

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

PAULETTE BANKS,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 11-CV-439-TLW
)	
MICHAEL J. ASTRUE,)	
Commissioner of the Social Security)	
Administration,)	
)	
Defendant.)	

OPINION AND ORDER

Paulette Banks (“plaintiff”) requests judicial review pursuant to 42 U.S.C. § 405(g) of the decision of the Commissioner of the Social Security Administration (“Commissioner”) denying her applications for disability insurance benefits and supplemental security income under Titles II and XVI of the Social Security Act. In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. (Dkt. # 8). Any appeal of this order will be directly to the Tenth Circuit Court of Appeals.

Plaintiff appeals the decision of the Administrative Law Judge (“ALJ”) and asserts that the Commissioner erred because the ALJ incorrectly determined that plaintiff was not disabled. On appeal, plaintiff asserts the ALJ failed to: (1) properly consider all of the medical source evidence; (2) perform a proper step four determination; and (3) perform a proper credibility determination. (Dkt. # 13 at 2). For the reasons discussed below, this Court AFFIRMS the decision of the Commissioner.

Procedural History

On April 13, 2009, plaintiff filed applications for disability insurance benefits and supplemental security income benefits under Titles II and XVI of the Social Security Act, 42

must then confirm that the opinion is consistent with other substantial evidence in the record. Id. “[I]f the opinion is deficient in either of these respects, then it is not entitled to controlling weight.” Id.

However, even if the ALJ finds the treating physician’s opinion is not well-supported by medically acceptable clinical and laboratory diagnostic techniques or is inconsistent with the other substantial evidence in the record, treating physician opinions are still entitled to deference and must be evaluated in reference to the factors enumerated in 20 C.F.R. § 404.1527, and § 416.927. Those factors are as follows:

- (1) the length of the treating 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, 350 F.3d at 1301 (citing Drapeau v. Massanari, 255 F.3d 1211, 1213 (10th Cir. 2001)).

The ALJ must give good reasons in her decision for the weight she ultimately assigns the opinion. Id. (citing 20 C.F.R. § 404.1527(d)(2)). If the ALJ rejects the opinion completely, she must then give specific, legitimate reasons for doing so. Id. (citing Miller v. Chater, 99 F.3d 972, 976 (10th Cir. 1990)). The reasons must be of sufficient specificity to make clear to any subsequent reviewers the weight the adjudicator gave to the treating physician’s opinion and the reasons for that weight. Anderson v. Astrue, 319 Fed. Appx. 712, 717 (10th Cir. 2009) (unpublished)¹.

If a treating physician’s opinion addresses an issue ordinarily reserved to the Commissioner, such as a claimant’s ability to work or the ultimate question of disability, the ALJ

¹ 10th Cir. R. 32.1 provides that “[u]npublished opinions are not precedential, but may be cited for their persuasive value.”

may not give controlling weight to that opinion. See Butler v. Astrue, 410 Fed.Appx. 137, 142 (10th Cir. 2011) (citing 20 C.F.R. §§ 404.1527(e), 416.927(e)) (unpublished). While a treating physician's opinion is ordinarily entitled to controlling weight, "treating source opinions on issues that are reserved to the Commissioner are never entitled to controlling weight or special significance." SSR 96-5p. The ALJ may not ignore those opinions but "must evaluate all the evidence in the case record to determine the extent to which the opinion is supported by the record," using the factors set forth in 20 C.F.R. § 404.1527(d), and § 416.927(d), cited *supra*.

The record contains evidence of only one visit to Dr. Puls. This visit occurred on June 25, 2010, and was the result of a referral from Ms. Scott for medication management. (R. 200-01). Dr. Puls and Ms. Scott completed a "Mental Residual Functional Capacity Assessment" form and "Mental Status Form" on this same day. These forms indicate that Dr. Puls and Ms. Scott believe that plaintiff has a marked limitation in eight (8) of the nineteen areas listed on the mental RFC form, and a moderate limitation in the remaining eleven areas; however, there is no substantial evidence in the record to support these findings. It appears Ms. Scott, not Dr. Puls, completed the mental status form, as there is a note stating "[p]atient to continue to see Dr. Puls for medication management ie [sic] anti-depressant medication." (R. 198). This form also states plaintiff has a "[g]ood prognosis with continued treatment," before claiming it is "difficult to state how she would respond in a work environment," then concluding by stating it is "[d]ifficult for patient to sustain work at this time." Id.

The only mental health records for plaintiff are Ms. Scott's notes from six counseling sessions from April 22, 2010 to June 25, 2010. These notes are based on plaintiff's subjective complaints to Ms. Scott, and the only treatment notes show "individual psychiatric therapy" with no notations of medication for depression until June 25, 2010. The majority of Ms. Scott's notes

assess plaintiff with “depression.” (R. 205-06, 208-10). There are two notations of “severe” depression on June 15, 2010 and June 8, 2010 (R. 203-04), yet Ms. Scott’s last note in the record, dated June 25, 2010, states plaintiff suffers “moderate recurrent major depression.” (R. 201).

The Court finds the ALJ properly handled Dr. Puls’ opinion. Although plaintiff asserts that Dr. Puls is a “treating physician,” the evidence shows he only examined plaintiff one time. (R. 17). See Doyal v. Barnhart, 331 F.3d 750, 762 (10th Cir. 2003) (citing Barker v. Shalala, 40 F.3d 789, 794 (6th Cir. 1994)) (“The treating physician doctrine is based on the assumption that a medical professional *who has dealt with a claimant and his maladies over a long period of time* will have a deeper insight into the medical condition of the claimant than will a person who has examined a claimant but once, or who has only seen the claimant's medical records.”) (emphasis added). The ALJ applied the Goatcher factors to Dr. Puls’ opinion, even though his opinion cannot be considered that of a treating physician, and explained her reasons for giving the opinion little weight. Id. She noted his opinion was formed after a “one time evaluation” of plaintiff, “together with counseling notes for six visits with Ms. Scott.” Id. The ALJ summarized Ms. Scott’s counseling session notes and further noted the marked limitations of the opinion were not supported by the “objective medical signs and findings,” which were “relatively mild.” Id. Additionally, the ALJ noted that Ms. Scott, as a licensed clinical social worker, is not an acceptable medical source. See 20 C.F.R. §§ 404.1513(a), 416.913(a). Also, even if Dr. Puls could be considered a treating physician, opinions on matters reserved to the Commissioner are not permitted to be given controlling weight. See Butler, 410 Fed.Appx. at 142.

Plaintiff argues the ALJ failed to re-contact Dr. Puls and “attempted to impose her own medical expertise over that of the treating physician of record,” and “could have had her own doctor assess Claimant’s mental limitations, but she chose not to do so.” The Court finds no

evidence in plaintiff's records to suggest that Dr. Puls could have provided any further information that would have been helpful to the ALJ, as he only saw plaintiff once. There is also no evidence to suggest that a consultative mental examination would have changed the ALJ's decision. More importantly, plaintiff's counsel did not request a consultative mental examination at the hearing. (R. 58). When a claimant for social security benefits is represented by counsel, the ALJ is entitled to "require counsel to identify the issue or issues requiring further development," and "[i]n the absence of such a request by counsel, we will not impose a duty on the ALJ to order a consultative examination unless the need for one is clearly established in the record." Hawkins v. Chater, 113 F.3d 1162, 1167-68 (10th Cir. 1997). Plaintiff fails to identify any evidence in the record which would prejudice plaintiff, trigger the ALJ's duty to re-contact Dr. Puls, or trigger the need to order a consultative mental examination. Plaintiff argues there is an unresolved conflict between the ALJ finding that plaintiff's depression is a severe impairment at step two, and her inclusion of only a mild mental limitation in her RFC. The Court finds no error here.

At step two, plaintiff is required to prove only a *de minimis* showing of impairment, and if he or she fails to do so, the evaluation process stops. See Hawkins, 113 F.3d at 1169. Here, the ALJ found that plaintiff met the *de minimis* showing requirement regarding depression. Step four of the sequential evaluation process involves three steps: (1) evaluation of a claimant's physical and mental RFC, (2) determination of the physical and mental demands of a claimant's past relevant work, and (3) determination of whether or not a "claimant has the ability to meet the job demands found in [step] two despite the mental and/or physical limitations found in [step] one." Winfrey v. Chater, 92 F.3d 1017, 1023 (10th Cir. 1996). In the instant case, after discussing plaintiff's mental records at length, including the opinion of Dr. Puls, the ALJ included the mental limitation of "simple and some complex tasks" in plaintiff's RFC, which is well

supported by the mild evidence found in Ms. Scott's records. (R. 13). Plaintiff again argues the ALJ failed to consider Dr. Puls' opinion in reaching her decision on plaintiff's mental limitations. As discussed *supra*, the ALJ had already properly discounted Dr. Puls' opinion, and the undersigned finds this limitation representative of the weight she assigned Dr. Puls' opinion.

Plaintiff next argues the ALJ did not "adequately evaluate" plaintiff's finger, hand, and wrist limitations and that the consultative examination of Dr. Wagner contradicts the ALJ's findings. The undersigned disagrees. Plaintiff initially claimed on June 15, 2009 that "nerve damage in [her] left hand" was the condition limiting her ability to work. (R. 134). On February 1, 2010, plaintiff first noted problems with her right hand. (R. 169). She stated on this Disability Report – Appeal form that she was seeing a doctor for this change, but failed to provide any further information to the Commissioner. (R. 169-70). The evidence of record shows plaintiff visited Njanja M. Ruenji, PA-C for treatment of her hand problems. Mr. Ruenji referred plaintiff to Austin A. Lyle, PAC, of The Orthopaedic Center for examination. Mr. Lyle examined plaintiff, finding full range of motion in her right hand, positive Phalen's and Tinel's signs, "some wasting of the thenar eminence," and "widened two-point discrimination." (R. 219). His impression was carpal tunnel syndrome of the right wrist. *Id.* Mr. Lyle recommended a "cockup splint" and an EMG. (R. 220). No records of an EMG are contained in the file. The ALJ discussed Dr. Wagner's, July 11, 2009 findings regarding both of plaintiff's hands, Mr. Ruenji's overall notes, and Mr. Lyle's July 7, 2010 diagnosis of carpal tunnel syndrome in her right wrist. (R. 14). Dr. Wagner noted plaintiff moved "all extremities well," that there was "mild deformity" of the left hand, resulting in weak ability to manipulate small objects and grasp tools on the left, but otherwise noted ranges of motion within normal limits for both hands. (R. 179-80). Grip strength was noted as 4/5 on the left and 5/5 on the right, finger to thumb opposition, and "fine

tactile manipulation of objects” were normal. (R. 179). The ALJ found plaintiff able “to handle and finger frequently, but not constantly” to accommodate the limitation proven by objective evidence for plaintiff’s hands. The Court finds that the consultative examination does not contradict the ALJ’s findings and that sufficient evidence supports the ALJ’s finding and declines to reweigh the evidence. See Clifton v. Chater, 79 F.3d 1007, 1008 (10th Cir. 1996) (holding that the court will not “engage in the task of weighing evidence in cases before the Social Security Administration.”).

Step Four

Plaintiff argues the ALJ erred by finding she could return to her past relevant work as a housekeeper, kitchen helper, cashier, or janitor, claiming the ALJ did not perform the second step of the three pronged analysis required at step four of the evaluation process. (Dkt. # 13 at 7). As discussed *supra*, step four of the sequential evaluation process involves three phases: (1) evaluation of a claimant’s physical and mental RFC, (2) determination of the physical and mental demands of a claimant’s past relevant work, and (3) determination of whether or not a “claimant has the ability to meet the job demands found in [step] two despite the mental and/or physical limitations found in [step] one.” Winfrey, 92 F.3d at 1023.

The undersigned previously determined the ALJ properly formulated plaintiff’s RFC for medium work with the limitations of handling and fingering frequently, but not constantly, and the limitation of simple and some complex tasks at step one of the three pronged analysis. (R. 13). While the ALJ did not specifically discuss her phase two analysis at step four, she did state she compared “the claimant’s residual functional capacity with the physical and mental demands of” her past relevant work and found “that the claimant is able to perform it as actually and generally performed. The vocational expert testified these jobs are within the residual functional

capacity of this decision.” (R. 18). In stating that she relied on testimony from the vocational expert to reach her decision, the ALJ did not err. She is entitled to rely on the vocational expert at phases two and three of the Winfrey analysis. See Doyal, 331 F.3d at 761.

In the ALJ’s analysis of plaintiff’s RFC determination, she provided a detailed discussion of plaintiff’s accepted mental limitations, and the undersigned sees no benefit to having the ALJ repeat that discussion for the phase two analysis of plaintiff’s mental demands of her past relevant work. “[O]ur general practice, which we see no reason to depart from here, is to take a lower tribunal at its word when it declares that it has considered a matter.” Hackett, 395 F.3d at 1173. Furthermore, the ALJ’s discussion of the evidence and her reasons for her conclusions demonstrate that she considered all of plaintiff’s impairments.

Credibility

Plaintiff’s final argument is that the ALJ failed to perform a proper credibility analysis. The Court finds to the contrary. “Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence. However, [f]indings as to credibility should be closely and affirmatively linked to substantial evidence and not just a conclusion in the guise of findings.” Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995) (quotation and citation omitted). The ALJ must “explain why the specific evidence relevant to each factor led him to conclude claimant’s subjective complaints were not credible.” Id. The ALJ can look at objective factors, such as attempts to find relief, use of medications, regular contact with doctors, and daily activities when determining a claimant’s credibility. Luna v. Bowen, 834 F.2d 161, 165-66 (10th Cir. 1987).

The ALJ listed plaintiff’s sparse and infrequent treatment for the allegedly disabling impairments. (R. 17). She also listed plaintiff’s lack of compliance with prescribed medication,

id., and the fact Dr. Puls opined that plaintiff's prognosis was good with continued treatment and medication management. Id. As to plaintiff's testimony that she was not taking prescribed medication because she could not afford it, the ALJ noted plaintiff provided no evidence she had tried to obtain health care and been denied, stating if her symptoms were as debilitating as she alleged, she would have exhausted all avenues, including "indigent" health care facilities run by government agencies. (R. 17-18). In light of the deference afforded the ALJ on the issue of credibility and the fact that the ALJ did cite to specific evidence which could fairly be interpreted as creating a credibility issue, the Court finds the ALJ's credibility determination to be supported by substantial evidence.

Conclusion

The decision of the Commissioner finding plaintiff not disabled is AFFIRMED.

SO ORDERED this 6th day of November, 2012.



T. Lane Wilson
United States Magistrate Judge