

TO BE PUBLISHED
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

HOLLY JEAN KOHN,
Plaintiff,

No. C13-4003-MWB

vs.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,
Defendant.

**REPORT AND
RECOMMENDATION**

Plaintiff Holly Jean Kohn seeks judicial review of a final decision of the Commissioner of Social Security (the Commissioner) denying her applications for Social Security Disability benefits (DIB) and Supplemental Security Income benefits (SSI) under Titles II and XVI of the Social Security Act, 42 U.S.C. § 401 *et seq.* (Act). Kohn contends that the administrative record (AR) does not contain substantial evidence to support the Commissioner's decision that she was not disabled during the relevant period of time. For the reasons that follow, I recommend that the Commissioner's decision be affirmed.

Background

Kohn was born in 1968 and was 36 years old on her alleged onset date of March 12, 2005.¹ AR 14, 120. She completed high school, is married and has one daughter.

¹ Kohn originally claimed an onset date of December 31, 2004, but later amended the alleged onset date to March 12, 2005. AR 14.

AR 36-37, 50. She suffered a closed head injury in 1992 due to a car accident. AR 43-44. She has past relevant work as a nurse aide and an accounting clerk. AR 263.

Kohn protectively filed her applications for DIB and SSI on March 10, 2010. AR 14. The applications were denied initially and on reconsideration. *Id.* Kohn then requested a hearing, which was conducted November 15, 2011, by Administrative Law Judge (ALJ) Ronald D. Lahners. *Id.* Kohn testified during the hearing, as did her husband and a vocational expert (VE). AR 33-60.

The ALJ issued a decision denying Kohn's application on December 7, 2011. AR 14-26. On December 11, 2012, the Appeals Council denied Kohn's request for review. AR 1-5. As such, the ALJ's decision is the final decision of the Commissioner. AR 1; *see also* 20 C.F.R. §§ 404.981, 416.1481.

On January 7, 2013, Kohn commenced an action in this court seeking review of the ALJ's decision. This matter has been referred to me pursuant to 28 U.S.C. § 636(b)(1)(B) for the filing of a report and recommended disposition of the case. The parties have briefed the issues and the matter is now fully submitted.

Disability Determinations and the Burden of Proof

A disability is defined 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 that 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), 1382c(a)(3)(A); 20 C.F.R. §§ 404.1505, 416.905. 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. §§ 423(d)(2)(A), 1382c(a)(3)(B).

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; *see Kirby v. Astrue*, 500 F.3d 705, 707 (8th Cir. 2007). 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(a)(4)(i), 416.920(a)(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 v. Barnhart*, 353 F.3d 602, 605 (8th Cir. 2003). "An impairment is not severe if it amounts only to a slight abnormality that would not significantly limit the claimant's physical or mental ability to do basic work activities." *Kirby*, 500 F.3d at 707; *see* 20 C.F.R. §§ 404.1520(c), 404.1521(a), 416.920(c), 416.921(a).

The ability to do basic work activities is defined as "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. §§ 404.1521(b), 416.921(b). These abilities and aptitudes include (1) physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; (2) capacities for seeing, hearing, and speaking; (3) understanding, carrying out, and remembering simple instructions; (4) use of judgment; (5) responding appropriately to supervision, co-workers, and usual work situations; and (6) dealing with changes in a routine work setting. *Id.* §§ 404.1521(b)(1)-(6), 416.921(b)(1)-(6); *see Bowen v. Yuckert*, 482 U.S. 137, 141, 107 S. Ct. 2287, 2291 (1987). "The sequential evaluation process may be terminated at step two only when the claimant's impairment or combination of impairments would have no more than a minimal impact on her ability to work." *Page v. Astrue*, 484 F.3d 1040, 1043 (8th Cir. 2007) (internal quotation marks omitted).

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, and work experience. 20 C.F.R. §§ 404.1520(a)(4)(iii), 404.1520(d), 416.920(a)(4)(iii), 416.920(d); *see Kelley v. Callahan*, 133 F.3d 583, 588 (8th Cir. 1998).

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 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(a)(4)(iv), 404.1545(a)(4), 416.920(a)(4)(iv), 416.945(a)(4). "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." *Lewis v. Barnhart*, 353 F.3d 642, 646 (8th Cir. 2003) (internal quotation marks omitted); *see* 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1). 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(a)(3), 416.945(a)(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. *Id.* §§ 404.1520(a)(4)(iv), 416.920(a)(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, and his or her age, education, and work experience. *See Bladow v. Apfel*, 205 F.3d 356, 358-59 n.5 (8th Cir. 2000). 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. *Eichelberger v. Barnhart*, 390 F.3d 584, 591 (8th Cir. 2004); 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). 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 that the claimant is disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). At Step Five, even though the burden of production shifts to the Commissioner, the burden of persuasion to prove disability remains on the claimant. *Stormo v. Barnhart*, 377 F.3d 801, 806 (8th Cir. 2004).

