UNPUBLISHED

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

BRIAN D. QUIST, Plaintiff, vs. JOANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, Defendant.	No. C03-3068-MWB **REPORT AND RECOMMENDATION**

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I. INTRODUCTION

The plaintiff Brian D. Quist ("Quist") appeals a decision by an administrative law judge ("ALJ") denying his application for Title XVI supplemental security income ("SSI") and Title II disability insurance ("DI") benefits. Quist claims the ALJ erred in discounting his credibility, arguing the record supports his assertion that he is unable to work. (*See* Doc. No. 6)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On August 31, 2001, Quist protectively filed an applications for DI and SSI benefits, alleging a disability onset date of August 13, 2001. (R. 47-49; 180-82) Quist alleged he was disabled due to back pain, seizures, and headaches. (R. 62) His applications were denied initially on January 16, 2002 (R. 28, 30-34, 183-88), and on reconsideration on April 23, 2002. (R. 29, 36-39, 189-93) On May 15, 2002, Quist requested a hearing (R. 40), and a hearing was held before ALJ Robert Maxwell on March 11, 2003, in Spencer, Iowa. (R. 194-242) Quist was not represented at the hearing. Quist, his girlfriend Darla Miller, and Vocational Expert ("VE") Tom Odet testified at the hearing.

On March 31, 2003, the ALJ ruled Quist was not entitled to benefits. (R. 9-24) On June 6, 2003, the Appeals Council of the Social Security Administration denied Quist's request for review (R. 5-7), making the ALJ's decision the final decision of the Commissioner.

Quist filed a timely Complaint in this court on July 31, 2003, seeking judicial review of the ALJ's ruling. (Doc. No. 1) In accordance with Administrative Order #1447, dated September 20, 1999, this matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition of Quist's claim. Quist filed a brief supporting his claim on November 19, 2003. (Doc. No. 6) The Commissioner filed a responsive brief on January 16, 2004. (Doc. No. 7). The matter is now fully submitted, and pursuant to 42 U.S.C. § 405(g), the court turns to a review of Quist's claim for benefits.

B. Factual Background

1. Introductory facts and Quist's testimony

At the commencement of the ALJ hearing, the ALJ noted Quist had appeared on a previously-scheduled hearing date in December 2002, and asked for a continuance to allow him to obtain legal representation. When the current hearing commenced on March 11, 2003, Quist again requested a continuance for the same reason. He also noted he was scheduled for further testing on August 4, 2003, relating to his seizure disorder and sleep apnea. The ALJ advised Quist that he would not continue the hearing another five months or more on the current applications. (R. 196-97; *see* R. 200-01) Quist's girlfriend, Darla Miller ("Miller"), stated Quist had lost his job because his doctor told him he could not run machinery, and they had no income and mounting medical bills. (R. 198) The ALJ advised Quist that he would grant a shorter continuance than Quist had requested, until May, or Quist could elect to proceed with the hearing on the basis of the current record. Quist and Miller indicated they wanted to go forward with the hearing. (R. 198-99)

The ALJ confirmed that Quist understood he had a right to be represented at the hearing, he had tried unsuccessfully to obtain representation, and he wanted to represent himself at the hearing. (R. 199-201)

At the time of the hearing, Quist and Miller were living together in Curlew, Iowa. (*See* R. 183, 205, 231-32) Quist was thirty-six years old, six feet tall, and weighed 220 pounds. He stated he had gained weight during the preceding eighteen months. He was separated from his wife (someone other than Miller), and he had no dependent children. He had graduated from high school and had one year of college, where he studied auto collision repair, learning to do body work on cars. (R. 205-06) He stated he has no problems reading or writing, although he "can't spell that well." (*Id.*)

Quist stated he has never used his auto body training in a job. He last worked in December 2002, as a laborer for Flanagan's Western Train Products in Emmetsburg, Iowa. His duties included "[g]rinding and painting," "[p]rep and paint." (R. 206) He worked at Flanagan from May 28, 2002, through December 13 or 14, 2002. (R. 207) He usually worked thirty-two hours per week, or sometimes fewer hours if there was not enough work available, and he was treated as an independent contractor rather than an employee. (*Id.*) He was paid $8.00 per hour, and estimated he made $2,021 during the seven months he worked in 2002. (R. 209-10) He stated he never made as much as $700 in any one month. (R. 210)

