UNPUBLISHED

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

MICHAEL C. HAVILL,

Plaintiff,

vs.

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY,

Defendant.

No. C03-3052-PAZ

MEMORANDUM OPINION AND ORDER

TABLE OF CONTENTS

I. INTRODUCTION

The plaintiff Michael C. Havill ("Havill") appeals a decision by an administrative law judge ("ALJ") denying his applications for Title XVI supplemental security income ("SSI") and Title II disability insurance ("DI") benefits. Havill argues the ALJ improperly weighed the medical evidence in the Record; substituted his own opinions for the opinions of the medical experts; made a finding concerning Havill's residual functional capacity that was not supported by substantial evidence in the Record; improperly assessed Havill's credibility; and submitted an inaccurate hypothetical question to the vocational expert. (*See* Doc. No. 8)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On April 20, 2001, Havill filed applications for DI and SSI benefits, alleging a disability onset date of January 31, 2001. (R. 94-96; 373-76) Havill alleged he was disabled due to spurs in his back; arthritis, neck, back, and left arm problems; depression; and alcoholism. (R. 83) His applications were denied initially on September 28, 2001 (R. 80, 82-85), and on reconsideration on December 14, 2001 (R. 81, 87-91). On January 31, 2002, Havill requested a hearing (R. 92), and a hearing was held before ALJ John P. Johnson on July 17, 2002, in Clear Lake, Iowa. (R. 32-79) Havill was represented at the hearing by non-attorney Nancy Withers. Havill testified at the hearing, as did Vocational Expert ("VE") William V. Tucker, Ph.D.

On November 27, 2002, the ALJ ruled Havill was not entitled to benefits, finding that although Havill is unable to perform his past work, there are sufficient other jobs in the national economy he could perform. (R. 9–23) On May 28, 2003, the Appeals Council

of the Social Security Administration denied Havill's request for review (R. 5-6), making the ALJ's decision the final decision of the Commissioner.

Havill filed a timely Complaint in this court on June 18, 2003, seeking judicial review of the ALJ's ruling. (Doc. No. 1) On July 23, 2003, the parties consented to jurisdiction by a United States Magistrate Judge, and Judge Donald E. O'Brien transferred the case to the undersigned. (Doc. No. 3) Havill filed a brief supporting his claim on November 21, 2003. (Doc. No. 8) On February 4, 2004, the Commissioner filed a motion to remand the action pursuant to sentence four of 42 U.S.C. § 405(g), to allow the ALJ to determine, through the use of vocational expert testimony, whether Havill can perform work in the national economy that is consistent with his residual functional capacity. (Doc. No. 11) On February 11, 2004, Havill filed a "limited" resistance to the motion, concurring in the request for a remand, but only if the court determines the Record does not contain substantial evidence to support a reversal and remand for an immediate award of benefits. (Doc. No. 12) On March 5, 2004, the Commissioner filed a brief on the merits. (Doc. No. 14). The matter is now fully submitted, and pursuant to 42 U.S.C. § 405(g), the court turns to a review of Havill's claim for benefits.

B. Factual Background

1. Introductory facts and Havill's daily activities

At the time of the ALJ hearing, Havill was 51 years old. He was six feet tall, and weighed 205 pounds. He lived with his girlfriend in a rented house, and he was receiving disability income from the Veterans Administration. He had a twelfth grade education, and had taken a semester of college courses in criminology. (R. 36-37)

Havill's last employment prior to the hearing was building brakes and actuators for off-road vehicles. He performed this work for a year-and-a-half, and then quit because of

pains in his chest, back, and hips. Before that, he worked for ten years building window and doors. He was terminated because he refused to wear required safety glasses. Before that, he was a bartender and waiter, and before that, he and his then wife ran a motel while, at the same time, he drove a truck on a route. Before that, he worked as a construction worker, a janitor, a blast furnace operator, a dairy worker, and a dockhand on a boat. (R. 37-43)

At the hearing, Havill explained that he is unable to work because of a crushed vertebra in his neck; bone spurs "all up and down" his spine; arthritis throughout his back, hips, knee, ankle, neck, and shoulder; loss of mobility in his left arm, wrist, and hand from three surgeries; and muscle and nerve damage to his stomach from a parachute accident. (R. 43-44, 63) He stated he also "blew out" his right knee and hip." (R. 61) He takes Ibuprofen for the pain, which "works pretty good." (R. 45, 47-48)