Summary of ALJ's Decision

The ALJ made the following findings:

- (1) The claimant meets the insured status requirements of the Social Security Act through September 30, 2014.
- (2) The claimant has not engaged in substantial gainful activity since March 12, 2005, the amended alleged onset date (20 CFR 404.1571 *et seq.*, and 416.971 *et seq.*).
- (3) The claimant has the following severe impairments: status post motor vehicle accident (1992) with traumatic closed brain injury; status post left hip and femur fractures with fixation; bilateral patellofemoral syndrome, left greater than right; degenerative joint disease of the left knee; posttraumatic left hip degenerative joint disease; chronic musculoskeletal

low back pain; and obesity (20 CFR 404.1520(c) and 416.920(c)).

- (4) The claimant does not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and 416.926).
- (5) After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to lift and carry 20 pounds occasionally and up to ten pounds frequently. She is able to stand for between four and six hours in an eight-hour workday and sit for up to six hours in an eight-hour workday. Given the customary allowance to alternate positions, she is capable of completing an eight-hour workday. She has unlimited use of her extremities. She is able to perform work that does not require more than occasional (not more than one-third of the workday) bending, stooping, balancing, kneeling and crouching. She is able to understand and remember instructions, procedures and locations. She has no significant difficulties in maintenance of attention, concentration or pace and is capable of appropriate interaction with coworkers, supervisors and the public.
- (6) The claimant is capable of performing past relevant work as an accounting clerk (sedentary, skilled, SVP² 5, DOT 216.482-010). This work does not require the performance of work-related activities precluded by the claimant's residual functional capacity (20 CFR 404.1565 and 416.965).

² "SVP" refers to Specific Vocational Preparation, defined in Appendix C of the Dictionary of Occupational Titles as "the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation." A position with SVP 5 requires between six months and one year of vocational preparation. See Dictionary of Occupational Titles, Appendix C.

- (7) The claimant has not been under a disability, as defined in the Social Security Act, from March 12, 2005, through the date of this decision (20 CFR 404.1520(f) and 416.920(f)).

AR 16-26.

At Step Two, while finding that Kohn had severe impairments, the ALJ further found that other physical and mental impairments alleged by Kohn were not severe. AR 17-18. The alleged physical impairments included headaches and right-shoulder arthritis. AR 17. The ALJ found nothing in the treating source medical records to indicate that Kohn had ever sought medical attention for either condition. *Id.* In addition, the ALJ noted that a consultative examining source, Dr. Douglas Martin, found that neither condition rose to the level of a severe impairment. *Id.*

The alleged mental impairments included memory deficits, depression and a short temper. *Id.* The ALJ found that the evidence as a whole does not support Kohn's claim that these conditions cause any significant impairment. *Id.* He pointed out that Kohn has never been treated by a mental health professional and that a state agency psychologist, Dr. Michael Baker, found only minimal functional limitations after conducting a consultative examination. AR 18.

In his Step Three analysis, the ALJ noted that Kohn did not allege that her medically-determinable impairments meet or medically equal any listed impairment. AR 18. He then stated that he considered her condition of obesity and found that it does not, either alone or in combination with other impairments, satisfy any listed impairment. *Id.* He also stated that he considered Kohn's alleged mental impairments pursuant to the regulations for evaluating mental disorders and the listings found at 20 C.F.R. Part 404, Subpart P, Appendix 1. *Id.* He found that Kohn has mild restrictions in her activities of daily living and mild difficulties in maintaining social

functioning and in maintaining concentration, persistence or pace. *Id.* He also found that Kohn has had no episodes of decompensation.³ *Id.*

At Step Four, the ALJ undertook a residual functional capacity (RFC) assessment. He found that despite her severe physical impairments, Kohn can lift and carry 20 pounds occasionally and up to ten pounds frequently. AR 19. He also found that she is able to stand for between four and six hours in an eight-hour workday and sit for up to six hours in an eight-hour workday. *Id.* He therefore concluded, in light of the “customary allowance to alternate positions,” that Kohn is capable of completing an eight-hour workday. *Id.* The ALJ also found that Kohn has unlimited use of her extremities and is able to perform work that does not require more than occasional bending, stooping, balancing, kneeling and crouching. *Id.*

The ALJ determined that Kohn’s mental impairments, which he had already found to be nonsevere, imposed no limits on her functional capacity. AR 19. Specifically, he found that Kohn is able to understand and remember instructions, procedures and locations and that she has no significant difficulties in maintenance of attention, concentration or pace. *Id.* He also found her to be capable of appropriate interaction with coworkers, supervisors and the public. *Id.*

In making these findings, the ALJ considered the medical evidence, weighed various medical opinions and gave consideration to statements by both Kohn and her husband concerning her alleged limitations. AR 19-24. The ALJ noted that a consultative physical examination was completed in April 2010, by Dr. Douglas Martin. AR 21. Dr. Martin provided an opinion that the ALJ ultimately adopted, in large part, as Kohn’s RFC. AR 19, 21, 285-86.

