UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

SUSAN STEWART, Plaintiff, vs. JO ANNE B. BARNHART, Commissioner of Social Security, Defendant.	No. C03-3061-MWB **REPORT AND RECOMMENDATION**

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I. INTRODUCTION

The plaintiff Susan N. Stewart ("Stewart") appeals a decision by an administrative law judge ("ALJ") denying her application for Title XVI supplemental security income ("SSI") benefits. Stewart argues the Record does not contain substantial evidence to support the ALJ's decision. (*See* Doc. No. 10)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On August 1, 2001, Stewart filed an application for SSI benefits, alleging a disability onset date of October 23, 1998. (R. 247-49; *see* R. 14) Stewart filed a prior application for benefits, also alleging disability since October 23, 1998. The application was denied on March 28, 2000, after an ALJ hearing, and Stewart did not appeal. (*See* R. 14-15, 80-214) The ALJ found no basis to reopen the prior decision, making the prior decision "the final and binding determination of the Commissioner through that date [*i.e.*, March 28, 2000]." (R. 14-15) *See Brown v. Sullivan*, 932 F.3d 1243, 1245-46 (8th Cir. 1991) (citing *Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977)).

Stewart's present application was denied initially on December 13, 2001 (R. 232, 234-38), and on reconsideration on February 25, 2002 (R. 233, 241-44[1]). On March 5, 2002, Stewart requested a hearing (R. 245), and a hearing was held before ALJ Andrew

[1]The page numbers cited by the Commissioner in her brief relate to the prior application for benefits. (*See* Doc. No. 11, p. 2)

T. Palestini on September 13, 2002. (R. 33-79) Stewart was represented at the hearing by attorney Dan Wilmoth. Stewart testified at the hearing, as did Vocational Expert ("VE") Elizabeth Albrecht.

On April 3, 2003, the ALJ ruled Stewart was not entitled to benefits. (R. 11-21) On June 6, 2003, the Appeals Council denied Stewart's request for review (R. 7-8), making the ALJ's decision the final decision of the Commissioner.

Stewart filed a timely Complaint in this court on July 3, 2003, seeking judicial review of the ALJ's ruling. (Doc. No. 3) In accordance with Administrative Order #1447, dated September 20, 1999, this matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition of Stewart's claim. Stewart filed a brief supporting her claim on October 6, 2003. (Doc. No. 10) The Commissioner filed a responsive brief on December 3, 2003. (Doc. No. 11).

The matter is now fully submitted, and pursuant to 42 U.S.C. § 405(g), the court turns to a review of Stewart's claim for benefits.

B. Factual Background

1. Introductory facts and Stewart's daily activities

At the time of the hearing, Stewart was 49 years old. (R. 36) She lived with her mother and her eight-year-old grandson. (R. 61)

She got her G.E.D. in 1978. She took clerical courses twice, once in approximately 1986, and again in the late 1990s, and received a certificate that qualifies her to work in an office. (R. 36-37)

Stewart stated her usual weight is about 140 pounds, but at the time of the hearing, she weighed about 220 pounds. She attributed her weight gain to nervousness, stating she eats a lot and drinks a lot of pop. (R. 37)

Stewart explained she received disability benefits for a period of time, beginning when she was about 13 years old and ending when she was 22 or 23 years old. Her disability was based on diagnoses of depression and schizophrenia. When she was taken off disability at age 22 or 23, her doctor told her the schizophrenia had "mysteriously disappeared." (R. 38) In addition, she received an inheritance when her father died in 1993, which made her ineligible for SSI benefits. (*Id.*)

After she was taken off SSI, Stewart worked part-time at Wal-Mart for about five months in 1994 or 1995. She worked in the domestics area stocking shelves, helping customers, and watching for shop lifters. She testified she was paid minimum wage. She characterized the job as a "stand-up job," and stated she was required to lift twenty to twenty-five pound boxes when she was stocking shelves. (R. 39-40) She left the job in August of 1995, because she was allergic to the dyes in the towels and linens in the domestics area, and, according to Stewart, Wal-Mart's doctors advised her to leave the department. She tried working as a cashier but she "was too nervous" and "couldn't do it." (R. 40)

After leaving Wal-Mart, she worked at Your, Incorporated, an "energy assistance program for low income people." (R. 40) The company also assisted individuals in applying for Head Start and food vouchers. Stewart performed clerical duties to assist the boss, including scheduling appointments, typing, filing, and sometimes taking applications. (R. 40-41) The job was full time, and she was paid minimum wage. She estimated the job required her to stand about 40% of the time, and sit the remaining 60% of the time. The job required little lifting, perhaps "five pounds or so" when she had to lift files or

small boxes. (R. 41-42) She stated the job required a lot of typing. She stated she left the job because she was very nervous and "just honestly could not do it." (R. 42) Her boss "agreed that maybe it would be better if [she] left." (*Id.*)

Stewart next worked part-time at Villa Care Center. She answered the phone, typed, filed, made photocopies, and occasionally took in payments. She was paid minimum wage. She stated she stood most of the time. The job required minimal lifting, never over ten pounds. (R. 43) She had been at the job for about two months when her employer told her that if she did not become less nervous, she would have to leave. (R. 43) She left the job because she "knew [she] wasn't going to be any less nervous than [she] was." (R. 44)

Stewart worked at Apac during two separate periods of time in 1997 and 1998, for a total of just under a year. Apac is a telemarketing company that markets credit cards and insurance services. She talked to people on the phone, and then used a computer to log information provided by the customers. The company trained her initially, and retrained her whenever they began handling a new product. The job was done sitting down, and required no lifting. She was earning about $6.50 an hour at the time she left. She initially began working about thirty-five hours per week, but she cut her hours to twenty-five or thirty because she was having trouble with headaches and sitting for long periods of time. She also stated she was "not a good sales person." (R. 45)

She worked as a housekeeper at Comfort Inn from June 2000 to February 2001, with a couple of months' hiatus sometime during that period. The job required her to fill the linen closets, fill her cart, and clean the rooms, which involved changing sheets, bedspreads and blankets; vacuuming; dusting; cleaning the rest rooms; and taking out the garbage. She stated the job involved carrying linens from the first floor to the second floor, and she estimated she lifted at least fifteen pounds at a time. (R. 46-47) She had

some difficulty carrying that amount of weight, and stated she would "have to stop and rest." (R. 47) She finally told someone she could not carry that much, and they allowed her to carry lighter loads. (*Id.*) She left the job in February 2001, because she "was having a lot of difficulty," and having periods of time where she was "incoherent," unable to remember who or where she was. She saw a doctor and was diagnosed with high blood pressure. (R. 48)

Stewart stated she has had problems with headaches for quite awhile. She had an MRI of her back, and in March 2001, she was told she has problems with her disks. She stated she also has depression. (R. 48) She takes medications for her headaches, and she stated the pain from the headaches radiates down into her neck, ears, shoulders, and left arm. Standing makes her headaches worse. She stated she has "a hard time with coordination." (R. 49) In addition, her back sometimes hurts so badly that it affects her ability to stand. The amount of her pain varies, being worse on some days than on others. Her back pain also varies in frequency, occurring more often some weeks than others. (R. 50) In general, Stewart estimated she can stand for about a half hour at a time.

She stated her pain also limits her ability to sit. She estimated she can sit for about forty-five minutes at a time before she has to get up and move around or lie down. She lies down during the day frequently, sometimes for a half hour, or up to two or three hours if she has a headache or "really severe" pain. (*Id.*) She stated she lies down for at least half an hour to an hour every day due to headaches and/or back pain. (R. 51)

Stewart could not recall if she missed work due to physical or mental problems while she was at Wal-Mart. When she was working a Your, Incorporated, she left early several times due to headaches and anxiety. She stated, "Some days, I would be so nervous, that I just couldn't sit there." (*Id.*) When she was at the Villa Care Center, she

did not leave early, but she occasionally took extra breaks due to physical or mental problems. (*Id.*)

When she worked at Apac, she had some problems sitting for a long time. She stated her first supervisor was very lenient and allowed her to take extra breaks, but her next supervisor would not allow the extra breaks. Stewart also stated she was very nervous talking with customers on the phone at Apac. (R. 52) At the Comfort Inn, Stewart had problems carrying linens up to the linen room. She also had problems getting on her knees to scrub the floors, and making the beds. (*Id.*)

Stewart stated she was diagnosed with polyneuropathy in March 2002. She stated she has lost feeling in her hands and has "trouble distinguishing . . . how hot things are or how cold things are or holding onto things." (R. 53) She has had the problem for over ten years, and it has increased over time. She stated doctors initially thought she might have carpal tunnel syndrome, before she was diagnosed with polyneuropathy. (*Id.*) She explained she has suffered cuts, bruises, and burns due to the lack of feeling in her hands. (R. 54-55)