Havill testified it is hard for him to sit or stand for long periods of time. (R. 46, 51) He cannot walk long distances without experiencing kidney pain that almost "takes [his] breath away." (R. 46, 49-50) He has problems climbing stairs, stooping, kneeling, crawling, pushing, and pulling. (R. 62-63) He can drive around town, but would have a problem driving or riding in a car for an hour. (R. 52) He suffers pain every day, and the pain is sharp and continuous. (R. 46) As a result of the pain, he can sleep only for two or three hours a night. (R. 46)

He does the dishes and a little cooking, but does not do any laundry, vacuuming, or yard work. He takes showers and shaves, but cannot get in and out of a bathtub without assistance. He has no hobbies, and does not belong to any clubs or groups. Except for going out for dinner, he has little social life. He sometimes watches television, and he visits friends two or three times a week, for an hour or so at a time. (R. 52-54)

Havill testified he normally wakes up by 5:30 or 6:00 in the morning, has breakfast, and then watches television. (R. 67) He then does the dishes, takes a shower, and cleans up. After that, he may go out to visit somebody, but he usually has lunch at home. (*Id.*) After lunch, he takes an hour-long nap. (R. 68) After his nap, he plays on his computer, calls a friend, goes to the grocery store, or watches a movie on television. He then eats supper and goes to bed early. He usually gets up during the night to take pain pills, and sometimes then watches television. (R. 67-68)

Havill testified that he has had problems with alcohol abuse in the past, but it never affected his work. (R. 55) He denied that alcohol was a problem for him as of the time of the hearing. (R. 66) He testified he also has had problems with post-traumatic stress disorder, stating "it's a Vietnam thing," but he indicated discussions with a VA representative have helped. (R. 55) He has no problems with memory or concentration, but some problems understanding things, mostly because of a hearing problem, although this has never affected his ability to work. (R. 63-64, 69)

2. Havill's medical history

The court has reviewed Havill's medical records in detail, and summarizes the relevant portions of his history as follows. In August 1994, Havill complained of chest pain to Robert Gross, D.O., a family practice doctor. (R. 270) In November 1995, Dr. Gross diagnosed Havill as suffering from depression, and prescribed Serzone. (R. 269-70) In December 1998, and again in January 1999, Havill complained to Dr. Gross of chest pain and depression. (R. 267-68)

On December 10, 1999, Havill complained to Dr. Gross of pain in his low back and hips, legs and knees, and left ankle. Dr. Gross diagnosed degenerative disease of the lumbar spine and left ankle, and prescribed Celebrex. (R. 266-67)

On August 2, 2000, Havill went to the hospital emergency room complaining of sharp chest pains. He saw J. Reeder, D.O. He was discharged the following day with a diagnosis of noncardiac chest pain, most likely structural in nature. (R. 188-94) On August 17, 2000, Havill again was admitted to the hospital for chest pain, and again saw Dr. Reeder. (R. 265) Dr. Reeder concluded the pain was musculoskeletal in nature. He noted Havill reported smoking two to three packs of cigarettes and drinking ten to twenty-four beers a day, and he recommended that Havill stop smoking and drinking. (*Id.*)

Havill's claimed disability onset date is January 31, 2001. In a medical record dated February 13, 2001, a VA social worker noted Havill appeared to be suicidal, hypervigilant, and depressed, and suggested inpatient treatment. (R. 250) On February 15, 2001, Havill was seen at the Veterans Administration mental health clinic in Des Moines, Iowa, for depression. (R. 195-209) He reported a history of depression, post traumatic stress disorder, polysubstance abuse, and suicidal thoughts. He also reported that he had attempted to get his girlfriend to stab him, and he had thoughts of harming her but was able to resist the impulse. He reported drinking fifteen to twenty-four beers a day, and noted that in the past he had used LSD, heroin, cocaine, and marijuana, but he had not used any of these drugs during the preceding eight years. He stated his depression was due to the fact that his physical disabilities prevented him from working. He also was having difficulty dealing with the death of his father five months earlier. He gave a history of two suicide attempts in the past. He was transferred to the Veterans Hospital in Omaha, Nebraska, where he was hospitalized until March 2, 2001, for detoxification and treatment. (R. 213-14)

