

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF ARKANSAS  
FORT SMITH DIVISION

BECKY CLARK

PLAINTIFF

vs.

Civil No. 2:14-cv-02150

CAROLYN W. COLVIN  
Commissioner, Social Security Administration

DEFENDANT

**MEMORANDUM OPINION**

Becky Clark (“Plaintiff”) brings this action pursuant to § 205(g) of Title II of the Social Security Act (“The Act”), 42 U.S.C. § 405(g) (2010), seeking judicial review of a final decision of the Commissioner of the Social Security Administration (“SSA”) denying her application for Disability Insurance Benefits (“DIB”) and a period of disability under Title II of the Act.

The Parties have consented to the jurisdiction of a magistrate judge to conduct any and all proceedings in this case, including conducting the trial, ordering the entry of a final judgment, and conducting all post-judgment proceedings. ECF No. 6.<sup>1</sup> Pursuant to this authority, the Court issues this memorandum opinion and orders the entry of a final judgment in this matter.

**1. Background:**

Plaintiff protectively filed her disability application on November 14, 2011. (Tr. 28). In her application, Plaintiff alleges being disabled due to diabetes, residuals from a stroke, shoulder pain, depression, carpal tunnel syndrome, and heart problems. (Tr. 117). Plaintiff alleges an onset date of March 9, 2010. (Tr. 28). This application was denied initially and again upon reconsideration. (Tr. 123-125).

Thereafter, Plaintiff requested an administrative hearing on her denied application, and this

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<sup>1</sup> The docket numbers for this case are referenced by the designation “ECF No. \_\_\_\_.” The transcript pages for this case are referenced by the designation “Tr.”

hearing request was granted. (Tr. 134-144). On February 8, 2013, the ALJ held this administrative hearing. (Tr. 84-122). This hearing was held in Fort Smith, Arkansas. *Id.* Plaintiff was present and was represented by Fred Caddell at this hearing. *Id.* Plaintiff and Vocational Expert (“VE”) Donna Humphries testified at this hearing. *Id.*

After this hearing, on February 8, 2013, the ALJ entered an unfavorable decision denying Plaintiff’s application for DIB. (Tr. 25-37). In this decision, the ALJ found Plaintiff met the insured status requirements of the Act on June 30, 2012. (Tr. 30, Finding 1). The ALJ determined Plaintiff had not engaged in Substantial Gainful Activity (“SGA”) from her alleged onset date of March 9, 2010 through her date last insured of June 30, 2012. (Tr. 30, Finding 2). The ALJ determined Plaintiff had the following severe impairments through her date last insured: insulin dependent diabetes mellitus, cerebral vascular accident (“CVA”), a bilateral shoulder surgery, pain in her left leg, pain in her knees, medication side effects, gastroesophageal reflux disease (“GERD”), fibromyalgia, and depression. (Tr. 30, Finding 3). However, the ALJ also determined Plaintiff’s impairments did not meet or medically equal the requirements of any of the Listings of Impairments in Appendix 1 to Subpart P of Regulations No. 4 (“Listings”). (Tr. 30-32, Finding 4).

The ALJ determined Plaintiff was fifty-three (53) years old, which is defined as a “person closely approaching advanced age” under 20 C.F.R. § 404.1563(d) (2008). (Tr. 35, Finding 7). As far as her education, the ALJ also determined Plaintiff had at least a high school education and was able to communicate in English. (Tr. 36, Finding 8).

In this decision, the ALJ evaluated Plaintiff’s subjective complaints and determined her RFC. (Tr. 32-35, Finding 5). First, the ALJ evaluated Plaintiff’s subjective complaints and found her claimed limitations were not entirely credible. *Id.* Second, the ALJ determined Plaintiff retained the RFC to perform the following:

After careful consideration of the entire record, the undersigned finds that, through the date last insured, the claimant had the residual functional capacity to perform light work as defined in 20 CFR 404.1567(b) except she could occasionally reach (including overhead reach) on a bilateral basis. She could operate foot controls frequently on the left. She must avoid even moderate exposure to hazardous machinery. She was able to perform work where interpersonal contact is incidental to the work performed; the complexity of tasks is learned and performed by rote, with few variables and little judgment; and the supervision required is simple, direct, and concrete. Due to the side effects of medication in combination with medical conditions and mental impairments, she would have one (1) unexcused/unscheduled absence per month on a consistent basis.

