UNPUBLISHED

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

DENNIS L. MILLER, Plaintiff, vs. JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, Defendant.	No. C03-4050-PAZ **MEMORANDUM OPINION AND ORDER**

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I. INTRODUCTION

The plaintiff Dennis L. Miller ("Miller") appeals a decision by an administrative law judge ("ALJ") denying his application for Title XVI supplemental security income ("SSI") benefits. Miller argues the Record does not contain substantial evidence to support the ALJ's decision. (*See* Doc. No. 7)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On April 3, 2001, Miller protectively filed an application for SSI benefits alleging a disability onset date of February 1, 2000.[1] (R. 94-97) Miller alleged he was disabled due to a lung mass, pancreatic cyst, and chronic pancreatitis, which together caused him shortness of breath, pain, and fatigue. (R. 104) His application was denied initially on August 18, 2001 (R. 72, 74-79), and on reconsideration on December 14, 2001 (R. 73, 82-86). On January 18, 2002, Miller requested a hearing (R. 87), and a hearing was held before ALJ Robert Maxwell on October 23, 2002, in Spencer, Iowa. (R. 30-71) Miller was represented at the hearing by attorney David Scott. Miller testified at the hearing, as did Vocational Expert ("VE") William Tucker, Ph.D.

On January 13, 2003, the ALJ ruled Miller was not entitled to benefits. (R. 9-21) On April 16, 2003, the Appeals Council of the Social Security Administration denied Miller's request for review (R. 4-6), making the ALJ's decision the final decision of the Commissioner.

Miller filed a timely Complaint in this court on June 12, 2003, seeking judicial review of the ALJ's ruling. (Doc. No. 1) On August 1, 2003, the parties consented to

[1] At the hearing, the ALJ misstated Miller's alleged disability onset date as December 1, 2000. (R. 33)

jurisdiction by the undersigned United States Magistrate Judge, and Chief Judge Mark W. Bennett transferred the case to the undersigned. (Doc. No. 3) Miller filed a brief supporting his claim on October 22, 2003. (Doc. No. 7) The Commissioner filed a responsive brief on December 9, 2003. (Doc. No. 8). The matter is now fully submitted, and pursuant to 42 U.S.C. § 405(g), the court turns to a review of Miller's claim for benefits.

B. Factual Background

1. Introductory facts and Miller's daily activities

There is no dispute between the parties regarding the relevant facts. In her brief, the Commissioner concurs with the facts as set forth in Miller's brief. (*See* Doc. No. 8, p. 2) The court similarly finds the plaintiff's summary of the facts to be complete, and therefore quotes from the plaintiff's statement of facts here:

> Plaintiff was forty-nine (49) years old at time of hearing and lives near Newell, Iowa[,] on his parents' acreage. (Tr. p. 34). His parents also live on the acreage. (Tr. p. 34). Plaintiff completed the eleventh grade and then corresponded to get the equivalent of a G.E.D. (Tr. p. 34.) He was not in the military service and has done automobile body work for most of his life. (Tr. p. 35). Two marriages ended in divorce. (Tr. p. 36). His ability to do body work declined to two or three hours per day because he felt that the use of his arms caused abdominal pressure and pain. (Tr. p. 39). Any vibration caused plaintiff to regurgitate. (Tr. pp. 39, 40). Those symptoms had bothered him to some degree for eight years. (Tr. p. 39). The complications associated with abdominal pain including shortness of breath led to plaintiff's continuous hospitalization at University of Iowa Hospitals and Clinics for over six weeks in the spring of 2001. (Tr. p. 42). Plaintiff testified that his treating doctor in Iowa City