The job at Flanagan required Quist to paint parts for attachment to county trucks that install signs on roadways. He operated a big hand grinder, a cutting torch, a paint gun, and an air paint sprayer. (208-09) Quist stated he sometimes was not able to work all the hours that were available to him because of back pain and headaches. He estimated he missed about one day a week due to health problems. (R. 208-09) He lost the job at Flanagan after his doctor said he could not use power equipment any longer. He could still

paint, but without the power sprayer. Flanagan told him that was unacceptable, and he could not work until he could use the power equipment. (R. 210)

Quist stated that because of his seizure disorder, he did not believe he could return to any of his previous jobs, and he also could not work full time at other jobs. He explained his doctors have told him that he has seizure episodes during the day while he is awake, when he "just spaces out" and is not aware of his surroundings. He did not believe that would be acceptable to any employer. (R. 212)

Quist stated his most serious health problem that affects his ability to work is his seizure disorder. He was first diagnosed as having seizures in 1993, and he has been on medication for seizures since that time. Until January 2003, he was taking Dilantin, but in January, his medication was changed to Tegretol. He has missed medication doses occasionally, but if he misses a dose, he takes the medication a little later, when he remembers. (R. 212-13) He stated he has had seizures despite taking his medications as prescribed. Quist does not remember what happens during his seizures because he loses consciousness, but he stated Miller has observed him having seizures. (R. 213-14) The last seizure he had was on August 19, 2001, when he was at church and he "just fell down and started shaking." (R. 214) That episode represents the basis for his claim that he became disabled as of August 2001. (*Id.*) He did not seek medical treatment at the time of the seizure because there were a couple of nurses in the church congregation who "knew what they were doing" and attended to him. (R. 215)

Quist is not aware of having any further seizures since August 2001; however, his girlfriend and his doctors have told him that he has had seizures. He stated doctors in Iowa City hooked him up to an EEG monitor and he "was sitting watching TV and then pretty soon [he] just had one." (*Id.*) Doctors told him the results of the EEG study were inconclusive and they wanted to schedule another test. (*Id.*) Doctors also told Quist they

want to do a sleep study to determine whether he would benefit from a CPAP machine. (R. 216)

Quist stated his medication was changed from Dilantin to Tegretol to "see what else would work." (*Id.*) He does not feel any different since the medication change. (*Id.*) He also has not noticed any side effects from the Tegretol. (R. 220)

Quist does not have a driver's license, but he did not lose his license due to seizures. He can get his license reinstated when he pays some outstanding fines. (R. 216-17) However, a doctor told Quist he should not drive while he is on medication. (R. 217)

Quist stated he consumes alcohol only about once per year. According to Quist, doctors have told him the effects of alcohol will be doubled by his seizure medication. (*Id.*)

Because Quist does not know when he has seizures, he was unable to state whether he ever had a seizure while he was working. He noted he had injured himself while using the grinders and other machinery, but he worked alone so he does not know if he might have had a seizure that caused an injury. He stated his restriction on using power equipment would include a paint sprayer. (R. 218) No doctor has told him he should not use a paint sprayer, which Quist stated is not motorized, but he noted that if he had a seizure, he might spray paint into his face. He also felt he could be injured using a grinder or table saw, or working on a ladder. (R. 219)

In addition to his seizures, Quist stated he has back pain from "a natural curve in [his] spine." (R. 220) He sees a chiropractor and occasionally takes Ibuprofen for the back pain. He stated that if his back were his only problem, he probably would still be working, but he opined he would be limited in the amount he could lift. (R. 221)

Quist stated one doctor said something to him about depression. His brother is depressed, and Quist stated depression runs in his family. He thought he had seen "a

psych doctor" in Iowa City for some testing, but no medications were prescribed and he has never been on any medication for depression or other mental health problems. (R. 222)

Quist also stated he has headaches "constantly," every day, sometimes worse than others. His headaches last all day long and are worse during the day than at night. He has not had any medical treatment for his headaches in the past. He stated a doctor told him the headaches could be due to scar tissue from an accident he had in 1984. He takes Ibuprofen for the headaches, which he stated does not relieve them completely but "mellows it out for sharp headaches." (R. 229-30)

Quist stated he has no problem attending to his personal needs. He can do housework when he wants to. He likes to fish, but had not gone fishing for a couple of years because he was too busy doing repair projects and remodeling on his house. For example, he has hung sheetrock, and hooked up the furnace and water pipes. (R. 223-24) When he is not working, Quist often watches videos. He usually is able to follow along with the story if it interests him. (R. 225)

