UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

SUMMER N. DEAKINS, Plaintiff, vs. JO ANNE B. BARNHART, Commissioner of Social Security, Defendant.	No. C02-4054-MWB **REPORT AND RECOMMENDATION**

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I. INTRODUCTION

The plaintiff Summer N. Deakins ("Deakins") appeals a decision by an administrative law judge ("ALJ") denying her Title XVI supplemental security income ("SSI") benefits. Deakins argues the ALJ erred in (1) not crediting Deakins's sworn testimony; (2) relying on the opinion of a non-examining, non-treating physician; and (3) failing to pose an appropriate hypothetical question to the vocational expert. Deakins argues that because of these errors, the Record does not contain substantial evidence to support the ALJ's decision. (*See* Doc. No. 10)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On March 17, 2000, Deakins filed an application for SSI benefits, alleging a disability onset date of January 1, 1987. (R. 89-91) The application was denied on July 28, 2000. (R. 65-70) On August 31, 2000, Deakins requested a hearing (R. 71), and a hearing was held before ALJ Jan E. Dutton in Sioux City, Iowa, on August 21, 2001. (R. 27-64) Non-attorney Royce Schweizer represented Deakins at the hearing. Deakins testified at the hearing, as did Vocational Expert ("VE") Sandra Trudeau.

On August 29, 2001, the ALJ ruled Deakins was not entitled to benefits. (R. 11-24) In accordance with 20 C.F.R. §§ 416.1406, 416.1466 (2002), the ALJ's decision was the final decision of the Commissioner.

Deakins filed a timely Complaint in this court on July 8, 2002, seeking judicial review of the ALJ's ruling. (Doc. No. 3) In accordance with Administrative Order #1447, dated September 20, 1999, this matter was referred to the undersigned United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition of Deakins's claim. Deakins filed a brief supporting her claim on December 12, 2002. (Doc. No. 10) The Commissioner filed a responsive brief on January 15, 2003. (Doc. No. 11). The matter is now fully submitted, and pursuant to 42 U.S.C. § 405(g), the court turns to a review of Deakins's claim for benefits.

B. Factual Background

1. Introductory facts and Deakins's daily activities

At the time of the hearing, Deakins was 25 years old, and living in an apartment in Sioux City, Iowa. (R. 33) She testified she had not graduated from high school or obtained a G.E.D., but nevertheless somehow had received a high school diploma. (R. 34.) She testified she can do basic math and reading, but has difficulty with higher level math and reading "big words." (*Id.*)

Deakins was placed in a foster home at age 14, which she "destroyed." (R. 35) She then was placed "all over," including the Iowa Juvenile Home and several detention centers. When she reached 18 years old, she was discharged from the juvenile system. (R. 36)

Deakins was charged with second degree criminal mischief as a result of the damage she caused to her foster home, but otherwise she has never been arrested or convicted of a crime. (*Id.*)

When Deakins was 19 years old, after being raped, she gave birth to a son. (R. 41) She gave the child to her mother to raise. (*Id.*) She also has a daughter, who was seven months old at the time of the hearing and lives with her. Her daughter was fathered by a 60-year-old bus driver with whom Deakins lived for about two years. (R. 43) Deakins testified she had broken up with the child's father because of sexual and emotional abuse. (R. 44)

Deakins received disability payments, possibly as a result of a disability suffered by her father, until she was 20 or 21, when the payments were discontinued. Her first job was working at Good Will Industries, where she went though a 90-day rehabilitation program. She failed to finish the program successfully because of "emotional problems." (R. 38, 40) She then she worked at McDonald's "on and off" for about a year. (R. 38) For short periods of time, she also worked as a waitress and at a gas station. (R. 39) She had trouble performing each of these jobs because of a "movement disorder" she has had her entire life. (*Id.*) She cannot get a driver's license, and at the time of the hearing was on welfare. (R. 42, 44)

Deakins testified she is taking Zyprexa, for her movement disorder, and Xanax, for depression and panic attacks, but she does not believe they help. (R. 42, 52, 58) She has been on "all sorts of medication" for the movement disorder, including Depakote, but nothing has worked. (R. 47) When asked by the ALJ why she has not gotten a job, she stated she has panic attacks, she hates people, people scare her, and she feels like people are laughing at her all the time. (R. 45) When asked about jobs that do not involve interaction with other people, Deakins stated when she gets a job, her "attention span goes to zip," and she gets "bored very easily." (*Id*; R. 53-54)

Deakins testified she is unable to sit down for any period of time because she has to be doing something. (R. 46, 53-54) She enjoys house cleaning, but does not like to cook. (*Id*). She does laundry and takes care of her baby, although she often makes a mess when

feeding the baby because of her jerking. (R. 46-47) She is helped in caring for her baby by an "adopted" mother, (R. 50-51)

Her daily routine revolves around the baby. (R. 57) She gets up at about 8:30 each morning, and feeds, bathes, and changes the baby. (R. 57) She cleans the house, and then visits a friend for about a half hour. (*Id*.) In the evenings, she watches television and plays with her baby. (*Id*). She goes grocery shopping on the first of every month, late at night to avoid other people. (*Id*).

Deakins testified she did not think she could return to work at McDonald's, but she stated, "If I had to go get a job, I would need something that didn't involve [being] around people, that an employer would understand my difficulties in the job, whatever, whatever I'm trying to say. I would be willing to do anything." (R. 54)

2. Deakins's medical history

A detailed chronology of Deakins's medical history is attached to this opinion as Appendix A. The earliest medical report in the Record is a psychological evaluation of Deakins prepared by M.A. Strider, Ph.D., a clinical psychologist, when Deakins was 13 years old. (R. 245-48) Dr. Striker found evidence of brain dysfunction, with difficulties in spelling and arithmetic. (R. 247) He did not find significant evidence of psychosis or significant depression or anxiety, but he noted Deakins had difficulties with complex, higher cognitive processing, and very limited ability for organization, planning, and judgment. (R. 247-48)

Deakins next was evaluated in 1994, at age 18, by Mark Haslett, M.D., a psychiatrist. (R. 242-44) At the time, Deakins was living alone and 14 weeks pregnant as the result of a gang rape. (R. 242) She had a history of Attention Deficit Hyperactivity Disorder ("ADHD"). She had been removed from her home and placed in foster care at age 11 or 12, because she was physically and sexually abused by her father. (*Id*.) She

reported she had been diagnosed with "Russell Silver Syndrome," defined by Dr. Haslett as "a syndrome of myoclonic jerks." (R. 243) After conducting an evaluation, Dr. Haslett concluded Deakins did not need therapy or psychiatric intervention. (R. 244)

On March 9, 1999, a Disability Determination Services (DDS) Report was prepared by Michael P. Baker, Ph.D., a licensed psychologist. (R. 249-51) After administering an intelligence test, Dr. Baker determined that Deakins's full scale IQ was 79. (R. 251) He further concluded as follows:

> From this single testing situation, it would appear that Summer is able to maintain attention, concentration and pace, yet whether this would be sufficient for an employment setting is uncertain. She certainly interacted appropriately with this evaluator and therefore might be expected to do so with supervisors, co-workers, and the public. Judgment does appear poor and might limit her ability to respond adequately to changes in the workplace.