Stewart testified she has had anxiety for many years. She has panic attacks and will "avoid all social contact as much as possible," noting she "cannot relate to people." (*Id.*) She also has been diagnosed with depression. When she is feeling depressed, she will "break into tears . . . [and] feel things are hopeless. Nothing is ever going to get better." (R. 53-54) She took Zoloft for a time, but in June 2002, her doctor took her off the medication for three months to see if it would affect the loss of feeling in Stewart's hands and feet. She stated it had not affected her hands and feet, however. (R. 54) When she is depressed, Stewart spends a lot of time laying on the couch or bed, and may not change her clothes for a couple of days. When she was on the Zoloft, she would feel "a little

better," and might make an effort to comb her hair and make herself presentable. (R. 57) Some days the Zoloft helped, and other days she felt it made no difference. (R. 59)

Although Stewart had problems with depression when she was working, she was not taking antidepressant medications because she did not have money to fill prescriptions regularly. When she was at Apac, she had a hard time talking to people and she stuttered. She stated when she was supposed to do rebuttals, if someone was rude to her, she would "just disconnect and leave [her] station." (R. 58) At Comfort Inn, she worked alone for the most part and was able to avoid contact with others. She did not recall missing work due to depression. She stated she has never had a problem with alcohol or other drugs. (*Id.*)

Stewart stated she attempted to obtain counseling for her depression at one point from Iowa Family and Lutheran Services in Fort Dodge, who agreed to take $10 per session. On March 19, 2002, she saw a licensed mental health counselor, Amy Ranard, and Stewart described the experience as follows:

> Amy right away wanted me to get a different diagnosis, and she wouldn't let me leave the room, and she called mental health, Webster County Mental Health, said that she wanted me in there right away, and I didn't have any money or insurance, and so we stayed in there quite a while. She wouldn't let me leave. She kept asking me if I was going to kill myself when I left. I said no, which I was not even thinking of that, and finally they couldn't get me in for two weeks to a place where I, I could apply to see if I could get financial aid, and during that time I was so upset with what had happened, I went and talked to my pastor, and Pastor Smith agreed that – he, you know – that maybe I should stay away. We both agreed to that.

(R. 59, 70, 430-48) She stated she never discussed the incident with a doctor.

Stewart stated she has arthritis in her knees, with her "left knee having severe arthritis and bone fragments." (R. 55) The pain affects her ability to stand. She stated her doctor refused to give her pain medication for her knees, and only gave her medication for her headaches. (R. 55-56) On days when her back and knees are hurting badly, she is afraid to bathe because she fears she might not be able to get out of the tub, and she has no one around to help her. (R. 55)

She would like to obtain further medical care but has been unable to afford it. Her uncle paid for her first two MRIs, and she stated Haliburton paid for the last one. (R. 56) Her brother, mother, and uncle have been loaning her money or paying for her to see doctors. She also sometimes does not fill prescriptions due to lack of funds. (R. 56-57) She takes Atenolol every day for her blood pressure. She has taken headache medications but she cannot afford to have her prescriptions refilled. (R. 68)

Stewart can drive, and she has a driver's license. She drives her grandsons to and from school every day, and takes her mother to buy groceries. She also drives her mother on other errands, and sometimes Stewart goes in with her. If her mother has a lot of walking to do, or if Stewart is feeling like she cannot be around people, then she stays in the car. When she goes grocery shopping with her mother, her grandson or her mother will push the cart around. Stewart will help carry the lighter sacks, and her grandson and mother carry the other sacks of groceries. (R. 60)

Regarding her daily activities, Stewart stated she usually gets up at 6:00 a.m. She gets her grandson cold cereal for breakfast. If he wants instant oatmeal, her mother will heat water for the oatmeal. Stewart does some of the cooking. Her mother usually does the dishes because Stewart does not like doing dishes, and she stated she tends to drop them because of the numbness in her hands. ((R. 61) Stewart does some of the vacuuming, but stated she has to rest during the task, or do part of it one day and finish

the next day. Her mother usually does the laundry, and her mother does the lifting involved with the laundry. They live in a two-story house, and the washing machine is in the basement. She stated her mother slides the laundry basket down the stairs. Stewart sometimes helps her, and the two of them will carry or slide the basket down the stairs. (R. 62)

Between breakfast and lunch, Stewart may take her grandson to a doctor's appointment or run an errand, but otherwise she stays at home. She drives family members to run errands even when she does not feel up to it. She usually has a sandwich for lunch, which she fixes herself. (R. 62-63) Between lunch and dinner, she may straighten up the house, or sometimes do a load of laundry. She stated she does "basically nothing." (R. 63) They have dinner at about 6:00 p.m., and she usually makes dinner. She makes dishes like casseroles, stuffed peppers, or chili. After dinner, she helps her grandson with his homework. He goes to bed at 8:30 p.m., and then she goes to bed at about 10:00 p.m. She stated at times it is very difficult for her to climb the stairs to go up to bed. (R. 63-64)

Stewart stated she has trouble sleeping, and she will wake up with her back hurting. She also has "very bad dreams, nightmares," and if she has "a terrible nightmare," she will get up and sit for a couple of hours. (R. 64)

She stated it is often difficult for her to have her grandson living with her, but she feels she has no choice. She explained her daughter "has a lot of problems," and "basically threw him out." (*Id.*)

She has no outside activities for fun. She has a friend who gets a day off occasionally, and they will take "the kids" to the park to play. (R. 65) She used to enjoy taking walks and riding a bicycle, but she is no longer able to do that because of her back

and leg problems. She stated, "That happened almost overnight," about two years before the hearing. (*Id.*)

Stewart went to South Dakota for three days in 2002, with a friend and her grandson, and she had been to South Dakota once before during the prior couple of years. He friend drove, and they made frequent stops so Stewart could get out, stretch, and have a snack. She estimated they stopped five or six times on the way to Andover, South Dakota. (R. 72)

Stewart, her mother, and her grandson drove to South Carolina a couple of months before the hearing, to visit her brother. They stopped frequently because Stewart had a hard time sitting, and they spent one night in a motel. She stated her brother wanted her to see a neurosurgeon for a consultation, and that was the reason for the trip. However, when they arrived, her brother could not afford to pay for the consultation because of his own medical problems. (R. 70-71)

Stewart sometimes has difficulty buttoning her clothing. If she were to drop a dime on the floor, she could reach down and pick it up, but with difficulty. She has problems bending or stooping down, and when she gets down, she has "a very hard time getting up." (R. 66) She drops things frequently when her hands go numb. (R. 65)

Stewart stated she could not return to her work at Wal-Mart because she could not do the required lifting, walking, and standing. She could not do the typing that was required in the job at Your, Incorporated, and she stated she still has trouble communicating with people. She is unable to type because she cannot feel the keys, and she has trouble bending her fingers to reach the lower row of keys. She stated when she went back for retraining in the clerical program, she had the same typing teacher she had had previously, and her teacher "couldn't believe how bad [Stewart's] typing had deteriorated." (R. 66)

She stated she could not return to the job at Villa Care Center because she is unable to be on her feet for long periods of time, and she could not stand and bend to do the filing. In addition, she continues to suffer from anxiety that causes her difficulty in communicating with people. (R. 67) She could not return to the job at Apac because it requires sitting for long periods of time and typing. When she sits for a long time without being able to get up and move around, her knees get stiff and her back hurts. She also stated she is sensitive to light, and looking at the movements on the computer screen for a long time triggers headaches. The Apac job also required her to communicate with people, which she finds difficult. (*Id.*) She could not return to the job at the Comfort Inn because she would be unable to do the walking, bending, lifting, and carrying required in the job. She was in a lot of pain during the job, a fact Stewart said was noted by her manager. (R. 68)

Stewart stated her greatest problems are physical limitations due to being in "a lot of pain," and her "anxiety or depression, that has been a long-term problem . . . for well over 20 years." (*Id.*) She stated her depression has not gotten any better, and she "always feel[s] like [she's] in desperation." (*Id.*) She talks with her pastor and keeps in touch with a doctor, but was not seeing anyone for her depression at the time of the hearing. She stated Dr. Steele wanted her to go on medication, and she stated she probably would go back on Zoloft after the testing period ended.