On April 5, 2001, Havill saw Dr. Gross, complaining of daily pain in his neck, back, and left arm, and swelling in his right knee. He told Dr. Gross he could not work due to the pain. He stated he could not sit for longer than a few hours at a time, could not

stand for any length of time due to pain in his hips and knees, and had poor hearing. He reported that he had been rated at fifty percent disability by the VA. Dr. Gross wrote a note for Havill stating that he was not to return to work because he was undergoing a disability determination. (R. 261-64)

On June 28, 2001, Havill was seen by psychiatrist Maria Eribal, M.D. at the Veterans Administration mental health clinic in Des Moines, for a review of his psychotropic medications. (R. 308-10) Havill reported he had not taken his medication (Remeron) for two months because it had upset his stomach. He stated he had tried Prozac in the past, but he stopped taking it because he "got pissed & threw it away." He was not interested in trying any medication. He stated he was seeing a "psychologist/therapist" in Mason City for PTSD, and he was trying to get VA benefits for the condition. According to Dr. Eribal, Havill appeared to be more frustrated than depressed. Dr. Eribal recommended that Havill quit smoking and drinking alcohol. She diagnosed Havill as suffering from a mood disorder due to substance abuse, alcohol dependence, and a history of alcohol dependence. She concluded Havill had a current Global Assessment of Function ("GAF") of 50, indicating either "serious symptoms (*e.g.*, suicidal ideation, severe obsessional rituals, frequent shoplifting)," or "any serious impairment in social, occupational, or school functioning (*e.g.*, no friends, unable to keep a job)." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) ("DSM-IV"), at 32.

On August 6, 2001, Havill was seen by Mark D. Dankle, D.O. at the Mercy Family Clinic in Clear Lake, Iowa, for a disability determination examination. (R. 278-82) Dr. Dankle recommended that Havill avoid heavy lifting and carrying, but determined he was capable of lifting and carrying up to twenty pounds on an occasional basis. Dr. Dankle's assessment of Havill was as follows:

> Chronic back, neck, and left arm pain;
> History of osteoarthritis;
> Uncontrolled hypertension;
> Chronic alcohol abuse;
> Chronic depression with history of post-traumatic stress disorder;
> Probable chronic obstructive pulmonary disease and tobacco abuse.

(R. 279) According to Dr. Dankle, Havill "should avoid prolonged standing, moving about, walking, and sitting. He needs to be allowed to change positions on a regular basis as necessary. He should avoid stooping, climbing, kneeling, and crawling. He may have some difficulty with handling objects." (*Id.*) Havill should avoid extremes of work environment, but Dr. Dankle determined that Havill had no limitations in seeing, hearing, speaking, or traveling.

On August 14, 2001, Havill saw Steven B. Mayhew, Ph.D. for a psychological evaluation. (R. 283-84) Dr. Mayhew's clinical impression was that Havill suffered from major depression and alcohol dependence, and he assessed Havill's GAF at 50. Dr. Mayhew's summary and recommendations from his examination of Havill were as follows:

> [He] is able to understand and remember simple instructions. He would appear capable of performing some activities within a schedule but maintaining regular attendance would likely be a problem. He appears capable of accepting instruction. His sustained attention and concentration and capacity to carry out instructions over a period of time are expected to be fair to poor. He appears pleasant and would likely work within proximity to others. His ability to set realistic goals for himself, complete those goals, and then also manage finances is expected to be poor. If determined eligible for benefits, it is recommended that these be managed by a payee.

(R. 284)

On September 4, 2001, Janet McDonough, Ph.D. completed a Psychiatric Review Technique form on Havill. (R. 285-98) From her review of Havill's medical records,

Dr. McDonough determined he suffered from depression, characterized by sleep disturbance, decreased energy, feelings of guilt or worthlessness, and thoughts of suicide. (R. 288) She also determined that he suffered from a substance addiction disorder. (R. 293). She concluded that he was mildly limited in performing the activities of daily living, maintaining social functioning, and maintaining concentration, persistence, or pace. (R. 295)

Dr. Mc Donough summarized Havill's mental health history as follows:

> Records from the VA MC showed that the claimant was treated for alcohol intoxication and dependence, and depression from 2/15/01 through 3/5/01. This writer had some difficulty interpreting the abbreviations in the records, but they seem to indicate that the claimant was involved in treatment groups although not on a residential basis. There is a summary of priory history. There was a suggestion that he go into structured living following treatment, but the claimant rejected that idea. He was interested in outpatient treatment.
>
> The records from Dr. Gross showed that he prescribed anti-depressant for the claimant for several years, beginning in late 1995. His symptoms were not described in any detail. Medications were changed from time to time. On 8/17/00, the claimant said that he drank heavily and would think about cutting down. The diagnostic formulation at that time included reference to substance abuse. On 4/5/01, the claimant told Dr. Gross that he was [seeing] a counselor. They discussed his application for disability, and the claimant said he could not work because of the pain.
>
> At the recent [consultative examination], the claimant complained of pain, and a history of depression, PTSD and alcohol abuse. He described his recent treatment as inpatient. He was not taking any psychiatric medications. He was drinking 10 to 12 beers daily. The psychologist described him as having fluent speech, depressed mood, appropriate affect, and logical

> thinking. He was tangential at times but responded quickly to redirection. His mental status otherwise was essentially unremarkable. He described his daily activities.
>
> The claimant's employer said that his work quality was good, and there was no problem with his work. He performed comparable to other workers. He had no problems dealing with changes in routine, and was very cooperative. His doctor had written that he was not capable of returning to work. The employer did not give an opinion about his ability to perform competitive work.
>
> The claimant provided brief information about his daily activities. He said he visited friends, but had no social activity otherwise. He said he got along with others when he worked. He lives alone, did some household chores, did not drive a car, could do errands independently, and handled his own money. He said he was depressed, and could not do the things he used to. The third party, who has the same post office address as the claimant said that he often cooked, did household chores and lawn work, drove a car daily, did his own errands several times a week, spent some time in the garage, and said that he had limited ability because of physical discomfort. She described somewhat less restriction in activity than the claimant did. She said he got down on himself sometimes.

(R. 299-300) Dr. McDonough concluded, "Considering the duration, frequency, intensity, response to intervention and level of intervention required, and the functionally limiting effects of the claimant's impairments and symptoms, he has nonsevere impairments. They cause no more than mild restrictions in daily activities, interpersonal interaction, and concentration, persistence and pace." (R. 300) She found that Havill's allegations were "supported to some extent" by the medical evidence in the record, but his degree of functional limitation was not severe enough to be considered disabling. (Id.)

On September 4, 2001, Havill saw Dr. Eribal for a psychiatric evaluation. (R. 305-07) Dr. Eribal noted that Havill was complaining of PTSD, and had filed a claim for this problem. (R. 305) Havill described his symptoms as "depression, used to think about hurting myself, lots of physical problems, lots of violent nightmares, some of them flashing back to [Vietnam]." (*Id.*) He described paranoid behavior, and stated he was only sleeping three to four hours per night. Havill opined his nightmares and other psychological problems might be due to the fact that he had not been working for six months and he was "financially down and out." (*Id.*)

Havill was not taking psychotropic medications, and did not want to try any. He continued to drink twelve beers a day, but stated he did not want treatment for alcoholism. (R. 306) Dr. Eribal reached the following diagnoses:

> I. Adjustment disorder [with] mixed emotions; PTSD, mild, chronic pending review of service records; [rule out] mood disorder due to alcoholism; alcohol dep[endence] cont[inues].
>
> [II. Omitted.]
>
> III. [Degenerative joint disease], cervical spine[.]
>
> IV. [S]evere unemployment & health problems[.]

(R. 307) She assessed Havill's current GAF at 55, indicating moderate symptoms or moderate difficulty with social and occupational functioning. *See* DSM-IV at 32. Dr. Eribal planned to consult a social worker and send Havill for further evaluation for PTSD. (*Id.*)

Dennis A. Weis, M.D. completed a Physical Residual Functional Capacity Assessment of Havill on September 24, 2001. (R. 322-29) From his review of Havill's medical records, he found Havill could lift or carry twenty pounds occasionally and ten pounds frequently; sit, stand, or walk, with normal breaks, for six hours in an eight-hour workday;

and occasionally climb, balance, stoop, kneel, crouch, and crawl. (R. 324) He noted a fused left wrist would limit Havill's gross manipulation. (R. 325) Other than these restrictions, Dr. Weis found Havill to have no limitations on his ability to work.

