

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

EXCERPT OF RULING FROM HEARING
BEFORE THE HONORABLE CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE
JANUARY 7, 2016

APPEARANCES BY TELEPHONE:

For Plaintiff: Kathleen E. Overton
PARMELE LAW FIRM, P.C.
1505 E. Bradford Parkway
Springfield, MO 65804

For Defendant: Meghan Jane McEvoy
SOCIAL SECURITY ADMINISTRATION
601 E. 12th Street, Room 535
Kansas City, MO 64106

REPORTED BY: SHANNON L. WHITE, RMR, CRR, CSR, CCR
Official Court Reporter
United States District Court
111 South Tenth Street, Third Floor
St. Louis, MO 63102
(314) 244-7966

PRODUCED BY COURT REPORTER COMPUTER-AIDED TRANSCRIPTION

(THE FOLLOWING PROCEEDINGS WERE HELD IN CHAMBERS.)

THE COURT: Hello. This is Judge Perry. Do I have
Ms. Overton and Ms. McEvoy?

MS. MCEVOY: Yes.

MS. OVERTON: Yes, Your Honor.

THE COURT: So we are resuming the telephone hearing in the *Ethridge v. Colvin* case in Case No. 1:15-CV-109.

I am now going to state my decision in the case. I will enter a judgment in this case, and I will attach this portion of the transcript to that judgment, and this will be your opinion for the record in the case; that I will not write a separate written opinion, although I will file, like I say, the judgment with the attached transcript from this point forward. If you want a transcript of the argument, you'd have to order that from the court reporter.

Okay. So the case is fully briefed and argued and is ready for resolution. In considering this case, I've considered -- I understand my responsibility to affirm the decision of the Commissioner if I conclude the decision is supported by substantial evidence when considering the record as a whole. In other words, I don't have authority to substitute my judgment for that of the Administrative Law Judge or that of the Commissioner.

The plaintiff raises the claims that the ALJ's residual functional capacity -- both mental and physical --

1 assessment was not supported by the substantial evidence on
2 the record as a whole, and the argument is that on the
3 physical that it's not supported by medical evidence and on
4 the mental that it didn't include all of the plaintiff's
5 credible allegations.

6 I am going to affirm the Commissioner's decision. I
7 do not believe that remand is appropriate. And the ALJ's
8 decision on residual functional capacity is at page 17 of the
9 record, and he did conclude -- or she -- the judge did
10 conclude that the claimant could -- had the capacity to
11 perform light work and also that -- and with some limitations
12 such as alternating between sitting and standing every thirty
13 minutes and not climbing ladders, ropes. I'm not reading the
14 whole paragraph, but I've got it right in front of me.
15 Additionally -- and some occasional -- only occasional
16 bending, stooping, et cetera. And some limitations with
17 exposure to work hazards. And then on the mental, limited her
18 to simple, routine, repetitive tasks. So it's at the, like I
19 say, page 17 of the record.

20 The ALJ reached this decision, I think, correctly,
21 after -- or, you know, under the standards after evaluating
22 the plaintiff's credibility and discussing the relevant
23 evidence, including her testimony and the medical evidence and
24 her daily activities and testimony of the vocational expert.
25 And I don't think there was a substantial error. This is

1 supported by substantial evidence on the record as the whole.

2 So with regard to the nurse practitioner, Damon
3 Davis, who did issue a medical source statement, the ALJ did
4 not err in failing to assign any weight to this source
5 statement because it's not an acceptable medical source under
6 Social Security regulations and also because this opinion was
7 unsupported and internally inconsistent and inconsistent with
8 the record as a whole.

9 The ALJ properly rejected Mr. Davis' opinion as
10 unreliable because he stated that the plaintiff was limited to
11 standing and walking an hour and sitting four hours in an
12 eight-hour workday, but he didn't find she needed to lie down
13 or recline and also that it was inconsistent with the record
14 as a whole, including his own treatment notes which didn't
15 reflect treatment for the limitations claimed in the
16 statement, and the other medical evidence in the case.

17 The plaintiff argues that there was no medical
18 evidence to support this, but the law does not require a --
19 specific opinions, as the plaintiff recognizes. In
20 particular, the medical evidence that was in the record, which
21 includes the consulting physician, Chul Kim, M.D., showed only
22 slightly reduced hand grip, with normal fine finger movements,
23 normal sensation, motor functioning, reflexes and tone, and a
24 slow but stable gait, and no edema.

25 She was full weight bearing, could walk on her heels

1 and toes, get on and off the examination table without
2 significant problems, and perform a full squat with some pain.
3 And although the doctor did recognize that there were some --
4 she did have some pain on some movements, this -- I agree that
5 this is essentially a normal examination.

6 Additionally, with the arthritis, she had not been --
7 had any imaging until 2012, even though she'd been diagnosed
8 long before. At her hearing, she said the diabetes was her
9 most disabling condition, but she's not insulin dependent, and
10 she has had basically conservative treatment.

11 So the ALJ properly considered that there was a lack
12 of objective medical basis for the subjective complaints. And
13 here this is not -- the plaintiff's argument that there's no
14 medical evidence and no opinion is not sufficient basis for a
15 remand because plaintiff was referred for a consultative
16 examination. And so the record is developed. It just doesn't
17 support the plaintiff's position. And so there's no error in
18 the ALJ's failure to get more medical evidence.

19 The lack of treatment is inconsistent with complaints
20 of disabling condition and is an appropriate factor for the
21 ALJ to consider. There are numerous Eighth Circuit cases to
22 that effect, such as *Clevenger* and *Kelley*; where the
23 impairment can be controlled by treatment or medication it
24 can't be considered disabling. And so it's clear that the ALJ
25 did rely on the medical evidence when fashioning this residual

1 functional capacity.

2 And the Eighth Circuit recently did consider a nurse
3 practitioner and affirmed an ALJ's decision to disregard the
4 opinion of a treating nurse practitioner, and that was the
5 *Crawford v. Colvin* case. It's Slip Opinion No. 15-1239, and
6 it was decided, I think, just recently, December 7 of 2015.
7 Yeah, it was. It was just last month, December 7.

8 And in that case they said, first of all, that the
9 nurse practitioner's opinion, as we know, was not an
10 acceptable medical source, although it can be looked at as
11 some -- as other evidence. The Eighth Circuit said that it
12 could be discounted for treating -- well, here's what they
13 said. If the ALJ can discount a treating physician's opinion
14 for inconsistencies, then they certainly can discredit a nurse
15 practitioner's inconsistent opinion, and I believe that is
16 true here. So I think that the ALJ's treatment of Mr. Davis
17 was appropriate. And so I think that there's no doubt that
18 the residual functional capacity is fine, I think.

19 With regard to the mental impairments, the plaintiff
20 argues that limiting her to simple, routine, repetitive tasks
21 doesn't adequately take into account the opinion of the
22 non-examining state agency's psychologist, who did opine that
23 she was moderately limited in the ability to maintain
24 attention and concentration for extended periods.

25 And the plaintiff relies on the *Logan-Wilson* case

1 from Judge Ross, which was decided in 2014 in this district,
2 where Judge Ross remanded the case for reevaluation because
3 there was a pace limitation, and said that limiting her to
4 simple instructions and nondetailed tasks didn't adequately
5 account for the impairment in pace.

6 However, in that case I think it is clearly
7 distinguishable from this case. The claimant had
8 substantially more limitations with respect to pace than the
9 plaintiff had here. And this is not a situation where she's
10 unable to do things quickly enough or perform within a
11 schedule or maintain regular attendance or be punctual within
12 customary tolerances or complete a normal work day or work
13 week without interruptions or perform in a consistent pace
14 without an unreasonable number or length of rest periods.
15 Those are not additional limitations in this case, and many of
16 them were present in *Logan-Wilson*.

17 I think this case is more analogous to the case, I
18 believe, cited by the defendant, but one of you cited the
19 *Faint* case that came also out of this district, Judge Baker's
20 case from June of 2014. And she affirmed the ALJ's
21 determination that the claimant was limited to simple,
22 unskilled work, where there were moderate limitations in
23 concentration, persistence, and pace. And she said, you know,
24 the person was only moderately limited in his ability to carry
25 out detailed instructions and maintain concentration for

1 extended periods of time; so simple, unskilled work adequately
2 accommodated that.

3 So in this case I think it's closer -- it's obviously
4 not exactly like either one of those cases, but I think it's
5 closer to *Faint* than *Logan-Wilson*. And the doctor found her
6 to be only moderately limited in her ability to carry out
7 detailed instructions or maintain attention and concentration
8 for extended periods of time; so limiting her to simple,
9 routine, repetitive tasks adequately accounts for this
10 limitation.

11 And I will also note that this RFC is consistent with
12 the objective medical findings in the record, which include
13 only a minimal treatment history for depression and anxiety,
14 no history of counseling or medication management from the
15 date of onset until the decision by the ALJ; and so lack of
16 treatment is an appropriate factor for the ALJ to consider.
17 And, additionally, of course, these were only mild conditions.

18 She was treated for the depression earlier and found
19 a great improvement, and she had -- you know, she reported
20 that she felt much better and had no -- had much -- was
21 greatly improved. And so it's clear that whatever depression
22 or mood disorder she might have suffered from could have been
23 controlled by medication adequately; so this is not a
24 disabling limitation. And just like the physical limitations,
25 no physician has ever stated that the plaintiff was unable to

1 work because of her mental limitations.

2 So I don't -- I agree with the Commissioner that the
3 RFC is not inconsistent with her moderate mental impairments
4 and that the ALJ properly relied on the testimony of the
5 vocational expert, the plaintiff, and also did consider the
6 statement from her daughter, although it was cumulative, and
7 all of the evidence in the record in finding that plaintiff
8 retained the ability to work as a price marker, routing clerk,
9 and collator operator. And this finding is substantially
10 supported by the record as a whole.

11 Now, finally, I want to address one point that we
12 talked about somewhat here today, and the plaintiff argues
13 that the ALJ relied too heavily on the daily activities of the
14 claimant when formulating the RFC; and, of course, the ALJ is
15 required to consider the daily activities. So it's really
16 that -- I think this really could be characterized as more a
17 *Polaski* argument that the ALJ didn't properly evaluate her
18 credibility, because, you know, he considered the activities;
19 and so the argument is, well, he gave too much weight to those
20 or didn't consider them appropriately.

21 And as we all know, the ALJ doesn't have to go
22 through each *Polaski* factor, but if he's discrediting the
23 claimant's complaints, then he has to -- you know, he needs to
24 state why. In here the ALJ did properly evaluate the
25 credibility based on her own testimony and the objective

1 medical record, her daily activities, the conservative nature
2 of her treatment, and the lack of restrictions set out by
3 treating and consulting physicians.

4 He considered that she cared for her disabled adult
5 daughter, cooked meals, washed dishes, watched television,
6 attended church, used a computer, drove, left the house by
7 herself, did laundry, shopped, played board games, visited
8 family, and used a sewing machine.

9 And he summarized her testimony regarding her daily
10 activities, including her subjective activities of pain, and
11 the third-party statement from her daughter, but he wasn't
12 required to believe all of her assertions, particularly in
13 light of the fact that she was a part-time care giver for her
14 adult disabled child. And the *Johnson* case that I believe was
15 cited by the Commissioner also supports that.

16 Now, I recognize that she was not doing, you know,
17 caring for her child on an eight hour a day. It was as she
18 said, I think it was two hours and forty-five minutes a day,
19 and she said she had to take breaks in between. But there's
20 still substantial activities that are appropriate for the ALJ
21 to consider, especially in conjunction with all of the other
22 activities that she engaged in.

23 So I think that the ALJ did seriously consider, but
24 explicitly discredited, the subjective complaints, and
25 therefore, there's no reason for me to disturb those findings.

1 And so for all the reasons I've stated, I believe
2 that the -- and I conclude that the ALJ's RFC and
3 determination -- overall determination that the claimant is
4 not disabled, was not disabled during the relevant time
5 period, is supported by substantial evidence on the record as
6 a whole, and so I will affirm the decision.

7 And as I said, I'll issue a judgment consistent with
8 this opinion, and I will attach a transcript of this oral
9 opinion to that judgment.

10 So this concludes the hearing. It will take a few
11 days for me to enter the judgment because, after all, we need
12 to get a transcript, but I will be doing so in the near
13 future. And, you know, obviously, all your time limits start
14 to run from when the judgment itself is entered. All right?

15 So at this time I will terminate the telephone call.
16 Thank you both for participating by phone. My goal in doing
17 that is not to deny you a chance to come to court, but it's
18 really to keep costs down for everyone, and so I appreciate
19 your participating by phone. And court is in recess.

20 (PROCEEDINGS CONCLUDED AT 10:45 AM.)

21

22

23

34

25

CERTIFICATE

I, Shannon L. White, Registered Merit Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 11 inclusive and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 8th day of January, 2016.

/s/Shannon L. White
Shannon L. White, CRR, RMR, CCR, CSR
Official Court Reporter