2. Stewart's medical history

The record includes evidence of Stewart's medical care and treatment since 1989. Much of the record consists of evidence submitted in connection with her prior application for benefits, which was denied on March 28, 2000. The court will summarize the medical

evidence, referring briefly to the earlier evidence when appropriate to place Stewart's current condition into context.

a. Depression and anxiety

The record substantiates Stewart's testimony that she has suffered from depression and anxiety from a very young age. She was hospitalized for suicide attempts on more than one occasion. She received regular counseling from January to August 1999, but beyond complaints to her family doctor in conjunction with treatment for her headaches, it does not appear she sought further mental health care until March 19, 2002. On that date, she saw a licensed mental health counselor for an intake evaluation. The counselor referred her for a complete evaluation to obtain an accurate diagnosis prior to determining a course of treatment. (R. 430-48) Stewart never called to make an appointment for the psychological evaluation, and the agency closed its file on June 19, 2002. (*See* R. 417-29)

b. Chest pain

Stewart saw James O. Steele, M.D. on July 19, 2000, complaining of chest pain. She reported a family history of coronary artery disease. She stated she had been experiencing intermittent left-sided chest pressure and pain upon exertion, usually not associated with left arm pain. An EKG was normal. Dr. Steele diagnosed possible angina pectoris syndrome, and noted she was at high risk of coronary artery disease. The doctor noted Stewart did not have insurance and could not afford to pay for a cardiology evaluation. He gave her samples of Zebeta, and advised her to stop smoking, take daily aspirin, and take Nitroglycerin when needed. (R. 375-76)

Dr. Steele saw Stewart for follow-up on August 2, 2000. She was taking the Zebeta daily, and had taken Nitroglycerin for one episode of chest pain that was associated with a lot of excitement and stress. The doctor noted Stewart had lost two pounds and was cutting down on her smoking. Her uncle had given her money to pay for tests. The

doctor switched her medication to Atenolol, and ordered lab tests to check for other risk factors. (R. 374-75) Dr. Steele saw her for follow-up on September 5, 2000. He noted her angina pectoris symptoms were improved with the beta blocker and nitroglycerin. He recommended she eat a diet low in saturated fats to lower her LDL cholesterol. Test results indicated what appeared to be "a beta thalassemia type of anemia, that is, she ha[d] a low hemoglobin, low hematocrit, very low MCV, MCH, with high iron count and high RBCs." (R. 372) The doctor found Stewart did not need supplemental iron, and recommended she have a complete blood count annually. (*Id.*)

Stewart returned for follow-up in January 2001. She had quit smoking in September 2000 (*see* R. 370-71), and continued trying to lose weight. She reported she was working, and her angina symptoms had resolved. She denied shortness of breath or wheezing episodes and was not having leg cramps. Dr. Steele noted he would conserve Stewart's medical costs because she had no insurance. He recommended checking her lipid panel annually; directed her to continue taking Atenolol and aspirin daily, and nitroglycerin as needed for chest pain; and return for follow-up in three months. Stewart also noted she was doing well with regard to her anxiety, and she was planning a trip to South Carolina to be with her brother, who was scheduled for some type of surgery.

On March 14, 2001, Stewart was evaluated at the Iowa Heart Center for chest pain. She gave a family history of coronary artery disease. She complained of left shoulder pain, which the doctor found to be atypical for angina remote. She also complained of left-sided chest pain that also was somewhat atypical for angina. The doctor detected a mild systolic heart murmur and ordered testing to rule out valvular disease. An EKG was normal. Because Stewart had been on "Phen-Fen" for a year (which she had stopped a year earlier), the doctor ordered an echocardiogram and treadmill stress echocardiogram, and additional lab studies. (R. 332-34) The echocardiogram showed mild mitral

regurgitation, but otherwise was normal. (R. 335) The stress echocardiogram indicated normal ventricle function, and no pericardial effusion, with a deconditioned heart rate response due to her tobacco use. (R. 336)

c. Pain in back, hips and arms, and numbness in hands and feet

The record indicates Stewart began complaining of back pain, and pain and numbness in her left arm, in August 1996. She reported having an accident some ten years earlier when she fell on the ice, and she stated she had experienced low back pain and trouble with her elbow ever since that time. The pain began worsening in 1996, causing her to seek treatment. (*See* R. 171-73) An X-ray and nerve conduction study were negative. The doctor recommended a bone scan but was unable to secure authorization in the face of Stewart's lack of insurance. (R. 173, 177-80) Stewart complained of pain in both of her arms in January 1998, and she was diagnosed with bilateral tennis elbow. She was treated with Motrin, splints, and an injection. (R. 176)

In a letter to Disability Determination Services ("DDS") dated January 21, 1999, E.D. DeHaan, M.D. noted Stewart reported having numbness in her hands and fingers for about ten years, progressing gradually over time. At that time, she reported the numbness was continuous and did not vary with activity. She stated the numbness caused difficulty "with fine touch activities such as typing, eating, writing, and manipulating small objects," and she "tends to drop things unexpectedly from time to time." (R. 183)

The next record evidence relating to her arm pain indicates she saw James O. Steele, M.D. on July 19, 2000, complaining of numbness and tingling in her fingertips, and pain in her forearm and shoulder. She reported she was unable to feel even an injury to her fingertips. Her arm pain was worse with activity, but it also was present at rest and was worse in certain body positions. Dr. Steele diagnosed her with carpal tunnel syndrome in her left hand with retrograde radiation of symptoms. She was given a wrist

splint to wear at night. (R. 375-76) At a follow-up visit on August 2, 2000, Dr. Steele noted Stewart's carpal tunnel syndrome had improved with the splint. (R. 374-75)

She complained of pain in her left shoulder, back, neck, and hip in March 2001. X-rays of her shoulder and hip were negative, but X-rays of her cervical spine indicated hypertrophic degenerative changes. She was diagnosed with left shoulder rotator cuff tendinitis, a right pelvic girdle hip muscle strain, and cervical spine degenerative arthritis with possible disk disease causing periodic radiculopathy symptoms. She was told to take nonsteroidal anti-inflammatories, and was instructed in range of motion exercises for her back, pelvis, shoulder, and neck. Dr. Steele noted that if her symptoms worsened, an MRI might be indicated. (R. 360, 366-67)

Stewart continued to complain of low back pain and sciatica symptoms, with pain extending into her right buttock, thigh, calf, and all the way into her right foot. She also complained of weakness in both legs and some urinary incontinence. On April 25, 2001, Stewart had an MRI of her cervical spine, which revealed the following:

1. Degenerative disk disease involving C3-4, C4-5, C5-6 and C6-7 disks with bulging of the annular fibrosis leading to spinal stenosis at the level of C3-4 disk through C5-6 disk.
2. Bulging of the annular fibrosis into the spinal canal and the right lateral recess leading to narrowing and occlusion of the neural foramen on the right side and spinal stenosis at the C6-7 levels.
3. Anterior degenerative spur formations are seen in C4, C5 and C6.
4. Otherwise unremarkable MRI of the cervical spine.

(R. 337) On May 10, 2001, Stewart had an MRI of her lumbar spine that was normal, with no evidence of disc bulging, protrusions, or herniations in her lumbar spine. (R. 338-39) The record does not contain further evidence of examinations or treatment relating to Stewart's back pain.

She was seen with complaints of numbness in her hands and feet on March 20, 2002. She reported picking up a hot baking pan without using gloves and burning her hands, but she was not aware they had been burned. She put her hands under cold water and did not feel that either. She also reported stepping on a tack and not feeling any pain. Jugal T. Raval, M.D. diagnosed her with polyneuropathy of unknown etiology. An EMG and limited nerve conduction study of her left upper extremity indicated mild carpal tunnel syndrome. Dr. Raval recommended a detailed EMG and nerve conduction study of both hands and one leg; however, because Stewart did not have insurance or funds to pay for the procedures, no further testing was performed. (R. 408-12) A neurological evaluation on June 24, 2002, resulted in a continued diagnosis of polyneuropathy. (R. 406-07)

d. Headaches

Stewart also complains of chronic headaches. The first indication in the record regarding her headaches is a record of a doctor's visit on July 17, 1997, when she reported a history of migraine headaches for several years. The doctor was unable to rule out depression or anxiety as a cause, and prescribed Zoloft. He advised Stewart to return if her symptoms worsened. (R. 331) On November 10, 1997, Stewart saw Dr. Raval with complaints of migraine headaches and flashing lights. He prescribed Teragel and Amitriptyline. (R. 175-76)

Stewart was not seen again for headache complaints until August 27, 2001, when she saw Dr. Steele. She reported having migraines since she was a teenager, and reported a past history of head trauma. The doctor noted the headaches were typical of migraines, with associated vertigo, nausea, and photophobia without other vision problems. The doctor noted Stewart was experiencing increased stress, which made the headaches worse. He prescribed Etodolac (a nonsteroidal anti-inflammatory), Zoloft (an antidepressant), Meclizine for the vertigo, and Vicodin for severe pain. (R. 256-57) Stewart returned for

follow-up on September 18, 2001, and reported her headaches were somewhat improved. The doctor increased her Zoloft dosage and prescribed Atenolol. Dr. Steele ordered an MRI of Stewart's head to rule out intracranial masses and lesions. The MRI was performed on September 21, 2001. There were no masses or abnormalities noted, and the MRI was "[e]ssentially normal." (R. 404)

Stewart returned for follow-up on November 2, 2001. Dr. Steele noted her headaches were much improved. Her anxiety and depressive symptoms also were improved on the Zoloft. (R. 351-52)

e. Knee pain

The first record evidence of Stewart's knee problems is a note during a January 6, 1999, psychiatric examination that Stewart complained her "left knee and left wrist bother her a lot." (R. 197) She reported ongoing treatment by her family physician, but stated no definitive diagnosis had been made. (*Id.*) In his letter to DDS dated January 21, 1999, Dr. DeHaan noted Stewart had quit her job at Wal-Mart because of "her tendency to drop things, and/or fall because her left knee gave out." (R. 183)

On January 16, 2001, Stewart complained to Dr. Steele that she "had problems with her left knee and, therefore, she use[d] her right lower extremity more for power." (R. 369) She was working as an on-call housekeeper at Comfort Inn at that time. (*Id.*) X-rays of both knees were taken on May 3, 2001. The right knee evidenced "minimal lateral degenerative subluxation of the patella." (R. 359) The left knee evidenced "1) [m]inimal degenerative changes of the patellofemoral compartment with minimal lateral degenerative patellar subluxation[; and] 2) [w]ell corticated bony fragment seen arising from the anterior tibial tuberosity which may either represent an ununited ossification center, or an old avulsed injury to this area." (R. 359)

On October 10, 2001, Stewart saw M.W. Stitt, M.D. for an examination at the request of DDS. She gave a history of arthritis of the neck, shoulders, and left knee. She stated she had been "referred to Orthopedics for her left knee but [couldn't] afford to go." (R. 340) Dr. Stitt noted Stewart would have problems stooping, climbing, kneeling, and crawling, and opined these were not reasonable activities for her in a work environment. He found she had "[n]o clear problems moving around although with knee and back pains . . . at some point she would have difficulty going all day.". (R. 342)

3. Consultative examinations

Stewart saw David P. Johnson, Ph.D. on October 3, 2001, for a mental status evaluation at the request of DDS. (R. 345-49) She reported suffering from panic attacks and social anxiety. Stewart gave the following description of her mood and emotional functioning:

> She said that she feels depressed all of the time and becomes nervous easily. She currently is taking the antidepressant, Zoloft 100 mg. prescribed by Dr. Steele at Trimark locally. This has improved her mood somewhat. However, she said that she cannot relax and likes being alone although she enjoys being outdoors. She has been sleeping poorly averaging, she said, only 2 to 3 hours per night with a disturbed pattern of sleep which is a long-term pattern for her. She will rarely sleep as much as 6 hours. She will try to nap for 1 to 2 hours during the day sometimes but is not able to sleep every day. Appetite has been somewhat decreased. She eats one meal a day plus a light lunch. However, she has gained some 80 pounds she said over the past two years. She has possibly lost a little bit of weight recently. Energy level is described as always drained and exhausted. Interest in and pleasure taken in usual activities have been decreased. She said that she used to like to go for walks but physically cannot do so as much anymore. She used to enjoy riding a bike and enjoyed horses

> but cannot participate in these activities either. She said that she really does not do very much but only watches her grandchildren. Concentration and memory have been problematic also. She may forget where she put her keys or her purse, for example. She also acknowledged having suicidal thoughts off and on for a long time. She said that she has literally made 27 suicide attempts in her life. She once took some 900 pills in 1988 or so. Her suicide attempts have usually involved pills she said. However, she said that she tried earlier this year to hang herself in the basement of her mother's home when she was home by herself. She was not successful though because her toes touched the floor. She also has cut her wrists a couple of times in the past.
>
> Mrs. Stewart also reported experiencing a great deal of social anxiety when around people. At such times she said that she cannot breathe and feels as if she is choking, her hands will shake, her heart races, she gasps for air, and she experiences a headache. She reported having such difficulties for 20 years or so in all but these have been worse in the past 5 years she said. The frequency of such episodes is variable, she said, but may happen at church or in other social settings. If she can sit by herself in a restaurant and by a window so that she can see outside she may be able to tolerate this, she said. Nonetheless she tends to avoid most social settings. Her most recent such episode was on the Sunday prior to this evaluation and this was the first such episode in a few months, she said.

(R. 346-47)

Stewart reported a long history of psychiatric treatment, including hospitalization at age 13, and three hospitalizations in the late 1980s. However, she was not on any psychiatric medications from 1993 until late 2000. (R. 347)

Dr. Johnson noted Stewart "was oriented to time, place, person and to the purpose of the interview." (R. 348) He noted, "She spoke in an anxious and somewhat pressured tone of voice and her description of events was rather circumstantial." (*Id.*) He had to

redirect her attention back to the focus of the interview on occasion. He further noted, "Her expressed affect was dysphoric and anxious and consistent with her mood as reported. Her speech and thought processes were, however, generally logical, coherent, and goal-directed, without any evidence of a thought disorder, loosening of associations, or other perceptual abnormalities. Overall judgment and insight into her condition can be considered to be fair." (*Id.*)

Dr. Johnson administered several brief exercises to test Stewart's mental status. She could count from one to twenty, forward and backward, and recite the alphabet correctly. She could recite the days of the week and months of the year forward and backward. (R. 348-49) In addition, "[s]he was able to perform serial 3's as far as the number 38 with one mistake in 30 seconds. She was able to perform serial 7's backward from 100 as far as the number 59 with one mistake in 30 seconds. She interpreted the proverb, 'strike while the iron is hot,' as 'do it quickly at the right time.' She interpreted the proverb, 'people who live in glass houses should not throw stones,' as 'you should not cast judgments on someone else if people could see your lifestyle.'" (R. 349)

Dr. Johnson's diagnostic impressions of Stewart were: (1) major depression, recurrent, severe, without psychotic features; social phobia, generalized; and rule out panic disorder with agoraphobia; (2) personality disorder not otherwise specified, with avoidant, dependent, and borderline personality traits; (3) arthritis, degenerative disk disease, high blood pressure, and frequent headaches, all by history; (4) mild severity of stressors; and (5) a current GAF of 35-40, with highest GAF in the preceding year of 45-50. (*Id.*) He reached the following conclusions regarding her ability to function in the workplace:

> Mrs. Stewart would appear able to remember and to understand simple instructions, procedures, and locations. She will probably be mildly to moderately limited in her ability to remember and to understand more detailed or complex

> instructions, procedures, and locations, and in her ability to maintain attention, concentration, and pace on the job. She will, however, be moderately to severely limited in her ability to carry out instructions, to interact appropriately with supervisors, coworkers and the public and in her ability to use good judgment and to respond appropriately to changes in the work place.
>
> She appears able to manage financial benefits on her own behalf if such benefits are provided to her.

(*Id.*)

As noted above, Stewart underwent a physical examination by Dr. Stitt on October 10, 2001, at the request of DDS. She complained of depression, noting she was taking Zoloft; arthritis of the neck, shoulders, and left knee; incapacitating migraine headaches once or twice a week, requiring bed rest, and exacerbated by life stressors; pain in her left arm down to her fingers; and carpal tunnel syndrome with numbness in both hands. (R. 340) Stewart exhibited full ranges of motion of her elbows, wrists, knees, hips, and ankles; very slightly decreased range of motion on adduction of both shoulders (60° out of 75°), but otherwise full ranges of motion in both shoulders; and slightly decreased ranges of motion of her cervical and lumbar spine (Cervical: lateral flexion, 30° out of 45° on right and left; flexion and extension, 40° out of 45°; rotation 70° out of 80° on right, and 60° out of 80° on left; Lumbar: flexion-extension, 80° out of 90°; lateral flexion 25° out of 30° on right and left). (R. 343-44) She had slight muscle weakness (4 out of 5, right and left), no reflex loss, and questionable sensory loss. The doctor observed that Stewart walked slowly and carefully with a limp. (R. 244)

Dr. Stitt found no clear indications that Stewart would be limited in her ability to lift and carry, noting, however, "she has a lot of neck and shoulder pain and probably would have pain at some point if she has to carry very heavy weights or do it very

frequently." (R. 342) Similarly, he found no clear problems with her ability to stand, move about, walk, and sit during an eight-hour day, but noted that with her knee and back pain, "I think at some point she would have difficulty going all day." (*Id.*) He recommended she not stoop, climb, kneel, or crawl. He found she had no limitations in her ability to handle objects ("I didn't see anything about her dexterity that suggested problems with handling things"), see, hear, speak, or travel. He also found no contra-indication to exposure to dust, fumes, etc., although Stewart did suggest she might have some environmental allergies, for example to dyes in clothes. (*Id.*)

Dr. Stitt reached the following conclusions regarding Stewart's ability to work:

> This lady has a number of Orthopedic and mechanical problems and complaints[,] [n]one of which seem to be terribly overwhelming but taken together tend to add up to problems with doing much physical labor. It sounds to me like her major problems are Psychiatric including but not limited to her chronic fairly severe depression. I think it would be useful to find out what the Psychiatrist[s] do think of her. I get reports on the MRI's. My gut feeling is that she really is not going to be able to do any sort of gainful employment even though she is qualified for fairly sedentary desk job type activities with her computer, typing and clerical job history. Certainly seems that there are a number of areas that she could use referral and further evaluation by specialties. Neurosurgery and Orthopedics coming to mind. She could certainly use some sort of disability or something that would involve health coverage.

(*Id.*)

David A. Christiansen, Ph.D. completed a Psychiatric Review Technique on December 4, 2001. (R. 378-89) His assessment considered Stewart's mental status from August 1, 2000, forward. He found Stewart suffered from the following: Affective Disorder: major depressive disorder, recurrent, severe, without psychotic features, and

characterized by appetite disturbance with weight change, sleep disturbance, decreased energy, and difficulty concentrating or thinking. Anxiety-Related Disorder: generalized social phobia. Personality Disorder nor otherwise specified, avoidance, dependent, with borderline traits. Based on these findings, he concluded Stewart would have a mild functional limitation restricting her activities of daily living, and moderate limitations affecting her ability to maintain social functioning, and to maintain concentration, persistence, or pace. (*Id.*)

Dr. Christiansen completed a concurrent Residual Functional Capacity Assessment of Stewart's mental activities. (R. 390-92) He concluded she was moderately limited in her ability to understand, remember, and carry out detailed instructions; maintain attention and concentration for extended periods; perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances; work in coordination with or proximity to others without being distracted by them; complete a normal workday and workweek without interruptions from psychologically-based symptoms; perform at a consistent pace without an unreasonable number and length of rest periods; get along with coworkers or peers without distracting them or exhibiting behavioral extremes; and respond appropriately to changes in the work setting. He found she was not significantly limited in any other respect. (*Id.*)

In a narrative summary accompanying his reports, Dr. Christiansen noted the only current information regarding Stewart's mental status was Dr. Johnson's evaluation of October 3, 2001, which "revealed no significant cognitive deficits except for some difficulties in attention and concentration typical of people who are preoccupied with depressive thoughts and feelings. " (R. 393) He opined Dr. Johnson's assigned GAF of 35-40 was "lower than would be expected considering [Dr. Johnson's] report as a whole," and "likely . . . includes consideration of the claimant's arthritis, degenerative disk

disease, high blood pressure, and frequent headaches." (*Id.*) Dr. Christiansen noted that although her physician had prescribed Zoloft, Stewart had "not been in treatment for depression or anxiety for several years, a fact which erodes her general credibility in alleging [mental] impairments." (*Id.*) He also found her credibility was eroded by the fact that although Stewart claimed to have attempted suicide 27 times in her life, her most recent reported attempt when she tried to hang herself in her mother's house "did not result in hospitalization or even treatment." (*Id.*) He noted her supervisor at the Comfort Inn reported Stewart's work quality was excellent, her pace was good, she adjusted to changes, her appearance was good, she related adequately to others, and she could concentrate and remained on task. Although she "was somewhat irregular in attendance and sometimes appeared to be . . . anxious, [she] managed her feelings well." (*Id.*)

Dr. Christiansen concluded:

> Based on psychological factors alone, it is likely the claimant will not have difficulty understanding, remembering, and carrying out simple instructions, such as would be involved in unskilled jobs like motel housekeeping. She is anxious around people and therefore would do better working primarily by herself. Depressive and anxious feelings do not appear to have influenced the claimant's ability to get the job done when she was working as a motel housekeeper, probably because she could work alone. She will have mild to moderate difficulty adhering to a schedule, and persisting through a regular period of work.
>
> [Regarding her credibility,] it should be noticed that the claimant has in the past alleged depression, but currently places the emphasis on social phobia. Since she has been diagnosed with both disorders, this does not erode credibility to any significant extent. The current information in file is limited, but consistent.

(*Id.*)

On February 5, 2002, David Beeman, Ph.D. reviewed all the evidence of record and concurred in Dr. Christiansen's assessment. (R. 378)

On December 4, 2001, Claude H. Koons, M.D. completed a Physical Residual Functional Capacity Assessment. (R. 394-401) He found Stewart could lift/carry ten pounds frequently and twenty pounds occasionally; stand, walk, and/or sit, with normal breaks, for a total of six hours in an eight-hour workday; push or pull without limitation. He found she could climb, balance, stoop, kneel, crouch, and crawl occasionally. With regard to manipulative limitations, Dr. Koons noted Stewart "complains of numbness and pain with arm movements but there is no objective evidence consistent with her complaints." (R. 397) Although he indicated there was a treating or examining source statement in the file, he found it was "not quantitative." (R. 400) He found Stewart to have no visual, communicative, or environmental limitations.

On February 23, 2002, Dennis A. Weis, M.D. reviewed Dr. Koons's assessment and concurred in the latter's opinions. Dr. Weis noted follow-up indicated Stewart's headaches were much improved, and there was no other new medical evidence that would indicate further restrictions on her functioning. (R. 401)

4. Vocational expert's testimony

The ALJ asked VE Elizabeth Albrecht the following hypothetical question:

> I'd like the vocational expert to consider the effects it would have on the claimant's ability to perform work activity if her maximum ability to lift was 20 pounds on occasion, 10 pounds frequently. She could sit or stand six hours of each activity, each day. She could occasionally bend, squat, stoop, or crawl; was limited to short, superficial interaction with coworkers; no direct public contact; and [no] stressful work such as emergency situations, handling complaints, working at a fast pace, working with strict deadlines[;] [her] work should

> be simple, routine, and repetitive without need for significant judgements, and no frequent changes of duties. With those limitations, could she return to any of her past relevant work?

(R. 73-74) The VE responded Stewart could return to the housekeeping job, as she performed it, which was unskilled and light. (R. 74)

In addition, considering Stewart "is a younger individual with a high school education plus some additional training as she described," the VE opined there are other light, unskilled jobs she could perform, including small products assembler I, routing clerk, and laundry folder. (*Id.*)

"[I]f she would frequently have difficulty attending a work site or completing the day secondary to either/or headaches or back pain," then she would be precluded "from doing competitive employment, either as she has done or any other jobs." (*Id.*)

If Stewart were limited in her ability to do fingering due to the lack of feeling in her hands, she might be precluded from doing assembler jobs, but the VE stated it would depend on how much of the time her fingering ability was affected. (R. 75) She also would be unable to do competitive work if she were required to lay down at unscheduled times at least once a day, for 30 minutes or more at a time. (R. 76)

If her depression caused her to have "severe limitations on her ability to carry out instructions, exercise good judgment, and interact appropriately with the public, coworkers, and supervisors," then she also would be precluded from competitive work. (*Id.*)

5. The ALJ's opinion

The ALJ found Stewart had not engaged in substantial gainful activity at any time since March 28, 2000. Of specific importance in this case (as discussed below), the ALJ found:

> The claimant worked from approximately June 2000 through February 2001 part-time as a housekeeper at a motel. She worked some eight to 15 hours a week and earned $5.15 an hour. These earnings do not rise to the substantial gainful activity level.

(R. 15)

The ALJ found Stewart had the following severe impairments:

> [M]ajor depressive disorder, recurrent, without psychotic features, social phobia, generalized, personality disorder, not otherwise specified, with avoidant, dependent, and borderline traits, degenerative disc disease and degenerative joint disease of the cervical spine, spurring of the lumbar spine, minimal degenerative changes of the knees, headaches, and poly-neuropathy with nerve conduction study evidence of mild carpal tunnel syndrome on the left[.]

(R. 20, ¶ 2) However, he found none of her impairments, singly or in combination, met the Listing requirements. The ALJ noted Stewart's mental impairments "corresponded[ed] to sections 12.04, 12.06, and 12.08 of the Listing of Impairments," and found that as a result of her mental impairments, she has "mild restriction in activities of daily living; moderate difficulties in maintaining social functioning; moderate difficulties in maintaining concentration, persistence, or pace; and has not experienced repeated episodes of decompensation." (*Id.*) The ALJ further found the evidence failed to establish the presence of the paragraph C criteria for sections 12.04 or 12.06. (*Id.; see* R. 15-16)

The ALJ found Stewart's subjective complaints of disabling pain, numbness, and anxiety were not credible. He noted the evidence "reflects the claimant has received minimal treatment for her mental impairments during the pertinent time period," and pointed to the findings and conclusions of Dr. Johnson's mental status examination and the conclusions of the state agency psychological consultants. (R. 17) In addition, the ALJ accepted Dr. Christiansen's opinion that Dr. Johnson's assessment of Stewart's GAF at 35

to 40 must have taken into account Stewart's physical impairments as well as her mental impairments. (*Id.*)

The ALJ acknowledged Dr. Stitt's conclusion that Stewart would have difficulty performing physical labor but could perform sedentary activities, and noted the consulting experts "concluded [she] could perform work at the generally light level of physical exertion with the occasional performance of postural activities." (R. 18) The ALJ found, "The record generally reflects the claimant's impairments have been satisfactorily managed with conservative treatment including pain, anti-depressant, and anti-hypertensive medications." (*Id.*)

The ALJ found Stewart's "relatively broad range of activities of daily living" to be inconsistent with her subjective allegations of disabling impairments, making the following observations:

> The claimant arises at six in the morning and retires at ten in the evening. She does report difficulty sleeping throughout the night, however, being up for some one to two hours before returning to sleep. The claimant resides with her mother in her mother's home and with her oldest grandson. She drives her grandson to school and picks up her grandson and another grandson after school. She helps her grandson with homework. She helps her mother with household chores including laundry. She does some dusting and meal preparation. She has been able to make several long car trips. She testified to one trip to South Dakota with a friend and her grandson of three days[']duration and another trip to South Carolina to see her brother. On this extensive trip, she drove with only one overnight stay, which would indicate that a great deal of the day had to be spent driving in the car to complete this distance and would not have allowed time for significant rest periods. Other trips are described in [the exhibits]. She went with her mother and her two grandsons. . . . She attends

> church. She has a friend whom she calls on the phone or occasionally sees. [Citations omitted.]

(*Id.*)

The ALJ also noted Stewart's "work history is characterized by many years of very low earnings," which he found "does not reflect a strong motivation to work nor return to work with or without impairments." (*Id.*) He found Stewart's inability to return to her past work of telemarketer, office clerk, or sales attendant, "says nothing about [her] ability to perform less physically, mentally, and/or emotionally strenuous work." The ALJ noted:

> Indeed, the head housekeeper in completing a Work Performance Assessment indicated the claimant had excellent work quality, understanding and carrying out of simple instructions and procedures and complex/detailed instructions and procedures, general appearance, and relation to supervisors and good work quantity/pace, good concentration and remaining on task, adapting to changes in the workplace, following rules, using good judgment, relating to co-workers, relating to the public, and managing workplace stress, and adequately adhered to schedule[s] including attendance and managing personal stress level in the workplace. The head housekeeper stated she would consider rehiring the claimant if the claimant's family problems and pain were not such issues.

(R. 18-19)

Therefore, the ALJ concluded as follows regarding Stewart's credibility and her residual functional capacity:

> Having considered the entire evidence of record, the undersigned finds the claimant's allegations of pain, numbness, depression, and anxiety of a disabling nature are not fully credible. They are inconsistent with: the level of treatment during the relevant period of time; the opinions expressed by State agency and consultative professionals that she generally could perform work at the light level of physical exertion of an

> unskilled nature; her extensive travel; her broad range of activities of daily living; and her work history.
>
> Indeed, the undersigned finds that despite the claimant's impairments . . . she remained able to perform the exertional and nonexertional requirements of work except for: lifting more than 20 pounds occasionally and more than 10 pounds frequently. She can stand a total of six hours during an eight-hour workday and sit a total of six hours during an eight-hour workday. She can occasionally bend, stoop, squat, and crawl. She can have short superficial interaction with co-workers. She can perform no stressful work, for example, handling emergency situations, handling complaints, working at a fast pace, or meeting strict deadlines. She can do work of a simple, routine, and repetitive nature which does not require significant judgment nor [sic] frequent change of duties. This assessment of residual functional capacity is generally based upon the functional limitations found by state agency medical and psychological consultants.

(R. 19)

Considering the above RFC, the VE found, and the ALJ agreed, that Stewart could return to her past relevant work of housekeeper, which is light and unskilled. The ALJ noted Stewart did not realize earnings at a substantial gainful activity level from the housekeeping job "because she performed this work on a part-time basis much of the time." (*Id.*) However, he noted that if she made the same hourly wage on a full-time basis, her earnings would have reached the substantial gainful activity level. Therefore, he concluded "her work as a housekeeper can be considered past relevant work, as she has performed the work for long enough to have learned the job, as shown in the work evaluation of the employer." (*Id.*)

Furthermore, the ALJ found that even if Stewart's housekeeping job "did not technically qualify as past relevant work," the VE had testified she could perform other

jobs that exist in significant numbers in the national economy, including small assembler I, route clerk, and laundry folder. The ALJ found the jobs cited by the VE to be consistent with Stewart's "impairments and symptoms, functional limitations, age, education, work experience, and skills." (R. 19-20)

For these reasons, the ALJ concluded Stewart was not disabled at any time through the date of his decision, and was not eligible for SSI. (R. 21)

III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD

A. Disability Determinations and the Burden of Proof

Section 423(d) of the Social Security Act defines a disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the claimant is "not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists . . . in significant numbers either in the region where such individual lives or in several regions of the country." 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step sequential evaluation process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *Dixon v. Barnhart*, 353 F.3d 602, 605 (8th Cir. 2003); *Kelley v. Callahan*, 133 F.3d 583, 587-88 (8th Cir. 1998) (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner will

consider a claimant's work activity. If the claimant is engaged in substantial gainful activity, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(i).

Second, if the claimant is not engaged in substantial gainful activity, the Commissioner looks to see "whether the claimant has a severe impairment that significantly limits the claimant's physical or mental ability to perform basic work activities." *Dixon*, 353 F.3d at 605; *accord Lewis v. Barnhart*, 353 F.3d 642, 645 (8th Cir. 2003). The United States Supreme Court has explained:

> The ability to do basic work activities is defined as "the abilities and aptitudes necessary to do most jobs." . . . Such abilities and aptitudes include "[p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling"; "[c]apacities for seeing, hearing, and speaking"; "[u]nderstanding, carrying out and remembering simple instructions"; "[u]se of judgment"; "[r]esponding appropriately to supervision, co-workers, and usual work situations"; and "[d]ealing with changes in a routine work setting."

Bowen v. Yuckert, 482 U.S. 137, 140-42, 107 S. Ct. 2287, 2291, 96 L. Ed. 2d 119 (1987) (citing 20 C.F.R. §§ 404.1521(b), 416.921(b)).

Third, if the claimant has a severe impairment, then the Commissioner will consider the medical severity of the impairment. If the impairment meets or equals one of the presumptively disabling impairments listed in the regulations, then the claimant is considered disabled, regardless of age, education, or work experience. 20 C.F.R. § 404.1520; *Kelley*, 133 F.3d at 588.

Fourth, if the claimant's impairment is severe, but it does not meet or equal one of the presumptively disabling impairments, then the Commissioner will assess the claimant's residual functional capacity ("RFC") to determine the claimant's "ability to meet the physical, mental, sensory, and other requirements" of the claimant's past relevant work.

20 C.F.R. §§ 404.1520(4)(iv); 404.1545(4); *see Lewis*, 353 F.3d at 645-46 ("RFC is a medical question defined wholly in terms of the claimant's physical ability to perform exertional tasks or, in other words, 'what the claimant can still do' despite his or her physical or mental limitations.") (citing *Bradshaw v. Heckler*, 810 F.2d 786, 790 (8th Cir. 1987); 20 C.F.R. § 404.1520(e) (1986)); *Dixon*, *supra*. The claimant is responsible for providing evidence the Commissioner will use to make a finding as to the claimant's RFC, but the Commissioner is responsible for developing the claimant's "complete medical history, including arranging for a consultative examination(s) if necessary, and making every reasonable effort to help [the claimant] get medical reports from [the claimant's] own medical sources." 20 C.F.R. § 404.1545(3). The Commissioner also will consider certain non-medical evidence and other evidence listed in the regulations. *See id.* If a claimant retains the RFC to perform past relevant work, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(iv).