(Dr. Frederick Johlin) told him that he was lucky to be alive and that the treating doctor thought plaintiff would die. (Tr. p. 43). . . . After plaintiff's lengthy hospitalization in February and March of 2001 for multiple procedures relating to surgical treatment for pleural effusions and a large pancreatic pseudocyst, plaintiff returned to University of Iowa Hospitals and Clinics on February 19, 2002 and March 29, 2003[,] for follow-up evaluation of his chronic pancreatitis and abdominal pain. (Tr. p. 253, 260, 261, 262). He reported that he was controlling his abdominal pain by diet. (Tr. p. 253). However, plaintiff's low back was causing significant pain at that time, and he was started on Naprosyn and Flexeril for the back pain. (Tr. pp. 253, 254). This was plaintiff's last trip to Iowa City. (Tr. p. 45). Plaintiff tried to follow an exercise regimen prescribed at University of Iowa Hospitals and Clinics when he returned home (using two towels to pull up his legs) but something popped in his left leg. (Tr. p. 44). He was laid up at home for six weeks after that incident – unable to travel back to Iowa City. (Tr. pp. 44, 45).

Plaintiff testified that he eats small meals at least six times per day and takes two pancrelipase with each meal. (Tr. pp. 49, 53). The pills affect plaintiff in terms of his ability to function because he has to lay down and sleep immediately after taking them. (Tr. p. 50). . . . Plaintiff also testified that his back pain and left leg pain [were] so bad that he could hardly sit. (Tr. pp. 43, 44). The pain is constant. (Tr. p. 44). . . . An epidural flood on July 3, 2002[,] offered relief for only about a week. (Tr. p. 66). Plaintiff still has abdomen and stomach pain. (Tr. p. 53). Darvocet is ineffective for relief of the pain. (Tr. p. 58). Plaintiff is unable to ride a lawn mower. (Tr. p. 61). Plaintiff testified that he can not be on his feet, standing or walking, for more than 2 hours. (Tr. p. 62). He cannot bend over and is unable to take off his socks. (Tr. p. 62). Plaintiff is also troubled with bouts of severe diarrhea every third day. (Tr. p. 64)

(Doc. No. 7, pp. 2-4)

2. Miller's medical history

The Commissioner also concurs with Miller's description of his medical history, and the ALJ's summary of the medical evidence. (*See* Doc. No. 8, p. 2) The plaintiff describes his medical history as follows:

> Plaintiff reported a full-feeling in his abdomen that started on his left side, went over to his right side, and up through his chest and into his shoulders – reporting pain in both shoulders – and shortness of breath when he saw the P.A. in Dr. Marczewski's office on February 26, 2001. They admitted him immediately to Loring Hospital in Sac City. (Tr. pp. 186, 273).
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> Plaintiff was recommended to transfer immediately to Trinity Regional Hospital in Fort Dodge on February 26, 2001. (Tr. p. 194). A massive right-sided pleural effusion (4300 cc) was found. He underwent two thoracentesis procedures. (Tr. p. 193). The physicians at Trinity Regional Hospital felt that plaintiff should then be transferred to University of Iowa Hospitals and Clinics for evaluation and treatment of a new lesion in the upper left lung and a retrocardiac mass. (Tr. p. 193).
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> During his hospitalization at University of Iowa Hospitals and Clinics, plaintiff presented with painful swallowing, fevers, and chills. (Tr. p. 239). He underwent pancreatic duct dilation and aspiration of a large pancreatic pseudocyst. (Tr. p. 239, 240). Plaintiff reported dyspnea on exertion with right chest pain increasing since December[] 2000[,] to the Cardiothoracic Surgery department. (Tr. p. 241). Plaintiff underwent esophageal endoscopy on March 1, 2001[,] and multiple surgical procedures including ERCP with pancreatic sphincterotomy, pancreatic ministent placement, and biliary sphincterotomy for non-resolving pseudocyst on March 22, 2001[,] after large volume attempt at non-operative therapy. (Tr. p. 233).

