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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

MARILYN OXENDALE,	*	
	*	4-99-CV-90602
Plaintiff,	*	
	*	
v.	*	
	*	
KENNETH S. APFEL, Commissioner of Social Security,	*	
	*	ORDER
Defendant.	*	
	*	

Plaintiff, Marilyn Oxendale, filed a Complaint in this Court on October 22, 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.*, 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.

Plaintiff filed applications for benefits on August 1, 1996. Tr. at108-11 and 293-99. 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 Jean M. Ingrassia (ALJ) on January 8, 1998. Tr. at 49-93. The ALJ issued a Notice of Decision – Unfavorable on May 26, 1998. Tr. at 13-38. The ALJ's decision was affirmed by the Appeals Council on September 15, 1999. Tr. at 7-9. A Complaint was filed in this Court October 22, 1999.

At the time of the hearing, Plaintiff was 50 years old. Tr. at 54. Since March of 1994,

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Copies to Counsel: OCT 23 2000
By:

Plaintiff has been treated at the University of Iowa Hospitals and Clinics (University) for numerous medical conditions, among which are type II diabetes with peripheral neuropathy, gastritis, and chronic diarrhea. On November 10, 1996, Joseph Truszkowski, M.D. wrote that Plaintiff had "life long diarrhea without clinical sequelae suggesting a progressive disorder or secondary malnutrition." Tr. at 207. Dr. Truszkowski wrote that her symptoms of diarrhea represented a functional disorder and that it was unlikely that the symptoms would be cured. Tr. at 208. On June 30, 1996, Plaintiff reported having 10 to 15 bowel movements per day. Tr. at 178. In a report dated December 5, 1996, Loreen Herwaldt, M.D. wrote that Plaintiff had discontinued her job due to the diarrhea and painful neuropathy. Tr. at 215. Dr. Herwaldt diagnosed "symptoms of depression" and wrote that a psychiatric appointment had been arranged. Tr. at 216.

At the request of Disability Determination Services, Plaintiff was seen for a psychiatric evaluation by David G. Windsor, M.D. on February 22, 1997. Tr. at 222- 26. Plaintiff told Dr. Windsor that she had last worked in November of 1996, and that she stopped working "because of severe diarrhea without warning, and she would often soil herself at work." Tr. at 222-23. In addition, Plaintiff said that she could not stand on her feet long enough to do her work. Plaintiff told Dr. Windsor that she spent most of her day sitting with her feet elevated. Tr. at 223. Plaintiff said that she had seen a psychiatrist on a couple of occasions. Dr. Windsor wrote: "Evidently, she is experiencing some degree of clairvoyance – 'I see things before they happen.' She recalled in detail how and where her husband would die." Tr. at 224. After a mental status examination, Dr. Windsor described Plaintiff as being "quite an amusing woman", and he said that he found no evidence of mental illness. Tr. at 225.

When Plaintiff saw Dr. Truszkowski on January 20, 1997, she reported up to 20 bowel

movements per day and night. Tr. at 236. A psychiatric outpatient note, written by Jeffrey Jansen, M.D., and Scott Stuart, M.D., both psychiatrists at the University, states that Plaintiff had obtained some books on parapsychology, and that she felt that her mood was "greatly improved secondary to not feeling as if she is going crazy any more." The doctors diagnosed mixed personality disorder with schizotypal traits. The doctors stated that during the interview, Plaintiff "interacts in a very histrionic and flamboyant manner constant with her Axis II pathology", i.e. the previously mentioned diagnosis. Tr. at 237.