On September 24, 2001, Claude Koons, M.D. completed a medical consultant review of Havill's medical records for Iowa Disability Determination Services. (R. 330) Dr. Koons summarized his findings as follows:

> The claimant alleges pain which is dull and occasionally sharp in his back, neck, hips, knees, legs[,] aggravated by movement and cold weather . He states the pain is constant and has gotten worse over the last year. He takes Remeron and Ibuprofen. He states the pain limits all of his activities, however, he doesn't quantify his abilities regarding standing, walking or sitting. He lives alone, cooks, does dishes and laundry, drives, shops and watches TV. [Third] party indicates that he also mows his lawn weekly.
>
> Discussion of the record for consistency and credibility: The record is rather sparse except for the [consultative examination] done by Dr. Dankle. The claimant's allegations are credible with the exception that he didn't mention mowing weekly and it appears that his symptoms are consistent with polyarticular arthritis. Based on the evidence in file he would be capable of the RFC provided.

(*Id.*)

On October 2, 2001, Havill saw Dr. Gross, complaining of back pain and stress. (R. 312) Havill stated he could not work. Dr. Gross's examination revealed tenderness generally along Havill's spine with some trapezial and lumbar soreness. The doctor noted Havill tended to walk with a slant and list. Neurological findings indicated Havill's gross nerve functioning was intact. Dr. Gross diagnosed Havill with chronic back and joint pain. He also noted Havill, a smoker, was suffering from bronchitis. (R. 312) X-rays taken on

November 5, 2001, of Havill's left ankle, left shoulder, left knee, and right hip revealed no abnormalities. An X-ray of his cervical spine showed evidence of minimal degenerative arthritic changes. An X-ray of his left wrist showed a marked deformity. (R. 316-321)

Havill was tested by an audiologist on November 3, 2001, and was found to have normal to moderately severe hearing loss bilaterally. The audiologist recommended a hearing aid trial, noting it might improve Havill's communication abilities. (R. 303-04)

On January 7, 2002, Havill was referred to the psychiatric unit of the Veterans Hospital in Iowa City. (R. 343-47) He reported that he had been feeling depressed for several days, and had been thinking of drowning himself. He stated he was despondent over being refused SSI benefits. He stated he was in chronic pain and was unable to work. He reported a history of PTSD secondary to his experiences in Vietnam, and he stated he felt like hurting people. He was diagnosed as suffering from depression with suicidal ideation, alcohol dependence, and PTSD by history. (R. 345) He was assessed as having a GAF of 35, indicating some impairment in reality testing or communication, or major impairment in several areas such as work, family relations, and judgment. *See* DSM-IV at 32. He was admitted for evaluation, and was treated with antipsychotic medications and Ibuprofen. Although at first Havill stated he did not want substance abuse treatment, he eventually spoke with a substance abuse counselor.

On January 11, 2002, Havill was discharged from the VA Hospital with an assessment by Eugene Rosenman, M.D. of alcohol abuse, substance-induced mood disorder, history of polysubstance abuse, and history of depression. His GAF was 50, still indicating serious symptoms or impairment, but much improved over his GAF upon admission. Dr. Rosenman suggested Havill consider inpatient substance abuse treatment. The doctor prescribed Ibuprofen, 400 mg. three times daily for pain; Ranitidine, 150 mg. twice daily for acid reflux; and a multivitamin/mineral tablet. (R. 362-63)

On January 30, 2002, Havill spoke with Dr. Rosenman by telephone. (R. 368) Havill stated he was feeling very well, and he denied depressive symptoms or suicidal ideation. He also stated he was maintaining sobriety, and he was having no side effects from his medication.

On February 4, 2002, Havill saw Dr. Gross for a reevaluation of his back and chest pain. He told Dr. Gross that he had spent a week in the VA hospital for depression, but he was not on any antidepressant medication because the VA doctors thought his depression was due to his pain and back problems. He stated the VA doctors had recommended he get hearing aids, but according to Havill, he was unable to get them because he was not considered "disabled." Dr. Gross noted Havill was "very down about all of this." He assessed Havill as suffering from chronic back pain, degenerative disk disease, and depression. He told Havill he would "simply continue to follow and monitor his progress or lack thereof." (R. 371)

X-rays of Havill's spine were taken on February 14, 2002, and revealed evidence of minimal degenerative arthritic changes in both his lumbosacral and his thoracic spine. (R. 313-15, 341-42)

On May 2, 2002, Dr. Gross wrote an opinion letter on behalf of Havill. He stated that Havill had the capacity to sit for four to six hours at a time, stand for one hour at a time, walk for one hour at a time, and lift from ten to twelve pounds. He also stated that periodic rest breaks and the opportunity to alter his body position often during the day would be helpful. (R. 369-70)

Havill saw Dr. Gross again on May 23, 2002. Havill complained of pain in his back and shoulders. He reported taking 1600 to 2400 milligrams of Ibuprofen per day, and stated his pain was worse when the weather was damp or cool. He stated the pain was "getting him down." He reported sleeping poorly due to his legs aching. He stated he was

trying to walk some. Havill stated he was scheduled for follow-up testing at the VA Hospital in September 2002.