(R. 250)

A year later, on March 23, 2000, Deakins was seen at Tri-County Mental Health Services, Inc., for "anger, fear and depression." (R. 143) She reported that she had lived in juvenile homes from ages 7 to 17, and she had attempted suicide "several times." (*Id.*) She was referred for psychiatric treatment and individual counseling. (R. 146)

On April 6, 2000, Deakins was seen by Les Flowers, L.P.C. (R. 136-39) Flowers found no evidence of any major thought disorders, and determined Deakins was properly oriented. (R. 138) Deakins denied suicidal ideation, but described mood swings, anger, agitation, fear of "being around people," and an inability to hold a job. (*Id.*) Flowers observed Deakins had a labile mood, fair insight, and poor judgement. (*Id.*) He diagnosed her as suffering from ADHD by history and a mood disorder NOS, with a GAF of 45.[1]

[1] *See* Appendix A, page A-5, note 2.

Flowers saw Deakins again on April 28, 2000. (R. 140) He noted Deakins had very poor social skills, a history of institutionalization, anger issues, is easily agitated, has rapid mood swings, and comes from "extremely dysfunctional family." However, there was no evidence of a major thought disorder, and she was properly oriented. Deakins focused on a "conflictual relationship" with her mother, "who continues to physically abuse" her. Flowers concluded Deakins's ability to understand and remember instructions and to sustain concentration and persistence in tasks was "extremely limited," and her ability to interact socially and adapt to her environment was "limited." (*Id.*)

On May 10, 2000, Deakins was seen at Tri-County Mental Health Services, Inc. by Grant Piepergerdes, M.D., for a psychiatric evaluation. (R. 147-49) Deakins's chief complaint was "anger problems and depression." (R. 147) Dr. Piepergerdes observed the following:

> The patient is a smaller appearing white female with a somewhat dysmorphic face and somewhat shorter limbs who was cooperative and fairly pleasant with the examination. Her eye contact was fair and speech was regular rate, rhythm and volume. She displayed no abnormal motor movements. Her mood was "depressed" and her affect was mildly labile to tears at times. Her thought processes were linear and thought content showed no current evidence of mania, psychosis, suicidal or homicidal ideation.

(R. 148) He prescribed Remeron and recommended psychotherapy. (R. 149)

Two days later, on May 12, 2000, Deakins was brought by police into St. Luke's Northland Hospital in Shawnee Mission, Kansas. (R. 204-212) She was crying, and stated she was depressed and wanted to give up. She reported that her boyfriend had kicked her out of their home, and had told her to kill herself, which she had contemplated doing for two hours while sitting by a bridge.

On June 6, 2000, she had a neurological consultation with Charles D. Donohoe, M.D., a neurologist. (R. 141-42) Dr. Donohoe disagreed with the diagnosis that Deakins

was suffering from Russell-Silver Syndrome. He noted her chief complaint at the time of his examination was "myoclonic tremor involving her entire body, but particularly the left arm and left leg. These are coarse jerking movements of her trunk, left arm and left leg which interfere with her ability to carry objects and to write." (R. 141) He concluded Deakins can walk, stand, sit, handle objects, and speak. (R. 142) He also concluded the cause of the myoclonus was unclear. (*Id.*)

On June 7, 2000, Deakins returned to Dr. Piepergerdes, and reported that she was having a difficult time with her boyfriend, and was frustrated about the status of her disability application. (R. 150) She complained of drowsiness and increased appetite. (*Id.*) Dr. Piepergerdes noted mild improvement, but discontinued the Remeron, and started a trial of Prozac. (*Id.*) He also recommended she begin psychotherapy with Flowers. (R. 151)

On June 30, 2000, Keith Allen, Ph.D. completed a Mental Residual Functional Capacity Assessment of Deakins. (R. 153-56) He found her to be moderately limited in the ability to understand, remember, and carry out detailed instructions; to respond appropriately to changes in the work setting; and to set realistic goals or make plans independently of others, but she is not significantly limited in any other mental activity. (R. 153-54) Dr. Allen made the following functional capacity assessment of Deakins: "[Deakins] may have difficulty with more demanding activities such as dealing routinely with others and with more complex tasks, but appears capable of understanding and performing less demanding tasks." (R. 155) Dr. Allen also completed a Psychiatric Review Technique form for Deakins. (R. 157-65) He concluded there is no evidence of an organic mental disorder; schizophrenic, paranoid, or other psychotic disorder; anxiety related disorder; somatoform disorder; personality disorder; or substance abuse addiction. He further concluded, however, that she suffers from a disturbance of mood and significantly subaverage general intellectual functioning. As a result, Dr. Allen rated Deakins as slightly restricted in the activities of daily living, and found she would have

moderate difficulties in maintaining social functioning. She also often has deficiencies of concentration, persistence, or pace, resulting in failure to complete tasks in a timely manner.

On July 18, 2000, Maria M. Legarda, M.D., a neurologist, completed a Residual Physical Functional Capacity Assessment of Deakins for DDS. (R. 166-74) Dr. Legarda found Deakins has no exertional, visual, or communicative limitations. Deakins occasionally is limited in climbing, balancing, and crawling, but otherwise has no postural limitations. She has some limitations in handling and fingering, as a result of tremor or myoclonic jerking in her hands, but otherwise has no manipulative limitations. She must avoid even moderate exposure to hazards, such as machinery or heights, but otherwise has no environmental limitations.