*Id.*

The ALJ evaluated Plaintiff's Past Relevant Work ("PRW") and found Plaintiff had no PRW she could perform. (Tr. 35, Finding 6). The ALJ then determined whether Plaintiff retained the capacity to perform other work existing in significant numbers in the national economy. (Tr. 36-37, Finding 10). The VE testified at the administrative hearing regarding this issue. *Id.* Considering her age, education, work experience, and RFC, the ALJ determined Plaintiff retained the capacity to perform the following representative occupation: machine tender with 1,500 such jobs in Arkansas and 75,000 such jobs in the national economy. (Tr. 36). Because Plaintiff retained the capacity to perform this other work, the ALJ determined Plaintiff had not been under a disability, as defined in the Act, from her amended alleged onset date of March 9, 2010 through her date last insured of June 30, 2012. (Tr. 37, Finding 11).

Thereafter, Plaintiff requested the Appeals Council's review of the ALJ's unfavorable decision. (Tr. 23). On June 4, 2014, the Appeals Council denied this request for review. (Tr. 1-3). Plaintiff then filed the present appeal on July 3, 2014. ECF No. 1. The Parties consented to the jurisdiction of this Court on July 10, 2014. ECF No. 6. This case is now ready for decision.

## 2. Applicable Law:

In reviewing this case, this Court is required to determine whether the Commissioner's findings are supported by substantial evidence on the record as a whole. *See* 42 U.S.C. § 405(g) (2006); *Ramirez v. Barnhart*, 292 F.3d 576, 583 (8th Cir. 2002). Substantial evidence is less than a preponderance of the evidence, but it is enough that a reasonable mind would find it adequate to support the Commissioner's decision. *See Johnson v. Apfel*, 240 F.3d 1145, 1147 (8th Cir. 2001). As long as there is substantial evidence in the record that supports the Commissioner's decision, the Court may not reverse it simply because substantial evidence exists in the record that would have supported a contrary outcome or because the Court would have decided the case differently. *See Haley v. Massanari*, 258 F.3d 742, 747 (8th Cir. 2001). If, after reviewing the record, it is possible to draw two inconsistent positions from the evidence and one of those positions represents the findings of the ALJ, the decision of the ALJ must be affirmed. *See Young v. Apfel*, 221 F.3d 1065, 1068 (8th Cir. 2000).

It is well-established that a claimant for Social Security disability benefits has the burden of proving his or her disability by establishing a physical or mental disability that lasted at least one year and that prevents him or her from engaging in any substantial gainful activity. *See Cox v. Apfel*, 160 F.3d 1203, 1206 (8th Cir. 1998); 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act defines a "physical or mental impairment" as "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. §§ 423(d)(3), 1382(3)(c). A plaintiff must show that his or her disability, not simply his or her impairment, has lasted for at least twelve consecutive months. *See* 42 U.S.C. § 423(d)(1)(A).

To determine whether the adult claimant suffers from a disability, the Commissioner uses the familiar five-step sequential evaluation. He determines: (1) whether the claimant is presently engaged in a “substantial gainful activity”; (2) whether the claimant has a severe impairment that significantly limits the claimant’s physical or mental ability to perform basic work activities; (3) whether the claimant has an impairment that meets or equals a presumptively disabling impairment listed in the regulations (if so, the claimant is disabled without regard to age, education, and work experience); (4) whether the claimant has the Residual Functional Capacity (RFC) to perform his or her past relevant work; and (5) if the claimant cannot perform the past work, the burden shifts to the Commissioner to prove that there are other jobs in the national economy that the claimant can perform. *See Cox*, 160 F.3d at 1206; 20 C.F.R. §§ 404.1520(a)-(f). The fact finder only considers the plaintiff’s age, education, and work experience in light of his or her RFC if the final stage of this analysis is reached. *See* 20 C.F.R. §§ 404.1520, 416.920 (2003).

### **3. Discussion:**

In his appeal brief, Plaintiff raises the following three arguments for reversal: (1) the ALJ erred by failing to fully and fairly develop the record; (2) the ALJ erred in assessing her credibility; (3) the ALJ erred in assessing her RFC; and (4) the ALJ erred in evaluating her treating physician’s medical source statement. ECF No. 8 at 1-20. Because the ALJ improperly evaluated her subjective complaints, the Court will only address Plaintiff’s second argument for reversal.