When Plaintiff was seen at the University on February 11, 1997, the diagnoses were irritable bowel syndrome and left wrist pain. Dr. Truszkowski told Plaintiff that it was unlikely that there would be other explanations for her chronic diarrhea. Plaintiff complained of left medial wrist pain with a history of a fracture some time in the past. Tr. at 238. An x-ray of the left wrist showed no evidence of fracture, dislocation, or interosseous lesions. Tr. at 239. Plaintiff was referred to Cutis M. Steyers, M.D., who wrote that x-rays taken in February of 1996, after a motor vehicle accident, were suspicious for a hairline fracture. After his examination, Dr. Steyers opined that Plaintiff's pain was due to ligamentous injury. Tr. at 240. Plaintiff was seen on March 18, 1997, at which time Loreen Herwaldt, M.D. wrote: "Mrs. Oxendale has had significant problems with painful neuropathy." The doctor wrote that Plaintiff had been given dicyclomine for her diarrhea and that although the medicine caused some improvement, Plaintiff complained of some difficulty walking. Plaintiff made a new complaint of urinary incontinence which she said occurs with coughing or laughing and upon standing from the toilet. Tr. at 241. Plaintiff returned to the University on April 22, 1997, at which time Dr. Herwaldt wrote that Plaintiff "suffers from severely painful neuropathy, which has been treated with Elavil and Teg-

retol with some improvement." Tr. at 244. Plaintiff saw Dr. Truszkowski, M.D. on April 23, 1997. Plaintiff complained of pain in the right upper quadrant of her abdomen which she said could be quite severe at times. She also complained of large amounts of mucus with the passing of stools, which the doctor said was common in people with irritable bowel syndrome. The doctor thought the abdominal pain was more musculoskeletal in origin and he offered a trigger point injection which Plaintiff declined. Tr. at 245. Plaintiff saw Dr. Steyers on April 23, 1997, for her left wrist pain. Dr. Steyers said that an arthrogram on March 18, 1997 (Tr. at 243) demonstrated a TFCC[1] tear. X-rays the day of the examination showed slight ulnar positive variance with distinct TFFC tear. Dr. Steyers recommended left wrist arthroscopy with either ulnar shortening or distal ulna resection. Tr. at 247. Plaintiff underwent a urodynamic study on June 2, 1997. Tr. at 251-52. At the conclusion of the study, Karl J. Kreder, M.D. instructed Plaintiff in pelvic floor exercises in order to give her greater muscle control. Tr. at 252. When Plaintiff was seen on June 3, 1997, it was noted that she was to have surgery on her left wrist. Plaintiff's chronic diarrhea was "improved somewhat on dicyclomine", but not resolved. Tr. at 253. Plaintiff was seen on June 3, 1997 by psychiatrists Nancy Williams, M.D., and Robert G. Robinson, M.D. Plaintiff reported that she continued to have "paranormal dreams". Tr. at 257. Plaintiff underwent a diagnostic left wrist arthroscopy and left ulnar shortening on June 5, 1997. Tr. at 262. When Plaintiff was seen ten days after the surgery, no complications were noted. Tr. at 265.

Plaintiff was seen at the University on September 16, 1997. Kamala Gullapalli Cotts,

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1 Transjugular fibrocartilage complex. Neil M. Davis, *Medical Abbreviations.*

M.D. wrote: "With regard to her chronic diarrhea, she is followed in the Gastroenterology Department for this, and it is believed to be secondary to irritable bowel syndrome. However, diabetic enteropathy is also likely." Tr. at 278. On September 17, 1997, Plaintiff saw Dr. Steyers for her wrist surgery. Although Plaintiff reported improved range of motion and no pain, x-rays demonstrated "delayed or perhaps nonunion of the ulnar osteotomy." Dr. Steyers recommended autogenous radial styloid inlaid bone grafting for the problem. Tr. at 281. The surgery took place November 13, 1997. Tr. at 292. On January 5, 1998, six weeks after the "hardware removal, replating and iliac crest bone grafting for a nonunion of the left ulna following ulnar shortening osteotomy", x-rays showed some slight bridging callus formation at the osteotomy site, and Dr. Steyers' impression was that healing was occurring. Tr. at 285.