> Plaintiff was in obvious pain before the March 22 procedures as the record reflects that he presented to the Pancreaticobiliary Clinic as an emergency add-on on March 19, 2001, with the following diagnos[es]: 1) Epigastric pain radiating into the shoulder; 2) dysphagia and sore throat secondary to a feeding tube and cigarette use; 3) water brash/gastroesophageal reflux symptoms; 4) severe chronic pancreatitis; 5) alcohol abuse; 6) pancreatitis with a giant pseudocyst; 7) pneumonia. (Tr. p. 266). . . .
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> On follow-up on October 25, 2001, at the Pancreaticobiliary Clinic at University of Iowa Hospitals and Clinics, it was documented that plaintiff still had significant meal-related abdominal distention and pain. . . . (Tr. p. 202).
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> Plaintiff's back, left buttock, and left thigh pain [were] documented on his March 29, 2002[,] visit to the Orthopedic department at University of Iowa Hospitals and Clinics on referral from Dr. Johlin. (Tr. p. 262). Dr. John Glaser recommended an epidural steroid injection which was done on July 3, 2002. (Tr. p. 209). No one at Iowa City suggested that plaintiff's pain complaints were not credible.

(Doc. No.7, pp. 4-7)

The ALJ noted Miller was diagnosed with degenerative changes in his low back at L4-5 with osteopenia involving his left hip, as well as left-sided sciatica. Doctor's notes of July 9, 2002, indicate Miller had good response to the epidural steroid injection. He "was ambulating better and he reported that the severe, excruciating pain had gone away." (R. 14; *see* R. 275) Miller saw a doctor on August 12, 2002, for a rash, and the doctor's notes do not contain a mention "of back pain per se." (*Id.*; *see* R. 275)

Although the record upon Miller's admission into the University of Iowa Hospital in February 2001, contains a diagnostic impression of alcohol abuse, the ALJ found no further evidence or diagnosis of any substance addiction disorder, and the clinical notes

subsequent to March 2001 "reflect that the claimant has desisted from consuming alcohol, consistent with his testimony." (R. 15) Therefore, although the ALJ noted Miller's alcohol abuse likely contributed to the onset of his pancreatitis, the ALJ did not find alcohol abuse to be a medically-determinable impairment, nor did the ALJ find evidence of any functional restrictions stemming from Miller's use of alcohol. (*Id.*)

Based on his review of the medical evidence, the ALJ found Miller's pancreatitis to be a severe impairment, but he did not find evidence to support a finding that Miller's pain in his low back, buttocks, legs, knees, or hands constituted impairments. (*Id.*) As the ALJ noted, Miller did not list these problems as disabling impairments when he filed his application, and although he mentioned that his back, left buttock, and left thigh pain had been documented at his March 29, 2002, doctor's visit, Miller does not argue in his brief that these problems are disabling. (*Id.*; *see* R. 104; Doc. No. 7, pp. 6-7)

In addition to these observations, the court notes the following from its own review of the medical evidence. At the time of Miller's evaluation at the University of Iowa Hospitals and Clinics, doctors' notes indicate he had "a long history of alcohol abuse," and he reported drinking a twelve-pack of beer a day or six shots of hard liquor a day. (R. 239, 241) Miller also reported smoking one and one-half packs of cigarettes per day for thirty years. (R. 241) The record indicates Miller's pleural effusion likely also was related to alcoholism and poor dental hygiene. (R. 243) On March 26, 2001, all of Miller's remaining teeth were extracted. (R. 231-32)

On May 31, 2001, Miller was seen for follow-up of his chronic pancreatitis. He reported doing much better; however, he complained of continued intermittent abdominal pain, which he treated with the narcotic OxyContin on an as-needed basis. His lung condition was stable, with no acute distress. The doctor noted Miller was "a little bit

thinner than previously." (R. 251) The doctor instructed Miller "not to use a riding lawn-mower because this recently caused a little flare-up." (*Id.*)

Miller continued to be evaluated for abdominal pain and pleural effusions from April through June 2001. (*See* R. 211-30, 251, 265-66, 272) In October 2001, he was still experiencing abdominal pain, and he reported an increase in diarrhea and in epigastric pain. He continued to abstain from alcohol use, but reported smoking about twenty-five cigarettes per day. Further testing at the University of Iowa Hospitals and Clinics revealed a possible carbohydrate intolerance and difficulty absorbing and digesting fructose. Dr. Johlin advised Miller to avoid high fructose beverages, and increase milk products and complex carbohydrates in his diet. The doctor noted Miller's body weight was inadequate (he was 6'2" tall and weighed 136 pounds). He noted some concern that Miller's pancreas remained obstructed, and he indicated, "We remain very concerned about this patient's long-term outcome." (R. 202; *see* R. 202-10) Miller was advised to return for repeat testing in three months.