In assessing the credibility of a claimant, the ALJ is required to examine and to apply the five factors from *Polaski v. Heckler*, 739 F.2d 1320 (8th Cir. 1984) or from 20 C.F.R. § 404.1529 and 20 C.F.R. § 416.929.<sup>2</sup> *See Shultz v. Astrue*, 479 F.3d 979, 983 (2007). The factors to consider are

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<sup>2</sup> Social Security Regulations 20 C.F.R. § 404.1529 and 20 C.F.R. § 416.929 require the analysis of two additional factors: (1) “treatment, other than medication, you receive or have received for relief of

as follows: (1) the claimant's daily activities; (2) the duration, frequency, and intensity of the pain; (3) the precipitating and aggravating factors; (4) the dosage, effectiveness, and side effects of medication; and (5) the functional restrictions. *See Polaski*, 739 at 1322.

The factors must be analyzed and considered in light of the claimant's subjective complaints of pain. *See id.* The ALJ is not required to methodically discuss each factor as long as the ALJ acknowledges and examines these factors prior to discounting the claimant's subjective complaints. *See Lowe v. Apfel*, 226 F.3d 969, 971-72 (8th Cir. 2000). As long as the ALJ properly applies these five factors and gives several valid reasons for finding that the Plaintiff's subjective complaints are not entirely credible, the ALJ's credibility determination is entitled to deference. *See id.*; *Cox v. Barnhart*, 471 F.3d 902, 907 (8th Cir. 2006). The ALJ, however, cannot discount Plaintiff's subjective complaints "solely because the objective medical evidence does not fully support them [the subjective complaints]." *Polaski*, 739 F.2d at 1322.

When discounting a claimant's complaint of pain, the ALJ must make a specific credibility determination, articulating the reasons for discrediting the testimony, addressing any inconsistencies, and discussing the *Polaski* factors. *See Baker v. Apfel*, 159 F.3d 1140, 1144 (8th Cir. 1998). The inability to work without some pain or discomfort is not a sufficient reason to find a Plaintiff disabled within the strict definition of the Act. The issue is not the existence of pain, but whether the pain a Plaintiff experiences precludes the performance of substantial gainful activity. *See Thomas v. Sullivan*, 928 F.2d 255, 259 (8th Cir. 1991).

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your pain or other symptoms" and (2) "any measures you use or have used to relieve your pain or symptoms (e.g., lying flat on your back, standing for 15 to 20 minutes every hour, sleeping on a board, etc.)." However, under *Polaski* and its progeny, the Eighth Circuit has not yet required the analysis of these additional factors. *See Shultz v. Astrue*, 479 F.3d 979, 983 (2007). Thus, this Court will not require the analysis of these additional factors in this case.

In the present action, the ALJ did not comply with the requirements of *Polaski*. (Tr. 32-35). Instead of complying with its requirements, the ALJ did what is *specifically* prohibited by *Polaski* and discounted Plaintiff's subjective complaints because they were not supported by her objective medical records:

In sum, the above residual functional capacity assessment is supported by the medical record as a whole. *As for the claimant's testimony, the undersigned finds it is not consistent with the medical evidence as a whole and is discounted to that extent.*

(Tr. 35) (emphasis added). This was entirely improper under *Polaski*. See *Polaski*, 739 F.2d at 1322 (holding a claimant's subjective complaints cannot be discounted "solely because the objective medical evidence does not fully support them [the subjective complaints]"). Indeed, *Polaski* prohibits this exact practice of evaluating a claimant's RFC based upon the medical evidence alone. Accordingly, because the ALJ provided no valid reasons for discounting Plaintiff's subjective complaints, this case must be reversed and remanded.

**4. Conclusion:**

Based on the foregoing, the undersigned finds that the decision of the ALJ, denying benefits to Plaintiff, is not supported by substantial evidence and should be reversed and remanded.<sup>3</sup> A judgment incorporating these findings will be entered pursuant to Federal Rules of Civil Procedure 52 and 58.

**ENTERED this 23<sup>rd</sup> day of April 2015.**

/s/ Barry A. Bryant  
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HON. BARRY A. BRYANT  
U. S. MAGISTRATE JUDGE

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<sup>3</sup> This remand is ordered solely for the purpose of permitting the ALJ the opportunity to comply with the requirements of *Polaski*. No part of this remand should be interpreted as an instruction that disability benefits be awarded. Upon remand, the ALJ should further evaluate the evidence and make a disability determination, subject to this Court's later review.