³ Episodes of decompensation are “exacerbations or temporary increases in symptoms or signs accompanied by a loss of adaptive functioning, as manifested by difficulties in performing activities of daily living, maintaining social relationships, or maintaining concentration, persistence, or pace.” 20 CFR Part 404, Subpart P, Appendix 1.

The ALJ next discussed other medical evidence in the record, pointing out that Kohn had suffered numerous injuries in the 1992 car accident, including a closed head injury, internal organ damage and a fractured femur and pelvis. AR 20. However, imaging conducted in 2002, 2008 and 2011 showed no evidence of acute injury or significant abnormalities. *Id.*

The ALJ then summarized Kohn's treatment in 2008 by Dr. Steven Meyer, an orthopedic surgeon. AR 21. Dr. Meyer examined Kohn's left knee, which had been injured in the car accident, and noted that she had done "quite well" since the accident, up until three months before his examination. AR 269. Kohn reported to Dr. Meyer that her left knee had started "catching" and was "a bit unsteady." *Id.* Testing was "slightly positive" for pain. *Id.* Dr. Meyer assessed Kohn with knee pain and "possible meniscal pathology." *Id.*

The ALJ noted that Kohn did not return to Dr. Meyer but, instead, received most of her subsequent medical care from a general practitioner, Dr. Jeffrey Krohn. AR 21. The ALJ further noted that it was not until May 2010 that Kohn again sought treatment for any of her severe impairments. *Id.* On May 12, 2010, Kohn saw Dr. Krohn and complained that she fell after her left knee suddenly gave out. AR 327. She also stated that there is "a lot of snapping, cracking and popping" when she walks. *Id.* Dr. Krohn assessed arthritis of the left knee and noted that Kohn was "currently pain free." *Id.* He found no abnormality in the left knee except crepitus (cracking or popping) during flexion and extension. *Id.* He encouraged Kohn to work on rehabilitation strengthening and to advise him in a couple of weeks if she was not improving. *Id.*

The ALJ next noted that Kohn saw Dr. Krohn again in both June and July 2010. AR 21. On June 8, 2010, Kohn told Dr. Krohn that she was having a pinching sensation in her left knee. AR 326. Again, he found no abnormalities but suspected a possible meniscal injury. *Id.* He directed her to see Dr. Meyer again. *Id.*

On July 2, 2010, Kohn visited Dr. Krohn to discuss her medications and stated that she has “chronic pain” in her knees. AR 325. Dr. Krohn stated that he observed her walking around and “she certainly does not seem to be impaired.” *Id.* He further noted that the MRI of the left knee taken by Dr. Meyer (in 2008) showed some post-traumatic changes but “otherwise pretty good knee.” *Id.* Dr. Krohn reported that Kohn was seeking “disability coverage.” He stated: “At this point, we will get her referred to Jim Rush PA and get a second opinion to see if she would qualify for disability but at this point, I would say no.” *Id.*

The ALJ pointed out that during none of these three visits in 2010 did Dr. Krohn reference Kohn’s other claimed physical impairments, such as hip pain, back pain, headaches or shoulder pain. AR 22. Nor did Dr. Krohn mention any mental impairments, other than to say that Kohn was being prescribed fluoxetine for being “easily angered.” AR 326. However, in January 2011 Dr. Krohn submitted a written opinion that described Kohn’s symptoms to include depression, fatigue, memory problems, decreased attention and learning disability, along with residual effects of her prior injuries. AR 338-39. He stated an opinion that Kohn is limited to no heavy lifting, no long periods of time sitting or standing and that she would be incapable of completing any kind of work for even as much as ten hours per week. *Id.*

The ALJ found that Dr. Krohn’s opinions were entitled to little weight because (a) they are not supported by his own records, (b) they contradict his statement in July 2010 that Kohn does not qualify for disability and (c) they are not supported by other substantial medical evidence in the record. AR 22.

The ALJ next discussed Kohn’s allegations of back pain, referring to it as a “more recent phenomenon.” *Id.* He stated that Kohn was seen by a chiropractor, Dr. Kayla Ludvigson, five times between August and October 2011, and reported back pain for two weeks prior to beginning treatment. *Id.* After the initial visit and adjustment, the

records of each visit indicate that Kohn was progressing as expected. AR 342. In her final note, concerning a visit on October 5, 2011, Dr. Ludvigson reported that Kohn's lower back was "feeling a lot better." *Id.*

After discussing the medical evidence of record, the ALJ found that Kohn's allegations of daily headaches, constant pain, trouble using her hands and problems with her right shoulder are "simply not reflected" in that evidence. AR 23. The ALJ further noted that the medical evidence is "characterized by infrequent visits to providers for her knee problems" and that the records make reference to knee pain and alleged back pain "at only brief and remote intervals." *Id.* The ALJ pointed out that while Kohn claims an onset date of March 12, 2005, the first evidence that she sought treatment for knee pain is from November 2008 and that, even then, she reported a duration of only three months. *Id.* The ALJ also stated that the first evidence of treatment for back pain is Kohn's visit to a chiropractor in 2011 and that she reported having pain for only the prior two weeks. *Id.*

The ALJ next discussed the fact that Kohn had performed significant work during the time she was allegedly disabled. *Id.* Specifically, she worked up to 25 hours per week as a home health aide for her husband's elderly parents for nearly three years, ending in March 2010. *Id.* Although the work never rose to the level of substantial gainful activity (SGA), the ALJ found that the duties Kohn attributed to this position far exceeded her alleged limitations. AR 16-17, 23. Moreover, the ALJ noted that Kohn did not stop performing this work due to her medical condition but, instead, because her husband's parents entered into an assisted living facility. AR 23-24. Indeed, he observed that Kohn did not apply for disability benefits until the health aide position ended, "further calling in to question whether her current unemployment is truly the result of disabling medical problems." AR 24.

For these reasons, the ALJ found that Kohn’s allegations concerning her limitations were not fully credible. AR 23. He made the same finding with regard to the testimony and statements of Kohn’s husband, Tim Kohn. AR 24. While Mr. Kohn corroborated his wife’s allegations, the ALJ found that his statements “are not more convincing than the weight of the medical evidence.” *Id.* As such, he only gave them some weight.

The ALJ concluded his Step Four analysis by stating that his finding as to Kohn’s RFC is supported directly by the opinion of Dr. Martin, as well as by the whole of the medical evidence and the opinions provided by non-examining state agency medical consultants. *Id.* Based on that RFC, and the VE’s testimony, the ALJ found Kohn could perform her past relevant work as an accounting clerk. *Id.* The ALJ then proceeded to Step Five and made alternative findings, again based on the VE’s testimony, that Kohn could perform other work that exists in significant numbers in the national economy. AR 25. As such, the ALJ concluded that Kohn is not disabled within the meaning of the Act. AR 26.

The Substantial Evidence Standard

The Commissioner’s decision must be affirmed “if it is supported by substantial evidence on the record as a whole.” *Pelkey v. Barnhart*, 433 F.3d 575, 577 (8th Cir. 2006); *see* 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 . . .”). “Substantial evidence is less than a preponderance, but enough that a reasonable mind might accept as adequate to support a conclusion.” *Lewis*, 353 F.3d at 645. The Eighth Circuit explains the standard as “something less than the weight of the evidence and [that] allows for the possibility of drawing two inconsistent conclusions, thus it embodies a zone of choice within which the [Commissioner] may decide to grant or deny

benefits without being subject to reversal on appeal.” *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994).

In determining whether the Commissioner’s decision meets this standard, the court considers “all of the evidence that was before the ALJ, but it [does] not re-weigh the evidence.” *Wester v. Barnhart*, 416 F.3d 886, 889 (8th Cir. 2005). The court considers both evidence which supports the Commissioner’s decision and evidence that detracts from it. *Kluesner v. Astrue*, 607 F.3d 533, 536 (8th Cir. 2010). 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) (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)).

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. Sec’y of Health & Human Servs.*, 879 F.2d 441, 444 (8th Cir. 1989). 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 Commissioner’s findings, [the court] must affirm the [Commissioner’s] denial of benefits.” *Kluesner*, 607 F.3d at 536 (quoting *Finch v. Astrue*, 547 F.3d 933, 935 (8th Cir. 2008)). This is true even in cases where the court “might have weighed the evidence differently.” *Culbertson*, 30 F.3d at 939 (quoting *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)). The court may not reverse the Commissioner’s decision “merely because substantial evidence would have supported an opposite decision.” *Baker v. Heckler*, 730 F.2d 1147, 1150 (8th Cir. 1984); *see Goff v.*

Barnhart, 421 F.3d 785, 789 (8th Cir. 2005) (“[A]n administrative decision is not subject to reversal simply because some evidence may support the opposite conclusion.”).

Discussion

Kohn raises three issues in contending that the ALJ’s decision is not supported by substantial evidence in the record as a whole:

- I. The ALJ Failed To Fully Consider Kohn’s Pain And Anger Issues And To Make Proper Credibility Findings Regarding Kohn And Her Husband.
- II. The ALJ Erroneously Gave Greater Weight To The Opinions Of The Examining And Non-Examining Physicians Than To Those Of Kohn’s Treating Physicians.
- III. Because The ALJ’s Analysis Of Kohn’s RFC Was Incorrect, So Too Were The ALJ’s Hypothetical Questions To The VE.

See Doc. No. 11. I will address each issue separately.

1. Credibility of Kohn and Her Husband

Kohn first argues that the ALJ failed to properly consider her allegations concerning her symptoms, along with her husband’s supporting testimony. The standard for evaluating the credibility of a claimant’s subjective complaints is set forth in *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984). The ALJ must consider the claimant’s daily activities; duration, frequency and intensity of pain; dosage and effectiveness of medication; precipitating and aggravating factors; and functional restrictions. *Polaski*, 739 F.2d at 1322. The claimant’s work history and the absence of objective medical evidence to support the claimant’s complaints are also relevant. *Wheeler v. Apfel*, 224 F.3d 891, 895 (8th Cir. 2000). These factors have been

incorporated into the Commissioner's regulations. *See* 20 C.F.R. §§ 404.1529 and 416.929.

The ALJ is not required to explicitly discuss each factor as long as he or she acknowledges and considers the factors before discrediting the claimant's subjective complaints. *Goff*, 421 F.3d at 791. "An ALJ who rejects [subjective] complaints must make an express credibility determination explaining the reasons for discrediting the complaints." *Singh v. Apfel*, 222 F.3d 448, 452 (8th Cir. 2000). The court must "defer to the ALJ's determinations regarding the credibility of testimony, so long as they are supported by good reasons and substantial evidence." *Guilliams v. Barnart*, 393 F.3d 798, 801 (8th Cir. 2005). The ALJ may not discount subjective complaints solely because they are not supported by objective medical evidence. *Mouser v. Astrue*, 545 F.3d 634, 638 (8th Cir. 2008); *O'Donnell v. Barnhart*, 318 F.3d 811, 816 (8th Cir. 2003).

Here, the ALJ found that Kohn's statements about the nature and limiting effects of her symptoms were not fully credible. AR 20-21. The ALJ provided several reasons for this finding, including: (a) lack of objective medical findings supporting the statements, (b) minimal or sporadic medical treatment and (c) Kohn's ability to perform work at just below the SGA level for a lengthy period of time while alleging to be disabled. AR 21, 25-26. Based on my review of the entire record, I find that these are good reasons supported by substantial evidence.

First, the medical evidence simply does not support Kohn's claim that she has suffered from disabling limitations since March 12, 2005. As the ALJ's thorough discussion of the evidence indicates, Kohn's knee and back pain issues did not arise until years after the alleged onset date. In November 2008, she told Dr. Meyer that her knee had been bothering her for about three months. AR 269. In 2011, Kohn saw a chiropractor and reported experiencing back pain for the previous two weeks. AR 342.

Moreover, as the ALJ also noted, none of the imaging in the medical evidence revealed abnormalities that could explain Kohn's allegations of severe pain and disabling limitations. AR 20-21.

Next, the ALJ correctly noted that Kohn received only sporadic treatment for her impairments. AR 23. While recognizing that financial concerns may have played a role, the ALJ noted that even when Kohn did seek treatment, the resulting care was conservative and not indicative of severe, disabling impairments. *Id.* Conservative medical treatment is an appropriate credibility factor. *Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001).

Finally, the ALJ engaged in a lengthy discussion of Kohn's work as a home health aide for nearly three years after her alleged onset date. AR 23. He noted that she worked up to 25 hours per week for her in-laws, doing such tasks as cooking, cleaning, laundry and shopping. *Id.* She also accompanied them to appointments and completed claim forms. *Id.* While her income from this work did not reach the SGA level, the ALJ correctly noted that the work Kohn performed, as described by Kohn herself, demonstrated functional abilities that far exceed her allegations of disabling limitations. AR 23, 202. Moreover, as the ALJ observed, this work ended not because of Kohn's impairments, but because her in-laws entered an assisted living facility. AR 23-24. Only at that time – in March 2010 – did Kohn apply for disability benefits and claim that she became disabled five years earlier. AR 24.

“Acts which are inconsistent with a claimant's assertion of disability reflect negatively upon that claimant's credibility.” *Johnson v. Apfel*, 240 F.3d 1145, 1148 (8th Cir.2001). Indeed, the Eighth Circuit has held that “cooking, vacuuming, washing dishes, doing laundry, shopping, driving, and walking, are inconsistent with subjective complaints of disabling pain.” *Medhaug v. Astrue*, 578 F.3d 805, 817 (8th Cir. 2009). Here, it was entirely appropriate for the ALJ to find that Kohn's ability to perform these

activities for other people (and to be compensated for doing so), was inconsistent with her allegations of disabling impairments. This inconsistency, and the lack of supporting medical evidence, constituted good reasons for the ALJ to discount Kohn's credibility.

When an ALJ explicitly discredits the claimant's testimony and gives good reason for doing so, the court should normally defer to the ALJ's credibility determination. *Gregg v. Barnhart*, 354 F.3d 710, 714 (8th Cir. 2003). It is not my role to re-weigh the evidence. *See* 42 U.S.C. § 405(g); *see also Young v. Apfel*, 221 F.3d 1065, 1068 (8th Cir. 2000) (“[I]f, after reviewing the record, [the Court] find[s] that it is possible to draw two inconsistent positions from the evidence and one of those positions represents the [Commissioner's] findings, [the Court] must affirm the decision of the Commissioner.”) (citations and quotations omitted). Here, I conclude that the ALJ provided good reasons, supported by substantial evidence in the existing record, for discounting Kohn's subjective complaints.

As for Kohn's husband, the ALJ noted that his statements and testimony described limitations consistent with Kohn's own allegations. AR 24. The ALJ found his statements to be only partially credible for the same reasons the ALJ discounted Kohn's complaints. *Id.* The ALJ's reasons for discounting Kohn's husband's allegations are supported by substantial evidence in light of the lack of supporting medical evidence and Kohn's engagement in activities that are inconsistent with an assertion of disability. The ALJ's credibility determinations with regard to Kohn and her husband were not erroneous.

2. *Weight of Medical Opinions*

Kohn next contends that the ALJ erred by giving more weight to the medical opinions provided by examining and non-examining consultative physicians than to those

provided by Dr. Krohn, a treating physician. The Commissioner's regulations give great deference to medical opinions provided by treating physicians:

Treatment relationship. Generally, we give more weight to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations. If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight. When we do not give the treating source's opinion controlling weight, we apply the factors listed in paragraphs (c)(2)(i) and (c)(2)(ii) of this section, as well as the factors in paragraphs (c)(3) through (c)(6) of this section in determining the weight to give the opinion. We will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion.

20 C.F.R. § 416.927(c)(2) [emphasis added]. What this means is that a treating physician's opinion is generally given controlling weight, but is not inherently entitled to it. *Hacker v. Barnhart*, 459 F.3d 934, 937 (8th Cir. 2006). A treating physician's opinion “does not automatically control or obviate the need to evaluate the record as a whole.” *Leckenby v. Astrue*, 487 F.3d 626, 632 (8th Cir. 2007). That opinion will be given controlling weight if it is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the case record. *Hacker*, 459 F.3d at 937. However, it is not improper to give more weight to the opinion of a non-treating physician if (1) it is supported by better or more thorough medical evidence or (2) the treating physician renders inconsistent opinions that undermine the credibility of his opinions. *Wagner v. Astrue*, 499 F.3d 842, 849 (8th Cir. 2007) (citing *Cantrell v. Apfel*, 231 F.3d 1104, 1107 (8th Cir. 2000)).

The ALJ must “always give good reasons” for the weight given to a treating physician's evaluation. 20 C.F.R. § 416.927(c)(2); *see also Davidson v. Astrue*, 501 F.3d 987, 990 (8th Cir. 2007). When a treating physician’s opinion is entitled to controlling weight, the ALJ must defer to the physician's medical opinions about the nature and severity of an applicant's impairments, including symptoms, diagnosis and prognosis, what an applicant is capable of doing despite the impairment, and the resulting restrictions. 20 C.F.R. § 416.927(a)(2); *Ellis v. Barnhart*, 392 F.3d 988, 995 (8th Cir. 2005). However, a treating physician’s conclusion that an applicant is “disabled” or “unable to work” addresses an issue that is reserved for the Commissioner and therefore is not a “medical opinion” that must be given controlling weight. *Ellis*, 392 F.3d at 994.

Here, it is undisputed that Dr. Krohn is a treating physician and that he provided a written opinion, dated January 20, 2011, concerning Kohn’s symptoms and limitations. AR 338-39. As noted earlier, he listed Kohn’s symptoms as depression, fatigue, memory problems, decreased attention and learning disability, along with residual effects of her prior injuries. AR 339. He then stated an opinion that Kohn is limited to no heavy lifting, no long periods of time sitting or standing and that she would never be capable of completing any kind of work for even as much as ten hours per week. *Id.*

In deciding to give this opinion little weight, the ALJ found that Dr. Krohn’s treatment notes “stand in direct contrast” to his opinion. AR 22. In particular, the ALJ noted that Dr. Krohn’s treatment notes for July 2, 2010, state that “she certainly does not seem to be impaired” and he does not believe she is qualified for disability benefits. AR 325. The ALJ found nothing in Dr. Krohn’s treatment notes between that date and January 20, 2011, that could explain his substantial change of position. AR 22. Indeed, the ALJ commented that the record contains no evidence of treatment by Dr. Krohn in January 2011, or at any other time after July 2010. *Id.*

Additional evidence was later submitted to the Appeals Council showing that Kohn did see Dr. Krohn or his nurse practitioner on several occasions between July 2010 and January 2011. AR 4, 31, 437-49. The Appeals Council found this additional evidence did not provide a reason to change the ALJ's decision. AR 1-2. I agree. Nothing in the later-submitted treatment notes even arguably explains why Dr. Krohn's opinion changed diametrically between July 2010 and January 2011. The intervening visits involved a series of mostly-minor complaints and/or medication reviews and adjustments. AR 437-49. Kohn usually saw the nurse practitioner, not Dr. Krohn himself. *Id.* The treatment notes do not reflect that Kohn's symptoms and limitations significantly changed during this period of time. *Id.* It was not improper for the ALJ to take into account the fact that Dr. Krohn's January 2011 opinion was, without explanation, inconsistent with his treatment notes.⁴

The ALJ also found that Dr. Krohn's January 2011 opinion is not supported by other substantial medical evidence. AR 22. As discussed in Section 1, *supra*, the medical evidence of record does not support Kohn's allegations of disabling impairments. The same is true with regard to Dr. Krohn's opinion that Kohn has severe, permanent limitations such that she will never be able to work at any job for even ten hours per week. AR 339. Neither his own records nor those from other providers contain evidence

⁴ Dr. Krohn submitted a letter in January 2012, after the ALJ's decision was issued, in which he attempted to explain the inconsistency. AR 452-53. The letter was made part of the record during the Appeal's Council's review of the ALJ's decision. AR 6. Dr. Krohn stated that the opinion he expressed in July 2010 was based on a misunderstanding. AR 452. He further acknowledged, however, that he was wrong to have stated in January 2011 that Kohn could not perform work of any kind. *Id.* He explained that he had "felt it was important to defend her in this difficult time." *Id.* Dr. Krohn did not include additional treatment notes, test results or clinical findings with his letter of January 2012. I find that the January 2012 letter does not explain the obvious inconsistency identified by the ALJ. If anything, Dr. Krohn's admission that he overstated Kohn's impairments in the January 2011 opinion based on a desire to "defend her in this difficult time" provides an additional reason to discredit that opinion.

suggesting that Kohn's RFC is so severely restricted. The ALJ did not err in making this finding.

These conclusions by the ALJ amount to findings that Dr. Krohn's January 2011 opinion was not "well-supported by medically acceptable clinical and laboratory diagnostic techniques" and was "inconsistent with the other substantial evidence in [the] case record." See 20 C.F.R. § 416.927(c)(2). Because these findings are supported by substantial evidence in the record as a whole, it was not error for the ALJ to decline to give controlling weight to Dr. Krohn's opinion. *Id.*

Upon finding that the opinion was not entitled to controlling weight, the ALJ was next required to consider the applicable factors in determining the weight to which it was entitled. *Id.* The ALJ referenced those factors and, ultimately, found that the medical opinions of two examining sources, Dr. Martin and Dr. Baker, were entitled to more weight than Dr. Krohn's opinion. AR 18, 21-22, 24. Dr. Martin conducted a comprehensive physical examination in April 2010. AR 21, 282-88. He found that Kohn had full range of motion in her knees and some mild limits to the range of motion in her lumbar spine and left hip. AR 288. His testing revealed no other deficits in Kohn's range of motion and full upper and lower extremity muscle strength. AR 287-88. He also indicated that Kohn had "reported cognitive issues of a mild variety, secondary to traumatic brain injury." AR 285. Those issues included intermittent headaches, memory issues and mood changes. AR 282. Dr. Martin found that Kohn had "some" function issues and imposed limits that the ALJ adopted in formulating Kohn's RFC. AR 19, 21, 285-86.

Dr. Baker conducted a consultative psychological examination in April 2010. AR 18, 290-92. He diagnosed Kohn as having adjustment disorder with depressed mood. AR 292. He found that she "seems able to remember and understand instructions, procedures, and locations." *Id.* He found no significant impairment regarding Kohn's

remote memory, recent memory and recall. *Id.* He further found no “significant difficulty with maintenance of attention, concentration, and pace to suggest problems in carrying out instructions.” *Id.* He determined that she would “appropriately interact with supervisors, coworkers, and the public.” He concluded by stating that Kohn has no impairment that would prevent her from using “good judgment in responding appropriately to changes in the workplace.” *Id.*

In finding that the opinions of Dr. Martin and Dr. Baker were entitled to more weight than Dr. Krohn’s opinion, the ALJ noted that the state agency medical consultants (who reviewed records but did not examine Kohn) provided opinions that were consistent with the Martin and Baker opinions.⁵ AR 18, 24. By contrast, as discussed above, the ALJ found that Dr. Krohn’s January 2011 opinion contradicted statements he made in July 2010, was inconsistent with his own treatment records and was not supported by other substantial medical evidence. As such, he found that Dr. Krohn’s opinion was entitled to little weight.

The ALJ applied the correct legal standard and provided good reasons, supported by substantial evidence in the record, for the weight he assigned to the various medical opinions. I reject Kohn’s argument that the ALJ committed error by failing to give more weight to Dr. Krohn’s opinion.

⁵ Kohn contends that it was improper for the ALJ to give weight to the opinions of the non-examining sources because their opinions were issued 18 months before the ALJ’s hearing and, therefore, were not based on a review of all medical evidence. However, the ALJ examined the subsequent medical evidence and found that it was not inconsistent with the consultants’ findings. AR 22-24. And, in fact, the opinion Dr. Krohn issued in January 2011 (discussed in detail, *supra*) is the only subsequent medical evidence that even arguably contradicts the non-examining source opinions. I find that the passage of time did not make it improper for the ALJ to assign significant weight to those opinions. *See, e.g., Chandler v. Comm’r of Soc. Sec.*, 667 F.3d 356, 361 (3d Cir. 2011) (“[B]ecause state agency review precedes ALJ review, there is always some time lapse between the consultant’s report and the ALJ hearing and decision. The Social Security regulations impose no limit on how much time may pass between a report and the ALJ’s decision in reliance on it.”).

3. *The VE's Testimony*

Kohn argues that the ALJ erred in relying on the VE's testimony because the ALJ improperly formulated a hypothetical question that did not encompass all of Kohn's impairments. Kohn correctly notes that when a hypothetical question fails to include all relevant impairments, the VE's answer to that question does not constitute substantial evidence. *Pickney v. Chater*, 96 F.3d 294, 296 (8th Cir. 1996). By contrast, "[a] vocational expert's testimony constitutes substantial evidence when it is based on a hypothetical that accounts for all of the claimant's proven impairments." *Buckner v. Astrue*, 646 F.3d 549, 560-61 (8th Cir. 2011) (quoting *Hulsey v. Astrue*, 622 F.3d 917, 922 (8th Cir. 2010)). "[A]n ALJ may omit alleged impairments from a hypothetical question posed to a vocational expert when [t]here is no medical evidence that these conditions impose any restrictions on [the claimant's] functional capabilities or when the record does not support the claimant's contention that his impairments significantly restricted his ability to perform gainful employment." *Buckner*, 646 F.3d at 561 (quoting *Owen v. Astrue*, 551 F.3d 792, 801-02 (8th Cir. 2008) (internal quotations omitted)).

Here, the ALJ asked the VE a hypothetical question that incorporated the same limitations the ALJ included in his RFC finding. AR 19, 56-57. As noted above, the ALJ made the RFC finding based on his assessment of Kohn's and her husband's credibility and the weight he assigned to the various medical opinions. I have already found that the ALJ's findings are supported by substantial evidence in the record. As such, the ALJ's hypothetical question properly accounted for all of Kohn's proven impairments. The VE's answer to that question constituted substantial evidence that Kohn can perform her past relevant work as an accounting clerk (along with a wide range of other work).

Conclusion and Recommendation

For the reasons discussed above, I RESPECTFULLY RECOMMEND that the Commissioner's decision be **affirmed** and that judgment be entered against Kohn and in favor of the Commissioner.

Objections to this Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b) must be filed within fourteen (14) days of the service of a copy of this Report and Recommendation. Objections must specify the parts of the Report and Recommendation to which objections are made, as well as the parts of the record forming the basis for the objections. *See* Fed. R. Civ. P. 72. Failure to object to the Report and Recommendation waives the right to *de novo* review by the district court of any portion of the Report and Recommendation as well as the right to appeal from the findings of fact contained therein. *United States v. Wise*, 588 F.3d 531, 537 n.5 (8th Cir. 2009).

IT IS SO ORDERED.

DATED this 26th day of September, 2013.



LEONARD T. STRAND
UNITED STATES MAGISTRATE JUDGE