Quist agreed with the assessment that he could lift up to fifty pounds occasionally (*i.e.*, up to one-third of the time), and twenty-five pounds frequently (*i.e.*, up to two-thirds of the time). (R. 226). He stated he could be on his feet, standing or walking, for about six hours in an eight-hour day, depending on the surface upon which he was standing. On a harder surface, such as concrete, he would not be able to be on his feet as long. He also noted he could not stand still, in one spot, for more than few minutes without having to change positions. He stated when he was working, he changed position constantly, and when he was painting, he sometimes sat or reclined to paint various surfaces. (R. 227-28)

He stated he could only sit on a hard chair for a short time before he would need to change positions. He can bend over and touch his toes, but did not feel he could do so

very often. He can bend his knees and squat down. He is able to climb stairs slowly. He has no problems with his hands, fingers, or arms. He can use his feet, for example to drive a vehicle with a manual transmission. (R. 228-29)

2. Darla Miller's testimony

Darla Miller testified she has known Quist for three years, and they share a household together. She stated Quist has seizures that come and go. During a seizure, he cannot hear her unless she gets right up in his face, and he will "get fidgety." (R. 231) She notices the seizures frequently at night when they are watching movies, and she stated "when he's sleeping he's terrible." (*Id.*) He stated he is "all over the bed," he has a hard time breathing, and he has hit her and elbowed her during his sleep without ever knowing he is doing so. (R. 232) She also stated Quist "snores real bad and he takes deep breaths." (R. 233) She stated the testing in Iowa City is related to the seizure-like episodes. Doctors told them there were unexplainable EEG results and that is why they were scheduling additional testing. (R. 232)

Miller confirmed the doctors have told Quist he should not use any machinery and should not drive. (R. 233) The doctor also suggested the possibility of vocational retraining, but Miller noted Quist lacks funds to get other training. (*Id.*)

3. Quist's medical history

The record indicates Quist has a seizure disorder that apparently started after he had a motorcycle accident in 1984. It appears he started taking Dilantin in 1997 (*see* R. 102), but stopped taking the medication in January 2000, due to financial reasons. In August 2000, he suffered a seizure, and he was hospitalized and restarted on Dilantin. (R. 102-03) He has not suffered further full-blown seizures since that time; however, he reports

very frequent "episodes" where he may stare ahead, be unresponsive and unaware of his surroundings, black out and fall down, or have twitching movements in his mouth and his extremities. These occur both while he is awake and while he is sleeping, although the episodes during waking hours are infrequent, occurring only once or twice a year. (*See* R. 136-38, 170-74) In notes from a consultative examination of Quist for purposes of his disability application, Dave Archer, M.D. stated Quist's seizure disorder had not been treated adequately. Quist's Dilantin levels had not been monitored and maintained at therapeutic levels, no other medications had been tried, and it was not clear at that time (December 2001) whether Quist's seizure disorder would respond to treatment. (*See* R. 127-30)

Quist also experiences headaches almost daily. The headaches are bitemporal, and sometimes extend to the occipital area. The headaches increased in frequency from 2001 to 2002. In their evaluation notes, Shana Vifian, M.D. and Erik K. St. Louis, M.D. from the University of Iowa Hospitals and Clinics noted Quist was drinking more than thirty-six cups of coffee per day and also caffeinated pop, which likely contributed to his headaches. He was advised to cut down gradually on his caffeine intake. In addition, he was taking high doses of Ibuprofen, which the doctors thought could be causing rebound headaches. He was advised to decrease his use of Ibuprofen. (*See* R. 171-74)

It appears Quist may suffer from sleep apnea or another sleep disorder. He is scheduled for a full sleep study to determine whether CPAP machine or other intervention might be beneficial.

Regarding his back condition, Quist has been receiving chiropractic treatment for back pain since March 1999, when he suffered a work-related injury while working at a hog confinement facility. (*See* R. 124-25) He saw James Bird, D.C. on twenty-two occasions from March 1999 through March 2000, during which visits Quist received

chiropractic adjustments, often with accompanying electronic muscle stimulation or interferential stimulation. (R. 108-25) On November 5, 2001, in an opinion letter for disability purposes, Dr. Bird opined Quist should avoid work that requires bending and lifting, although he noted he had not seen Quist in over eighteen months. (*See* R. 107) Spine X-rays taken on December 1, 2001, indicated Quist had mild disc narrowing at L3-L4, and mild anterior spur formation at L3 through L-5. (R. 131)

Jan Hunter, D.O. completed a residual functional capacity ("RFC") assessment of Quist on January 14, 2002. He noted Quist has "evidence of very mild degenerative disc disease of the lumbar spine[.]" (R. 142-43) He found Quist could lift/carry up to fifty pounds occasionally and twenty-five pounds frequently; stand/walk and sit for six hours in an eight-hour workday, with normal breaks; and frequently climb ramps or stairs, balance, stoop, kneel, crouch, and crawl. He found Quist should never climb ladders, ropes, or scaffolds due to seizure precautions, and he should avoid even moderate exposure to hazards, such as heights and machinery. (R. 140-49)

On March 13, 2003, Rex J. Jones, D.C. examined Quist at his request and prepared a report for DDS. Dr. Jones's examination revealed a restriction of the range of motion of Quist's cervical spine at 45 degrees flexion, 20 degrees extension, 20 degrees on right and left bending, and 60 degrees at right and left rotation. Dr. Jones found Quist had "mildly positive foramina compressions bilaterally," and some discomfort from cervical distraction and shoulder depressor. His lumbar range of motion was restricted at 45 degrees flexion, 15 degrees extension, 15 degrees right and left bending. Quist exhibited "palpable tenderness of the cervical spine musculature bilaterally primarily at C5-C6, mid scapular region at T5, T6, T7, and L5-S1 facet and left sacroiliac articulation." (R. 178) Other findings were noted on X-ray examination, including "loss of normal cervical anterior curve, military neck, and some degenerative changes present throughout the

cervical spine facet," "left upper thoracic curvature, mild scoliosis, . . . wedging of L5 on S1, imbalance of the pelvis and some pelvic rotation," and "some mild degenerative changes throughout the lumbar spinal facet and disc end plates." (*Id.*)

Dr. Jones stated Quist's activities of daily living were "restricted with lifting at 20 pounds repetitively, standing longer than one-half hour, restricted rotation at four times per hour." (R. 179)

4. Vocational expert's testimony

The VE observed that all of Quist's past relevant work included either hazardous working conditions or the use of machinery. (R. 235) In addition, he stated none of Quist's work skills would transfer to other semi-skilled, but less physical, jobs. (*Id.*) Further, the auto body training that Quist has never used in a job would not provide transferable skills to a less-physical, semi-skilled job. (R. 236)

The VE asked the ALJ to consider a younger individual with a high school education and Quist's past work history. Further, he was to assume the person had medically determinable impairments that caused work-related limitations such as those testified to by Quist and Miller. The VE testified as follows regarding available employment for the hypothetical person:

> Well, I think we've already established that he can't go back to any of his past work. I think he needs a job – it sounded like he agreed that he was at the medium duty level as far as lifting, but would need probably a sit/stand option with the ability to move around somewhat, and it would have to be in a fairly safe environment. No machinery or things like that. Probably no height. And I think that, you know, from basically describing medium with you, and I don't think there would be very many medium jobs that – because any time you need to sit down, you're probably going to be operating

> equipment. So there probably isn't going to be any medium jobs that fit within the hypothetical. But there would be some light jobs that would fit within the hypothetical. And what I'm talking about is like simple jobs like light duty mail clerk jobs where you could sit and stand, move around a little bit. That's a light duty unskilled job. You're not working around equipment or anything. It's probably, in numbers, 2,500 in the regional economy if we look at Minnesota, Iowa, and North and South Dakota. There's a number of production assembler jobs that are light duty unskilled. Same regional economy. There would probably be 3,000 to 4,000. There are packager positions that are light duty unskilled, where you can stand, sit, get up, move around a bit. In the regional economy there would probably be 1,500 to 2,000. So that would be some examples of some jobs that would fit within the limitations. Now, I just want to – as far as the seizures that he's having, I think there is some indication that when he's awake he does have some spells. I don't know how much he's having them. I think the testimony is vague on that. But let me say that, you know, anytime you actively have seizures, I think that's going to have an impact on any type of work that you can do, and I think employers would be quite leery about having somebody like that around in any capacity.

(R. 236-37)

The VE noted ongoing seizures likely would affect production, pace, attendance, and unscheduled work breaks. (R. 237-38)

The ALJ next asked the VE to consider an individual with the following limitations:

> What if a person could occasionally lift or carry 50 pounds, frequently 25 pounds. Could stand, walk or sit with normal breaks about six hours of an eight-hour day. That's in each category. Push/pull is unlimited. Postural activities: no climbing of ladders, ropes, or scaffolds, other[wise] they don't limit the postural activities. No manipulative, visual, or communicative limits. Environmentally, . . . seizure precau-

> tions, and to spell it out, they would avoid even moderate exposures to hazardous working conditions. The examples they give (but not the only ones) are hazardous machinery and unprotected heights. What would be the effect here, first of all, on past jobs?

