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

SANDY RIDOUT,	*	
	*	4-00-CV-90603
Plaintiff,	*	
v.	*	
LARRY G. MASSANARI[1], Acting Commissioner of Social Security,	*	
	*	ORDER
Defendant.	*	

Plaintiff, Sandy Ridout, filed a Complaint in this Court on October 30, 2000, seeking review of the Commissioner's decision to deny her claim for Social Security benefits under Title II and Title XVI of the Social Security Act, 42 U.S.C. §§ 401 *et seq*. and 1381 *et seq*. This Court may review a final decision by the Commissioner. 42 U.S.C. § 405(g). For the reasons set out herein, the decision of the Commissioner is reversed.

BACKGROUND

Plaintiff filed applications for Social Security Disability Benefits on September 30, 1997, claiming to be disabled since January 1, 1997. Tr. at 385-87 & 592-94. After the applications were denied, initially and on reconsideration, Plaintiff requested a hearing before an Administrative Law Judge. A hearing was held before Administrative Law Judge John P.

1Larry G. Massanari became the Acting Commissioner of Social Security on March 29, 2001. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure [Rule 43(c)(2) of the Federal Rules of Appellate Procedure], Larry G. Massanari should be substituted, therefore, for Commissioner Kenneth S. Apfel, or for Acting Commissioner William A. Halter as the defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

Johnson (ALJ) on April 6, 1999. Tr. at 72-115. The ALJ issued a Notice Of Decision – Unfavorable on June 25, 1999. Tr. at 10-30. After the decision was affirmed by the Appeals Council on September 20, 2000, (Tr. at 12-14), Plaintiff filed a Complaint in this Court on October 30, 2000. On June 19, 2001, the Commissioner moved for a remand to allow for reconsideration of an opinion from a treating physician regarding the severity of Plaintiff's impairments. The doctor's report is in the record at page 591. Plaintiff resisted, arguing that substantial evidence on this record as a whole, including the aforementioned report, requires reversal with an award of benefits. The Court agrees with Plaintiff.

MEDICAL EVIDENCE

At the outset, the Court would note that it reviewed the entire 610 pages of this record a large percentage of which are inpatient and outpatient treatment records for alcoholism. In the opinion of the Court, a detailed summary of those records would add nothing to the ultimate opinion to be rendered in this case.

When Plaintiff made her applications for benefits, she stated that she became disabled, January 1, 1997. It should be noted that Plaintiff had made previous applications for benefits which had resulted in an award of benefits. When the Social Security Act was amended to exclude payment of benefits based on alcoholism and/or drug addiction, Plaintiff's benefits were terminated and she made her new applications. At the administrative hearing, Plaintiff amended her alleged onset of disability date to May 7, 1998. That date was chosen to coincide with Plaintiff's discharge from an alcohol treatment program some eleven months prior to the hearing after which Plaintiff had been abstinent. Tr. at 83. In his findings, the ALJ found that Plaintiff's severe impairments, included "a history of alcohol dependence," but he did not find that

alcoholism was a material contributing factor to a finding of disability. Therefore, in determining whether or not the Commissioner's final decision is supported by substantial evidence on the record as a whole, the Court, like the ALJ (*see* Tr. at 26), will consider the severity of Plaintiff's other severe impairments without consideration of alcoholism. About this, more will be said below.

At step two of the familiar five step sequential evaluation the ALJ found that Plaintiff has, in addition to the history of alcohol dependence, severe scoliosis of the thoracic spine, spasmodic torticollis and dysphonia, borderline IQ, and recurrent major depressive disorder. Tr. at 44.