Dr. Truszkowski filled out a questionnaire on November 6, 1997. Tr. at 260-71. He indicated that Plaintiff continued to have between 10 and 20 episodes of chronic diarrhea despite his treatment. Tr. at 269. The doctor stated that if Plaintiff were to work, she would need frequent access to a restroom, and that she would sometimes need to clean up and change clothes. The doctor opined that Plaintiff would not be able to work with a normal work schedule which provided for 15 minute breaks, one in the morning and one in the afternoon, with a half hour lunch period. When asked to identify side effects of Plaintiff's medication, he listed drowsiness, mental dulling, decreased ability to concentrate, and fatigue. Tr. at 270. Finally, the doctor indicated that fatigue is a prominent feature of Plaintiff's condition, and that fatigue significantly limits Plaintiff's ability to perform daily activities on a predictable schedule. Tr. at 271.

Lori Lee Larson, M.D., who usually saw Plaintiff at the same time as Dr. Herwaldt, filled out a questionnaire on December 18, 1997. Dr. Larson opined that due to neuropathy, Plaintiff

would frequently need to elevate her legs, and that she would need complete freedom to rest at will frequently throughout the day. Tr. at 272. Dr. Larson opined that because of her neuropathy and chronic diarrhea, Plaintiff is unable to sit, stand, or walk on a sustained basis, and is able to lift "less than 10 lbs." Tr. at 274.

ADMINISTRATIVE HEARING

Plaintiff appeared and testified at a hearing on January 8, 1998. At the time of hearing, Plaintiff was 50 years old. Plaintiff testified that she has a high school education. Plaintiff testified that she had last worked at Southwest Iowa Residential Facilities, and that she had worked there for about four years. Tr. at 54. Plaintiff said that she was "an assistant trainer to the physical and mental adult handicapped." She said that she trained the residents to do activities of daily living such as banking, cooking, cleaning, and "everyday living skills." Tr. at 55. Plaintiff said that she quit that work because of the neuropathy in her legs and because of diarrhea – "severe diarrhea. I had people bringing me clothes at work because I had just – it was a mess. I had no control, I have no feeling." Tr. at 57. When asked if she would be able to return to her work as an assistant trainer, given the current condition of her diabetes and diarrhea (Tr. at 61), Plaintiff responded that she is unable to stand long enough to do the work Tr. at 62. Plaintiff also said that poor memory was a side effect of her medication. Tr. at 63. Plaintiff said that at the time of the hearing, the arm on which she had surgery was "completely useless." She also said that her doctors had not told her if she could expect improvement. Tr. at 69.

At the conclusion of her testimony, Plaintiff amended her alleged onset of disability date to her fiftieth birthday - March 11, 1997. Tr. at 77.

In response to a question from the ALJ, Plaintiff said that she had to quit her job because,

as she got older, her diarrhea became progressively worse. When asked which of her impairments were the most debilitating, Plaintiff responded that it was the neuropathy from the diabetes and the diarrhea. Tr. 82. Plaintiff explained to the ALJ that she had experienced two episodes of diarrhea the morning of the hearing. Tr. at 83. The ALJ asked Plaintiff if she were given restroom breaks every two hours, if she would be able to work, to which Plaintiff responded: "Oh, no, it varies. ... Some days I can go for maybe 15 minutes and I have to be in a bathroom constantly or there's days when – like today, it's like every couple hours or so I'll have to go, or some days it's every hour. There's no schedule for it. ... Even with the medication." Tr. at 84. When the ALJ asked if she could work if she could go to the bathroom every hour, Plaintiff's said:

> Well, what I'm going to tell you is no because if I was allowed to go every hour, okay, there's no guarantee that I'm going to go every hour. It could be every 15 minutes, or I could be standing there and then all of a sudden, boom, there it is, and it's before my hours, you know – I mean, you understand what I'm saying? There's no schedule.
> ...
> No, it wouldn't work because there's times I can't make it to the bathroom. That's what I'm trying to tell you, and then there's days like today, like I said. ... I don't take the chance because I have had too many people bring me clothes at work or into the bathroom, you know, by the bathroom door and hang them on the outside of the bathroom door like my roommate has.

Tr. at 84-85.

The ALJ asked the vocational expert if Plaintiff would have any transferable skills if she was unable to do medium work because of the injury to her arm, and if she has "a problem with incontinence although she can't seem to pin down the frequency, and needs ready access to a lavatory..." Tr. at 87. The vocational expert testified that Plaintiff would have transferable skills

to several sedentary jobs such as information clerk. Tr. at 88. The vocational expert testified that the need to elevate the feet would eliminate the identified jobs. Finally, the vocational expert said that if work processes and attention to detail were inhibited because of side effects of medication, then semiskilled work would be precluded. Tr. at 91.

ALJ'S DECISION

In her decision, following the familiar five step sequential evaluation, the ALJ found that Plaintiff has not engaged in substantial gainful activity since her amended onset of disability date. At the second step, the ALJ found Plaintiff has non-insulin dependent diabetes mellitus and chronic diarrhea, but that the impairments do not meet or equal a listed impairment. Tr. at 36. At the fourth step, the ALJ wrote:

> The claimant has not provided sufficient evidence to show that her overall physical condition is worse now than when she was able to work. She remains able to meet the physical and emotional demands of a job she has performed in the relevant past, to wit: Assistant trainer in a residential facility for handicapped persons.

In making the fourth step finding, the ALJ also found that Plaintiff retains the residual functional capacity for a wide range of light work. Tr. at 37. The ALJ also found that Plaintiff is somewhat limited in her ability to reach, handle, and finger due to the condition of her non-dominant left wrist. Tr. at 34. The ALJ wrote: "The undersigned finds little objective or other evidentiary support for the claimant's contention that she must sit with her legs elevated for up to six hours of each day or that she has attacks of diarrhea up to 20 times per day and often soils herself." Tr. at 34.

The ALJ found that Plaintiff is not disabled or entitled to the benefits for which she applied. Tr. at 37.

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).

At the second step of the sequential evaluation, the ALJ found that Plaintiff suffers from diabetes, and chronic diarrhea. These findings are supported by substantial evidence in the record as a whole. The ALJ goes on to find, however, that these impairments do not prevent Plaintiff from doing her past relevant work because she found little objective or other evidentiary support for the claimant's contention that she must sit with her legs elevated or that she has attacks of diarrhea. Tr. at 34. So, on the one hand the ALJ finds diabetes and chronic diarrhea to be severe impairments, and on the other hand she finds it incredible that Plaintiff has episodes of diarrhea, or that Plaintiff suffers from the symptoms of neuropathy caused by the diabetes. If these two findings are not inconsistent, they are at least curious.

Polaski v. Heckler, 739 F.2d 1320 (8th Cir. 1984) 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. It appears to the Court that the primary reason that the ALJ discounted Plaintiff's complaints was that those complaints were not supported by objective evidence. ("The undersigned finds little objective or other evidentiary support for the claimant's" complaints of pain and diarrhea. Tr. at 34) Clearly, that is an insufficient reason.

Regarding the diarrhea, the Court finds there are some isolated inconsistencies, but not enough to say that Plaintiff's testimony is not credible. For example, in the beginning, the doctors seemed to be of the opinion that there was no medical explanation for the diarrhea. Dr. Truszkowski opined that Plaintiff's symptoms represented a functional disorder. Plaintiff did not present with clinical sequelae suggesting malnutrition. Plaintiff did not seem to have any episodes of diarrhea during a hospitalization. In the opinion of the Court, these seeming inconsistencies are outweighed by the fact that as time went on, the doctors attributed Plaintiff's symptoms to irritable bowel syndrome rather than to a functional disorder. Dr. Cotts wrote that the diarrhea could also be caused by diabetic enteropathy. When Plaintiff reported mucus in her stools, her doctor told her that it was a common occurrence with irritable bowel syndrome. Plaintiff's doctors at the University of Iowa prescribed medication which helped somewhat, but which did not entirely control the diarrhea. The medication that was prescribed was expected to have, and did have, side effects such as drowsiness, mental dulling, decreased ability to concentrate, and fatigue. It is incomprehensible that the doctors would prescribe strong medication for

a condition which they did not believe existed. When the record is viewed as a whole, therefore, Plaintiff's complaints of diarrhea are not inconsistent with the medical evidence, and there is no reason that will pass muster under *Polaski* to justify discrediting her testimony regarding same.

