

UNPUBLISHED

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

ALLISON G. BECK,

Plaintiff,

vs.

MICHAEL J. ASTRUE,¹
Commissioner of Social Security,

Defendant.

No. C06-3071-PAZ

**MEMORANDUM OPINION AND
ORDER**

I. INTRODUCTION

The plaintiff Allison G. Beck (“Beck”) seeks judicial review of a decision by an administrative law judge (“ALJ”) denying her applications for Title XVI Supplemental Security Income (“SSI”) and Title II disability insurance (“DI”) benefits. Beck claims the ALJ erred in discounting her subjective complaints of pain and in finding she is able to perform substantial gainful employment activity. (*See* Doc. Nos. 10 & 12)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On February 3, 2003, Beck filed applications for SSI and DI benefits, alleging a disability onset date of March 10, 2000. Beck claims she is disabled due to back pain arising from an automobile accident in which she broke her back, requiring surgical insertion of two metal rods in her back. She also claims disability due to depression and acid reflux disease.

¹This case was filed originally against Jo Anne B. Barnhart, who was at that time Commissioner of the Social Security Administration (“SSA”). On February 12, 2007, Michael J. Astrue became Commissioner of the SSA, and he hereby is substituted as the defendant in this action. *See* Fed. R. Civ. P. 25(d)(1).

Beck claims that because of these conditions, she is unable to bend over; lift, push or pull more than ten pounds; and sit or stand for very long. She alleges she quit work because constant pain caused her to miss a lot of work and require assistance from her coworkers. Beck's applications were denied initially and on reconsideration.

Beck requested a hearing, and a hearing was held before ALJ George Gaffaney on November 8, 2004. Beck was represented at the hearing by attorney Timothy L. LaPointe. Witnesses at the hearing included Beck; Shelly Van Ness, a former coworker and friend of Beck's; and Vocational Expert ("VE") Warren Haagenson.

On March 24, 2005, the ALJ ruled Beck was not entitled to benefits. Beck appealed the ALJ's ruling, and on September 8, 2005, the Appeals Council denied Beck's request for review, making the ALJ's decision the final decision of the Commissioner.

Beck filed a timely Complaint in this court, seeking judicial review of the ALJ's ruling. On May 10, 2006, with the parties' consent, Chief Judge Mark W. Bennett transferred the case to the undersigned for final disposition and entry of judgment. Beck filed a brief supporting her claim on July 13, 2006. The Commissioner filed a responsive brief on September 8, 2006, and Beck filed a reply brief on September 13, 2006. The matter is now fully submitted, and pursuant to 42 U.S.C. § 405(g), the court turns to a review of Beck's claim for benefits.

B. Factual Background

1. Background facts and hearing testimony

Beck was born in 1977. She has lived with her mother in Garner, Iowa, for the past thirteen years, except for one year when she lived with a friend, Shelly Van Ness, in Rockwell, Iowa. She is a little over 5'4" tall, and at the time of the hearing she weighed about 230 pounds. She stated she had gained considerable weight since her auto accident in 2000. Prior to the accident, she weighed about 170 pounds. She indicated she tries to watch her diet, but she is unable to exercise due to pain.

Beck completed the tenth grade in high school. She quit school because she “felt the work was too hard,” she was falling behind, and she did not expect to graduate. Her last job was working part-time as a personal assistant for disabled individuals at Opportunity Village in Clear Lake, Iowa, a job she held from sometime in 2001 until about October 2003. As a personal assistant, she helped clients prepare food, did some laundry, and performed cleaning tasks. Previously, Beck worked from 1998 to 2000 in a factory, assembling oil filters. She worked from 1991 to 1992 as a corn detasseler, and she had additional prior experience as a factory worker.

Beck was involved in a motor vehicle accident on March 10, 2000, in which she broke her back in several places. Her injuries required surgical placement of two metal rods in her back. She stated that after the accident, she was severely limited in her ability to work due to back pain. She attempted to return to her job on the assembly line but missed a lot of work due to her absences. She was laid off, but believes that had she not been laid off, she would have been fired due to excessive absences.

Beck’s employer at Opportunity Village completed a Work Performance Assessment indicating Beck had frequent absences, frequently asked to leave early, and complained constantly about not feeling well and being in pain. Her employer noted Beck had a poor attitude generally, and she was reprimanded about her attendance, as well as for not following certain rules regarding phone calls to coworkers and coming onto the grounds during her off hours. Her employer also indicated Beck exhibited a lack of respect for her coworkers and lost her temper with them.

Beck maintains she is unable to work due to ongoing, intense pain that requires her to change position frequently from standing to sitting to lying down. She described her back pain as intense and agonizing, going from the top of her back between her shoulder blades to the bottom of her back at about the belt line. In addition to her back pain, she also has frequent headaches and neck pain. She indicated her neck pain has worsened over time, and on some days, it hurts to turn her neck only slightly. She also suffers from depression and

acid reflux disease. She stated doctors have prescribed medications for her pain, depression, and acid reflux, but she has no insurance and is unable to afford the medications. She takes over-the-counter pain relievers but they are ineffective. According to Beck, she looked into getting some type of assistance to pay for her medications, but she was told she would not qualify for assistance unless she was found to be disabled or she had a child.

Regarding her daily activities, Beck stated she can dress herself, with difficulty, but she has to have help putting on her socks and tying her shoes. Her mother helps her dress every day. Beck stated she is unable to bend over to pick up items from the floor without experiencing extreme pain throughout her back. She estimated she can bend forward three-fourths of the way or sometimes halfway, but not all the way over. If she is alone, she has a “grabber” that she can use to try to retrieve objects she drops on the floor.

Beck’s daily activities are limited, and she only leaves the house once or twice every couple of weeks. During the day, she sits in a recliner and watches television, changing her position from sitting to standing every thirty to forty-five minutes due to pain in her back. She also lies down three to four times each day. She can sit for thirty minutes to an hour at a time, although she stated an hour would be “pushing it.”² She can only walk about a block before she has to sit down or lie down. According to Beck, she is unable to do her own laundry, shopping, dishes, or meal preparation. She enjoys writing poetry and stated she draws “a little bit.” She used to engage in other activities that she has had to curtail due to pain.

Beck’s mother has cared for her most of the time since her accident, except for a period of about a year when Beck lived with Shelly Van Ness and her children. During that time, Shelly and her children helped Beck with her household chores and other needs.

Beck stated she has problems with her feet going to sleep, but she does not have problems with manual dexterity. She can lift a gallon of milk, but stated it is a strain to do

²The court notes Beck changed position from sitting to standing a couple of times during the hearing.

so. At night, she sleeps for an hour or two before she wakes up and has to get up for awhile. She estimated she sleeps a total of five to six hours per night.

Beck has a driver's license, and she is able to drive short distances. If she has to drive more than about twenty miles, she will have to stop during the drive to stand up or walk around for a bit.

The ALJ asked Beck to respond to the x-ray evaluations and treatment notes that indicate her doctors have been unable to explain her ongoing pain by objective findings. Beck stated, "I guess, they don't live my everyday life so they wouldn't know the amount of pain that I'm in everyday to know what I know by looking at an x-ray."

The ALJ also questioned Beck about a suicide attempt in August 2002. Beck stated she had been drinking at the time, and she took three bottles of prescription medications that had been prescribed to her for depression and her stomach problems. Beck indicated that since that time, she has had thoughts of suicide but has not made any further attempts or plans. She stated she has not had any further episodes of excessive drinking and she does not take street drugs.

Shelly Van Ness testified that Beck rented a room in her basement for awhile, and then Beck moved into another house on the Van Ness property, where she lived for about a year. Van Ness met Beck shortly before Beck's accident, when the two were coworkers in a factory. She stated she and Beck had the same job at the factory, which she described as "basically a sit down job" involving the inspection of parts.

Van Ness also worked with Beck at Opportunity Village. She stated the workers at Opportunity Village were organized into two-person teams assigned to a cottage to care for the clients overnight. According to Van Ness, other employees complained about having to work with Beck because they felt they had to do too much of the work due to Beck's limitations. Van Ness was willing to work with Beck and do the work Beck was unable to do. She indicated Beck was unable to turn clients, clean bathrooms, or do laundry. If Van Ness brought clean clothes to a table, Beck could fold the clothes for awhile, but then her back would begin to hurt from sitting and folding the clothes. She stated Beck continually complained about her back pain and she cried frequently. At home, Van Ness's children

would help Beck with numerous tasks of daily living, including taking out the trash, doing dishes, making dinner, and putting on and tying her shoes. Van Ness stated Beck moved back home after she lost her job.

Van Ness stated she and Beck went shopping together occasionally, and she witnessed Beck having a great deal of difficulty getting around. When they went to a mall, Van Ness and her children pushed Beck in a wheelchair. According to Van Ness, she can see that Beck is in pain. She stated that after seeing Beck attempt the light duty work at Opportunity Village, she does not believe Beck is able to perform any type of work.

2. *Beck's medical history*

In February 1999, Beck was seen in the emergency room for what was diagnosed as an atypical migraine headache. Doctors prescribed Midrin and Ibuprofen, and advised Beck to follow up with her doctor if her headaches increased in frequency.

On March 10, 2000, Beck was involved in a single-vehicle accident in which her car left the roadway, rolled over, and ejected her from the car. She told the emergency room physician that she had been drinking and using speed, and she had used drugs several times in the past. She had been ambulatory at the scene, and had gotten up and walked to find her cell phone to call for help. Beck complained of burning chest pain, worsening body pain, neck pain, and cold hands and feet. She denied head or extremity pain, shortness of breath, palpitations, numbness or tingling anywhere, and abdominal pain.

After evaluation and consultation with several physicians, and a CT scan of Beck's thoracic spine, Beck was diagnosed with "[m]ultiple and unstable fractures of the thoracic spine." She was transferred by helicopter to the Mayo Clinic's St. Mary's Hospital in Rochester, Minnesota, for neurosurgical consult and surgery. In addition to her unstable thoracic fractures, X-rays also showed a slight subluxation at C2-3.

On March 13, 2000, Beck underwent a T3 to T10 spinal fusion with instrumentation. She was fitted with a back brace, and received physical therapy to assist her in moving about.

She was discharged on March 20, 2000, with instructions to wear her back brace whenever she was out of bed, except that she could remove the brace to shower. She was advised to have her sutures removed locally two weeks after surgery. She was told “not to lift, carry, or push objects greater than 5 pounds or to engage in activities which require[d] bending or twisting of the back until reevaluated by [the doctor].” (A.R. 149)

On March 23, 2000, Beck slipped in the shower and fell to her knees. Her mother attempted to catch her during the fall, but Beck felt she might have jarred her back somewhat. She reported a prickly sensation but no other neurologic symptoms. She saw her doctor with complaints of left medial scapular pain and left posterior chest wall pain. She was continuing to wear her back brace as directed. The doctor advised Beck to return to her normal activities with the previous restrictions, wearing her back brace, and he prescribed Ultram.

On June 8, 2000, Beck was seen for a three-month post-op exam. She reported some muscular aches and pains, and persistent numbness on the lateral right midthigh and lateral left distal thigh. She was directed to wean herself out of the brace, and then to return to light-duty work in six weeks, beginning with four hours daily with no lifting, pushing, or pulling over ten pounds. In two months, she was directed to return to work full time with the same restrictions.

On September 1, 2000, Beck returned to the doctor for follow-up, complaining of pain in the area of her left scapula, pain at the thoracolumbar junction, and wobbly legs after standing for awhile. She had returned to work but reportedly had missed work eight days in August 2000, due to her back pain. She was supposed to work eight-hour days, but stated she could only work about a day-and-a-half per week because of back pain and fatigue. Doctors noted Beck had not been through a physical therapy program yet. Doctors gave Beck an excuse from the eight days of work she had missed, and prescribed a work hardening program. She was directed to return to work at four hours per day for three weeks, then six hours per day for three weeks, and then stay at eight hours per day until she was seen for her

one-year post-op exam. She was given a ten-pound lifting restriction for this period of time, with an indication that at one year post-op, she would be considered to have reached maximum medical improvement and would go to a permanent weight restriction of thirty-five pounds. Notes indicate Beck had lost some weight, and she was encouraged to continue losing weight.

On December 26, 2000, Beck was seen in the emergency room with complaints of worsening epigastric distress over the previous ten months. She was not on any current medications. She was treated with Maalox and Prilosec.

On June 26, 2001, Beck again was seen in the emergency room with complaints of abdominal pain. She described a shooting pain in her stomach that went into her back. She was diagnosed with gastrointestinal reflux disease (“GERD”), and received a prescription for Prevacid. Beck’s epigastric distress apparently continued because on May 20, 2002, she underwent an EGD with biopsy. Beck reportedly had been vomiting intermittently over the preceding one week and she had lost five pounds due to the vomiting. Findings from the procedure were “consistent with ulcerative esophagitis, probably secondary to chronic intermittent emesis,” and “[m]oderate erosive antral gastritis consistent with nonsteroidal gastropathy.” (A.R. 214) Beck was advised to stop taking Ibuprofen, and Nexium was prescribed.

Beck saw her family doctor on April 19, May 6, May 28, and June 17, 2002, for followup of her ongoing gastrointestinal problems, depression, and neck and back pain. Her back pain worsened during this time period, and the nonsteroidal anti-inflammatory medications Beck took for pain aggravated her reflux and esophagitis symptoms. In addition, Beck was gaining weight, and the doctor repeatedly advised her to get into a walking program and remain active. Beck also was experiencing headaches. Various medications were prescribed for Beck’s gastrointestinal symptoms, pain, and depression. Protonix and Pepcid helped control her gastrointestinal symptoms, but medications did not appear to

control her depression well, and Beck continued to report back and neck pain despite taking Ultram and Tylenol.

On August 10, 2002, Beck was hospitalized after taking an overdose of Celexa pills and drinking what she described as “a lot of alcohol.” Beck stated she had been increasingly depressed over the preceding six months, and she had been worrying about work and relationships. She was noted to be “highly focused on physical complaints,” and notes indicate she appeared tense and sad. She was observed on the psychiatric unit overnight and was evaluated by a psychologist. She was discharged the next day after her mood had stabilized. Her discharge diagnoses were major depression, single episode, moderate; personality disorder, not otherwise specified; and alcohol intoxication. Her GAF at discharge was 27. Beck left the hospital against medical advice, denying suicidal ideation. She stated she would not have taken the drug overdose if she had not been drinking. She made an appointment for outpatient counseling; however, at an appointment on October 8, 2002, notes indicate Beck had not followed up with the psychiatrist and she was “[v]ery uninterested in counseling.”

Also at the October 8, 2002, appointment, Beck report worsening of her low back pain. She stated the pain was exacerbated by going up and down steps, and when she tried to lift her left leg. She stated changing positions brought on more discomfort, but lying still helped somewhat. The doctor prescribed Prednisone and Lortab. He advised Beck to get into a physical therapy program for long-term back health, but Beck was “very resistant to that” and had “low motivation.” Although she had the opportunity to swim at Opportunity Village, where she was employed, the doctor indicated Beck was unwilling to do that, either.

On October 16, 2002, Beck saw her family doctor to discuss her depression. A friend accompanied her to the appointment. Beck stated she was angry much of the time and would hit inanimate objects at work. She reported frequent fatigue, recent weight gain, and chronic back pain. The doctor placed Beck back on Wellbutrin in combination with Celexa. She was

referred to a psychiatrist for further evaluation and treatment, and Beck agreed to accept some counseling through a mental health center.

On November 26, 2002, Beck saw her family doctor for followup regarding her depression. She reported that a combination of Wellbutrin and Lexapro helped her somewhat, but not significantly. Beck indicated her hours at work were being cut back from full time to part time, and she was losing her medical benefits. She had difficulty affording her medications when she was full time, and felt she could no longer afford them when she went to part time. The doctor gave Beck medication samples for two months. He also gave her names and contact information for medication assistance programs, and he encouraged her to apply for Title XIX benefits. He noted Beck was complacent about taking any action to help herself, both with regard to obtaining medication assistance and generally regarding her health. She had gained sixty pounds since her accident, she was not doing any exercises, and she was not engaging in positive interactions with people around her.

On February 26, 2003, Beck was evaluated by neurologist Sant M. Hayreh, M.D., at the request of Disability Determination Services. Dr. Hayreh examined Beck and indicated she had a history of GERD, ongoing depression, and exogenous obesity. He indicated that due to Beck's bilateral rod placement in her back, she had limited range of motion in her lumbar spine. She had marked difficulty with forward bending and lateral flexion and extension of her lumbar spine. She was able to rise from a squatting position slowly, and her gait was slow but steady. She exhibited normal muscle tone and grip strength in her upper extremities, and normal ranges of motion in her shoulders, elbows, wrists, knees, cervical spine, and ankles.

On April 1, 2003, Beck underwent a psychodiagnostic disability assessment by Steven B. Mayhew, Ph.D. Dr. Mayhew found Beck to be cooperative, and indicated she put forth an adequate effort during the evaluation. He noted Beck had been prescribed Celexa, Wellbutrin, and Protonix in the past, but she was off her medications because she was unable to afford them. He found Beck's capacity to understand, retain, and follow work-related

instructions and procedures to be “mildly impaired with some functional limitations.” He found her capacity to interact appropriately with supervisors, coworkers, and the public to be moderately impaired, and he suggested she might work best in settings that limited her contact with coworkers and the public. He further found moderate impairment in Beck’s capacity to tolerate stress and the pressure of simple, unskilled work, and to respond appropriately to these stressors. He noted that although Beck’s ability to sustain attention, concentration, and reasonable pace at entry-level worklike tasks was “variable,” those abilities nevertheless were not limited significantly.

Beck saw a doctor on April 10, 2003, with complaints of abdominal discomfort and occasional vomiting for three to four days. She also was having reflux problems. She reported having significant depression, but stated she did not feel any different whether she was on or off antidepressant medications. The doctor placed her back on Protonix and directed her to drink plenty of fluids and eat bland foods. He released Beck to return to work the next day. He noted Beck refused counseling or therapy for her depression, and further noted that she had refused counseling in the past as well. He referred Beck to a physical therapist for a disability workup.

On April 14, 2003, Dennis A. Weis, M.D. reviewed the record and completed a Physical Residual Functional Capacity Assessment form concerning Beck. Dr. Weis found Beck’s “lack of medical attention over the past couple of years” for her back pain, together with the fact that she took no medications for pain, eroded her credibility. He noted none of Beck’s treating or examining sources had provided any estimates regarding her residual functional capacity. He opined Beck should be able to lift up to twenty pounds occasionally and ten pounds frequently; stand/walk or sit, with normal breaks, for about six hours each in a normal workday; and push/pull without limitations. He indicated Beck occasionally could perform all postural movements, including climbing, balancing, stooping, kneeling, crouching, and crawling. On June 17, 2003, J.D. Wilson, M.D. reviewed the record and concurred in Dr. Weis’s assessment.

On April 23, 2003, Janet S. McDonough, Ph.D. reviewed the record and completed a Mental Residual Functional Capacity Assessment form and a Psychiatric Review Technique form concerning Beck. Dr. McDonough found Beck to be moderately limited in the ability to sustain an ordinary routine without special supervision, work in coordination with or proximity to others without being distracted by them, interact appropriately with the general public, respond appropriately to criticism from supervisors, and get along with coworkers or peers without distracting them or exhibiting behavioral extremes. She otherwise found Beck not to be limited significantly in any work-related mental activity. Dr. McDonough found Beck's credibility to be "eroded by her substance use/abuse, and noncompliance with treatment recommendations," including her failure to follow up with recommendations for outpatient substance abuse treatment and psychological counseling. On June 18, 2003, David A. Christiansen, Ph.D. reviewed the record and concurred in Dr. McDonough's findings.

On October 15, 2003, Beck was evaluated by physical therapist Mike Haberman at the request of Beck's employer, Opportunity Village. Haberman opined Beck occasionally (i.e., 1-12 times per hour) could lift five pounds from floor to waist, using both hands; fifteen pounds from waist to shoulder; ten pounds from shoulder to overhead; and carry twenty pounds. He found Beck frequently could sit, walk, operate foot controls, and work with her arms at shoulder level, and she would have no restrictions on her ability to touch, grasp repetitively, grip forcefully, or perform fine manipulation. He indicated Beck could stand, kneel, climb stairs, bend, twist, and perform overhead work occasionally. She should never crawl, and she could only squat partially. He noted that with these restrictions, Beck should be able to return to work, with the recommendation that she would "need the opportunity to change positions occasionally."

Haberman noted Beck "demonstrated poor use of body mechanics and lifting techniques," and she displayed a lot of difficulty lifting fifteen pounds. He expressed some doubt that Beck had lifted to her maximal effort. He further noted Beck had fair upper

extremity strength, but she had stopped some activities due to pain. Beck's treating physician signed off on Haberman's evaluation on October 24, 2003.

In the course of her evaluation by Haberman, Beck indicated she could perform the following work responsibilities at Opportunity Village: assist with showers if client was standing; complete certain personal care duties if client was in bed, as long as prolonged bending was not required; assist clients in face washing, tooth brushing, hair combing, and feeding; clean and rearrange the pantry; assist with meal preparation, as long as prolonged standing was not required; clean and sort chemical and linen closets; do some vacuuming; use a wheelchair to transport clean and dirty laundry, as long as she did not have to lift the chair; do room checks, order supplies, take vital signs, and perform a number of other work-related tasks. (A.R. 290)

3. *Vocational expert's testimony*

The ALJ asked VE Warren Haagenon to consider an individual of Beck's age and with her education and past relevant work, who has the following limitations:

First hypothetical: limit the lifting to ten pounds occasionally, 20 frequently, six hours standing, six hours sitting in a day, only occasionally non-exertional limits, balance, stoop, crouch, kneel, crawl, and climb. Do only simple, routine, repetitive, any constant tasks. Only occasional interaction with the public and co-workers. With those restrictions, would the claimant be able to do any of her past relevant work?

(A.R. 348) The VE responded that the individual would be able to perform the job of assembling oil filters, which is unskilled, light work.

The ALJ next asked the VE to revise the hypothetical individual's limitations as follows:

Second hypothetical we'll go to five pounds frequently and ten occasionally. Stand for 30 minutes at a time up to, for four hours in an eight hour workday. Sit 60 minutes at a time for six hours in an eight hour workday. And the same non-exertional limits except no kneeling and the same other

limitations, simple, routine, repetitive work and only occasional interaction with public and co-workers. With those restrictions could [the] claimant do any of her past relevant work?

(*Id.*) The VE responded that the hypothetical individual would not be able to perform any of Beck's past work, nor would she have any transferable skills. However, he further stated the individual would be able to perform unskilled, sedentary work such as small parts and bench assembly worker (giving examples of assembler of eye glass frames or lens inserter), food and beverage order clerk, and charge account clerk. The VE stated all of these jobs exist in sufficient numbers in the regional and national economies.

The ALJ then asked the VE to consider an additional hypothetical individual, as follows:

Third hypothetical: Again, five pounds occasionally or frequently, ten occasionally. Stand 30 minutes at a time. Sit 30 minutes at a time. Again, for four hours standing, six sitting in a day. Non-physical and exertional would remain the same, balance, stoop, crouch, crawl, and climb occasionally, kneeling never, only simple, routine, repetitive work. And again, only the occasional interactions with the public and unable to sustain an eight hour workday. Would an individual the same age, education, and work experience as the claimant with those restrictions be able to perform any job in the national economy?

(A.R. 348-49) The VE stated the hypothetical individual would be unable to perform any job on a competitive basis, all of which would require the ability to sustain an eight-hour workday. He further indicated that limiting the individual's ability to sit for thirty minutes at a time, rather than sixty minutes, would not, standing alone, make a substantial difference because the jobs he had identified would allow the flexibility to change positions from sitting to standing.

Beck's attorney asked the VE to consider the same limitations contained in the ALJ's third hypothetical, but remove the limitation that the individual could not sustain an eight-hour workday. Instead, he asked the VE to consider that the individual would have to change positions between sitting, standing, and walking throughout the day to alleviate pain, with

no more than thirty minutes standing or sixty minutes sitting at one time. In addition, the individual would have to lie down at least twice during the workday. The VE stated that if the individual could lie down during standard fifteen-minute breaks during the workday, she could still work, but most competitive employment will not allow employees to lie down.

4. *The ALJ's decision*

The ALJ found that although Beck has performed some work since her alleged disability onset date, she has not performed substantial gainful work activity at any time during the relevant period. He found Beck has severe impairments including obesity, back pain, and depression, none of which, singly or in combination, meet the Listing level of severity. He also found Beck's gastroesophageal reflux disease to be non-severe. Regarding Beck's mental limitations, the ALJ found Beck "is mildly restricted in activities of daily living; mildly limited in social functioning characteristics; mildly limited in maintaining concentration, persistence or pace and has not experienced any episodes of decompensation." (A.R. 17)

From his review of the record, the ALJ concluded Beck's allegations and testimony were inconsistent with the evidence of record, "and the severity of her disabling symptoms and limitations [is] totally unsupported by the objective evidence of record." (A.R. 18) The ALJ found it significant that Beck had not obtained either samples of medications from her physicians or financial assistance to pay for medications through some public or private program. He found Beck's statement that "she spends time using the computer" to be inconsistent with Beck's claim that she can only sit for fifteen minutes at a time. He further found that Beck's consumption of more than the prescribed amount of pain medications on one occasion eroded her credibility.

The ALJ found Beck has the following residual physical functional capacity: "lift and/or carry 10 pounds occasionally and 5 pounds frequently; stand 30 minutes at a time, 4 hours a day in an 8-hour workday; sit 1 hour at a time for 6 hours in an 8-hour workday;

occasionally balance, stoop, crouch, crawl and climb. She is prohibited from kneeling.” (A.R. 21) Regarding Beck’s residual mental functional capacity, the ALJ found Beck “is able to perform unskilled repetitive simple, routine tasks. She can only occasionally interact with the public and co-workers. She is mildly restricted in activities of daily living; mildly limited in social functioning; mildly limited in concentration, persistence or pace and has had no episodes of decompensation.” (*Id.*)

Relying on these assessments and the VE’s testimony, the ALJ concluded Beck cannot return to her past relevant work, but she is able to perform other work that exists in significant numbers in the national economy, such as small parts assembler, food and beverage order clerk, and charge account clerk. The ALJ therefore ruled Beck was not disabled at any time pertinent to his decision.

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; *Goff v. Barnhart*, 421 F.3d 785 (8th Cir. 2005); *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). At step five, even though the burden of production shifts to the Commissioner, the burden of persuasion to prove disability remains on the claimant. *Goff*, 421 F.3d at 790 (citing *Stormo v. Barnhart*, 377 F.3d 801, 806 (8th Cir. 2004)).

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 Commissioner's decision if it is supported by substantial evidence on the record as a whole. *Pelkey v. Barnhart*, 433 F.3d 575, 578 (8th Cir. 2006); 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 v. Barnhart*, 294 F.3d 1019, 1022 (8th Cir. 2002) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000)); accord *Pelkey*, *supra* (quoting *Goff*, 421 F.3d at 789).

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." *Id.* 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.” *Goff*, 421 F.3d at 789 (“[A]n administrative decision is not subject to reversal simply because some evidence may support the opposite conclusion.”); *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). The court must "defer to the ALJ's determinations regarding the credibility of testimony, so long as they are supported by good reasons and substantial evidence." *Guilliams v. Barnhart*, 393 F.3d 798, 801 (8th Cir. 2005).

IV. DISCUSSION

After a careful review of the record, the court concludes the ALJ's assessment of Beck's credibility and his determination of her residual functional capacity are supported by substantial evidence. Although the record contains credible evidence that Beck has chronic pain that causes her difficulties, she nevertheless went for a period of thirty-one months, from September 2000 to April 2002, without seeking any treatment at all for her back pain. In addition, at a functional capacity evaluation on October 15, 2003, Beck reported to the physical therapist that she could perform work responsibilities that are inconsistent with her allegation that she is completely disabled. (*See A.R.* 290)

Of particular significance to the court are the many instances where doctors' notes indicate Beck failed or refused to follow her doctors' treatment recommendations. She

repeatedly was encouraged to exercise to improve and maintain her mobility, to lose weight, and to obtain counseling. Her doctors recommended she go through a physical therapy program for long-term back health, but Beck was “very resistant to that” and had “low motivation.” She had the opportunity to swim when she was employed at Opportunity Village, but she was unwilling to do so. She consistently was complacent about taking actions to help herself and to improve her overall health. These actions undercut Beck’s allegations of disabling pain. *See Rankin v. Apfel*, 195 F.3d 427, 429 (8th Cir. 1999) (citing *Harwood v. Apfel*, 186 F.3d 1039, 1045 (8th Cir. 1999); *Black v. Apfel*, 143 F.3d 383, 386-87 (8th Cir. 1998)).

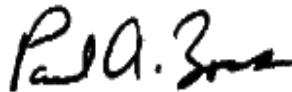
Beck correctly points out that the ALJ made several statements in his decision that are derogatory in nature and are unsupported by the record. Nevertheless, even when the evidence of record may lead to inconsistent conclusions, the ALJ’s decision must be upheld if it is supported by substantial evidence on the record *as a whole*. *Guilliams v. Barnhart*, 393 F.3d 798, 801 (8th Cir. 2005). The court finds the ALJ’s credibility determination was explained by him adequately, and the record as a whole supports his conclusion that Beck is not disabled.

V. CONCLUSION

Accordingly, for the reasons discussed above, the Commissioner’s decision is **affirmed**, and judgment will be entered in favor of the Commissioner and against Beck.

IT IS SO ORDERED.

DATED this 16th day of February, 2007.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT