

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

RICHARD L. ROWE

PLAINTIFF

vs.

Civil No. 6:08-cv-06079

MICHAEL J. ASTRUE  
Commissioner, Social Security Administration

DEFENDANT

**MEMORANDUM OPINION**

Richard L. Rowe (“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 his applications for a period of disability, Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI 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).<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 filed applications for DIB and SSI on May 9, 2005. (Tr. 54-57). Plaintiff alleged he was disabled due to a visual impairment, migraine headaches, and back pain. (Tr. 13, 82). Plaintiff alleged an onset date of January 15, 2004. (Tr. 54). This application was initially denied

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<sup>1</sup> 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.”

on July 19, 2005 and was denied again on reconsideration on September 27, 2005. (Tr. 40-44).

On October 5, 2005, Plaintiff requested an administrative hearing on his applications. (Tr. 39). This hearing was held on February 7, 2007 in Hot Springs, Arkansas. (Tr. 146-176). Plaintiff was present and was represented by counsel, Shannon Carroll, at this hearing. *See id.* Plaintiff, and Vocational Expert (“VE”) Millard Sales testified at this hearing. *See id.* On the date of this hearing, Plaintiff was thirty-one (31) years old, which is defined as a “younger person” under 20 C.F.R. § 404.1563(c) (2009), and had a high school education. (Tr. 150-151).

On May 12, 2007, the ALJ entered an unfavorable decision denying Plaintiff’s applications for DIB and SSI. (Tr. 11-19). The ALJ determined Plaintiff had not engaged in Substantial Gainful Activity (“SGA”) since January 15, 2004. (Tr. 13, Finding 2). The ALJ determined Plaintiff had the following severe impairments: reduced vision in the left eye, blindness in right eye, migraine headaches, and chronic back strain. (Tr. 13, Finding 3). The ALJ also determined, however, that Plaintiff did not have an impairment or a combination of impairments that met or medically equaled one of the listed impairments in the Listing of Impairments in Appendix 1 to Subpart P of Regulations No. 4 (“Listings”). (Tr. 15, Finding 4).

In this decision, the ALJ evaluated Plaintiff’s subjective complaints and determined his RFC. (Tr. 13-18). First, the ALJ evaluated Plaintiff’s subjective complaints pursuant to the requirements of *Polaski v. Heckler*, 739 F.2d 1320 (8th Cir. 1984) and found his claimed limitations were not totally credible. (Tr. 16-18). Second, the ALJ determined, based upon this review of Plaintiff’s subjective complaints, the hearing testimony, and the evidence in the record, that Plaintiff retained the RFC to perform a reduced range of medium work, which includes the ability to perform sedentary and light work activity. (Tr. 15, Finding 5).

The ALJ then evaluated Plaintiff's Past Relevant Work ("PRW") and his ability to perform that work and other work in the national economy. (Tr. 18, Finding 6). Plaintiff and the VE testified at the administrative hearing regarding these issues. (Tr. 152-155, 171-173). Based upon this testimony, the ALJ determined Plaintiff's PRW included work as a cart pusher, hall man (laundry worker), and as a cleaner. (Tr. 18). The ALJ determined, considering his RFC and the testimony by the VE, that Plaintiff retained the ability to perform his PRW as a hall man (laundry worker) and as a cleaner. (Tr. 18, Finding 6). Thereafter, the ALJ determined Plaintiff had not been under a disability as defined by the Act from January 15, 2004 through the date of his decision or through May 12, 2007. (Tr. 18, Finding 7).

On May 21, 2007, Plaintiff requested that the Appeals Council review the ALJ's unfavorable decision. (Tr. 6-7). *See* 20 C.F.R. § 404.968. On July 29, 2008, the Appeals Council declined to review the ALJ's unfavorable decision. (Tr. 3-5). On August 18, 2008, Plaintiff filed the present appeal. (Doc. No. 1). The parties consented to the jurisdiction of this Court on August 27, 2008. (Doc. No. 4). Both parties have filed appeal briefs. (Doc. Nos. 7,8). 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:**

Plaintiff brings the present appeal claiming the following: (A) the ALJ erred in his finding Plaintiff did not have an impairment or combination of impairments equal to one listed in 20 C.F.R. pt. 404, subpt. P, app. 1; (B) the ALJ erred in his evaluation of Plaintiff's subjective complaints, and (C) the ALJ erred in his RFC determination. In response, Defendant argues: (A) the ALJ properly considered Plaintiff's subjective complaints, and (B) the ALJ properly determined the Plaintiff's RFC. This Court will address each of Plaintiff's arguments.

#### **A. Listings**

The ALJ must determine whether Plaintiff has a severe impairment that significantly limits the physical or mental ability to perform basic work activities. A medically determinable impairment or combination of impairments is severe if it significantly limits an individual's physical or mental ability to do basic work activities. *See* 20 C.F.R. §§ 404.1521 and 416.921.

The ALJ found Plaintiff did suffer from impairments considered to be severe within the meaning of the Social Security regulations. These impairments included reduced vision in the left eye and essential blindness in right eye, migraine headaches, and chronic back strain. (Tr. 13, Finding 3). However, there was no substantial evidence in the record showing Plaintiff's condition was severe enough to meet or equal that of a listed impairment as set forth in the Listing of

Impairments. *See* 20 C.F.R. pt. 404, subpt. P, app.1. Plaintiff has the burden of establishing that his impairment(s) meet or equal an impairment set out in the Listing of Impairments. *See Sullivan v. Zebley*, 493 U.S. 521, 530-31 (1990). Plaintiff has not met this burden.<sup>2</sup>

Plaintiff alleges he has a listed impairment and sets forth twelve (12) diagnoses that appear throughout the record. (Doc. No. 7, pg. 4-5). However, Plaintiff fails to show his impairments meet or equal any specific listing. A diagnosis of an impairment is not disabling *per se*. There must be a functional loss establishing an inability to engage in substantial gainful activity before a disability occurs. *See Trenary v. Brown*, 898 F.2d 1361,1364 (8<sup>th</sup> Cir. 1990).

I find substantial evidence supports the ALJ's determination Plaintiff did not have an impairment or combination of impairments equal to one listed in 20 C.F.R. pt. 404, subpt. P, app.1.

### **B. Subjective Complaints**

Plaintiff claims the ALJ erred in evaluating his subjective complaints. 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>3</sup> *See Shultz v. Astrue*, 479 F.3d 979, 983 (2007). The factors to consider are 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

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<sup>2</sup> Plaintiff failed to specifically identify which Appendix 1 Listing he meets or equals.

<sup>3</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 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.

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).

Plaintiff argues the ALJ erred in failing to properly apply the five factors from *Polaski v. Heckler*, 739 F.2d 1320 (8th Cir. 1984). The Defendant argues the ALJ properly evaluated Plaintiff's subjective complaints of pain in compliance with *Polaski*. Defendant further states the ALJ found Plaintiff not fully credible based on the lack of objective medical findings, evidence showing he was capable of greater activity than alleged, conservative medical treatment, and inconsistencies between Plaintiff's testimony and the record as a whole.

In the present action, this Court finds the ALJ properly addressed and discounted Plaintiff's subjective complaints. In his opinion, the ALJ outlined the *Polaski* factors, addressed those factors, and stated inconsistencies between Plaintiff's testimony and the record. (Tr. 16-18). Specifically, the ALJ noted the following: (1) Plaintiff's very restricted pattern of daily living was inconsistent with the objective clinical and medical findings, (2) Plaintiff did not have regular or frequent medical treatment, (3) Plaintiff's physician's had not placed any limitations on his daily activities, (4) Plaintiff's medical records did not support his claimed functional limitations, and (5) Plaintiff has not received strong prescribed medication for pain relief.

These findings are valid reasons supporting the ALJ's credibility determination, and this Court finds the ALJ's credibility determination is supported by substantial evidence and should be affirmed. *See Lowe*, 226 F.3d at 971-72. Accordingly, the ALJ did not err in discounting Plaintiff's subjective complaints of pain.

### **C. RFC**

Plaintiff claims substantial evidence does not support the ALJ's RFC determination that he can perform medium work. Plaintiff argues the ALJ did not account for his non-exertional limitations. Defendant argues the ALJ properly found Plaintiff's non-exertional limitations would not prevent Plaintiff from performing his PRW. However, this Court finds the ALJ's RFC determination is supported by substantial evidence and in making that determination, the ALJ provided a sufficient basis for his RFC determination.

Prior to Step Four of the sequential analysis in a disability determination, the ALJ is required to determine a claimant's RFC. *See* 20 C.F.R. § 404.1520(a)(4)(iv). This RFC determination must be based on medical evidence that addresses the claimant's ability to function in the workplace. *See Stormo v. Barnhart*, 377 F.3d 801, 807 (8th Cir. 2004). The ALJ should consider "all the evidence

in the record' in determining the RFC, including 'the medical records, observations of treating physicians and others, and an individual's own description of his limitations.'" *Stormo v. Barnhart*, 377 F.3d 801, 807 (8th Cir. 2004) (quoting *Krogmeier v. Barnhart*, 294 F.3d 1019 (8th Cir. 2002)). The Plaintiff has the burden of producing documents and evidence to support his or her claimed RFC. *See Cox*, 160 F.3d at 1206; 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A).

The ALJ, however, bears the primary responsibility for making the RFC determination and for ensuring there is "some medical evidence" regarding the claimant's "ability to function in the workplace" that supports the RFC determination. *Lauer v. Apfel*, 245 F.3d 700, 703-04 (8th Cir. 2001). Furthermore, this Court is required to affirm the ALJ's RFC determination if that determination is supported by substantial evidence on the record as a whole. *See McKinney v. Apfel*, 228 F.3d 860, 862 (8th Cir. 2000).

Plaintiff argues Plaintiff's disabilities come from vision problems and migraine headaches. However, in this matter, the ALJ properly determined the Plaintiff had the RFC to perform a reduced range of medium work.

Based on being legally blind in the right eye, the ALJ found Plaintiff would be precluded from work requiring good depth perception and work requiring vision for small detail. Plaintiff could also not work in bright sunlight. (Tr. 15). Substantial evidence supports the ALJ's findings regarding Plaintiff's RFC.

On June 27, 2006 Plaintiff had a general physical exam by Dr. Marvin Kirk. (Tr. 96-102). Dr. Kirk found Plaintiff would have moderate restrictions with detail work due to his eyesight and would have severe restrictions with working in bright sunlight. (Tr. 102). Dr. Kirk also found Plaintiff was capable of holding a pen to write, picking up a coin, and had normal grip strength. (Tr.

100).

The Plaintiff also claims limitations from migraine headaches, however, the medical evidence does not support this. On June 27, 2005 Plaintiff was examined by Dr. Marvin Kirk. (Tr. 95). Plaintiff complained of headaches and being sensitive light and sound with vomiting. (Tr. 95). However, Plaintiff did not see a physician or take any medication for these complaints. As pointed out by the ALJ, if Plaintiff was consistently experiencing problems with these headaches, there would be more frequent and regular treatment. (Tr. 14).

I find the ALJ's hypothetical question properly set forth those limitations he found credible and which are supported by the evidence of record. *See Haynes v. Shalala*, 26 F.3d 812, 815 (8th Cir. 1994); *Rappoport v. Sullivan*, 942 F.2d 1320, 1322 (8th Cir. 1991) (ALJ need only include in his hypothetical question those impairments he accepts as true). The VE testified the Plaintiff retained the ability to perform his PRW as a hall man (laundry worker), and as a cleaner. (Tr. 18, Finding 6). Such testimony, based on a hypothetical question consistent with the record, provided substantial evidence to support the ALJ's decision.

Plaintiff has the burden of establishing his claimed RFC. *See Goff v. Barnhart*, 421 F.3d 785, 790 (8th Cir. 2005) (quoting *Eichelberger v. Barnhart*, 390 F.3d 584, 590 (8th Cir. 2004)). Because Plaintiff has not met his burden in this case and because the ALJ's RFC determination is supported by sufficient medical evidence, this Court finds the ALJ's RFC determination should be affirmed.

#### **4. Conclusion:**

Based on the foregoing, the undersigned finds that the decision of the ALJ, denying benefits to Plaintiff, is supported by substantial evidence and should be affirmed. A judgment incorporating these findings will be entered pursuant to Federal Rules of Civil Procedure 52 and 58.

**ENTERED this day of 8<sup>th</sup> September, 2009.**

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