

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

KATHY BALLARD

PLAINTIFF

vs.

Civil No. 6:08-cv-06047

MICHAEL J. ASTRUE

DEFENDANT

Commissioner, Social Security Administration

MEMORANDUM OPINION

Kathy Ballard (“Plaintiff”) brings this action pursuant to § 205(g) of Title II of the Social Security Act (“The Act”), 42 U.S.C. § 405(g) (2006), seeking judicial review of a final decision of the Commissioner of the Social Security Administration (“SSA”) denying her application for Disability Insurance Benefits (“DIB”) 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. (Doc. No. 4).¹ Pursuant to this authority, the Court issues this memorandum opinion and orders the entry of a final judgment in this matter.

1. Background:

Plaintiff filed her application for DIB on February 9, 2005. (Tr. 48). Plaintiff alleged she was disabled due to asthma and arthritis in the neck, shoulders, arms, lower back, and hips. (Tr. 72). Plaintiff alleged an onset date of October 12, 2002. (Tr. 73). These applications were initially denied on May 23, 2005 and were denied again on reconsideration on November 28, 2005. (Tr. 33-

¹ The docket numbers for this case are referenced by the designation “Doc. No.” The transcript pages for this case are referenced by the designation “Tr.”

39). On October 13, 2006, Plaintiff requested an administrative hearing on her application. (Tr. 28-29). The hearing was held on March 7, 2007, in Hot Springs, Arkansas. (Tr. 225-258). Plaintiff was present and represented by counsel Shannon Carroll, at this hearing. *See id.* Plaintiff, Plaintiff's witness Lynette O'Neil, and Vocational Expert ("VE") Nancy Hughes testified at this hearing. *See id.* On the date of the hearing, Plaintiff was fifty-four (54) years old, which is defined as a "person closely approaching advanced age, 20 C.F.R. § 404.1563(d) (2008), and had a twelfth grade education. (Tr. 228-229).

On February 4, 2008, the ALJ entered an unfavorable decision denying Plaintiff's request for DIB. (Tr. 12-20). In this decision, the ALJ determined Plaintiff had not engaged in Substantial Gainful Activity ("SGA") since her alleged onset date, October 12, 2002. (Tr. 14, Finding 2). The ALJ determined Plaintiff had the severe impairments of degenerative disc disease of the cervical spine, arthritis of the knees, and asthma. (Tr. 14, Finding 3). The ALJ also determined the Plaintiff did not have an impairment or combination of impairments that met or medically equaled one of the listed impairments contained in the Listing of Impairments in Appendix 1 to Subpart P of Regulations No. 4 ("Listings"). (Tr. 14, Finding 4).

In this decision, the ALJ indicated he evaluated Plaintiff's subjective complaints and determined her Residual Functional Capacity ("RFC"). (Tr. 15-18, Finding 5). The ALJ stated he evaluated these subjective complaints and allegedly disabling symptoms pursuant to the requirements and factors of *Polaski v. Heckler*, 739 F.2d 1320 (8th Cir. 1984), 20 C.F.R. § 404.929 and 20 C.F.R. § 404.1529(c). (Tr. 15). The ALJ found that Plaintiff's claimed limitations were not totally credible. (Tr.16).

The ALJ also reviewed all the medical evidence and hearing testimony and determined Plaintiff's RFC. (Tr. 16-18, Finding 5). Specifically, the ALJ determined Plaintiff retained the

following RFC:

After careful consideration of the entire record, the undersigned finds that, through the date last insured, the claimant had the residual functional capacity to lift and carry 10 pounds frequently, 20 pounds occasionally; to stand and walk for six hours and to sit for six hours out of an eight hour day; to push and pull within the limits of lifting and carrying; to engage in a full range of postural movements occasionally, with the exception of never climbing ropes, ladders or scaffolds; to manipulate in all directions frequently with the exception of only occasional overhead reaching; to see and communicate without restriction and to work within any environment with the exception of working around unprotected heights, moving machinery or operating automotive equipment.

(Tr. 15, Finding 5).

The ALJ then determined Plaintiff was unable to perform her Past Relevant Work (“PRW”). (Tr. 18, Finding 6). However, the ALJ also determined, considering her age, education, past work experience, and RFC, that there were other jobs existing in significant numbers in the national economy which Plaintiff would be able to perform. (Tr. 19, Finding 10). Specifically, the ALJ found Plaintiff would be able to perform a job such as an office helper with 1,000 such jobs in Arkansas and 20,000 such jobs in the United States, as a fast food worker with 20,000 such jobs in Arkansas and 2,000,000 such jobs in the United States, and as a retail sales attendant with 22,000 such jobs in Arkansas and 2,000,000 such jobs in the United States. (Tr. 20). After making this finding, the ALJ determined Plaintiff had not been under a disability, as defined by the Act, at any time from October 12, 2002 through September 26, 2007, the date last insured. (Tr. 20, Finding 11).

On February 19, 2008, Plaintiff requested the Appeals Council review the ALJ’s unfavorable decision. (Tr. 7-8). *See* 20 C.F.R. § 404.984(b)(2). On April 17, 2008, the Appeals Council declined to review this determination. (Tr. 4-6). On May 7, 2008, Plaintiff appealed the ALJ’s decision to this Court. (Doc. No. 1). Both parties have filed appeal briefs. (Doc. Nos. 7,8). The parties consented to the jurisdiction of this Court on May 20, 2008. (Doc. No. 4).

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 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 supporting 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 an 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:

Plaintiff brings the present appeal claiming the following: (A) the ALJ erred in his evaluation of Plaintiff’s subjective complaints, (B) the ALJ erred in not considering the effect of Plaintiff’s impairments in combination, and (C) the ALJ erred in his RFC determination. In response, Defendant argues: (A) the ALJ properly considered Plaintiff’s subjective complaints, (B) the ALJ considered the combined effects of Plaintiff’s impairments, and (C) the ALJ properly determined Plaintiff’s RFC.

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. § 416.929.² *See Shultz v. Astrue*, 479 F.3d 979, 983 (2007). The factors to consider are

² 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 your pain or other

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).

In the present action, the ALJ did not perform a *Polaski* analysis. Instead of evaluating the

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.

Polaski factors and noting inconsistencies between Plaintiff's subjective complaints and the evidence in the record, the ALJ merely evaluated the medical records and noted the following:

After considering the evidence of record, the undersigned finds that the claimant's medically determinable impairments could have been reasonably expected to produce the alleged symptoms, but that the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely credible.

(Tr. 16). The ALJ stated no inconsistencies between Plaintiff's subjective complaints and the record in this case. This lack of analysis is entirely insufficient under *Polaski*, and this case must be reversed and remanded for further consideration consistent with *Polaski*. Upon remand, the ALJ may still find Plaintiff not disabled, however a proper and complete analysis pursuant to *Polaski* must be performed.³

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. A judgment incorporating these findings will be entered pursuant to Federal Rules of Civil Procedure 52 and 58.

ENTERED this 31st day of August, 2009.

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

³Based on these findings, I do not find it necessary to reach to other points of error raised by the Plaintiff in this appeal.