On July 11, 1996, Joseph C. Pollpeter, M.D. wrote a letter of referral to Lynn Struck, M.D. Dr. Pollpeter stated that Plaintiff had "a rather remarkable spastic torticollis." Dr. Pollpeter asked Dr. Struck to evaluate Plaintiff for possible treatment with "Botox." Tr. at 464. When Plaintiff was seen by Dr. Struck on July 26, 1996, the doctor opined that Plaintiff would be an excellent candidate for botulinum toxin injections and, after obtaining the necessary consent forms, proceeded to administer the first treatment. Tr. at 467. On November 7, 1996, Plaintiff saw Steven R. Herwig, D.O. of Iowa ENT. Plaintiff told Dr. Herwig that she had been having progressively worse problems with the voice for the previous twelve years. She said that she becomes short of breath if she speaks for an extended period of time. The doctor wrote that Plaintiff had a "strained and strangled quality to her voice. Tr. at 471.

On November 13, 1997, Plaintiff saw Michael J. Luttrell, M.S., licensed psychologist. Tr. at 498-500. On mental status examination, Mr. Luttrell observed that Plaintiff appeared older than her stated age, and that the deformity of neck was quite noticeable. "[H]er neck is not

centered between her shoulders and seems to be off line to the left. She frequently will hold her head, then, to the right, reportedly to relieve the strain on her muscles. She talks in a rather breathless manner and her voice quavers as if she does not get enough air support," wrote Mr. Luttrell. Tr. at 499.

Plaintiff saw Rodney R. Carlson, M.D. for a physical examination on November 21, 1997. Tr. at 504-08. On examination, the doctor wrote:

> The patient would become very spastic involving her head and neck. She had a marked spastic torticollis with her head shifted towards her left. The neck movements are almost constant and exaggerated with speaking. ... She has a very strangulated quality to her speech with whisper qualities superimposed with many breaks in the speech pattern. This apparently can be correlated with a spasm of the pharyngeal muscles. ... Patient had an obvious scoliosis with the superior portion of the spinedirected towards the right. The scoliosis appears to involve primarily the thoracic spine.

Tr. at 505. The doctor concluded his report: "Her main problem appears to be the spastic dystonia and the spasticity of the neck and head due to the torticollis both of which would cause a significant inability to be gainfully employed." Tr. at 506.

Plaintiff saw Mr. Luttrell for a second psychological evaluation on July 17, 1998. Tr. at 545-48. Plaintiff reported worsening depressive symptoms since the previous interview with Mr. Luttrell:

> Sandy reports, however, that since she was last seen, she became increasingly discouraged in part because she was served with divorce papers, continued to have to live with her parents, and was turned down for disability. She indicates that she found that she began to have increasing feelings of hopeless and worthlessness. She began sleeping more, lost interest in activities, and basically felt like giving up. She noted significant problems with concentration because of worries about the problems, noticed that she lost her appetite and, subsequently lost about seven pounds. She also reports that she has not been interested in being with other people. She had reportedly

> stopped drinking when seen by the undersigned in 1997. She reports that she began drinking again since that time. Towards the middle of June of 1998 she was again drinking and went on about a one-week binge in which she was drinking so much that she believes that she was unaware of just how much she was drinking. She reportedly began threatening suicide to her parents and was subsequently committed. She indicates that when she was admitted to the Ellsworth Municipal Hospital psychiatric unit, she had a 0.4 alcohol level. She spent five days at the Ellsworth Hospital in Iowa Falls and was released on June 29. She indicates that the doctor placed her on Paxil 20 mg. and Antabuse. She is no longer drinking. She reports that she no longer has the suicidal ideations but she reports continued depressive symptoms outlined above.

Tr. at 545-46. Among the other diagnoses, Mr. Luttrell opined that Plaintiff suffers from major depression, possibly recurrent. Tr. at 547.