When he returned for follow-up on February 19, 2002, he reported he had controlled his abdominal pain by changing his diet. He was drinking Ensure and gaining weight and some strength. A CT scan of his abdomen evidenced some areas of inflammatory changes from his previous pancreatitis, but otherwise his abdomen was dramatically improved. He was advised to return for follow-up in six months. Miller's main complaint at the time of this visit was constant low back pain, increasing in severity, and exacerbated by vibration/bouncing such as riding in a car or riding a lawn mower – something the court notes his doctor had told him not to do in May 2001 (*see* R. 251). Miller reported difficulty walking due to the pain. He evidenced decreased range of motion of his left leg. X-rays of his lumbar spine demonstrated narrowing at the L4-L5 disc space. Dr. Johlin prescribed Flexeril and Naprosyn, scheduled an MRI, and referred

Miller to the Spine Clinic for further evaluation. (R. 253-54) Dr. Johlin also indicated Miller might need additional evaluation for his anger problem. (R. 254)

Miller underwent an MRI of his lumbar spine on March 29, 2002. The test showed some cystic degenerative changes at L4-L5, and a possible foraminal disc herniation on the left at L3-L4. (R. 267) At his examination the same day, Miller "moved uncomfortably around the room," but the doctor was unable to reproduce symptoms during straight leg raising, and noted "no obvious motor, sensory or reflex deficit." (R. 260) Miller reported limitations on his functional abilities due to pain, including an inability to walk or stand for more than ten minutes or sit for more than one hour at a time; inability to lift heavy objects off the floor, although he could lift heavy objects from a table; moderate difficulty opening a jar, tying his shoes, and starting and stopping the flow of urine during urination; and interruptions of his sleep. He reported no difficulty writing, turning a key, buttoning buttons, or using a fork and knife to cut food. (R. 261) He also reported that pain was causing him to limit his activities, such as cutting wood, lifting and carrying groceries, bending, kneeling, stooping, and walking more than a mile. He reported being able to walk one block without difficulty. (R. 262)

The doctor suggested an epidural flood, which was performed on July 3, 2002. The record indicates he tolerated the procedure well. (R. 269) At a follow-up visit, he reported the severe, excruciating pain was gone, and he was ambulating better. His straight-leg-raising test was still slightly positive. He was scheduled for follow-up in two weeks, and was instructed to call if he had problems. (R. 275) The record does not indicate he reported any problems.

Dennis A. Weis, M.D. completed a Physical Residual Functional Capacity Assessment of Miller on August 9, 2001. (R. 149-56) He assessed Miller's functional capacity as being within the range required to perform the full range of medium exertional

work. (*See id.*; R. 19, 69) The assessment was affirmed by John May, M.D. on November 23, 2001. (R. 174-81, 184) Dr. May attempted to contact Miller for an interview on November 29, 2001, but Miller's mother stated he was not at home. Miller's mother stated Miller had "done nothing but sit all day since he got home from the hospital except for brief shopping trips to Storm Lake about 13 miles away." (R. 182, 183) She stated he was not eating solid foods, and she expressed concern about his condition. Dr. May noted there was some indication Miller was not complying with doctors' instructions about staying away from sugars. He opined Miller should be capable of medium exertional work if he complied with his diet and follow-up care as recommended by his doctors. (*Id.*)

Herbert L. Notch, Ph.D. completed a Psychiatric Review Technique on November 29, 2001. (R. 158-71) Dr. Notch found Miller's alcohol abuse to be in "sustained remission," and not to constitute a severe impairment. He found Miller not to have "significant functional limitations in regard to memory, concentration, pace, interaction with supervisors, co-workers and the public, judgment or ability to handle changes at work like activities." (R. 172) Dr. Notch found Miller's subjective allegations of physical problems and pain to be credible, and he found the medical and non-medical evidence to be consistent. (R. 172, 173) He noted that if Miller were awarded benefits, "he would need assistance with funds." (R. 173)

3. Vocational expert's testimony

The ALJ noted none of Miller's past work had been done at substantial gainful activity levels. Therefore, he asked VE William Tucker, Ph.D. to assume "a person with no relevant work history by Social Security standards," under age fifty, with a high school equivalency education. (R. 68-69) Further, the ALJ stated, "I want you to assume

because of medically determinable impairments, a person has the same work related limitations exertionally and non-exertionally described in Mr. Miller's testimony. Crediting that testimony, would you expect a person to do any unskilled entry level kind of work on a full-time basis?" (R. 69)

The VE replied, "I don't think on a full-time basis. He indicates that he alternates between standing and lying down during the work day, and in response to questioning, he indicates that he can't cumulatively sit, stand and walk eight hours a day, so based on his testimony, he couldn't work full-time." (*Id.*)

The ALJ then asked the VE to assume the hypothetical individual "could occasionally lift or carry 50 pounds, frequently 25 pounds, could stand, walk or sit with normal breaks for about six hours of eight, push pull is unlimited, postural activities are all frequent, no manipulative[,] visual or environmental [limitations]. This is medium work." (*Id.*) The VE noted the hypothetical limitations also would include light or sedentary work. (R. 70) Based on the hypothetical, the VE opined the individual would have no "reduction in the full range of unskilled, medium, light or sedentary" work. (*Id.*) Again, however, if Miller's testimony were found to be credible, he would not be able to do full-time work. (*Id.*)

4. The ALJ's decision

The ALJ found Miller had not engaged in substantial gainful activity since the protective filing date of his application. Although the ALJ found Miller's chronic pancreatitis was a severe impairment, he found the condition did not meet or equal an impairment listed in the Regulations. (R. 20) In so holding, the ALJ found no evidence in the record that Miller had suffered weight loss as set out in Tables I or II of Appendix 1 to section 5.08A, or weight loss with corollary laboratory findings to the extent set out

in Tables III or IV of section 5.08B. (R. 13-14) The ALJ also noted the medical consultants found a lack of clinical signs and findings that Miller's pancreatitis met the regulatory requirements for twelve months or longer. (R. 14)

In considering how Miller's pancreatitis affected his ability to function, the ALJ found Miller's "testimony combined with the written record [did] not establish a work-precluding level of pain, abdominal symptoms or similar subjective feature[.]" (R. 21) The ALJ observed that none of Miller's physicians had commented upon any functional limitations on Miller's capacity for work. (R. 16) Doctors made note of Miller's subjective complaints regarding his functional limitations, but made no findings in that regard. (*Id.*) As a result, the ALJ looked to the opinions of the medical consultants in holding as follows:

> [T]he undersigned is initially persuaded that the claimant retains the residual functional capacity for performing medium exertional work activity. By Department of Labor standards, medium work involves lifting/carrying up to 50 pounds occasionally and up to 25 pounds with frequency. The undersigned does not find the claimant's capacity for performing this type of work to be contraindicated in the objective clinical reports. While accepting that the claimant was not capable of this type of activity circa his treatment for pancreatitis and pseudocyst in March 2001, the record does not support that his ability to perform medium exertional work was compromised for 12 consecutive months or longer. . . . [T]he claimant underwent injection therapy related to back and leg pain in July 2002, but the record does not support that he continued to be symptomatic and was therefore functionally limited for 12 consecutive months or longer. . . . [T]here is no medical evidence supporting the presence of impairments to the claimant's knees or hands, and the record does not establish the presence of a substance addiction disorder which results in work-related limitations.