Dr. Legarda made the following observations about Deakins:

> Allegation of Russell-[S]ilver syndrome is partially credible. She was diagnosed with this in childhood and MER reflect that. Neuro CE on 6-6-00, however, found no facial or structural abnormalities consistent with this diagnosis. Allegations re. the myoclonic jerking are mentioned in the ADL in that she has difficulty with knives, scissors, and other sharp objects due to jerking. She cooks simple things and doees [sic] not iron bec. she has burned herself in the process bec. of the jerking. Live-in boyfriend states the twitching causes problems eating, writing, using the phone, dressing, cooking. She can't get a driver's license. The jerking occurs when she is under pressure. The jerking is mentioned in her prior file, on one exam in 5-89 by Dr. Sharma, who noted mild clonic type of jerks in arms and legs. Before the exam, however, they were not there, but when the exam started they began. Numerous examinations by physicians, mostly psychiatrists, and other mental health professionals whom she has been treated by over the years, have not mentioned seeing myoclonic jerks. The discharge summary of a 2 year stay in an inpatient psych treatment center in Iowa made no mention of myoclonic jerks. In 3-99 during the administration of WAIS-R test by Dr. Baker,

> fine hand motor shakiness was noted when she did the block design subtest. On 2-2-99 claimant filled out a supplemental disability report where she stated she cooked and did chores everyday. On the same date her mother filled out a 3rd party questionnaire and stated she does outside chores like sweep, and does ordinary household chores. She does her own errands without help. Her hobbies are dancing and gambling. She is shrewd in taking care of herself. She goes out whenever she wants to; she has complete mobility. When her case was allowed previously, it was on the basis of psych problems and not physical ones. Diagnosis of histrionic personality with conduct disorder was made in 1989. At Tricounty Mental health center on 3-23-00 claimant answered questionnaire that for recreation she gambles. It was the clinician's impression that she is consumed with anger towards her mother which triggers verbal aggression and vigilant defensive behavior. Her mother still physically abuses her when they are together. On 4-6-00 clmt. told clinical counselor that muscle spasms and jerkiness occur when she is angry or agitated. She only stays at jobs a few days, because she gets angry and frustrated, not for physical reasons. During a one hour session at Tricounty Mental Health Clinic on 5-10-00 TP psychiatrist Dr. Pieperge[r]des stated he saw no abnormal motor movements.
>
> After reviewing all the evidence, clmt.'s allegations of myoclonic jerks are only partially credible. She does appear to have them, but it is very difficult to reconcile the fact that less than one month prior to Dr. Donohoe's exam, which the clmt. knew was specifically for evaluation of the jerking, she had a one-hour psych exam and her doctor observed no abnormal movements, yet when Dr. Donohoe saw her, she had them continuously, and Dr. Donohoe himself stated in his report that this was very unusual. He told me in RC he could not tell whether the jerks were real or feigned. She also is not on medication or other treatment for the jerking.

(R. 171, 173) Dr. Legarda also commented that if Deakins has Russell-Silver syndrome, that, by itself, is not limiting. (R. 173) Because Deakins is capable of engaging in "activities such as dancing, gambling, and going out when she wants to," Dr. Legarda

concluded Deakins is not impaired functionally by the jerking. (*Id.*) Dr. Legarda also observed Deakins "has been noted to begin jerking when the exam begins, but not during the history taking." (*Id.*)

On January 10, 2001, Deakins saw David Brown, M.D., who conducted a diagnostic psychiatric interview of Deakins. (R. 198-99) Deakins was nine months pregnant at the time, and living in a trailer by herself. She told Dr. Brown the she "needs meds." She described a history of mood swings, poor attention span, depression, explosive anger outbursts, and being easily frustrated. She reported that for the preceding four or five months, she had been "hearing things" and "seeing things." She described a past psychiatric history of being "locked up until age 18," ADHD (treated with Ritalin), and Bipolar disorder(treated with Lithium and Depakote). (R. 198) On February 14, 2001, Deakins saw Dr. Brown again. (R. 200) In his notes, Dr. Brown wrote, "Paranoid," and, "Auditory hallucinations - hears someone yelling her name." He also wrote, "Has visions her baby is standing over her in her bed while baby is in basinet." Dr. Brown asked Deakins to return in two weeks, but Deakins was a "no show." (*Id.*)

On February 27, 2001, Deakins was seen by Iftekhar Ahmed, M.D., a neurologist. (R. 197) Dr. Ahmed stated the following:

> I am not clear [as to] the significance of her jerks which only occur when people come close to her, otherwise she has no symptoms. Recently they are not seizures so certainly they are not any kind of involuntary tic's. I would defer this for a psychiatric opinion. It will be reasonable to obtain a CT head scan and EEG. This needs to be scheduled through her primary care physician. Patient will see a primary care physician and follow-through there.

(R. 197)

On March 9, 2001, John D. Clark, M.D., interpreted an EEG that had been performed on Deakins. His impressions were as follows:

> Mildly abnormal adult awake, Stage I, and Stage II sleep EEG demonstrating several episodes of intermittent slowing involving both temporal head regions (independent focal slowing). Although this is a subtle finding, an underlying structural lesion involving one or both temporal lobes is possible. Correlation with neuroimaging is suggested. An MRI might be needed to better delineate the temporal lobes. No epileptiform discharges are seen. No (SREDA?) discharges are seen during the patient's twitching as noted by the EEG technician.

(R. 202)

On May 17, 2001, Deakins was seen at Riverside Family Practice Clinic in Sioux City, Iowa. (R. 234) Although Deakins reported a history of "twitches" since birth, no twitches or neurological problems were observed. A follow-up appointment was scheduled with Philip J. Muller, D.O. On May 22, 2001, Dr. Muller conducted a psychiatric evaluation of Deakins. (R. 237-39) After taking a history and conducting an evaluation, Dr. Muller reached the following diagnosis:

> AXIS I: Psychosis, NOS; tic disorder, NOS.
>
> AXIS II: T/O personality disorder, NOS; R/O borderline intellectual functioning.
>
> AXIS III: None
>
> AXIS IV: She has a history of being in an abusive relationship, has a history of having behavior problems as a child. She grew up institutionalized for the most part as a child she indicates.
>
> AXIS V: [GAF] 65

(R. 238) Dr. Muller started Deakins on Zyprexa. (*Id.*) On June 15, 2001, Deakins called the clinic and reported that she was experiencing panic attacks and hyperventilating. (R. 239) Dr. Muller prescribed Xanax. (*Id.*)

On June 18, 2001, Deakins saw Dr. Muller, and was "a little bit agitated." (R. 239) Deakins advised Dr. Muller that the Zyprexa was not working, and she thought it was

increasing her problems with tics. (*Id.*) Dr. Muller noted Deakins's tic disorder seemed to have improved, and increased her dosages of Zyprexa and Xanax. (R. 240) Deakins saw Dr. Muller again on June 28, 2001, and she seemed to have improved. (R. 240) He noted that no psychosis was present. (*Id.*)

On July 23, 2001, Deakins was seen by Sherrill J. Purves, M.D. for a neurological examination. (R. 227-28) Dr. Purves noted Deakins had "quite prominent involuntary tics which can affect her left side a little more than her right." (R. 228) The doctor also noted the tics "are brought on by some increased tension but never went away completely even when I had her distracted." (*Id.*) She diagnosed Deakins as "[a] patient with an unusual movement disorder which would fall in the classification of uncontrolled tics. It might fit best in the extreme severity of Tourette's although she has no vocalization. I do not think it fits with the epilepsies." (*Id.*)

On July 31, 2001, Deakins returned to Dr. Muller, complaining of racing thoughts at night and paranoia in the morning. (R. 241) She stated she was continuing to have problems with depression, although Dr. Muller noted some improvement in her affect. She complained that her tic disorder was not improving, but Dr. Muller noted she did not appear to be having any problems tics during the examination. He increased her dosage of Zyprexa. (*Id.*)

On August 1, 2001, Deakins was seen by Raul Sanchez, Ph.D., for an evaluation. Dr. Sanchez observed "There were several inconsistencies in Summer's evaluation and self-report on this date." (R. 241) Therefore, Dr. Sanchez made no specific diagnosis. (*Id.*)

On August 10, 2001, Dr. Purves wrote the following in a letter to "Benefit Team Services, Inc.":

> You will find enclosed the consultation of 07/23/01 which I provided for Dr. Phil Muller[, Deakins's] treating psychiatrist[,] about my opinions of the myoclonic jerks and tics. I

> believe these are an involuntary movement disorder which would interfere with her ability to hold a job. I think her primary disability is psychiatric. . . .
>
> I think the patient's statement about the Russell-Silver syndrome . . . is irrelevant to her current application for disability. This is a rare syndrome which none of us really know what it means. . . .
>
> There is some IQ testing available in records I have received from your office which indicate her numbers are too high to qualify for disability purely on the basis of mental retardation but they do show that she is well below average and I think coupled with her psychiatric problems and this documented mood disorder that it makes it very unlikely that she would be able to obtain and hold a job in the competitive job market.
>
> I am not providing this woman with any treatment and I am unable to provide any prognosis for her but given the number of doctors she has seen already and the number of medications that have been tried without success, I think the prognosis for getting an improved level of function is very poor and that she is likely to remain permanently disabled in her current state.

(R. 226)

3. Vocational Expert's Testimony

The ALJ asked the VE about someone who is a younger individual who claims to have a high school education, but probably only has a limited education, with past work experience as a fast food worker and a cashier. (R. 60, 135) The ALJ asked the VE to assume the following about the hypothetical person:

> From a functional capacity, I'd want her to be at medium to sedentary to light, not heavy or very heavy work. And, let's see, posturally, I'd say she could do most activities on a frequent basis. She should not work on ladders, ropes, scaffolds. She should not work with hazards, such as dangerous machinery or heights or any kind of power tools or equipment,

> that would result in an injury to herself or others if she had this myochronic [phonetic] jerking or the tic that she has described. She should not work on – at dangerous heights. From the standpoint of the hands, I would say there is moderate limitation in her ability to do fine work, and also to do handling on a repetitive basis. She said that she's able to do these jobs if she gets comfortable, so it's kind of hard for me to quantify how often the tic would occur, because it seems to have kind of a psychological comfort level, but I would think -- let me go on to say that, from a mental standpoint, she said there would be a limitation in working with the general public or working in close proximity -- I'd say close proximity with co-workers without distracting them or being distracted by them. Also, a moderate limitation in dealing with changes in the work setting or setting realistic goals. And I would also ask that you restrict jobs to the unskilled level, at the SVP 1 or 2 level, due to a moderate limitation and ability to maintain attention and concentration for extended periods of time, or to carry out and remember detailed work.

(R. 60-61) The VE responded this person would not be able to perform Deakins's past work, but could work as a janitor, cleaner, or laundry worker, all of which exist in substantial numbers in Iowa. (R. 62)

The VE testified that if Deakin's testimony is considered to be credible, *i.e.*, that she has panic attacks, depression, crying, racing thoughts, and inability to stay on task for more than a half hour, she could not successfully perform any job. (R. 62-63)

4. The ALJ's conclusions

After summarizing the medical evidence in the Record, the ALJ concluded, "The medical evidence indicates that the claimant has nervous system myoclonic tic, affective mood disorder, and a full scale IQ of 79, impairments that are severe within the meaning of the Regulations but not severe enough to meet or medically equal one of the impairments [listed in the Regulations]." (R. 18) After summarizing the applicable regulations, and

citing *Polaski v. Heckler*, 739 F.2d 1320 (8th Cir. 1984), the ALJ concluded Deakins's "allegations of a total inability to engage in substantial gainful activity are not entirely credible." (R. 20)

The ALJ noted "the medical evidence and the opinions expressed by her treating physicians do not support her allegations." (R. 20-21) The ALJ stated it is clear "that the claimant has had a significant history of psychiatric problems as a young child, but that her condition has improved and she now experiences only moderate difficulties [in] a few areas of functioning." (R. 21) The ALJ relied on the indication by Dr. Muller, Deakins's treating psychiatrist, that Deakins "reacted well to her medication regimen and does have the ability to function in the workplace."[2] (*Id.*) The ALJ also noted that on many occasions when Deakins saw her doctors, and also at the ALJ hearing, her tics were not evident. (*Id.*)

The ALJ discounted the testimony of Dr. Purves that Deakins is unable to work. (*Id.*) According to the ALJ, Dr. Purves based her opinion on the number of doctors and medications Deakins had tried without success. (*Id.*) The ALJ pointed out a full neurological evaluation by neurologist Dr. Legarda indicated Deakins "has but a few moderate limitations in her ability to function." After stating Dr. Legarda's opinions were being given "significant weight," the ALJ stated, "The limitations placed on the claimant by Dr. Legarda are not of such significance that they prevent [Deakins] from working." (*Id.*) The ALJ also noted:

> The undersigned has also given significant consideration to the claimant's testimony that she is able to care for her daughter on a daily basis, visits with a friend, and would be willing to try to work. The claimant also indicates she wants to work and is

[2]This quotation is from the ALJ's opinion. The court cannot find in the Record that Dr. Muller ever made any statement of this nature, although his opinions are consistent with Deakins's showing progress under the medication regimen he had prescribed.

> willing to try anything. These claims are significantly different from those of an individual who alleges a total inability to work.