Plaintiff received treatment at the Mental Health Center of Mid-Iowa between July 9, 1998 and January 11, 1999. Tr. at 550-66. The initial interview, dated July 9, 1998, states that the current treatment episode was the fifth time Plaintiff had received treatment at the Center. Tr. at 564. Although Nancy Veldey, M.A., Mental Health Counselor and Mark Smith, A.C.S.W., Licensed Independent Social Worker/Supervisor, both of whom signed the report, were of the opinion that Plaintiff's alcohol dependence was the primary problem, they also opined that Plaintiff was experiencing chronic pain which was significant and which was impacting her mood and ability to function. Tr. at 565. Plaintiff saw Douglas F. Steenblock, M.D. for a psychiatric evaluation on July 28, 1998. Tr. at 558-60. Dr. Steenblock agreed that although alcoholism was a "major factor in her mood state," it appeared that she was suffering from recurrent major depressive disorder. Discussing Plaintiff's ability to work in spite of the severe scoliosis with spasmodic dysphonia and spasmodic torticollis, the doctor wrote: "It looks to me, however, that it would be very difficult for her to work in most job settings, given her

neurological impairments." Tr. at 559.

Plaintiff was seen for a neurological examination by Michael J. Stein, D.O. on July 13, 1998. Tr. at 567-70. After his examination, the doctor opined that in spite of her ability to lift 20 or 30 pounds as well as stand, walk and sit, Plaintiff "...would have difficulty with gainful employment due to her severe spasticity of her neck and her difficulty with speech." Tr. at 569.

On September 29, 1998, when Plaintiff was seen at the University of Iowa, Robert L. Rodnitzky, M.D. noted marked laterocollis to the right and the right shoulder was markedly elevated. The doctor observed mild torticollis to the left and that the right trapezius and the right levator scapulae muscles were in spasm. The doctor also noted that Plaintiff had a prominent abductor spasmatic dysphonia. Plaintiff was treated with injections of botulinum toxin. Tr. at 571.

John F. Tedesco, Ph.D. reviewed the records for Disability Determination Services and completed a Psychiatric Review Technique Form. Tr. at 574-83. Dr. Tedesco opined that Plaintiff's case should be evaluated with the following conditions in mind: Organic Mental disorders; affective disorders; and, substance addiction disorders. Tr. at 574. On the portion of the form denominated "Rating of Impairment of Severity," Dr. Tedesco determined that Plaintiff was moderately limited in restriction of activities of daily living and difficulties in maintaining social functioning. He opined that Plaintiff frequently had deficiencies of concentration, persistence and pace resulting in failure to complete tasks in a timely manner. Finally, he opined that Plaintiff once or twice had episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms which may include deterioration of adaptive behaviors. Tr. at 581. Dr.

Tedesco also completed a mental residual functional capacity assessment form. Tr. at 584-89. On this form, he found that Plaintiff was moderately limited in several domains among which was the ability to maintain attention and concentration for extended periods of time (Tr. at 584) and the ability to accept instructions and respond appropriately to criticism from supervisors (Tr. at 585). The doctor opined that Plaintiff is markedly limited in her ability to perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances. Tr. at 584. He also opined that Plaintiff is markedly limited in her ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods. Tr. at 585. At the conclusion of the report, Dr. Tedesco wrote that absent consideration of alcohol dependence, none of Plaintiff's impairments would reach the marked level of severity. Tr. at 589.

Plaintiff returned to the University of Iowa on February 18, 1999, where she was seen by Dr. Rodnitzky for more injections of botulinum toxin. Tr. at 590. On April 8, 1999, Dr. Rodnitzky wrote a report in which he stated that torticollis is usually a very painful condition which is relieved by recumbency. He said that while botulinum toxin injections relieve the discomfort to a certain extent, they do not always last the entire duration of time between shots. He said that it is reasonable to expect Plaintiff's need to lie down to relieve her pain. Finally, the doctor stated that patients with torticollis often have arm pain which can limit the function of the affected extremity. Tr. at 591.