In addition to diarrhea, the ALJ found that diabetes is a severe impairment. As a result of the diabetes, Plaintiff suffers from neuropathy in her feet and legs. Here, there are no inconsistencies. On March 18, 1997, Dr. Herwaldt wrote that Plaintiff has "significant problems with painful neuropathy." On April 22, 1997, Dr. Herwaldt wrote that Plaintiff suffers from "severely painful neuropathy." To treat the neuropathy, the doctors prescribed Elavil and Tegretol. When Dr. Larson completed her interrogatories, she stated that Plaintiff frequently needs to elevate her legs and rest frequently for relief of pain. She also opined that because of the neuropathy, as well as the diarrhea, Plaintiff is unable to sit, stand, or walk on a sustained basis, and can lift no more than ten pounds. In *Cox v. Apfel*, 160 F.3d 1203, 1208 (8th Cir. 1998), the Court held that a consistent diagnosis of chronic pain, coupled with drug treatment, was objective evidence of pain. Plaintiff, in the case at bar, has consistently been diagnosed with diabetic neuropathy, thus providing objective evidence to support her complaints of pain. Here again, then, there are no inconsistencies in the evidence as a whole, nor any other reason provided for in *Polaski*, that justifies a finding that Plaintiff's testimony is not credible.

At the hearing, the ALJ began her questioning of the vocational expert by asking if Plaintiff would have any transferable skills if she were unable to do medium work. That would have indicated to Plaintiff that the ALJ had already decided that she was unable to return to past relevant work, and that the burden of proof was on the Commissioner to prove, with medical

evidence, that she has a residual functional capacity and that other jobs exist that she 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.* It is the holding of this Court that Plaintiff met her burden of proving that she can not return to her past work and the ALJ's finding to the contrary is not supported by substantial evidence on the record as a whole. The only medical evidence of Plaintiff's residual functional capacity in this record is from Plaintiff's treating physicians who opined that she is unable to keep a normal work schedule because the diarrhea. Doctor Truszkowski testified that side effects of medication included drowsiness, mental dulling, decreased ability to concentrate and fatigue. Dr. Larson testified that Plaintiff frequently needs to elevate her legs and that she needs freedom to rest throughout the day, and that she cannot sit, stand or walk on a sustained basis. Finally, Dr. Larson said that Plaintiff is unable to lift more than ten pounds.

When the aforementioned limitations were taken into account by the vocational expert, she testified that Plaintiff would have no skills transferable to other kinds of work. The Court finds no evidence to support the ALJ's finding that Plaintiff has the residual functional capacity for a wide range of light work. Rule 201.14 of the medical vocational guidelines provides that a person who is between 50 and 55 years of age and limited to sedentary unskilled work, is entitled to a finding of disabled. At the hearing, Plaintiff amended her onset of disability date to coincide with her 50th birthday. Therefore, a remand to take additional evidence would only delay the receipt of benefits to which she is entitled. In such a circumstance, a reversal with an order to award benefits is the appropriate remedy. *Gavin v. Heckler*, 811 F.2d 1195, 1201 (8th Cir.

1987).

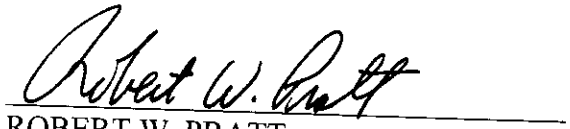
CONCLUSION AND DECISION

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.

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 23rd day of October, 2000.



ROBERT W. PRATT
U.S. DISTRICT JUDGE