(R. 238) The VE responded that the hypothetical individual still could not return to any of Quist's past work, which would require climbing and being around hazardous conditions. (*Id.*)

The VE stated the individual would be able to perform safe, medium-duty, unskilled jobs. He gave the example of a laundry worker who folds and sorts clothes, and noted such jobs would be available in large hospitals and other establishments, with estimated numbers of 7,000 to 8,000 in the regional economy. (R. 239)

The VE stated the individual also could perform the full range of light-duty, unskilled jobs. (*Id.*)

5. The ALJ's decision

The ALJ found Quist had not engaged in substantial gainful activity since August 13, 2001, his alleged disability onset date. (R. 22, ¶ 2; *but see* R. 13, where ALJ noted record evidence was insufficient to make finding as to SGA) He found Quist had "a severe impairment diagnosed as intractable partial epilepsy with reported secondarily generalized seizures once or twice a year despite use of medication." (*Id.*, ¶ 3; *see* R. 17-20) He also found Quist had non-severe impairments of right eye blindness since birth, daily headaches, and incidental back pain requiring the use of medication and/or chiropractic treatment. (*Id.*, ¶ 3; *se* R. 11-16))

The ALJ found Quist's testimony regarding the presence and severity of his back pain and headaches to be less than fully credible, noting his subjective complaints were not

substantially supported by the medical evidence and opinion in the record. (R. 32, ¶ 4; *see* R. 14-17) Although the ALJ found Darla Miller's testimony to be credible, he noted her testimony did not support a finding of disability based on the RFC as determined by the ALJ. (R. 23, ¶ 4)

The ALJ determined that Quist had the residual functional capacity "to perform work-related activities at all exertional levels on a regular and sustained basis except for performing work at heights or around hazardous machinery," and without any exertional limitations. (*Id.*, ¶ 5) He found Quist could not perform his past relevant work, presumably because of the height and machinery restrictions. However, he found Quist could "make a vocational adjustment to jobs which are present in significant numbers in the regional and national economy" (i*d.*, ¶¶ 5-6), citing examples of hand packager, laundry worker, mail clerk, production assembler, and inspector/hand packager. (R. 21) The ALJ noted Quist's seizures do not occur "in such frequency or severity as to preclude the performance of basic work-related activities on a regular and sustained basis." (R. 21) As a result, the ALJ concluded Quist was not disabled at any time through March 31, 2003, the date of his decision. (R. 21, 23 ¶ 11)

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

Quist argues the ALJ should have given his testimony full weight, and erred in finding his testimony lacked credibility. He claims the medical evidence of record supports his claim that he is unable to work due to seizure activity. (Doc. No. 6) The Commissioner argues the ALJ assessed Quist's credibility properly, and in accordance with *Polaski*. (Doc. No. 7, pp. 12-15) The Commissioner further argues the ALJ properly assessed Quist's residual functional capacity. (*Id.*, pp. 16-17)

The court agrees the record contains evidence that Quist suffers from some type of seizure disorder. However, based on the medical evidence and Quist's own testimony, the court is unable to find substantial evidence that Quist has been unable to perform any type of substantial gainful activity since August 2001. The only restriction his doctors placed

on him was to avoid hazards such as machinery and heights. There is no tangible evidence that his seizure activity would have prevented him from working in any of a wide variety of jobs that do not involve those hazards.

The VE cautioned that frequent seizure activity could discourage employers from hiring Quist. On this record, however, there is no evidence other than Quist's testimony that he actually is suffering from frequent seizures. This is not to say further testing and evaluation might not reveal that he is having frequent seizure-like episodes, but the current record does not contain substantial evidence that Quist was disabled.

The court finds the ALJ properly assessed Quist's credibility based on the evidence of record, and the Commissioner's decision that Quist was not disabled should be affirmed.

V. CONCLUSION

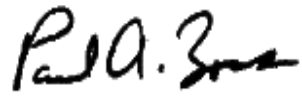
For the reasons discussed above, **IT IS RESPECTFULLY RECOMMENDED**, unless any party files objections[1] to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service

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

of a copy of this Report and Recommendation, that the Commissioner's decision be affirmed, and judgment be entered for the Commissioner and against Quist.[2]

IT IS SO ORDERED.

DATED this 16th day of June, 2004.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[2]NOTE: If the district court overrules this recommendation and final judgment is entered for the plaintiff, the plaintiff's counsel must comply with the requirements of Local Rule 54.2(b) in connection with any application for attorney fees.