(R. 16-17)

In considering Miller's credibility, the ALJ noted his past work history was quite poor in terms of reported earnings, although the ALJ recognized this could be due to the profit/loss picture from Miller's self-employment. The ALJ found Miller to be less than candid about his work history, noting the following:

> Of significance to the undersigned, however, is the suggestion that the claimant has been working and was not forthright about work information in his testimony. When asked when he last did any work, the claimant responded that this was a "good question". He explained that he had an individual's pickup in his shop for approximately 3 years and was able only to work on it sporadically, whereby the individual took the vehicle approximately 2 months ago even though the work was not complete. Yet, on October 13, 2001, the claimant reported to Dr. Johlin that he ". . . is now working for someone else painting rather than working in his own garage doing custom work." [Citing R. 208] The claimant's lack of candor at hearing with respect to employment seriously detracts from accepting that he is unable to work because of debilitating pain or similar features. Moreover, this employment, whether or not the wages are reported, goes against accepting that the claimant is functionally limited to the extent described in his testimony.
>
> So also, the above-noted report concerning work goes against accepting that daily activities, since December 2000, have been seriously compromised by pain, bloating, diarrhea or similar feature. In his earlier disability reports, the claimant informed the Administration that he relies upon his mother for cooking, laundry and cleaning. He further described pain, stating that he is unable to even ride in a vehicle very far. . . . These reports in 2001 are inconsistent with the work activity reported to Dr. Johlin in October 2001. . . . Moreover, a disability examiner . . . reported for the

> record that, on November 29, 2001, he attempted to contact the claimant by phone and was informed by the claimant's mother that he was not at home. . . . While this may have been an isolated incident, it goes against accepting that, at the time, the claimant was more or less housebound because of pain and an inability to endure a ride in a vehicle. So also, his absence from home on that date would be consistent with the report from Dr. Johlin in October 2001 that the claimant was working. . . . Clinical reports subsequent to March 2001 contain physician concern over the claimant's weight and nutritional status, but there is no medical concern indicated with respect to the claimant's ability to maintain his daily activities.

(R. 17-18; citations omitted except where noted).

The ALJ further found Miller's subjective complaints about the duration, frequency, and intensity of his symptoms to be inconsistent with the objective medical evidence. (R. 18) He noted Miller had reported to his doctors that he was able to control his pain and abdominal symptoms through diet management and medications. (R. 18-19) The ALJ concluded that although Miller may experience episodical abdominal bloating, diarrhea, and back/leg pain, the persistent level of functional restrictions to which Miller testified was contradicted by "the overall level of medical attention, the positive results of injections and diet noted in the clinical reports, the lack of functional restrictions noted by either treating physician, and the suggestion that the claimant has worked since October 2001." (R. 19)

The ALJ found Miller retained the residual functional capacity to perform the full range of medium exertional work, including lifting/carrying up to fifty pounds occasionally and twenty-five pounds frequently. (*Id.*) The ALJ further found Miller had no vocationally relevant work history, and therefore, the ALJ looked to "the existence of jobs in the national economy at the various exertional levels as supported by the Dictionary of

Occupational Titles, Occupational Outlook Handbook, and other publications by the Department of Labor, Bureau of the Census, and other state employment agencies." (R. 20) From these sources, the ALJ concluded jobs exist in significant numbers in the national economy that Miller could perform. The ALJ therefore found Miller was not disabled. (*Id.*)

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

Little analysis is required in this case. Miller argues his extensive medical treatment since 2000, and the "life threatening nature of [his] condition," corroborate his claim that he is disabled, and the ALJ "was not justified in concluding that the record did not show a work-precluding level of pain." (Doc. No. 7, p. 4) The court disagrees. The ALJ's opinion was well-supported and thorough, and he considered all of the relevant evidence. The record contains substantial evidence to support his opinion. Whether the court might have weighed the evidence differently is irrelevant. *Culbertson*, 30 F.3d at 939 (citing *Browning, supra*); *Krogmeier,* 294 F.3d at 1022 (citing *Woolf, supra*). Given the deferential standard of review, the court may not reverse the Commissioner's decision when it is supported by substantial evidence on the record as a whole.

V. CONCLUSION

For the reasons discussed above, the Commissioner's decision is affirmed.

IT IS SO ORDERED.

DATED this 19th day of May, 2004.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT