plaintiff's mental impairments as severe impairments. As it was, the ALJ did not know of the

traumatic events to which Plaintiff had been subjected, nor did Plaintiff, a lay person, know the implications of those events on his physical and mental health. Simply because a person does not know the extent of his own illness, does not mean that he is not disabled. *Adams v. Weinberger,* 548 F.2d 239, 245 (8th Cir. 1977) holding that the statement of an alcoholic that drinking beer was not harmful was "the rationalizations of a sick individual who does not realize the extent of his illness." Here, unlike in *Adams*, Plaintiff was not trying to fool himself, he simply did not know the impact of the death of his daughter on his ability to function. In the case at bar, Plaintiff knew that he was depressed, and that the depression was affecting his ability to work. The ALJ breached his duty to fully and fairly develop the record on this crucial question. Therefore, the Commissioner was not required to carry his burden of proving with medical evidence that Plaintiff has the residual functional capacity to work day in and day out in the competitive and stressful conditions in which real people work in the real world. *McCoy v. Schweiker*, 683 F.2d at 1147.

In *Gavin v. Heckler,* 811 F.2d 1195, 1201 (8th Cir. 1987), the Court held that where the burden of proof has been incorrectly allocated the remedy is ordinarily to remand for further proceedings. "However, where the total record is overwhelmingly in support of a finding of disability and the claimant has demonstrated his disability by medical evidence on the record as a whole, we find no need to remand." *Id.* In the case at bar, Dr. Singh's diagnosis of a GAF of 35, Ms. Burnham's explanation of Plaintiff's post traumatic stress disorder, Mr. Wernimont's observation of significant depression, and Dr. Taylor's opinion of Plaintiff's marked inability to function in the workplace render a remand to take additional evidence an inappropriate remedy. Psychiatrists, not lawyers or judges, are the experts on mental health issues. *Wilder v. Chater,*

64 F.3d 335, 337 (7th Cir. 1995). Here, the psychiatrists have spoken loud and clear. The case, therefore, is reversed, and the Commissioner is ordered to award Plaintiff the benefits for which he applied.

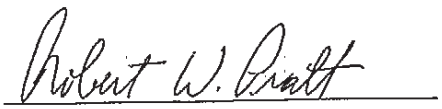
CONCLUSION AND DECISION

It is the holding of this Court 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 evidence in this record does not establish that Plaintiff has the ability to return to past relevant work or to any other type of work that exists in significant numbers in the national economy. A remand to take additional evidence would only delay the receipt of benefits to which Plaintiff is clearly entitled. Therefore, Plaintiff is entitled to disability benefits as of the amended onset of disability date, July 26, 1994.

Defendant's motion to affirm the Commissioner is denied. **This cause is remanded to the Commissioner for computation and payment of benefits.** 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). *See also, McDannel v. Apfel*, 78 F.Supp.2d 944 (S.D. Iowa 1999).

IT IS SO ORDERED.

Dated this 3rd day of July, 2000.



ROBERT W. PRATT
U.S. DISTRICT JUDGE