(*Id.*)

The ALJ made the following specific findings:

> [T]he claimant retains the following residual functional capacity: can occasionally lift and/or carry (including upward pulling) 50 pounds on an occasional basis and 25 pounds on a frequent basis; can occasionally climb ramps and stairs but never ladders, ropes, or scaffolds; can occasionally balance and crawl; is limited in her ability for gross and fine manipulation; otherwise no other physical limitations. She is moderately limited in her ability to understand, remember and carry out detailed instructions; is moderately limited in her ability to maintain attention and concentration for extended periods; to interact appropriately with the general public; to respond appropriately to changes in the work setting; and to set realistic goals or make plans independently of others.

(*Id.*)

Because Deakins's past relevant work as a fast food worker and a cashier required significant abilities to appropriately deal with the general public, the ALJ found Deakins cannot perform her past relevant work. (R. 22) However, the ALJ found, based on the testimony of the VE, and "considering the claimant's age, educational background, work experience, and residual functional capacity, she is capable of making a successful adjustment to work that exists in significant numbers in the national economy."[3] (R. 23)

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[3]The ALJ found Deakins has the residual functional capacity to perform a significant range of medium work:

> Although the claimant's exertional limitations do not allow her to perform the full range of medium work, using Medical-Vocational Rule 203.25 as a framework for decision-making, there are a significant number of jobs in the national economy that she could perform. Examples of such jobs

(continued…)

Based on this finding, the ALJ concluded Deakins was not under a disability as defined in the Social Security Act at any time through the date of the ALJ's decision (*id.*), and therefore is not entitled to SSI benefits. (R. 24)

III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD

A. Disability Determinations and the Burden of Proof

Section 423(d) of the Social Security Act defines a disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the claimant is "not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists . . . in significant numbers either in the region where such individual lives or in several regions of the country." 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *see Kelley v. Callahan*, 133 F.3d 583, 587-88 (8th Cir. 1998) (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner must determine whether the claimant is currently engaged in substantial

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[3](…continued)

> include work as a maid - there are 2,988 medium and 2842 light unskilled jobs in Iowa; janitor cleaner - there are 20,2777 [sic] medium and 2,000 light unskilled jobs in Iowa; and laundry worker - there are 620 medium and 789 light unskilled jobs in Iowa.

R. 24.

gainful activity. Second, he looks to see whether the claimant labors under a severe impairment; *i.e.*, "one that significantly limits the claimant's physical or mental ability to perform basic work activities." *Kelley*, 133 F.3d at 587-88. Third, if the claimant does have such an impairment, then the Commissioner must decide whether this impairment meets or equals one of the presumptively disabling impairments listed in the regulations. If the impairment does qualify as a presumptively disabling one, then the claimant is considered disabled, regardless of age, education, or work experience. Fourth, the Commissioner must examine whether the claimant retains the residual functional capacity to perform past relevant work.

Finally, if the claimant demonstrates the inability to perform past relevant work, then the burden shifts to the Commissioner to prove there are other jobs in the national economy that the claimant can perform, given the claimant's impairments and vocational factors such as age, education and work experience. *Id.*; *accord Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001) ("[I]f the claimant cannot perform the past work, the burden then shifts to the Commissioner to prove that there are other jobs in the national economy that the claimant can perform.") (citing *Cox v. Apfel*, 160 F.3d 1203, 1206 (8th Cir. 1998)).

Step five requires that the Commissioner bear the burden on two particular matters:

> In our circuit it is well settled law that once a claimant demonstrates that he or she is unable to do past relevant work, the burden of proof shifts to the Commissioner to prove, first that the claimant retains the residual functional capacity to do other kinds of work, and, second that other work exists in substantial numbers in the national economy that the claimant is able to do. *McCoy v. Schweiker*, 683 F.2d 1138, 1146-47 (8th Cir. 1982) (*en banc*); *O'Leary v. Schweiker*, 710 F.2d 1334, 1338 (8th Cir. 1983).

Nevland v. Apfel, 204 F.3d 853, 857 (8th Cir. 2000) (emphasis added); *accord Weiler v. Apfel*, 179 F.3d 1107, 1110 (8th Cir. 1999) (analyzing the fifth-step determination in terms of (1) whether there was sufficient medical evidence to support the ALJ's residual

functional capacity determination and (2) whether there was sufficient evidence to support the ALJ's conclusion that there were a significant number of jobs in the economy that the claimant could perform with that residual functional capacity); *Fenton v. Apfel*, 149 F.3d 907, 910 (8th Cir. 1998) (describing "the Secretary's two-fold burden" at step five to be, first, to prove the claimant has the residual functional capacity to do other kinds of work, and second, to demonstrate that jobs are available in the national economy that are realistically suited to the claimant's qualifications and capabilities).

B. The Substantial Evidence Standard

Governing precedent in the Eighth Circuit requires this court to affirm the ALJ's findings if they are supported by substantial evidence in the record as a whole. *Krogmeier v. Barnhart*, 294 F.3d 1019, 1022 (8th Cir. 2002) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000)); *Weiler, supra*, 179 F.3d at 1109 (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); *Kelley, supra*, 133 F.3d at 587 (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . ."). Under this standard, "[s]ubstantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion." *Krogmeier, id.*; *Weiler, id.*; *accord Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993).

Moreover, substantial evidence "on the record as a whole" requires consideration of the record in its entirety, taking into account both "evidence that detracts from the Commissioner's decision as well as evidence that supports it." *Krogmeier*, 294 F.3d at 1022 (citing *Craig*, 212 F.3d at 436); *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998)

(quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951)); *Gowell, id.; Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213); *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Steadman v. S.E.C.*, 450 U.S. 91, 99, 101 S. Ct. 999, 1006, 67 L. Ed. 2d 69 (1981)). The court, however, does "not reweigh the evidence or review the factual record *de novo.*" *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (quoting *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it "possible to draw two inconsistent positions from the evidence and one of those positions represents the agency's findings, [the court] must affirm the [Commissioner's] decision." *Id.* (quoting *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992), and citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); *see Hall v. Chater*, 109 F.3d 1255, 1258 (8th Cir. 1997) (citing *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996)). This is true even in cases where the court "might have weighed the evidence differently." *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)); *accord Krogmeier*, 294 F.3d at 1022 (citing *Woolf*, 3 F.3d at 1213). The court may not reverse "the Commissioner's decision merely because of the existence of substantial evidence supporting a different outcome." *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997); *accord Pearsall*, 274 F.3d at 1217; *Gowell, supra.*

On the issue of an ALJ's determination that a claimant's subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ's credibility determinations are entitled to considerable weight. *See, e.g., Young v. Secretary of H.H.S.*, 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen*, 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v. Secretary of H.H.S.*, 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108

S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.*, 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not discredit a claimant's subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only discredit subjective complaints if they are inconsistent with the record as a whole. *See Hinchey v. Shalala*, 29 F.3d 428, 432 (8th Cir. 1994); *see also Bishop v. Sullivan*, 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)). As the court explained in *Polaski v. Heckler:*

> The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:
>
> 1) the claimant's daily activities;
> 2) the duration, frequency and intensity of the pain;
> 3) precipitating and aggravating factors;
> 4) dosage, effectiveness and side effects of medication;
> 5) functional restrictions.

Polaski, 739 F.2d 1320, 1322 (8th Cir. 1984). *Accord Ramirez v. Barnhart*, 292 F.3d 576, 580-81 (8th Cir. 2002).

IV. ANALYSIS

A. Credibility Determination

Deakins first complains the ALJ discredited her sworn testimony without adequate reasoning. (Doc. No. 10, pp. 5-8) She states the ALJ's conclusion that her allegations were "not entirely credible" was reached without any analysis or discussion as to why or how her allegations lacked credibility. (*Id.*, at 6) She argues that, as a result, the ALJ did not correctly apply the *Polaski* factors to evaluate her testimony.

The court will examine this argument by looking at how the ALJ addressed each of the *Polaski* factors:

1. Claimant's Daily Activities

The ALJ noted that Deakins testified she is able to care for her daughter and visit with friends, and is willing to attempt work. Deakins also testified she enjoys house cleaning, and she does laundry and shopping. The ALJ concluded "these claims are significantly different from those of an individual who alleges a total inability to work." (R. 21)

The court recognizes "an SSI claimant need not prove that she is bedridden or completely helpless to be found disabled and the fact that claimant cooks and cleans for herself, shops for groceries, does laundry, visits friends, attends church, and goes fishing does not in and of itself constitute substantial evidence that a claimant possesses the residual functional capacity to engage in substantial gainful activity." *Cline v. Sullivan*, 939 F.2d 560, 566 (8th Cir. 1991) (citing *Thomas v. Sullivan*, 876 F.2d 666, 669 (8th Cir. 1989)). However, under the facts of this case, it was not inappropriate for the ALJ to consider these facts as *part* of the *Polaski* analysis.

2. Duration, Frequency, and Intensity of Pain

There is nothing in the Record, or in the ALJ's opinion, relating to any significant or disabling pain.

3. Precipitating and Aggravating Factors

According to Deakins, her problems are exacerbated, and in some circumstances brought on, by contact with other people. The ALJ noted Deakins would be unable to work at a job that involves being around other people. (R. 20) The ALJ further noted Deakins

did not exhibit her symptoms during the ALJ hearing and during her visits with several of her doctors. (R. 21) The ALJ was entitled to consider her personal observations of Deakins's demeanor in making credibility determinations. *Johnson v. Apfel*, 240 F.3d 1145, 1147-48 (8th Cir. 2001).

4. Dosage, Effectiveness, and Side Effects of Medication

The Record establishes that the regimen and dosages of Zyprexa and Xanax prescribed by Dr. Muller seemed to have, for the most part, controlled Deakins's movement disorder and depression, with no indication of any side effects.

5. Functional Restrictions

The functional restrictions recited by the ALJ (*see* pages 17-18, *supra*) are supported by substantial evidence in the Record, and they do not support a finding of disability. The only evidence to suggest Deakins has greater restrictions is in the August 10, 2001, report of Dr. Purves, which was discounted by the ALJ, as discussed in the next section of this opinion.

In her own testimony, Deakins testified her movement disorder and inability to work with other people prevented her from working. When asked if she could work at a job that did not involve interaction with other people, Deakins testified she likely would get "bored" and have a short attention span while working at such a job. There is nothing in the Record to support a claim that boredom or a short attention span would, in the circumstances of this case, be disabling.

In sum, after analyzing Deakins's testimony under the *Polaski* standards, the court cannot find the ALJ's credibility determination was not supported by substantial evidence in the Record.

B. Evidence from a Non-Treating, Non-Examining Physician

Deakins next argues the ALJ incorrectly relied on the opinion of Dr. Legarda, a non-examining, non-treating neurologist working for DDS. (Doc. No. 10, pp. 8-14) She argues the ALJ should have given more weight to the opinion of Dr. Purves, a neurologist who personally examined Deakins on one occasion (July 23, 2001). (*Id.*)

"A treating physician's opinion should not ordinarily be disregarded and is entitled to substantial weight. *Ghant v. Bowen*, 930 F.2d 633, 639 (8th Cir. 1991). By contrast, '[t]he opinion of a consulting physician who examines a claimant once or not at all does not generally constitute substantial evidence.' *Kelley v. Callahan*, 133 F.3d 583, 589 (8th Cir. 1998)." *Jenkins v. Apfel*, 196 F.3d 922, 925 (8th Cir. 1999).

In *Prosch v. Apfel*, 201 F.3d 1010 (8th Cir. 2000), the Eighth Circuit Court of Appeals discussed the weight to be given to the opinions of treating physicians:

> The opinion of a treating physician is accorded special deference under the social security regulations. The regulations provide that a treating physician's opinion regarding an applicant's impairment will be granted "controlling weight," provided the opinion is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] record." 20 C.F.R. § 404.1527(d)(2). Consistent with the regulations, we have stated that a treating physician's opinion is "normally entitled to great weight," *Rankin v. Apfel*, 195 F.3d 427, 430 (8th Cir. 1999), but we have also cautioned that such an opinion "do[es] not automatically control, since the record must be evaluated as a whole." *Bentley v. Shalala*, 52 F.3d 784, 785-86 (8th Cir. 1995). Accordingly, we have upheld an ALJ's decision to discount or even disregard the opinion of a treating physician where other medical assessments "are supported by better or more thorough medical evidence," *Rogers v. Chater*, 118 F.3d 600, 602 (8th Cir. 1997), or where a treating physician renders inconsistent opinions that undermine the credibility of such opinions, *see Cruze v. Chater*, 85 F.3d 1320, 1324-25 (8th Cir. 1996).

> Whether the ALJ grants a treating physician's opinion substantial or little weight, the regulations provide that the ALJ must "always give good reasons" for the particular weight given to a treating physician's evaluation. 20 C.F.R. § 404.1527(d)(2); *see also* SSR 96-2p.

Prosch, 201 F.3d at 1012-13. *See Wiekamp v. Apfel*, 116 F. Supp. 2d 1056, 1063-64 (N.D. Iowa 2000). *See also Rankin v. Apfel*, 195 F.3d 427, 429 (8th Cir. 1999) (where physician's conclusion is based heavily on claimant's subjective complaints and is at odds with the weight of objective evidence, ALJ need not give physician's opinion the same degree of deference) (citing *Haggard v. Apfel*, 175 F.3d 591, 595 (8th Cir. 1999)).

Before reaching the question of whether the ALJ improperly discredited Dr. Purves's opinion, a threshold question is whether Dr. Purves was, in fact, a "treating physician." A "treating physician" is a physician who has "treated the claimant/patient over a number of years." *Kirk v. Secretary*, 667 F.2d 524, 536 (6th Cir. 1981); *see Campbell v. Bowen*, 800 F.2d 1247, 1250 (4th Cir. 1986) ("[T]he opinion of a treating physician is entitled [to] more weight because it reflects a judgment based on a continuing observation over a number of years."); *Mitchell v. Schweiker*, 699 F.2d 185, 187 (4th Cir. 1983) ("While the Secretary is not bound by the opinion of a claimant's treating physician, that opinion is entitled to great weight for it reflects an expert judgment based on a continuing observation of the patient's condition over a prolonged period of time.") To determine whether a physician is a "treating physician," the court must consider the length of the treatment relationship, the frequency of examination, and the nature and extent of the treatment relationship. *See* 20 C.F.R. § 404.1527(d)(2)(i) & (ii); *Henderson v. Sullivan*, 930 F.2d 19, 21 (8th Cir. 1991) ("We have consistently discounted the opinions of non-treating physicians who have seen the patient only once, at the request of the Social Security Administration. There is no reason to treat differently the opinion of a non-treating physician who has seen the patient only once, at the request of the patient or her lawyer.").

A physician will be regarded as a "treating physician" only if the physician has seen the patient "a number of times and long enough to obtain a longitudinal picture of [the patient's] impairment." 20 C.F.R. § 404.1527(d)(2)(i); *see, e.g.*, *Trossauer v. Chater*, 121 F.3d 341, 344 (8th Cir. 1997) (Doctor "could be expected to be quite familiar with the medical history of a patient he had treated for almost forty years.")

On this Record, it does not appear Dr. Purves was a treating physician. She saw Deakins only once, in July 2001, and specifically stated she was "not providing [Deakins] with any treatment." (R. 26) The ALJ compared the two doctors' opinions, and specifically chose to credit the opinions of Dr. Legarda and ignore the opinions of Dr. Purves, finding Dr. Legarda's opinions to be more fully supported by other evidence in the Record. (R. 21) A brief comparison of the two doctors' opinions here will illustrate the correctness of the ALJ's decision.

In a letter dated August 10, 2001, Dr. Purves stated Deakins suffers from "an involuntary movement disorder which would interfere with her ability to hold a job." (R. 26) Dr. Purves went on to state, however, that Deakins's "primary disability is psychiatric." (*Id.*) Dr. Purves commented that Deakins's statements about having Russell-Silver syndrome were "irrelevant to her current application for disability." (*Id.*) After noting Deakins's IQ is "well below average," Dr. Purves concluded Deakins's lack of intelligence, "coupled with her psychiatric problems" and "mood disorder," make it "very unlikely that she would be able to obtain and hold a job in the competitive job market." (*Id.*) Dr. Purves concluded with the following:

> I am not providing this woman with any treatment and I am unable to provide any prognosis for her but given the number of doctors she has seen already and the number of medications that have been tried without success, I think the prognosis for getting an improved level of function is very poor and that she is likely to remain permanently disabled in her current state.

(*Id.*)

On the other hand, Dr. Legarda concluded Deakins has no significant functional limitations, and only has minor limitations in handling and fingering as a result of the myoclonic jerking in her hands. (R. 166-70) In Dr. Legarda's opinion, Deakins's allegations of myoclonic jerks "are only partially credible because the jerking often was absent during physician examinations, which is "very unusual." The doctor opined further that if Deakins does, in fact, suffer from Russell Silver syndrome, the condition is not, by itself limiting, and whatever the cause of Deakins's myoclonic jerking, she "is not impaired functionally by the jerking." (R. 173)

Deakins argues the ALJ somehow confused Drs. Purves and Legarda, and did not realize either that Dr Purves is a neurologist, as is Dr. Legarda, or that Dr. Purves personally examined Deakins, while Dr. Legarda based her opinions only on a review of Deakins's medical records. (*See* Doc. No. 10, pp. 9-11) The court does not agree. It is clear from the Record that the ALJ was not confused about these matters, but simply chose to give more credit to Dr. Legarda's opinions. (*See* R. 21)

There are two other problems with Deakins's argument on this issue. First, Dr. Purves's opinion that Deakins is disabled is based on matters outside of Dr. Purves's speciality of neurology. Dr. Purves concluded the possibility that Deakins suffers from Russell-Silver syndrome is irrelevant to her current application for disability. Although Dr. Purves stated Deakins's involuntary movement disorder would interfere with her ability to hold a job, the doctor did not state the disorder would totally disable Deakins from working. Instead, Dr. Purves concluded Deakins's primary disability is psychiatric, and her lack of intelligence, coupled with her psychiatric problems and a mood disorder, make it very unlikely she would be able to obtain and hold a job in the competitive job market. Thus, Dr. Purves's opinions were based on intelligence and mental health considerations, not on neurological issues. The Commissioner is entitled to give less weight to the opinion of a specialist about issues that are not related to his or her area of expertise. *Singh v. Apfel*,

222 F.3d 448, 452 (8th Cir. 2000) (citing *Metz v. Shalala*, 49 F.3d 374, 377 (8th Cir. 1995)); *accord Wiekamp*, 116 F. Supp. 2d at 1064-64.

Dr. Purves concluded her letter with the following statement: "I am not providing this woman with any treatment and I am unable to provide any prognosis for her but given the number of doctors she has seen already and the number of medications that have been tried without success, I think the prognosis for getting an improved level of function is very poor and that she is likely to remain permanently disabled in her current state." This conclusion does not represent a medical opinion, but an opinion on whether Deakins is capable of performing work. Even if Dr. Purves is considered to be a treating physician, she nevertheless is not an expert on whether Deakins has the residual functional capacity to work in the competitive marketplace. *See Cruze v. Chater*, 85 F.3d 1021, 1025 (8th Cir. 1996).

Second, Dr. Purves's conclusions are contradicted by the opinions of several other treating physicians. In 1994, Dr. Haslett did not believe Deakins needed therapy or psychiatric intervention to deal with her myoclonic jerking or mental health issues. In 1999, Dr. Baker, a psychologist, determined Deakins had an IQ of 79, but opined she was not significantly impaired except for poor judgment. In May and June 2000, Deakins saw Dr. Piepergerdes, a psychiatrist, and he noted "no abnormal motor movements," and recommended psychotherapy. In June 2000, she saw Dr. Donohoe, a neurologist, who did not believe Deakins suffered from Russell Silver syndrome. He noted she had myoclonic tremors in her trunk, left arm, and left leg which interfered with her ability to carry objects and write, but concluded she could walk, stand, sit, handle objects, and speak. He was unclear as to the cause of the myoclonus. Also in June 2000, Deakins saw Dr. Allen, a psychologist, who concluded Deakins might have difficulty with more demanding activities, but she appeared to be capable of understanding and performing less demanding tasks.

Dr. Brown, a psychiatrist, saw Deakins in January 2001, for a psychiatric intake evaluation, and he saw her again in February 2001, when Deakins was complaining of paranoid and auditory hallucinations. Although a follow-up appointment was scheduled, Deakins failed to show up for the appointment, and the Record contains no indication that Dr. Brown ever saw her again. In February 2001, Deakins was seen by Dr. Ahmed, a neurologist, who was curious about the significance of Deakins's jerking, "which only occurs when people come close to her, otherwise she has no symptoms." (R. 197) From May through July 2001, Deakins saw Dr. Muller, a psychiatrist, who was successful in treating Deakins with Zyprexa and Xanax.

None of these doctors' findings support Dr. Purves's opinion that Deakins is permanently disabled. This court cannot find the ALJ abused her discretion when she discounted the opinions of a neurologist who saw Deakins one time; whose opinions were based on intelligence and mental health considerations, not on neurological issues; and whose opinion conflicted with the opinions of several other doctors, including three other neurologists.

C. Improper Hypothetical Question

Finally, Deakins argues the ALJ did not pose an appropriate hypothetical question to the VE. (Doc. No. 10, pp. 14-15)

The Eighth Circuit has held an ALJ's hypothetical question must fully describe the claimant's abilities and impairments as evidenced in the record. *See Chamberlain v. Shalala*, 47 F.3d 1489, 1495 (8th Cir. 1995) (citing *Shelltrack v. Sullivan*, 938 F.2d 894, 898 (8th Cir. 1991)). A hypothetical question is "sufficient if it sets forth the impairments which are accepted as true by the ALJ." *Johnson v. Chater*, 108 F.3d 178, 180 (8th Cir. 1997); *House v. Shalala*, 34 F.3d 691, 694 (8th Cir. 1994). Only the impairments substantially supported by the record as a whole must be included in the ALJ's hypothetical.

Cruze v. Chater, 85 F.3d 1320, 1323 (8th Cir. 1996) (citing *Stout v. Shalala*, 988 F.2d 853, 855 (8th Cir. 1993)). If a hypothetical question does not encompass all relevant impairments, the vocational expert's testimony does not constitute substantial evidence to support the ALJ's finding of no disability. *Cruze*, 85 F.3d at 1323 (citing *Hinchey v. Shalala*, 29 F.3d 428, 432 (8th Cir. 1994)). The ALJ may produce evidence of suitable jobs by eliciting testimony from a VE "concerning availability of jobs which a person with the claimant's particular residual functional capacity can perform." *Cox v. Apfel*, 160 F.3d 1203, 1207 (8th Cir. 1998). A "proper hypothetical question presents to the vocational expert a set of limitations that mirror those of the claimant." *Hutton v. Apfel*, 175 F.3d 651, 656 (9th Cir. 1999).

In *Wiekamp*, Judge Bennett discussed the requirements for a proper hypothetical question posed to a VE:

> "Testimony from a vocational expert is substantial evidence only when the testimony is based on a correctly phrased hypothetical question that captures the concrete consequences of a claimant's deficiencies." *Taylor v. Chater*, 118 F.3d 1274, 1278 (8th Cir. 1997). Although "questions posed to vocational experts should precisely set out the claimant's particular physical and mental impairments, . . . a proper hypothetical question is sufficient if it sets forth the impairments which are accepted as true by the ALJ." *House v. Shalala*, 34 F.3d 691, 694 (8th Cir. 1994) (internal citations, quotation marks, and alterations omitted).
>
> *Roberts v. Apfel*, 222 F.3d 466, 471 (8th Cir. 2000). "The hypothetical need not use specific diagnostic terms . . . where other descriptive terms adequately describe the claimant's impairments." *Warburton* [*v. Apfel*], 188 F.3d [1047,] 1050 [(8th Cir. 1999)]. An ALJ is not required to include in a hypothetical question to a vocational expert any impairments that are not supported by the record. *Prosch*, 201 F.3d at 1015.

> However, where an ALJ improperly rejects the opinion of a treating physician or subjective complaints of pain by the claimant, the vocational expert's testimony that jobs exist for the claimant does not constitute substantial evidence on the record as a whole where the vocational expert's testimony does not reflect the improperly rejected evidence. *See Singh*, 222 F.3d at 453 ("In view of our findings that the ALJ improperly rejected both the opinion of Singh's treating physician and Singh's subjective complaints of pain, we find that the hypothetical question posed to the vocational expert did not adequately reflect Singh's impairments. Accordingly, the testimony of the vocational expert that jobs exist for Singh cannot constitute substantial evidence on the record as a whole.").

Wiekamp, 116 F. Supp. 2d at 1073-74.

From a careful review of Deakins's brief, the court is unable to determine her precise objection to the ALJ's hypothetical question. (*See* Doc. No. 10, pp 14-15) Deakins argues generally that the ALJ did not include the "additional limitations described by Dr. Purves," but does not identify those limitations. From a review of Dr. Purves's report, it appears the only "limitation" mentioned is the doctor's opinion that Deakins is disabled, and is likely to remain disabled. This is not the type of limitation that properly would be included in a hypothetical question to a VE.

The ALJ included in her hypothetical question all of the limitations the ALJ believed to be credible. Because Deakins has identified no additional limitations supported in the Record, the court finds there was no error in the hypothetical question.

V. CONCLUSION

For the reasons discussed above, **IT IS RESPECTFULLY RECOMMENDED**, unless any party files objections[4] to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that judgment be entered in favor of the Commissioner and against Deakins.

IT IS SO ORDERED.

DATED this 29th day of May, 2003.

_____
PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[4]Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).