On examination, Dr. Gross noted Havill's low back area was very tender and in spasm, and he noted decreased flexion and extension. Havill's shoulders were tender anteriorly left to right with notable crepitus. His general strength was noted to be adequate. Dr. Gross's assessment was chronic back pain and degenerative disease. He noted Havill had a history of substance abuse and he should "watch for depression." The doctor recommended Havill take Glucosamine and Chondroitin daily, and told him to return for follow-up in three to four months. (R. 372)

3. Vocational expert's testimony

The ALJ asked VE William V. Tucker, Ph.D. the following hypothetical question:

> [M]y first assumption is that we have an individual who is 51 years old. He was 50 years old as of the alleged onset date of disability. He is a male with a high school education and past relevant work as you've indicated in exhibit 20E, and he has the following impairments. He has degenerative changes of the lumbar thoracic and cervical spine. He is status post fusion of the left wrist. He has medically determinable impairments resulting in complaints of pain in multiple joints, a hearing impairment, hypertension, a mood disorder, and a history of chronic alcohol abuse. And as a result of a combination of those impairments he has the residual functional capacity as follows. He cannot lift more than 20 pounds, routinely lift 10 pounds. No standing of more than 60 minutes at a time or walking of more than 60 minutes at a time. With walking and standing up to six out of eight hours, sitting of up to six out of eight hours. With no repetitive bending, stooping, squatting, kneeling, crawling, or climbing. And only occasional handling with the left wrist. And by handling I mean twisting, twisting or turning objects with the left wrist. 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 involve the use of independent judgment for decision making and does not require very close [attention] to detail. He does require occasional supervision. He should not work more than a regular pace, and that's using three speeds of pace, being fast, regular and slow. He should not work at more than a mild to moderate level of stress. And he should perform no work which requires fine hearing acuity in the presence of background noise. 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?

(R. 74-75)

The VE replied, "I don't think he could perform any of his previous work. (R. 75) The VE also testified that he did not think the individual would have "readily transferable skills." (*Id.*) The VE testified the individual "could perform unskilled work activity," but not necessarily a wide range of such activity." (R. 76) He identified inspector and hand packager, small products assembler, and cashier II as a sampling of jobs the hypothetical individual could perform. (*Id.*)

The ALJ then asked the VE to assume the hypothetical individual was the same age and sex, and had the same education, past relevant work, and impairments as in the first hypothetical, but with the following residual functional capacity:

> This individual could not lift more than five to ten pounds. With no standing of more than 10 to 15 minutes at a time. No sitting of more than an hour at a time and no walking of more than three blocks at a time. With only occasional bending, stooping, squatting, kneeling, crawling, or climbing. No repetitive pushing or pulling, repetitive gripping with the left arm or repetitive or gross fine manipulation with the left hand. Only occasional handling with the left wrist. And only occa-

> sional work with the left arm above the shoulder. And this is a right-handed dominant individual. This individual should perform no work which requires fine hearing acuity in the presence of background noise.

(R. 77)

The VE stated the hypothetical individual could not return to any of Havill's past relevant work, would have no transferable skills, and could not perform a wide range of unskilled jobs. (*Id.*) The VE testified this individual also could not perform light work, but would be in the sedentary classification. (R. 77-78)

Havill's representative asked the VE to consider the same individual, but with the limitations of having to change positions frequently or as needed, standing limited to one hour a day, walking limited to one hour a day, sitting for four to six hours a day, and only occasional handling with the left hand. The VE stated the individual would fall into the sedentary classification. (R. 78)

4. The ALJ's decision

The ALJ made the following findings. Havill had not engaged in substantial gainful activity at any time pertinent to the pending claim. (R. 13) He had impairments which, in combination, were severe, including "degenerative changes of the lumbar, thoracic and cervical spine; a status post fusion of the left wrist; a hearing impairment, hypertension, a mood disorder and chronic alcohol abuse." (*Id.*) No impairment or combination of impairments met the criteria of the listings. (R. 14)