ADMINISTRATIVE HEARING

On April 5, 1999, Plaintiff appeared with counsel at an administrative hearing. After

Plaintiff testified, the ALJ called Roger Marquardt to testify as a vocational expert. Tr. at 102. The ALJ asked the following hypothetical question:

> ... The first assumption is that we have an individual who is 42 years old. She was 40 years old as of the alleged onset date of disability. She's a female, she has a high school education and past relevant work as you've indicated in Exhibit 17E (Tr. at 454) and she has the following impairments: she has scoliosis of the thoracic spine, spasmodic torticollis and dysphonia, borderline intelligence, recurrent major depressive disorder and a history of alcohol dependency. And as a result of a combination of those impairments she has the residual functional capacity as follows: she cannot lift more than 20 to 30 pounds, routinely lift ten pounds, with no repetitive bending or twisting of the neck, this individual should not work at unprotected heights or in the presence of excessive cold, she should not perform any work requiring more than occasional clear speech. She is able to do only simple routine repetitive work, which does not involve the use of independent judgement and does not require constant attention to detail. She does require occasional supervision. She should not work at more than a regular pace and she should not work at more than a mild to moderate level of stress. Would this individual be able to perform any jobs she previously work at either as she performed it or as it is generally performed within the national economy?

Tr. at 106. In response, the vocational expert testified that Plaintiff would be able to do her past relevant work as a delivery driver and as a fast food worker.

The ALJ asked a second hypothetical which limited Plaintiff, among other things, to lifting ten pounds, standing more than 20 minutes, walking more than 10 to 15 feet, or sitting for more than a half hour. The second hypothetical also included the proviso that Plaintiff should not perform work which requires more than occasional clear speech or work at more than a mild level of stress. The vocational expert testified that under this hypothetical, Plaintiff would not be able to do her past relevant work (Tr. at 107), but that unskilled work would exist which could be done given the limitations. Tr. at 108-09. When asked if there were other factors which would affect the ability to work, the vocational expert testified that if Plaintiff needs to lie down to

relieve her pain, no work is possible. Tr. at 109.

ALJ'S DECISION

In his decision, following the familiar five step sequential evaluation (*see* 20 C.F.R. § 404.15), the ALJ found that Plaintiff had not worked since her amended alleged onset of disability date, May 7, 1998. At the second step, the ALJ found Plaintiff's severe impairments are severe scoliosis of the thoracic spine, spasmodic torticollis and dysphonia, borderline IQ, recurrent major depressive disorder and a history of alcohol dependence. The ALJ found that none of Plaintiff's impairments meet or equal a listed impairment. Tr. at 44. At the fourth step, the ALJ found that Plaintiff is able to return to her past relevant work as a delivery driver, and therefore, not disabled. Tr. at 45. The ALJ found that Plaintiff's residual functional capacity was consistent with his first hypothetical question to the vocational expert. Tr. at 44. The ALJ, therefore, held that Plaintiff was not disabled nor entitled to the benefits for which she applied. Tr. at 45.

DISCUSSION

> The scope of this Court's review is whether the decision of the Secretary in denying disability benefits is supported by substantial evidence on the record as a whole. 42 U.S.C. § 405(g). *See Lorenzen v. Chater*, 71 F.3d 316, 318 (8th Cir. 1995). Substantial evidence is less than a preponderance, but enough so that a reasonable mind might accept it as adequate to support the conclusion. *Pickney v. Chater*, 96 F.3d 294, 296 (8th Cir. 1996). We must consider both evidence that supports the Secretary's decision and that which detracts from it, but the denial of benefits shall not be overturned merely because substantial evidence exists in the record to support a contrary decision. *Johnson v. Chater*, 87 F.3d 1015, 1017 (8th Cir. 1996)(citations omitted). When evaluating contradictory evidence, if two inconsistent positions are possible and one represents the Secretary's findings, this Court must affirm. *Orrick v. Sullivan*, 966 F.2d 368, 371 (8th Cir. 1992)(citation omitted).

Fenton v. Apfel, 149 F.3d 907, 910-11 (8th Cir. 1998).

In short, a reviewing court should neither consider a claim de novo, nor abdicate its function to carefully analyze the entire record. *Wilcutts v. Apfel*, 143 F.3d 1134, 136-37 (8th Cir. 1998) citing *Brinker v. Weinberger*, 522 F.2d 13, 16 (8th Cir. 1975).

Prior to the application for benefits which is the subject of the current litigation, Plaintiff had been awarded benefits which were terminated in January of 1997 due to amendments to the Social Security Act which provides that benefits are not to be given where alcoholism or drug addiction is a contributing factor material to a determination of disability. In *Jackson v. Apfel*, 162 F.3d 533, 537 (8th Cir. 1998), the Court wrote that the regulations implementing the amendments, found at 20 C.F.R. § 404.1535, spell out a test that focuses on what physical and mental limitations remain if the claimant stopped using alcohol or drugs. In the case at bar, as in *Jackson*, Plaintiff testified that she stopped drinking contemporaneous with her amended alleged onset of disability date. There is no evidence to the contrary, and the ALJ did not find that alcoholism was a contributing factor material to the determination of disability in the current application. The Court, therefore, will proceed with its analysis of whether the final decision of the Commissioner is supported by substantial evidence on the record as a whole.

The ALJ stopped the sequential evaluation after finding, at the fourth step, that Plaintiff is able to do her past relevant work. In *Pfitzner v. Apfel*, 169 F.3d 566, 568 (8th Cir. 1999), the Court wrote:

> "An ALJ's decision that a claimant can return to his past work must be based on more than conclusory statements. The ALJ must specifically set forth the claimant's limitations, both physical and mental, and determine how those limitations affect the claimant's residual functional capacity." *Groeper v. Sullivan*, 932 F.2d 1234, 1238-39 (8th Cir. 1991). The Administration's own interpretation

> of the regulations reflects this need for specificity. The determination that a "claimant retains the functional capacity to perform past work ... has far-reaching implications and must be developed and explained fully in the disability decision." S.S.R. No. 82-62, 1992 WL 31386, *3 (Ruling 82-62). *See also Sells v. Shalala*, 48 F.3d 1044, 1046 (8th Cir. 1995)(discussing Ruling 82-62, that "[a] conclusory determination that the claimant can perform past work, without these findings, does not constitute substantial evidence that the claimant is able to return to his [or her] past work'" *Id.* (quoting *Groeper*, 932 F.2d at 1239.

In *McCoy v. Schweiker*, 683 F.2d 1138, 1147 (8th Cir.1982)(en banc), Judge, later Chief Judge, Richard Arnold wrote that the most important issue in the evaluation of a disability claim is the determination of residual functional capacity. This, wrote Judge Arnold, "... is not the ability merely to lift weights occasionally in a doctor's office; it is the ability to perform the requisite physical acts day in and day out, in the sometimes competitive and stressful conditions in which real people work in the real world." In *Ford v. Secretary of Health and Human Services*, 662 F.Supp. 954, 955 (W.D. Arkansas 1987), Judge Arnold, sitting by designation as a District Judge, wrote that residual functional capacity is a medical question.

In the case at bar, there is no question that Plaintiff suffers from painful disorders of her cervical and thoracic spine, namely scoliosis and spasmodic torticollis. After his examination of Plaintiff, Dr. Stein opined that she could "perhaps" lift 20 or 30 pounds maximum. He was quick to add, however, that while Plaintiff is able to stand, move about, walk and sit, it would be difficult for her to do it for eight hours per day. Dr. Stein wrote: "I feel that this patient would have difficulty with gainful employment due to her severe spasticity of her neck and her difficulty with speech." Tr. at 569. Likewise, all of the other treating and examining doctors commented on the difficulty Plaintiff would have working consistently due to the severity of her impairments. Dr. Rodnitzky, a treating physician and the physician whose report the

Commissioner asks to have considered in remand proceedings, made it very clear that in spite of some relief by the botulinum toxin injections, it is quite reasonable to expect that Plaintiff needs to lie down for relief of her pain. The need to lie down, according to the testimony of the vocational expert when he was asked to comment on other factors in the record, eliminates the possibility of competitive employment.

In the opinion of the Court, the ALJ's hypotheticals did not capture the concrete consequences of Plaintiff's impairments because it assumed that Plaintiff is able to perform the elements of the hypothetical on a consistent basis. That assumption is not valid and not supported by the bulk of the medical evidence in this voluminous record. The testimony of the vocational expert in response to the hypothetical upon which the ALJ relied, therefore, was not substantial evidence upon which to base a denial of disability benefits. *See Taylor v. Chater*, 118 F.3d 1274, 1278-79 (8th Cir. 1997).

In addition to the aforementioned physical impairments, Plaintiff suffers from severe recurrent major depression. As noted above, the psychologist who reviewed the medical records found that there are moderate limitations in several significant domains such as the ability to work full days or full weeks. As the Court noted in *Rhines v. Harris*, 634 F.2d 1076, 1079 (8th Cir. 1980): "Employers are concerned with substantial capacity, psychological stability, and steady attendance." Just as in *Rhines*, it is the opinion of this Court that it is unrealistic to think that anyone would hire an applicant with the impairments of this Plaintiff, or that she can realistically perform in existing employment.

Where the ALJ's decision that Plaintiff can return to past relevant work is not supported by substantial evidence on the record as a whole, remand is often the appropriate remedy. *See*

Pfitzner v. Apfel, 169 F.3d at 569. In *Gavin v. Heckler*, 811 F.2d 1195, 1201 (8th Cir. 1987), however, the Court wrote: "Ordinarily, where the Secretary has incorrectly allocated the burden of proof based upon an erroneous finding that the claimant can return to his prior work, we will remand for further proceedings. However, where the total record is overwhelmingly in support of a finding of disability and the claimant has demonstrated his disability by medical evidence on the record as a whole, we find no need to remand." In the case at bar, substantial evidence on the record as a whole supports only one conclusion – Plaintiff is not able to work at her past work or any other work that exists in the national economy and is, therefore, disabled and entitled to the benefits for which she applied.

CONCLUSION AND DECISION

The Court holds that Commissioner's decision is not supported by substantial evidence on the record as a whole. The Court finds that the evidence in this record is transparently one sided against the Commissioner's decision. *See Bradley v. Bowen*, 660 F.Supp. 276, 279 (W.D. Arkansas 1987). The medical evidence from both treating and examining sources as well as the doctors who reviewed the medical records and opined regarding Plaintiff's mental status, establishes that a combination of Plaintiff's impairments is of a severity which entitles Plaintiff to a finding of disability at step five of the sequential evaluation. A remand to take additional evidence would only delay the receipt of benefits to which Plaintiff is clearly entitled. Therefore, reversal with an award of benefits is the appropriate remedy. *Parsons v. Heckler*, 739 F.2d 1334, 1341 (8th Cir. 1984).

Defendant's motion to remand the case for further evidentiary proceedings is denied. **This cause is remanded to the Commissioner for computation and payment of benefits.**

The judgment to be entered will trigger the running of the time in which to file an application for attorney's fees under 28 U.S.C. § 2412 (d)(1)(B) (Equal Access to Justice Act). *See Shalala v. Schaefer*, 509 U.S. 292 (1993). *See also*, *McDannel v. Apfel*, 78 F.Supp.2d 944 (S.D. Iowa 1999) (discussing, among other things, the relationship between the EAJA and fees under 42 U.S.C. § 406 B), and LR 54.2(b).

IT IS SO ORDERED.

Dated this ___6th___ day of July, 2001.

Robert W. Pratt

ROBERT W. PRATT
U.S. DISTRICT JUDGE