

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

TERESA MAE LEWIS,

Plaintiff,

vs.

Case No. 15-9892-SAC

CAROLYN W. COLVIN,
Acting Commissioner of
Social Security,

Defendant.

MEMORANDUM AND ORDER

This is an action reviewing the final decision of the Commissioner of Social Security denying the plaintiff disability insurance benefits. The matter has been fully briefed by the parties.

I. General legal standards

The court's standard of review is set forth in 42 U.S.C. § 405(g), which provides that "the findings of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." The court should review the Commissioner's decision to determine only whether the decision was supported by substantial evidence and whether the Commissioner applied the correct legal standards. Glenn v. Shalala, 21 F.3d 983, 984 (10th Cir. 1994). Substantial evidence requires more than a scintilla, but less than a preponderance, and is satisfied by

such evidence that a reasonable mind might accept to support the conclusion. The determination of whether substantial evidence supports the Commissioner's decision is not simply a quantitative exercise, for evidence is not substantial if it is overwhelmed by other evidence or if it really constitutes mere conclusion. Ray v. Bowen, 865 F.2d 222, 224 (10th Cir. 1989). Although the court is not to reweigh the evidence, the findings of the Commissioner will not be mechanically accepted. Nor will the findings be affirmed by isolating facts and labeling them substantial evidence, as the court must scrutinize the entire record in determining whether the Commissioner's conclusions are rational. Graham v. Sullivan, 794 F. Supp. 1045, 1047 (D. Kan. 1992). The court should examine the record as a whole, including whatever in the record fairly detracts from the weight of the Commissioner's decision and, on that basis, determine if the substantiality of the evidence test has been met. Glenn, 21 F.3d at 984.

The Social Security Act provides that an individual shall be determined to be under a disability only if the claimant can establish that they have a physical or mental impairment expected to result in death or last for a continuous period of twelve months which prevents the claimant from engaging in substantial gainful activity (SGA). The claimant's physical or mental impairment or impairments must be of such severity that

they are not only unable to perform their previous work but cannot, considering their age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy. 42 U.S.C. § 423(d).

The Commissioner has established a five-step sequential evaluation process to determine disability. If at any step a finding of disability or non-disability can be made, the Commissioner will not review the claim further. At step one, the agency will find non-disability unless the claimant can show that he or she is not working at a "substantial gainful activity." At step two, the agency will find non-disability unless the claimant shows that he or she has a "severe impairment," which is defined as any "impairment or combination of impairments which significantly limits [the claimant's] physical or mental ability to do basic work activities." At step three, the agency determines whether the impairment which enabled the claimant to survive step two is on the list of impairments presumed severe enough to render one disabled. If the claimant's impairment does not meet or equal a listed impairment, the inquiry proceeds to step four, at which the agency assesses whether the claimant can do his or her previous work; unless the claimant shows that he or she cannot perform their previous work, they are determined not to be disabled. If the claimant survives step four, the fifth and final step

requires the agency to consider vocational factors (the claimant's age, education, and past work experience) and to determine whether the claimant is capable of performing other jobs existing in significant numbers in the national economy. Barnhart v. Thomas, 124 S. Ct. 376, 379-380 (2003).

The claimant bears the burden of proof through step four of the analysis. Nielson v. Sullivan, 992 F.2d 1118, 1120 (10th Cir. 1993). At step five, the burden shifts to the Commissioner to show that the claimant can perform other work that exists in the national economy. Nielson, 992 F.2d at 1120; Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). The Commissioner meets this burden if the decision is supported by substantial evidence. Thompson, 987 F.2d at 1487.

Before going from step three to step four, the agency will assess the claimant's residual functional capacity (RFC). This RFC assessment is used to evaluate the claim at both step four and step five. 20 C.F.R. §§ 404.1520(a)(4), 404.1520(e,f,g); 416.920(a)(4), 416.920(e,f,g).

II. History of case

On April 24, 2014, administrative law judge (ALJ) Christine A. Cooke issued her decision (R. at 19-30). Plaintiff alleges that she has been disabled since June 9, 2009 (R. at 19). Plaintiff is insured for disability insurance benefits through

December 31, 2012 (R. at 21).¹ At step one, the ALJ found that plaintiff did not engage in substantial gainful activity from June 9, 2009 through December 31, 2012 (R. at 21). At step two, the ALJ found that plaintiff had severe impairments (R. at 22). At step three, the ALJ determined that plaintiff's impairments do not meet or equal a listed impairment (R. at 23). After determining plaintiff's RFC (R. at 23), the ALJ found at step four that plaintiff is able to perform past relevant work as a proofreader (R. at 28). In the alternative, at step five, the ALJ found that plaintiff could perform other jobs that exist in significant numbers in the national economy (R. at 28-29). Therefore, the ALJ concluded that plaintiff was not disabled (R. at 30).

III. Did the ALJ err in her mental RFC findings?

At step two, the ALJ found that plaintiff's mental impairments, although medically determinable, were non-severe (R. at 22-23). The ALJ gave great weight to the opinions of Dr. Altomari, a state agency psychologist, who opined on January 10, 2013 that plaintiff's mental impairments did not impose severe work-related limitations prior to the date last insured (R. at 27, 103-104).²

¹ An ALJ had issued a previous decision that plaintiff was not disabled from June 9, 2009 through May 7, 2012 (R. at 129-145). Thus, the only issue before the ALJ in this case was whether plaintiff was disabled from May 8, 2012 through December 31, 2012, the date she was last insured (R. at 21).

² On March 12, 2013, Dr. Wilkinson also found that plaintiff's mental impairments did not impose severe work related limitations (R. at 118-119).

Plaintiff alleges that the ALJ did not state that in making her RFC findings she considered all of plaintiff's impairments, including impairments that were not severe. However, in her decision, the ALJ did in fact state that in making RFC findings, the ALJ must consider all of plaintiff's impairments, including impairments that are not severe (R. at 20). In discussing the evidence in regards to her RFC findings, the ALJ discussed the opinions of Dr. Altomari, and gave great weight to his opinion that plaintiff's mental impairments imposed no severe work-related limitations. That opinion was supported by the opinion of Dr. Wilkinson.

The court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Hackett v. Barnhart, 395 F.3d 1168, 1173 (10th Cir. 2005); White v. Barnhart, 287 F.3d 903, 905, 908, 909 (10th Cir. 2002). Although the court will not reweigh the evidence, the conclusions reached by the ALJ must be reasonable and consistent with the evidence. See Glenn v. Shalala, 21 F.3d 983, 988 (10th Cir. 1994)(the court must affirm if, considering the evidence as a whole, there is sufficient evidence which a reasonable mind might accept as adequate to support a conclusion). The court can only review the sufficiency of the evidence. Although the evidence may support a contrary finding, the court cannot displace the agency's choice between two fairly conflicting views, even

though the court may have justifiably made a different choice had the matter been before it de novo. Oldham v. Astrue, 509 F.3d 1254, 1257-1258 (10th Cir. 2007).

Plaintiff does not point to any medical or medical opinion evidence that plaintiff's mental impairments resulted in limitations not contained in the ALJ's RFC findings. The court finds that substantial evidence supports the ALJ's RFC determination that plaintiff's mental impairments do not result in any limitations other than those contained in the ALJ's RFC findings.

IV. Did the ALJ err in her physical RFC findings?

The opinions of physicians, psychologists, or psychiatrists who have seen a claimant over a period of time for purposes of treatment are given more weight than the views of consulting physicians or those who only review the medical records and never examine the claimant. The opinion of an examining physician is generally entitled to less weight than that of a treating physician, and the opinion of an agency physician who has never seen the claimant is entitled to the least weight of all. Robinson v. Barnhart, 366 F.3d 1078, 1084 (10th Cir. 2004). When a treating source opinion is inconsistent with the other medical evidence, the ALJ's task is to examine the other medical source's reports to see if they outweigh the treating source's reports, not the other way around. Treating source opinions are

given particular weight because of their unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations. If an ALJ intends to rely on a nontreating physician or examiner's opinion, he must explain the weight he is giving to it. Hamlin v. Barnhart, 365 F.3d 1208, 1215 (10th Cir. 2004). The ALJ must provide a legally sufficient explanation for rejecting the opinion of treating medical sources in favor of non-examining or consulting medical sources. Robinson, 366 F.3d at 1084.

A treating physician's opinion about the nature and severity of the claimant's impairments should be given controlling weight by the Commissioner if well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. Castellano v. Secretary of Health & Human Services, 26 F.3d 1027, 1029 (10th Cir. 1994); 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2). When a treating physician opinion is not given controlling weight, the ALJ must nonetheless specify what lesser weight he assigned the treating physician opinion. Robinson v. Barnhart, 366 F.3d 1078, 1083 (10th Cir. 2004). A treating source opinion not entitled to controlling weight is still entitled to deference and must be weighed using all of the following factors:

- (1) the length of the treatment relationship and the frequency of examination;
- (2) the nature and extent of the treatment relationship, including the treatment provided and the kind of examination or testing performed;
- (3) the degree to which the physician's opinion is supported by relevant evidence;
- (4) consistency between the opinion and the record as a whole;
- (5) whether or not the physician is a specialist in the area upon which an opinion is rendered; and
- (6) other factors brought to the ALJ's attention which tend to support or contradict the opinion.

Watkins v. Barnhart, 350 F.3d 1297, 1300-1301 (10th Cir. 2003).

After considering the above factors, the ALJ must give good reasons in his/her decision for the weight he/she ultimately assigns the opinion. If the ALJ rejects the opinion completely, he/she must then give specific, legitimate reasons for doing so. Watkins, 350 F.3d at 1301.

The ALJ found that plaintiff is limited to carrying 20 pounds occasionally and 10 pounds frequently. She cannot lift or carry objects above chest level, and could push or pull less than 5 pounds, and never above chest level. Plaintiff can sit for 6 hours, and stand/walk for 6 hours in an 8 hour workday. She cannot climb ladders, ropes, or scaffolding, or crawl. She cannot reach above shoulder level with her upper extremities. Plaintiff (who is right handed) could never engage in hard repetitive grasping, such as would be required to use pliers or open a sealed jar, with her left upper extremity. She can occasionally climb stairs or ramps, kneel, and crouch (R. at 23-

24, 66). With these limitations, the ALJ, in reliance on VE testimony, found that plaintiff could perform past work as a proofreader, and other work that exists in substantial numbers in the national economy (R. at 28-29, 66-67).

The key issue here is whether the ALJ erred in the relative weight accorded to the various medical opinions. On March 12, 2013, Dr. Kaur, a state agency physician, reviewed the medical record. He opined that plaintiff was limited to lifting and carrying 10 pounds. He further opined that plaintiff should avoid repetitive handling with the left upper extremity due to carpal tunnel syndrome (R. at 120-123). The ALJ did not include these limitations in her RFC findings, and gave the opinions of Dr. Kaur only some weight because, according to the ALJ, plaintiff's treating orthopedist (Dr. Katta) showed plaintiff did not have the same level of limitations on lifting as suggested by Dr. Kaur (R. at 27).

However, a review of Dr. Katta's records cited to by the ALJ (R. at 373, 376) do not express any opinions regarding plaintiff's ability to lift or carry, or her ability to handle with her left upper extremity. In the case of Ringgold v. Colvin, 2016 WL 1297817 at *4 (10th Cir. April 4, 2016), the court held that conclusory reasoning, which did not explain how or why the specific limitations in Dr. Crall's opinion are inconsistent with the medical evidence or with her daily

activities, was inadequate to explain the ALJ's rejection of the medical opinion.

Defendant's brief cited to certain pieces of the report from Dr. Katta, which, in defendant's opinion, might support the ALJ's decision to discount some of the limitations expressed by Dr. Kaur (Doc. 13 at 8-9), while plaintiff's brief cited to other portions of the same report by Dr. Katta, which, in plaintiff's opinion, might support the limitations set forth by Dr. Kaur (Doc. 16 at 2). However, nothing in Dr. Katta's report specifically addresses plaintiff's ability to lift or carry, or her ability to handle with the left upper extremity. Furthermore, the ALJ failed to explain how the limitations in Dr. Kaur's report are inconsistent with the report of Dr. Katta. Such conclusory reasoning, on the facts of this case, failed to provide a legitimate basis for discounting the opinions of Dr. Kaur.³

Furthermore, the ALJ failed to give any explanation for not including Dr. Kaur's limitation of avoiding repetitive handling with the left upper extremity. If the RFC assessment conflicts with an opinion from a medical source, the ALJ must explain why

³ It should also be noted that an ALJ's decision should be evaluated based solely on the reasons stated in the decision. Robinson v. Barnhart, 366 F.3d 1078, 1084 (10th Cir. 2004). A decision cannot be affirmed on the basis of appellate counsel's post hoc rationalizations for agency action. Knipe v. Heckler, 755 F.2d 141, 149 n.16 (10th Cir. 1985). A reviewing court may not create post hoc rationalizations to explain the Commissioner's treatment of evidence when that treatment is not apparent from the Commissioner's decision. Grogan v. Barnhart, 399 F.3d 1257, 1263 (10th Cir. 2005). By considering legal or evidentiary matters not considered by the ALJ, a court risks violating the general rule against post hoc justification of administrative action. Allen v. Barnhart, 357 F.3d 1140, 1145 (10th Cir. 2004).

the opinion was not adopted. SSR 96-8p, 1996 WL 374184 at *7. SSR rulings are binding on an ALJ. 20 C.F.R. § 402.35(b)(1); Sullivan v. Zebley, 493 U.S. 521, 530 n.9, 110 S. Ct. 885, 891 n.9, 107 L. Ed.2d 967 (1990); Nielson v. Sullivan, 992 F.2d 1118, 1120 (10th Cir. 1993). The ALJ clearly failed to comply with SSR 96-8p.

As noted above, Dr. Kaur opined that plaintiff should avoid repetitive handling with his left upper extremity due to carpal tunnel syndrome. In his testimony, the vocational expert (VE) was asked if plaintiff could perform her past relevant work or the other jobs that the VE had previously identified that plaintiff could perform in light of the ALJ's RFC findings if plaintiff had the additional limitation of the need to avoid repetitive handling on the left side. The VE was further told that repetitive handling was meant to include frequent handling. The ALJ answered that a person who had to avoid repetitive or frequent handling on the left side could not perform past work or the three other jobs previously identified as other work that plaintiff could perform given the RFC findings of the ALJ (R. at 68-69).

Furthermore, the other work identified as work that plaintiff could perform given the ALJ's RFC findings were three jobs in the light work category (R. at 29, 67), which requires the ability to occasionally lift and carry up to 20 pounds

occasionally. 20 C.F.R. § 404.1567(b). However, Dr. Kaur limited plaintiff to only lifting and carrying up to 10 pounds (R. at 120).

Because of the ALJ's failure to provide legitimate reasons for discounting the opinions of Dr. Kaur regarding plaintiff's ability to lift and carry, and plaintiff's need to avoid repetitive handling with her left upper extremity, the court finds that substantial evidence does not support the ALJ's physical RFC findings. Furthermore, the opinions of Dr. Kaur and the testimony of the VE indicate that substantial evidence does not support the ALJ's determination that plaintiff can perform past work as a proofreader or other work that exists in substantial numbers in the national economy.

Furthermore, Dr. Katta provided a report dated March 26, 2014 stating that plaintiff was limited to lifting and carrying 10 pounds, can stand/walk for less than 2 hours in an 8 hour workday, and must periodically alternate sitting and standing to relieve pain or discomfort. Plaintiff can engage in no postural activities (R. at 458-459). The ALJ gave this opinion no weight as it did not address the relevant period (R. at 28) (plaintiff was last insured for benefits on December 31, 2012).

However, in the case of Baca v. Department of Health and Human Services, 5 F.3d 476, 479 (10th Cir. 1993), the court held that evidence bearing upon an applicant's condition subsequent

to the date upon which the earning requirement was last met is pertinent evidence in that it may disclose the severity and continuity of impairments existing before the earning requirement date or may identify additional impairments which could reasonably be presumed to have been present and to have imposed limitations as of the earning requirement date (in Baca, the court held that medical records within fourteen months of the expiration of claimant's insured status should have been considered; 5 F. 3d at 479). Given the fact that Dr. Katta was treating plaintiff prior to the expiration of disability insurance benefits, and the opinion of Dr. Kaur, who also limited plaintiff to lifting and carrying 10 pounds prior to the expiration of disability insurance benefits (R. at 119-123), the ALJ erred by giving no weight to these opinions by Dr. Katta.

The ALJ also gave no weight to the opinions of Dr. Schicker, who examined plaintiff on October 12, 2013 and set forth opinions regarding plaintiff's limitations (R. at 27, 388-399). On remand, this opinion should also be examined to determine if it discloses the severity of impairments before the expiration of insured benefits. Furthermore, the ALJ clearly erred by giving the opinion no weight (R. at 27), but then relying on that same opinion to state that the use of the cane was not medically necessary (R. at 26).

Finally, the ALJ gave very little weight to the opinions of Dr. Lyche, plaintiff's treating physician, because he "did not address specific functional limitations imposed by the symptoms of claimant's impairments" (R. at 28). However, Dr. Lyche indicated that plaintiff is "severely limited in [her] ability to walk at least 100 feet due to an arthritic, neurological, or orthopedic condition" (R. at 493). This is a specific functional limitation which must be addressed when this case is remanded.

In light of the numerous errors by the ALJ in her evaluation of the opinions of Dr. Kaur, Dr. Katta, Dr. Schicker, and Dr. Lyche, the court finds that substantial evidence does not support the ALJ's physical RFC findings, or the ALJ's finding that plaintiff can perform past relevant work or other work in the national economy. This case shall be remanded in order for the defendant to properly evaluate the medical evidence and make new RFC findings.

V. Did the ALJ err in evaluating plaintiff's credibility?

Plaintiff has also asserted error by the ALJ in evaluating plaintiff's credibility. The court will not address this issue because it may be affected by the ALJ's resolution of the case on remand after the ALJ gives proper consideration to the medical source opinions regarding plaintiff's physical

limitations. See Robinson v. Barnhart, 366 F.3d 1078, 1085 (10th Cir. 2004).

IT IS THEREFORE ORDERED that the judgment of the Commissioner is reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this memorandum and order.

Dated this 24th day of January 2017, Topeka, Kansas.

s/Sam A. Crow
Sam A. Crow, U.S. District Senior Judge