The ALJ performed a detailed credibility analysis pursuant to the standards formulated by the Eighth Circuit Court of Appeals in *Polaski v. Heckler*, 739 F.2d 1320 (8th Cir. 1984). (R. 13-20) He concluded Havill's "allegations concerning the existence, persistence, and intensity [of] symptoms and limitations are not given full weight and

credibility but only such as reflected in the functional capacity found for him set out below." (R. 20) The ALJ determined Havill's residual functional capacity to be as follows:

> The claimant has had the residual functional capacity to perform the physical exertional and nonexertional requirements of work except for lifting more than 20 pounds maximum or 10 pounds repeatedly. He can stand 60 minutes at a time. He can sit for up to six hours in an eight-hour workday. He can walk 60 minutes at a time and can stand or walk up to six hours in an eight-hour workday. He should avoid repetitive bending, stooping, squatting, kneeling, crawling and climbing. He can occasionally handle with his left upper extremity. The work should not require fine hearing acuity in the presence of background noise. He is not able to do very complex-technical work, but is able to do more than simple, routine, repetitive work. The work should not require use of independent judgment and should not require very close attention to detail. He may have occasional supervision and is able to work at a regular pace. He should avoid stress above a mild to moderate level.

(*Id.*)

Considering this residual functional capacity, the ALJ found the VE's testimony established that Havill could perform a number of unskilled jobs at the light level, such as hand packager/inspector, small parts assembler, and cashier II. (R. 21) Based on this finding, the ALJ held Havill was not "disabled," as defined by the Social Security Act.

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 sequential evaluation process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *Dixon v. Barnhart*, 353 F.3d 602, 605 (8th Cir. 2003); *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 will consider a claimant's work activity. If the claimant is engaged in substantial gainful activity, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(i).

Second, if the claimant is not engaged in substantial gainful activity, the Commissioner looks to see "whether the claimant has a severe impairment that significantly limits the claimant's physical or mental ability to perform basic work activities." *Dixon*, 353 F.3d at 605; *accord Lewis v. Barnhart*, 353 F.3d 642, 645 (8th Cir. 2003). The United States Supreme Court has explained:

> The ability to do basic work activities is defined as "the abilities and aptitudes necessary to do most jobs." . . . Such abilities and aptitudes include "[p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling"; "[c]apacities for seeing, hearing, and speaking"; "[u]nderstanding, carrying out and remembering simple instructions"; "[u]se of judgment"; "[r]esponding appropriately to supervision, co-workers, and usual work situations"; and "[d]ealing with changes in a routine work setting."

Bowen v. Yuckert, 482 U.S. 137, 140-42, 107 S. Ct. 2287, 2291, 96 L. Ed. 2d 119 (1987) (citing 20 C.F.R. §§ 404.1521(b), 416.921(b)).

Third, if the claimant has a severe impairment, then the Commissioner will consider the medical severity of the impairment. If the impairment meets or equals one of the presumptively disabling impairments listed in the regulations, then the claimant is considered disabled, regardless of age, education, or work experience. 20 C.F.R. § 404.1520; *Kelley*, 133 F.3d at 588.

Fourth, if the claimant's impairment is severe, but it does not meet or equal one of the presumptively disabling impairments, then the Commissioner will assess the claimant's residual functional capacity ("RFC") to determine the claimant's "ability to meet the physical, mental, sensory, and other requirements" of the claimant's past relevant work. 20 C.F.R. §§ 404.1520(4)(iv); 404.1545(4); *see Lewis*, 353 F.3d at 645-46 ("RFC is a medical question defined wholly in terms of the claimant's physical ability to perform exertional tasks or, in other words, 'what the claimant can still do' despite his or her physical or mental limitations.") (citing *Bradshaw v. Heckler*, 810 F.2d 786, 790 (8th Cir. 1987); 20 C.F.R. § 404.1520(e) (1986)); *Dixon*, *supra*. The claimant is responsible for providing evidence the Commissioner will use to make a finding as to the claimant's RFC, but the Commissioner is responsible for developing the claimant's "complete medical

history, including arranging for a consultative examination(s) if necessary, and making every reasonable effort to help [the claimant] get medical reports from [the claimant's] own medical sources." 20 C.F.R. § 404.1545(3). The Commissioner also will consider certain non-medical evidence and other evidence listed in the regulations. *See id.* If a claimant retains the RFC to perform past relevant work, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(iv).