Fifth, if the claimant's RFC as determined in step four will not allow the claimant to perform past relevant work, then the burden shifts to the Commissioner "to prove that there is other work that [the claimant] can do, given [the claimant's] RFC [as determined at step four], age, education, and work experience." Clarification of Rules Involving Residual Functional Capacity Assessments, etc., 68 Fed. Reg. 51,153, 51,155 (Aug. 26, 2003). The Commissioner must prove not only that the claimant's RFC will allow the claimant to make an adjustment to other work, but also that the other work exists in significant numbers in the national economy. *Id.*; 20 C.F.R. § 404.1520(4)(v); *Dixon, supra*; *Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001) ("[I]f the claimant cannot perform the past work, the burden then shifts to the Commissioner to prove that there are other jobs in the national economy that the claimant can perform.") (citing *Cox v. Apfel*, 160 F.3d 1203, 1206 (8th Cir. 1998)); *Nevland v. Apfel*, 204 F.3d 853, 857 (8th

Cir. 2000). If the claimant can make an adjustment to other work that exists in significant numbers in the national economy, then the Commissioner will find the claimant is not disabled. If the claimant cannot make an adjustment to other work, then the Commissioner will find the claimant is disabled. 20 C.F.R. § 404.1520(r)(v).

B. The Substantial Evidence Standard

Governing precedent in the Eighth Circuit requires this court to affirm the ALJ's findings if they are supported by substantial evidence in the record as a whole. *Krogmeier v. Barnhart*, 294 F.3d 1019, 1022 (8th Cir. 2002) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000)); *Weiler, supra,* 179 F.3d at 1109 (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); *Kelley, supra,* 133 F.3d at 587 (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . ."). Under this standard, "[s]ubstantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion." *Krogmeier, id.*; *Weiler, id.*; *accord Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993).

Moreover, substantial evidence "on the record as a whole" requires consideration of the record in its entirety, taking into account both "evidence that detracts from the Commissioner's decision as well as evidence that supports it." *Krogmeier,* 294 F.3d at 1022 (citing *Craig*, 212 F.3d at 436); *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951)); *Gowell*, 242 F.3d at 796*; Hutton*, 175 F.3d at 654 (citing

Woolf, 3 F.3d at 1213); *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)). The court must "search the record for evidence contradicting the [Commissioner's] decision and give that evidence appropriate weight when determining whether the overall evidence in support is substantial." *Baldwin v. Barnhart*, 349 F.3d 549, 555 (8th Cir. 2003) (also citing *Cline*, *supra*).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Steadman v. S.E.C.*, 450 U.S. 91, 99, 101 S. Ct. 999, 1006, 67 L. Ed. 2d 69 (1981)). The court, however, does not "reweigh the evidence presented to the ALJ," *Baldwin*, 349 F.3d at 555 (citing *Bates v. Chater*, 54 F.3d 529, 532 (8th Cir. 1995)), or "review the factual record *de novo*." *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (citing *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it "possible to draw two inconsistent positions from the evidence and one of those positions represents the agency's findings, [the court] must affirm the [Commissioner's] decision." *Id.* (quoting *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992), and citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); *accord Baldwin*, 349 F.3d at 555. This is true even in cases where the court "might have weighed the evidence differently." *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)); *accord Krogmeier,* 294 F.3d at 1022 (citing *Woolf*, 3 F.3d at 1213). The court may not reverse the Commissioner's decision "merely because substantial evidence would have supported an opposite decision." *Baldwin*, 349 F.3d at 555 (citing *Grebenick v. Chater*, 121 F.3d 1193, 1198 (8th Cir. 1997); *see Pearsall,* 274 F.3d at 1217; *Gowell*; 242 F.3d at 796; *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997).

On the issue of an ALJ's determination that a claimant's subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ's credibility determinations are entitled to considerable weight. *See, e.g., Young v. Secretary of H.H.S.,* 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen,* 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v. Secretary of H.H.S.,* 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.,* 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not discredit a claimant's subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only discredit subjective complaints if they are inconsistent with the record as a whole. *See Hinchey v. Shalala,* 29 F.3d 428, 432 (8th Cir. 1994); *see also Bishop v. Sullivan,* 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler,* 739 F.2d 1320, 1322 (8th Cir. 1984)). As the court explained in *Polaski v. Heckler:*

> The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:
>
> 1) the claimant's daily activities;
> 2) the duration, frequency and intensity of the pain;
> 3) precipitating and aggravating factors;
> 4) dosage, effectiveness and side effects of medication;
> 5) functional restrictions.

Polaski, 739 F.2d 1320, 1322 (8th Cir. 1984). *Accord Ramirez v. Barnhart*, 292 F.3d 576, 580-81 (8th Cir. 2002).

IV. ANALYSIS

Stewart argues the ALJ erred in his determination that her testimony was not credible, claiming the ALJ's analysis under *Polaski* was insufficient. She also argues the ALJ improperly disregarded the opinions of her treating physicians in favor of the opinions of the medical consultants. (*See* Doc. No. 10) The Commissioner disagrees. (*See* Doc. No. 11)

Before turning to Stewart's arguments, the court is troubled by the ALJ's characterization of Stewart's work history, and the finding that she could return to past relevant work. The ALJ specifically found Stewart had not engaged in substantial gainful activity since March 28, 2000. (R. 15, 20) He noted Stewart's earnings at the motel housekeeping job did not rise to the substantial gainful activity level. (R. 15) However, he then made an unjustified leap in concluding that if Stewart made the same hourly wage for full-time work, her earnings would have reached the substantial gainful activity level, and therefore, "her work as a housekeeper can be considered past relevant work, as she has performed the work for long enough to have learned the job, as shown in the work evaluation of the employer." (R. 19) The VE similarly viewed the housekeeping job as past relevant work, and testified Stewart could return to that job as she had performed it, which was unskilled and light. (R. 74)

The conclusion that the housekeeping job constituted past relevant work was improper. "To constitute past relevant work, a claimant must have performed the work as 'substantial gainful activity.'" *Buckner v. Apfel*, 213 F.3d 1006, 1013 (8th Cir. 2000) (citing 20 C.F.R. § 416.965(a); *Terrell v. Apfel*, 147 F.3d 659, 661 (8th Cir. 1998)). It is fundamentally inconsistent to find the housekeeping job did not constitute substantial gainful activity, and then to find it nevertheless constituted past relevant work.

Apparently recognizing this inconsistency, the ALJ goes on to note that even if the housekeeping job "did not technically qualify" as past relevant work, Stewart's

impairments did not prevent her from performing the job, "whether that job is considered past relevant work or other work that could be performed considering her age, education, and functional limitations." (R. 19-20, 21 ¶ 6) The ALJ elicited testimony from the VE regarding other jobs in the national economy that Stewart could perform. If the ALJ had truly found Stewart could return to past relevant work, it is curious why he moved on to step five of the sequential evaluation process. In any event, the court finds it was improper for the ALJ to extrapolate Stewart's hourly wage for part-time work into a corresponding full-time job for purposes of deeming the job past relevant work.

The ALJ found Stewart's allegations not to be credible based on five factors, which he listed as follows: "the level of treatment during the relevant period of time; the opinions expressed by State agency and consultative professionals that she generally could perform work at the light level of physical exertion of an unskilled nature; her extensive travel; her broad range of activities of daily living; and her work history." (T. 19) The court will examine each of these areas to determine whether the record contains substantial evidence to support the ALJ's decision regarding Stewart's credibility.

First, the court notes nothing in the record suggests Stewart traveled "extensively." The ALJ noted Stewart took a three-day trip to South Dakota with her grandson and a friend, and an "extensive" trip to South Carolina to visit her brother. The ALJ stated other trips were described in Exhibit B8F and B9F. (R. 18) Exhibit B8F is the report from Dr. Johnson's disability examination of Stewart on October 10, 2001. There is no reference anywhere in the exhibit to trips taken by Stewart. (*See* R. 345-49)

Exhibit B9F consists of treatment notes from Trimark Physicians Group for the period from July 19, 2000, to November 2, 2001. (R. 350-77). In Dr. Steele's office records, he noted on September 5, 2000, "Travel to South Carolina to be with her brother who is having some type of complicated kidney surgery." (R. 372) At a follow-up exam

on January 16, 2001, the doctor noted Stewart was "flying out to South Carolina to be with her brother who [was] undergoing some type of kidney surgery." (R. 369) It is not clear whether these two entries relate to one or two trips to South Carolina, but the former appears more likely, particularly in light of Stewart's testimony that she had taken one trip to South Carolina. There are no other notations in Dr. Steele's records regarding trips. The court finds the ALJ's statement that Stewart had engaged in "extensive travel" in erroneous, and does not provide a proper basis for discounting Stewart's credibility.

The court also does not find support in the record for the ALJ's conclusion that Stewart engages in a "broad range" of daily activities. She drives her grandsons to and from school, attends church on Sundays, and drives her mother to the grocery store and appointments. Otherwise, Stewart testified she basically stays home all the time. She has no extracurricular activities. She does little housework. She naps every day for anywhere from half an hour to two or more hours, depending on how she is feeling. As the Eighth Circuit Court of Appeals observed in *Cline v. Sullivan*, 939 F.2d 560 (8th Cir. 1991), "[A]n SSI claimant need not prove that she is bedridden or completely helpless to be found disabled and the fact that claimant cooks and cleans for herself, shops for groceries, does laundry, visits friends, attends church, and goes fishing does not in and of itself constitute substantial evidence that a claimant possesses the residual functional capacity to engage in substantial gainful activity." *Cline*, 939 F.2d at 566 (citing *Thomas v. Sullivan*, 876 F.2d 666, 669 (8th Cir. 1989)).

Further, rather than undermining her disability claim, the court finds Stewart's work history supports her subjective allegations of disability. Despite problems due to pain and psychological conditions, Stewart continued to attempt to work at a variety of jobs. Her low earnings are more a reflection of the types of jobs she was able to secure than of a lack

of motivation to work. The court finds Stewart's work history is consistent with her allegations of disability, rather than the opposite conclusion reached by the ALJ.

In finding Stewart's allegations not to be fully credible, the ALJ relied heavily on the opinions of the State agency and other medical consultants, and the level of treatment Stewart received during the period in question. The court will address these factors in conjunction with Stewart's second argument -- that the ALJ erred in disregarding the opinions of her treating physicians in favor of those of the State agency and other medical consultants.

Stewart's primary treating physicians during the period in question were the doctors at Trimark Physicians Group, primarily Dr. Steele and Dr. Raval. These physicians treated Stewart frequently for her headaches, and the numbness in her hands and feet. Nevertheless, it does not appear the ALJ contacted either of these physicians, or any other treating physician, to obtain an opinion regarding Stewart's ability to function in the workplace. In addition, Dr. Raval recommended Stewart have a detailed EMG and nerve conduction study for further evaluation of the numbness in her extremities. These tests were not performed because Stewart could not afford them and did not have insurance.

Instead of requesting the opinions of Stewart's treating physicians, and/or ordering further testing to determine the extent to which the numbness in Stewart's extremities would affect her ability to function in the workplace, the ALJ chose to rely on the opinions of the consulting physicians, but the ALJ picked and chose which portions of the consultants' opinions to accept. While relying extensively on Dr. Johnson's mental status examination of Stewart, the ALJ then accepted Dr. Christiansen's opinion, based solely on a review of the written record, that Dr. Johnson's assessment of Stewart's GAF at 35 to 40 "took into account [her] physical impairments as well as mental impairments." (R. 17, citing Dr. Christiansen's report) It is unreasonable to conclude that a psychologist

who is specifically retained by the State agency to perform a disability examination is so unaware of the requirements for assessing a claimant's GAF that he would include improper factors in assigning the GAF score. A GAF of 35 to 40, as found by Dr. Johnson, would indicate some level of impairment in reality testing or communication, or major impairment in several areas such as work, family relations, and judgment. *Diagnostic and Statistical Manual of Mental Disorders* (*DSM-IV*) 32 (4th ed. 1994).

The record indicates Stewart was actually examined by two medical experts at the request of DDS. The first, Dr. Stitt, examined her for purposes of assessing her physical abilities. He concluded Stewart would have difficulty doing any type of physical labor, and likely would be unable to maintain any sort of gainful employment. Dr. Stitt also recommended Stewart be evaluated further by a neurosurgeon and an orthopedic specialist, as well as a psychiatrist. (*See* R. 342)

The second expert, Dr. Johnson, examined Stewart for purposes of assessing her mental status and ability to function in the workplace. Although he found Stewart would be able to remember and understand both simple and complex instructions and procedures, he found she would be "moderately to severely limited in her ability to carry out instructions, to interact appropriately with supervisors, coworkers and the public[,] and in her ability to use good judgment and to respond appropriately to changes in the work place." (R. 349)

The regulations provide that generally, the opinion of a source who actually examines, but does not treat, a claimant (a "nontreating source") will be given greater weight than that of a source who has not examined the claimant (a "nonexamining source"). 20 C.F.R. § 404.1527(d)(1) & (2). In the present case, the ALJ failed to provide an adequate explanation for discounting the opinions of the nontreating sources in favor of those of the nonexamining sources.

In summary, the court finds the ALJ erred in finding Stewart's subjective complaints not to be credible, and further erred in failing to develop the record adequately to arrive at a decision regarding Stewart's level of impairment. Although the court finds the record does not contain substantial evidence to support the ALJ's decision, neither does the record contain adequate evidence to reach the opposite conclusion. The ALJ should have ordered a complete nerve conduction study to determine the degree of impairment resulting from the numbness in Stewart's hands and feet, and further evaluation by neurosurgery, orthopedic, and psychiatric experts regarding Stewart's ability to function in the workplace. Further, the ALJ should have requested an opinion from Stewart's treating sources regarding her impairment.

As the Eighth Circuit has explained, it is the Secretary's:

> "'duty to develop the record fully and fairly, even if . . . the claimant is represented by counsel.'" *Boyd v. Sullivan*, 960 F.2d 733, 736 (8th Cir. 1992) (quoting *Warner v. Heckler*, 722 F.2d 428, 431 (8th Cir. 1983)). This is so because an administrative hearing is not an adversarial proceeding. *Henrie v. Dept. of Health & Human Serv.*, 13 F.3d 359, 361 (10th Cir. 1993). "[T]he goals of the Secretary and the advocates should be the same: that deserving claimants who apply for benefits receive justice." *Sears v. Bowen*, 840 F.2d 394, 402 (7th Cir. 1988).

Battles v. Shalala, 36 F.3d 43, 44 (8th Cir. 1994); *accord Cox v. Apfel*, 160 F.3d 1203, 1209 (8th Cir. 1998); *Johnson v. Callahan*, 968 F. Supp. 449, 458 (N.D. Iowa 1997); *Barry v. Shalala*, 885 F. Supp. 1224, 1241-42 (N.D. Iowa 1995). *See Heckler v. Campbell*, 461 U.S. 458, 471 & n.1, 103 S. Ct. 1952, 1959 & n.1, 76 L. Ed. 2d 66 (1983) (Brennan, J., concurring) (ALJ's "duty of inquiry . . . rises to a 'special duty . . . to scrupulously and conscientiously explore for all relevant facts' . . .," citing *Broz v. Schweiker*, 677 F.2d 1351, 1364 (11th Cir. 1982), and decision maker should "inform

himself about facts relevant to his decision and . . . learn the claimant's own version of those facts."); *Hawkins v. Chater*, 113 F.3d 1162, 1164 (10th Cir. 1997).

Because the ALJ failed to inform himself about all of the relevant facts, it follows that the hypothetical question posed to the VE could not have accurately included all of Stewart's limitations, and therefore, the VE's testimony cannot be considered substantial evidence to warrant a finding that Stewart is not disabled.

For these reasons, the court finds the Commissioner's decision should be reversed, and this case should be remanded for further proceedings consistent with this opinion.

V. CONCLUSION

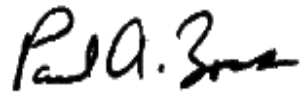
For the reasons discussed above, **IT IS RESPECTFULLY RECOMMENDED**, unless any party files objections[2] to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service

[2]Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

of a copy of this Report and Recommendation, that the Commissioner's decision be reversed, and this case be remanded for further proceedings consistent with this opinion.[3]

IT IS SO ORDERED.

DATED this 6th day of April, 2004.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[3]NOTE: If the district court overrules this recommendation and final judgment is entered for the plaintiff, the plaintiff's counsel must comply with the requirements of Local Rule 54.2(b) in connection with any application for attorney fees.