Fifth, if the claimant's RFC as determined in step four will not allow the claimant to perform past relevant work, then the burden shifts to the Commissioner "to prove that there is other work that [the claimant] can do, given [the claimant's] RFC [as determined at step four], age, education, and work experience." Clarification of Rules Involving Residual Functional Capacity Assessments, etc., 68 Fed. Reg. 51,153, 51,155 (Aug. 26, 2003). The Commissioner must prove not only that the claimant's RFC will allow the claimant to make an adjustment to other work, but also that the other work exists in significant numbers in the national economy. *Id.*; 20 C.F.R. § 404.1520(4)(v); *Dixon, supra*; *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)); *Nevland v. Apfel*, 204 F.3d 853, 857 (8th Cir. 2000). If the claimant can make an adjustment to other work that exists in significant numbers in the national economy, then the Commissioner will find the claimant is not disabled. If the claimant cannot make an adjustment to other work, then the Commissioner will find the claimant is disabled. 20 C.F.R. § 404.1520(r)(v).

B. The Substantial Evidence Standard

The court reviews an ALJ's decision to determine whether the ALJ applied the correct legal standards, and whether the factual findings are supported by substantial evidence on the record as a whole. *Hensley v. Barnhart*, 352 F.3d 353, 355 (8th Cir. 2003); *Banks v. Massanari*, 258 F.3d 820, 823 (8th Cir. 2001) (citing *Lowe v. Apfel*, 226 F.3d 969, 971 (8th Cir. 2000)); *Berger v. Apfel*, 200 F.3d 1157, 1161 (8th Cir. 2000) (citing 42 U.S.C. § 405(g); *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971)). This review is deferential; the court must affirm the ALJ's factual findings if they are supported by substantial evidence on the record as a whole. *Id.* (citing *Estes v. Barnhart*, 275 F.3d 722, 724 (8th Cir. 2002); *Krogmeier v. Barnhart*, 294 F.3d 1019, 1022 (8th Cir. 2002) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000)); *Kelley v. Callahan*, 133 F.3d 583, 587 (8th Cir. 1998) (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*, 242 F.3d at 796*; 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)). The court must "search the record for evidence contradicting the [Commissioner's] decision and give that evidence appropriate weight when determining whether the overall evidence in support is substantial." *Baldwin v. Barnhart*, 349 F.3d 549, 555 (8th Cir. 2003) (also citing *Cline*, *supra*).

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 presented to the ALJ," *Baldwin*, 349 F.3d at 555 (citing *Bates v. Chater*, 54 F.3d 529, 532 (8th Cir. 1995)), or "review the factual record *de novo*." *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (citing *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)); *accord Baldwin*, 349 F.3d at 555; *Young v. Apfel*, 221 F.3d 1065, 1068 (8th Cir. 2000). 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 substantial evidence would have supported an opposite decision." *Baldwin*, 349 F.3d at 555 (citing *Grebenick v. Chater*, 121 F.3d 1193,

1198 (8th Cir. 1997)); *Young*, 221 F.3d at 1068; *see Pearsall*, 274 F.3d at 1217; *Gowell*, 242 F.3d at 796; *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997).

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

The court has reviewed the Record and the parties' briefs carefully, and has considered each of Havill's arguments. The court is not persuaded by any of Havill's objections to the ALJ's findings. The ALJ conducted a thorough review of the record, and fairly weighed the evidence. The court finds the ALJ's credibility assessment and his determination of Havill's residual functional capacity to be supported by substantial evidence in the record.

However, the court also finds the ALJ's conclusion was in error to the extent the ALJ relied on the VE's testimony. As noted in the Commissioner's motion for remand and her brief on the merits, the jobs listed by the VE (*i.e.*, inspector and hand packager, small products assembler, and cashier II) all require frequent handling, according to the Dictionary of Occupational Titles. The ALJ's residual functional capacity determination included a limitation that Havill can handle with his left upper extremity only occasionally. Thus, remand is appropriate for the ALJ to obtain additional vocational expert testimony to determine whether Havill can perform jobs that are consistent with all of his limitations as set forth in the ALJ's residual functional capacity determination.

V. CONCLUSION

For the reasons discussed above, the motion for remand (Doc. No. 11) is **granted**. Judgment will be entered in favor of Havill[1] and against the Commissioner, and this case is **reversed and remanded** to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g), for further proceedings consistent with this opinion.

---

[1]**Note to plaintiff's counsel:** The plaintiff's counsel must comply with the requirements of Local Rule 54.2(b) in connection with any application for attorney fees.

IT IS SO ORDERED.

DATED this 17th day of September, 2004.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT