

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION**

RUSSELL TOLLEFSON,

Plaintiff,

vs.

**MICHAEL J. ASTRUE,
Commissioner of Social Security,**

Defendant.

No. C07-0015

ORDER ON JUDICIAL REVIEW

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I. INTRODUCTION

This matter comes before the Court on the Complaint (docket number 3) filed by Plaintiff Russell Tollefson on February 20, 2007, requesting judicial review of the Social Security Commissioner's decision to deny his application for Title II disability insurance benefits and Title XVI supplemental security income ("SSI") benefits. Tollefson asks the Court to reverse the decision of the Social Security Commissioner ("Commissioner") and order the Commissioner to provide him disability insurance benefits and SSI benefits. In the alternative, Tollefson requests the Court to remand this matter for further proceedings.

II. PRIOR PROCEEDINGS

Tollefson applied for disability insurance benefits on May 9, 2001.¹ In his application, Tollefson alleged an inability to work since August 3, 1998, due to loss of vision and shoulder impairments. Tollefson later amended his disability onset date to March 29, 2001. Tollefson's application was denied on December 10, 2001. On February 18, 2002, his application was denied on reconsideration. On March 23, 2002, Tollefson requested an administrative hearing before an Administrative Law Judge ("ALJ"). On January 29, 2003, Tollefson appeared with counsel, via video conference, before ALJ John P. Johnson for an evidentiary hearing. Tollefson, Cheryl Choate, Tollefson's sister, and vocational expert Roger F. Marquardt testified at the hearing. In a decision dated July 22, 2003, the ALJ denied Tollefson's claim. The ALJ determined that Tollefson was not disabled and was not entitled to disability insurance benefits or SSI benefits because he was

¹ Tollefson also applied for SSI benefits; however, it is unclear when this application was made. According to the "List of Exhibits" which constitutes the table of contents for the Administrative Record, Tollefson's application for SSI benefits and the denial of those benefits initially and on reconsideration should be found at pages 213-19 of the Administrative Record. These pages, however, are missing from the record before the Court. The Administrative Record contains two decisions by the administrative law judge ("ALJ"). In his first decision, the ALJ indicated that Tollefson protectively filed his application for SSI benefits on October 19, 2001. *See* Administrative Record at 10D. In his second decision, the ALJ indicated that Tollefson filed his application for SSI benefits on May 9, 2001. *See* Administrative Record at 287. While it is unclear as to the date Tollefson applied for SSI benefits, there is agreement that he did file such an application in May or October, 2001, and his application was denied initially and on reconsideration.

functionally capable of performing work that exists in significant numbers in the national economy. Tollefson appealed the ALJ's decision. On February 27, 2004, the Appeals Council denied Tollefson's request for review. Consequently, the ALJ's July 22, 2003 decision was adopted as the Commissioner's final decision.

On April 28, 2004, Tollefson filed an action seeking judicial review of the Commissioner's final decision (Case No. 04-cv-0046). On January 18, 2005, Magistrate Judge John A. Jarvey entered an Order in that case, remanding the matter to the Commissioner for further proceedings to "address and develop the record as it relates to [Tollefson's] determination of disability by the Veterans Administration."² On September 12, 2005, the Appeals Council remanded the case to the ALJ for further proceedings consistent with Judge Jarvey's Order. On May 4, 2006, Tollefson appeared with counsel, via video conference, before ALJ Johnson for a second evidentiary hearing. Tollefson, Mabel Morey, Tollefson's friend, Cheyl Choate,³ Tollefson's sister, and vocational expert Marian S. Jacobs testified at the second hearing. On remand, in a decision dated October 20, 2006, the ALJ denied Tollefson's claim. The ALJ determined Tollefson was not disabled and was not entitled to disability insurance benefits or SSI benefits because he was functionally capable of performing work that exists in significant numbers in the national economy. Tollefson did not timely file exceptions with the Appeals Council to the ALJ's decision and the Appeals Council did not review his case on its own motion. Consequently, the ALJ's October 20, 2006, decision on remand was adopted as the Commissioner's final decision.

On February 20, 2007, Tollefson filed this action for judicial review. The Commissioner filed an answer on June 7, 2007. On August 15, 2007, Tollefson filed a

² See Administrative Record at 311. Additionally, the Veterans Administration is now referred to as the Department of Veterans Affairs and the Court will also refer to it as such.

³ The transcript from the second administrative hearing consistently spells Cheryl Choate's last name as Chote. For purposes of this case, the Court will spell Cheryl's last name as "Choate," as it was spelled in the first administrative hearing.

brief arguing that the ALJ did not properly address the issues on remand and there is not substantial evidence in the record to support the ALJ's finding that he is not disabled and that there is other work in the national economy that he can perform. On November 9, 2007, the Commissioner filed a responsive brief arguing the ALJ's decision on remand was correct and asking the Court to affirm the ALJ's decision. On April 20, 2007, both parties consented to proceed before the undersigned in this matter pursuant to the provisions set forth in 28 U.S.C. § 636(c).

III. PRINCIPLES OF REVIEW

Title 42, United States Code, Section 405(g) provides that the Commissioner's final determination following an administrative hearing not to award disability insurance benefits is subject to judicial review. 42 U.S.C. § 405(g). Pursuant to 42 U.S.C. § 1383(c)(3), the Commissioner's final determination after an administrative hearing not to award SSI benefits is subject to judicial review to the same extent as provided in 42 U.S.C. § 405(g). 42 U.S.C. § 1383(c)(3). 42 U.S.C. § 405(g) provides the Court with the power to: "[E]nter . . . a judgment affirming, modifying, or reversing the decision of the Commissioner . . . with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). "The findings of the Commissioner . . . as to any fact, if supported by substantial evidence, shall be conclusive . . ." *Id.*

The Court must consider "whether the ALJ's decision is supported by substantial evidence on the record as a whole." *Vester v. Barnhart*, 416 F.3d 886, 889 (8th Cir. 2005) (citing *Harris v. Barnhart*, 356 F.3d 926, 928 (8th Cir. 2004)). Evidence is "substantial evidence" if a reasonable person would find it adequate to support the ALJ's determination. *Id.* (citing *Sultan v. Barnhart*, 368 F.3d 857, 862 (8th Cir. 2004)). Furthermore, "[s]ubstantial evidence is 'something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions does not prevent an administrative agency's findings from being supported by substantial evidence.'" *Baldwin v. Barnhart*, 349 F.3d 549, 555 (8th Cir. 2003) (quoting *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989), in turn quoting *Consolo v. Fed. Mar. Comm'n*, 282 U.S. 607, 620 (1966)).

In determining whether the ALJ'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." *Vester*, 416 F.3d at 889 (citing *Guilliams v. Barnhart*, 393 F.3d 798, 801 (8th Cir. 2005)). The Court not only considers the evidence which supports the ALJ's decision, but also the evidence that detracts from his or her decision. *Guilliams*, 393 F.3d at 801. "[E]ven if inconsistent conclusions may be drawn from the evidence, the agency's decision will be upheld if it is supported by substantial evidence on the record as a whole." *Id.* (citing *Chamberlain v. Shalala*, 47 F.3d 1489, 1493 (8th Cir. 1995)).

IV. FACTS

A. Tollefson's Education and Employment Background

Tollefson was born in 1952. He completed the tenth grade and later obtained his GED. Tollefson worked at a number of jobs between 1980 and 1998. His primary employers were: (1) Waydens Heavy Haulers, Inc. (1980-1983), (2) Enos Brothers Concrete Construction (1984), (3) Foster Heating & Air Conditioning (1985-1990), (4) Novak Heating Company, Inc. (1991), (5) Gregerson Electric (1991-1993), (6) Osmose, Inc. (1995), (7) Rick Miller Construction, Inc. and Miller Chimney, Inc. (1996-1998), and (8) All Tri-R, Inc. (1998). According to the detailed earnings query, Tollefson earned \$264 in 1994 and has no record of earnings for 1999 through 2005.

B. Testimony from the First Administrative Hearing

1. Tollefson's Testimony

At the January 29, 2003 administrative hearing, Tollefson testified that he received disability benefits from the Department of Veterans Affairs ("DVA") based upon his shoulder impairment and vision loss. Tollefson injured his left shoulder in August, 1998, while working at the ADM Corporation as a laborer.⁴ Tollefson had surgery on his left shoulder. He claims, however, that it is still problematic. He testified that he cannot lift anything with his left arm, use his left shoulder, or reach over his head. He also testified that his shoulder caused him pain, but he did not take any pain medication for it.

⁴ Tollefson worked at ADM through his employer All Tri-R, Inc.

Tollefson testified that on March 29, 2001, he “woke up in the morning and fell down. When I went to stand up my whole left side was numb. And the feeling came back and I got up and I walked in[to] a wall and that’s when I figured out I couldn’t see.”⁵ Specifically, Tollefson stated that he had an inability to see peripherally to the right unless he physically turned his head to the right. He claimed that his vision problems also effect his ability to walk. He testified that he sometimes runs into things on his right side. He also testified that he is not allowed to have a driver’s license, has difficulty reading, and has difficulty writing and signing his name to checks.

Tollefson further testified that on a typical day, he walks to the post office at 9:30 a.m., stops for a cup of coffee, and then walks back home. He cooks for himself, but generally has pre-made food which he heats up in the microwave. He stated that he is also able to clean his home, including vacuuming.⁶

2. Vocational Expert Testimony

At the January 29, 2003 hearing, the ALJ provided vocational expert Roger F. Marquardt with a hypothetical for an individual with the following limitations:

[The individual] cannot lift more than 24 pounds from floor to shoulder or 60 pounds from floor to waist. Routinely lifting 10 pounds with only occasional squatting and climbing. No repetitive pushing or pulling and no pushing or pulling of greater than 135 pounds. No reaching above the shoulder level on the left and only occasional work with the arms above the head. This individual should not work at unprotected heights or around hazardous moving machinery. And he [or she] should perform no work, which requires full fields of vision.

(Administrative Record at 271-72) The vocational expert testified that under such limitations, Tollefson could not return to any of his past work. The vocational expert testified, however, that under such limitations, Tollefson could perform work as a lot attendant (500 positions in Iowa and 50,000 positions in the nation), cleaning/housekeeping

⁵ See Administrative Record at 236-37.

⁶ Tollefson testified, however, that he often runs the vacuum into furniture or other things because of his vision problems.

for a lodging facility (5,000 positions in Iowa and 200,000 positions in the nation), and fast food worker (12,000 positions in Iowa and 300,000 positions in the nation). The ALJ provided the vocational expert with a second hypothetical for an individual with the following limitations:

This individual could not lift more than 20 pounds, routinely lift 10 pounds, however lifting with the left upper extremity, which is the minor upper extremity would be limited to less than five pounds. No sitting of more than a half hour at a time. Only occasional squatting or climbing. No work requiring continuous gripping with the left hand. Only occasional work with the left arm to the shoulder level. This individual should not work at unprotected heights or around hazardous moving machinery. He [or she] should perform no work requiring full fields of vision and he [or she] should perform no work, which requires constant fine visual acuity for reading printed material.

(Administrative Record at 274) The vocational expert testified that under such limitations, Tollefson could not return to any of his past work, but could perform the jobs described under the first hypothetical.

C. Summary of Medical Evidence contained in Judge Jarvey's Order

At the outset, the Court notes that both Tollefson and the Commissioner accept the recitation of the medical evidence provided in Judge Jarvey's Order, dated January 18, 2005. Instead of providing a detailed discussion of that evidence, the Court will summarize the medical evidence in Judge Jarvey's Order as follows: (1) Tollefson had arthroscopic surgery on his left shoulder and open rotator cuff repair on January 11, 2001; (2) Tollefson was diagnosed with right homonymous hemianopsia secondary to stroke on April 2, 2001; (3) ophthalmological examinations in April and October, 2001, revealed visual problems which were the result of the right homonymous hemianopsia secondary to stroke, making it difficult for Tollefson to read, drive, or perform other visual tasks; (4) Tollefson had a consultative examination with Dr. AnnaMaria Guidos in November, 2001, and Dr. Guidos opined that Tollefson had limitations with his left shoulder and doubted that he could be

meaningfully employed;⁷ and (5) in April, 2002, Tollefson was treated at the Iowa Veterans Administration Medical Center for erythrocytosis and polycythemia and underwent phlebotomy and blood draining.

D. The ALJ's First Decision

In his first decision, dated July 22, 2003, the ALJ made the following findings:

1. [Tollefson] has not engaged in substantial gainful activity at any time relevant to this decision.
2. [Tollefson] met the disability insured status requirements of the Act on March 29, 2001, the date he alleges he became disabled, and continues to meet them at least through December 31, 2002.
3. The medical evidence establishes that [Tollefson] has the following medically determinable "severe" impairments: Right homonymous hemianopsia secondary to a stroke; erythrocytosis; hypertension; and open repair of the left rotator cuff, by history.
4. [Tollefson] does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No.4.
5. [Tollefson's] allegations of total inability to work were not fully credible because of significant inconsistencies in the record as a whole[.] . . .

⁷ Specifically, Dr. Guidos opined that:

[I]t is doubtful that [Tollefson] can be meaningfully employed. There is no specific limitation in sitting, however, there are limitations in terms of lifting and carrying. He should not be lifting and carrying anymore than 5 pounds with his left upper extremity and on his right side he should be limited to approximately 20 pounds on an occasional basis and 10 pounds on a frequent basis. Traveling would be difficult secondary to inability to drive. Walking would also be limited with objects on his right side with his limitation of vision on the right side.

See Administrative Record at 127.

6. [Tollefson] has the residual functional capacity to occasionally lift and/or carry 24 pounds from floor to shoulder and 60 pounds from floor to waist. [Tollefson] is frequently able to lift and/or carry 10 pounds. [Tollefson] is occasionally able to squat and climb. [Tollefson] is unable to do any repetitive push and/or pulling of greater than 135 pounds. [Tollefson] is unable to . . . reach above shoulder level on the left side, and only occasionally work with the arms overhead. [Tollefson] . . . would need [to] avoid dangers such as unprotected heights and moving machinery. [Tollefson] would be unable to perform work which required a full field of vision.

. . .

8. [Tollefson] has a limited education, having completed the tenth grade.

9. [Tollefson's] past relevant work required the performance of work related activities precluded by the above limitations[.] . . .

10. [Tollefson] has acquired no skills from past work which are transferable to other work.

11. [Tollefson] is able to make a vocational adjustment to work which exists in significant number in the national economy. Examples of such jobs include: Lot attendant, cleaner/housekeeper (lodging facility), and fast foods worker.

12. [Tollefson] is not under a "disability" as defined in the Social Security Act[.] . . .

(Administrative Record at 10K-10L) The ALJ concluded that Tollefson was not disabled and was not entitled to disability insurance benefits or SSI benefits.

E. Judicial Review Order, dated January 18, 2005

Tollefson filed a complaint seeking judicial review of the ALJ's first decision which was adopted as the Commissioner's final decision on April 28, 2004. The issues considered by the court were: (1) Whether the ALJ properly considered the opinion of Dr. Guidos;

(2) whether the ALJ properly considered Tollefson's visual impairments as they related to his residual functional capacity ("RFC"); (3) whether the ALJ fully and fairly developed the record with regard to Tollefson's homonymous hemianopsia and the DVA's disability determination; and (4) whether the ALJ properly considered Tollefson's objective allegations of disability.

The court determined that the ALJ properly weighed Dr. Guidos' opinion regarding Tollefson's left shoulder limitations. The court also found that the ALJ properly gave greater weight to the opinion of Dr. David P. Hart, M.D., Tollefson's treating physician, with regard to Tollefson's left shoulder limitations. The court stated "the ALJ properly relied upon substantial medical evidence, the assessment of a treating physician, in determining [Tollefson's] RFC with respect to his shoulder limitations."⁸ Next, the court concluded that the ALJ properly considered the relevant medical evidence regarding Tollefson's visual impairments. The court further found that the ALJ's RFC determination, that Tollefson would need to avoid unprotected heights and moving machinery and would be unable to perform work requiring a full field of vision, was consistent with the conclusions of the three physicians that examined Tollefson for his vision problems. The court stated "[t]he opinions of three examining physicians is evidence that a reasonable mind would find adequate to support the ALJ's conclusion. Therefore, there is clearly substantial medical evidence supporting the ALJ's RFC determination with respect to [Tollefson's] visual impairments."⁹ The court also found that there was "an extensive record regarding [Tollefson's] homonymous hemianopsia . . . [demonstrating] that the ALJ fully developed the record with regards to this issue."¹⁰ The court found, however, that the record was undeveloped with regard to the DVA's determination that Tollefson was disabled. The court concluded:

⁸ See Administrative Record at 307.

⁹ *Id.* at 308.

¹⁰ *Id.* at 309.

In the present case, the record contains no information regarding [Tollefson's] VA [(Veteran's Administration)] disability, other than the fact that he receives monthly disability payments from the VA. The record contains no documents or testimony as to why the VA determined that [Tollefson] is disabled. Furthermore, the ALJ's opinion contains no reference to [Tollefson's] VA disability and provides no reasons for why the VA's determination should be rejected. Therefore, the record is undeveloped with regards to the VA's disability determination because no reasons for rejecting this determination are mentioned in the ALJ's opinion nor are any reasons present in the record. Therefore, the case must be remanded for further investigation with regards to this matter.

(Administrative Record at 309-10) Lastly, the court determined that the ALJ properly discounted Tollefson's subjective allegations of disability in accordance with the factors set forth in *Polaski v. Heckler*, 739 F.2d 1320 (8th Cir. 1984).

F. Testimony from the Second Administrative Hearing

1. Tollefson's Testimony

At the May 4, 2006 administrative hearing, Tollefson testified that he has no peripheral vision on his right side. He further testified that he had difficulty reading because after a short period of time, everything becomes gray and blurry. Tollefson stated that he could read about one paragraph of written material before his vision turned gray and blurry. He also noted that he had difficulty watching television. He testified that he could watch television for about ten minutes before everything becomes blurry. Tollefson indicated that after his vision becomes blurry, it takes 15 to 20 minutes before he can start watching television again. Tollefson and his attorney had the following colloquy which summarized his vision problems:

- Q: Okay. So just in sort of a short summary, as far as your vision is concerned, you can only do something where you focus and pay attention, so something with your vision for what? How long? 10, 15 minutes?
- A: Yeah. 10 would be about the max.
- Q: And then your vision gets gray or grays or --
- A: Everything gets gray and it gets blurry.

Q: Okay. And then you have to stop for another 10 to 15 minutes?

A: Yeah. I just don't get too much done, I'll tell you that.

(Administrative Record at 528) Tollefson also testified that on a typical day, he walked about five blocks to and from the post office and tavern. Tollefson also discussed problems he has with his left arm. He testified that he was not supposed to lift any weight with his left arm or raise it as high as his shoulder.

2. Vocational Expert Testimony

At the May 4, 2006 hearing, the ALJ asked vocational expert Marian Jacobs, if he provided her with the same hypothetical questions he asked vocational expert Marquardt at the January 29, 2003 hearing, would she agree with his answers. Vocational expert Jacobs answered that under the first hypothetical,¹¹ she agreed with vocational expert Marquardt that Tollefson could perform work as “housekeeping/cleaner,” but disagreed that he could perform work as a “lot attendant” or “fast food worker.” Vocational expert Jacobs concluded under the first hypothetical, however, that Tollefson could perform the jobs of coffee shop counter attendant (1,000 positions in Iowa and 83,000 positions in the nation), copy messenger (1,400 positions in Iowa and 162,000 in the nation), and usher (400 positions in Iowa and 57,000 positions in the nation).

The ALJ also provided vocational expert Jacobs with a hypothetical for an individual with the following limitations:

¹¹ The ALJ's first hypothetical at the January 29, 2003 hearing was: [The individual] cannot lift more than 24 pounds from floor to shoulder or 60 pounds from floor to waist. Routinely lifting 10 pounds with only occasional squatting and climbing. No repetitive pushing or pulling and no pushing or pulling of greater than 135 pounds. No reaching above the shoulder level on the left and only occasional work with the arms above the head. This individual should not work at unprotected heights or around hazardous moving machinery. And he [or she] should perform no work, which requires full fields of vision.

See Administrative Record at 271-72.

[The individual] has the ability to lift, as a maximum, 24 pounds from the floor to the shoulder and 60 pounds from the floor to the waist, routinely lifting 10 pounds, standing or walking of six hours out of an eight-hour day, sitting of six hours out of an eight-hour day, with occasional squatting, climbing, no repetitive pushing or pulling over 135 pounds, no reaching above the shoulder on the left and only occasional work with the arms above the head. This individual should not work at unprotected heights or around moving machinery. He [or she] should perform no work requiring full fields of vision.

(Administrative Record at 543) Vocational expert Jacobs testified that under such limitations, Tollefson could not return to any of his past work. She testified, however, that under such limitations, Tollefson could perform work as an order filler (5,000 positions in Iowa and 34,000 positions in the nation). Additionally, she testified that, under the ALJ's hypothetical, Tollefson could perform the jobs she discussed earlier in answer to the ALJ's first question regarding the hypothetical question from the January 29, 2003 hearing.

Tollefson's attorney also questioned vocational expert Jacobs. Tollefson's attorney asked her the following questions:

- Q: Well, you heard [Tollefson's] testimony about being able to only focus on anything for about 15 minutes at a time with his vision then getting blurry, where he has to then take another 15 minute break. Would any jobs be feasible if that happens?
- A: Not in my opinion.
- Q: If the hypothetical person needed to work at a slow pace, up to 1/3 of the time, would any jobs be feasible?
- A: Not in my opinion.
- Q: Just as a practical matter, Ms. Jacobs, if someone has lost vision out of mostly -- out of one eye mostly and both eyes have lost in half so that the person can't see to the right at all, do you think, I mean, just as a practical matter, would jobs be available where somebody can see to that degree?
- A: I think they would be very few in number.
- Q: And what kind of numbers are you talking about?
- A: I don't have any statistics on that. I'm sorry.

Q: Okay. But would the jobs that you indicated that [Tollefson] could do be significantly reduced in number if the vision were to that degree?

A: I think they probably would be.

(Administrative Record at 545)

G. Additional Medical Evidence

On March 4, 2004, Tollefson was examined by Dr. Raman Shekar, a staff physician at the Iowa Veterans Administration Medical Center, for complaints of visual problems. Tollefson informed Dr. Shekar that he had recently experienced left-sided numbness that lasted a few minutes. Dr. Shekar indicated that he thought Tollefson might be experiencing right hemisphere transient ischemic attacks (“TIAs”), or “mini-strokes.” Dr. Shekar ordered further tests, encouraged Tollefson to take Aspirin everyday, and recommended Ramipril for his hypertension.

On June 10, 2004, Tollefson underwent a head/brain CT scan. The CT scan revealed encephalomalacia of the left occipital lobe related to his stroke in 2001. The CT scan revealed no evidence of masses or tumors. Tollefson also underwent an EEG examination which showed “relatively infrequent delta slow waves from the left temporal region.” Dr. Thoru Yamada, M.D., noted that the EEG results were excessive for a person of Tollefson’s age.

On December 6, 2004, Tollefson met with Dr. Jamie Haas. In his “Progress Note,” Dr. Haas reviewed Tollefson’s complaints and symptoms:

[On his last visit, Tollefson] was having episodes of left hemibody numbness. He had a “borderline” EEG showing left temporal slowing. . . . He states that he still has numbness on his left foot and leg that occur rarely. He states that his legs are tired all of the time and worse with activity. He states he feels tired with walking and has pain. He denies back pain. He has no weakness or numbness at rest. He rarely has throbbing in his left leg. He is still taking [Aspirin] for stroke prevention. He has not had a seizure that he is aware. He states that his leg can go numb for up to 5 minutes at a time. . . .

He states that he also does not sleep at night. He will sleep maybe an hour a night at times. He states that the just cannot

sleep. He states that he will snore. He states that he has woken himself up from snoring. He denies being excessively tired during the day.

(Administrative Record at 396) Dr. Haas diagnosed Tollefson's leg pain as vascular claudication. Dr. Haas recommended that Tollefson continue taking Aspirin for stroke prevention and ordered a sleep study test to evaluate his snoring and difficulty maintaining sleep.

On March 22, 2005, Tollefson met with Dr. Brian K. Petroelje, M.D., complaining of leg pain. Specifically, Tollefson complained that he had pain in his calf muscles after walking about 2.5 blocks. Tollefson stated that the pain resolved with rest after a couple of minutes. After examining him, Dr. Petroelje diagnosed Tollefson with lower extremity claudication.

Tollefson also underwent an Arm Ankle Index ("AAI") test on March 22, 2005. The test revealed that Tollefson's right AAI and ankle pulmonary vascular resistance ("PVR") were moderately abnormal with segmental pressures suggesting iliac obstruction. Tollefson's left AAI and ankle PVR was severely abnormal with segmental pressures suggesting iliac obstruction. Dr. Chris Bunch, M.D., interpreted the AAI test results and diagnosed Tollefson with inflow disease, probably bilaterally. Dr. Bunch ordered a lower extremity MRA for Tollefson. On August 4, 2005, after reviewing Tollefson's MRA, Dr. Kerri A. Nowell, M.D. recommended "fem-fem" bypass surgery.¹²

On September 19, 2005, Tollefson underwent a right to left femoro-femoral bypass with polytetrafluorethylene graft for peripheral vascular disease with left-sided intermittent claudication. Tollefson was discharged from the hospital on September 20, 2005. On October 20, 2005, Tollefson met with Dr. Lilja Bjornsdottir, M.D., for follow-up regarding his femoro-femoral bypass surgery. Dr. Bjornsdottir found that Tollefson was doing well and was able to walk without claudication. Tollefson informed Dr. Bjornsdottir that he

¹² "Fem-fem" bypass surgery refers to femoro-femoral bypass surgery which involves the "insertion of a vascular prosthesis between the femoral arteries as a passage around an occluded or injured iliac artery." *See* http://www.mercksource.com/pp/us/cns/cns_hl_dorlands.

could walk six blocks without pain and was able to ride a bike. Tollefson also noted that he had some residual weakness in his legs after walking for awhile. Follow-up visits from November 14, 2005 and December 5, 2005, indicated that Tollefson continued to be able to walk six blocks without pain in his legs and ride a bike.

V. CONCLUSIONS OF LAW

A. ALJ's Disability Determination

The ALJ determined that Tollefson is not disabled. In making this determination, the ALJ was required to complete the five-step sequential test provided in the social security regulations. See 20 C.F.R. § 404.1520(a)-(f); *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987); *Page v. Astrue*, 484 F.3d 1040, 1042 (8th Cir. 2007); *Anderson v. Barnhart*, 344 F.3d 809, 812 (8th Cir. 2003). The five steps an ALJ must consider are:

- (1) whether the claimant is gainfully employed,
- (2) whether the claimant has a severe impairment,
- (3) whether the impairment meets the criteria of any Social Security Income listings,
- (4) whether the impairment prevents the claimant from performing past relevant work, and
- (5) whether the impairment necessarily prevents the claimant from doing any other work.

Goff v. Barnhart, 421 F.3d 785, 790 (8th Cir. 2005) (citing *Eichelberger v. Barnhart*, 390 F.3d 584, 590 (8th Cir. 2004)); see also 20 C.F.R. § 404.1520(a)-(f). “If a claimant fails to meet the criteria at any step in the evaluation of disability, the process ends and the claimant is determined to be not disabled.” *Eichelberger*, 390 F.3d at 590-91 (citing *Ramirez v. Barnhart*, 292 F.3d 576, 580 (8th Cir. 2002)).

“To establish a disability claim, the claimant bears the initial burden of proof to show that he [or she] is unable to perform his [or her] past relevant work.” *Frankl v. Shalala*, 47 F.3d 935, 937 (8th Cir. 1995) (citing *Reed v. Sullivan*, 988 F.2d 812, 815 (8th Cir. 1993)). If the claimant meets this burden, the burden of proof then shifts to the Commissioner to demonstrate that the claimant retains the residual functional capacity to perform a significant number of other jobs in the national economy that are consistent with claimant’s impairments and vocational factors such as age, education, and work experience. *Id.* The RFC is the most an individual can do despite the combined effect of all of his or

her credible limitations. 20 C.F.R. § 416.945. “It is the ALJ’s responsibility to determine a claimant’s RFC based on all relevant evidence, including medical records, observations of treating physicians and others, and claimant’s own descriptions of his [or her] limitations.” *Tellez v. Barnhart*, 403 F.3d 953, 957 (8th Cir. 2005) (quoting *Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001)).

The ALJ applied the first step of the analysis and determined that Tollefson had not engaged in substantial gainful activity since his amended alleged onset date, March 29, 2001.¹³ At the second step, the ALJ concluded, from the medical evidence, that Tollefson had the following severe combination of impairments “status post left rotator cuff repair, status post cerebrovascular accident with right homonymous hemianopsia, hypertension, a history of right shoulder and right knee surgery, erythrocytosis. More recently, after the date last insured, hyperlipidemia and peripheral vascular disease, status post right to left [femoro-]femoral bypass. Veterans Administration diagnoses include alcohol and tobacco use.”¹⁴ At the third step, the ALJ found that Tollefson does not have “an impairment or combination of impairments that meets or medically equals one of the listed impairments in 20 C.F.R. [§ 404, Appendix 1, Subpart P, Regulations No. 4 (the Listing of Impairments)].” At the fourth step, the ALJ determined Tollefson’s RFC as follows:

[Tollefson] has the residual functional capacity to occasionally lift a maximum of 24 pounds floor to shoulder, sixty pounds from floor to waist; routinely lift ten pounds; stand/walk six hours in an eight hour day; sit six hours in an eight hour day; occasionally squat and climb; cannot perform repetitive push/pull over 135 pounds; can occasionally work with arms overhead; cannot reach above shoulder with the left arm; should avoid heights and moving machinery; and cannot perform work requiring full fields of vision.

¹³ The ALJ noted that Tollefson receives a monthly disability pension from the DVA in the amount of \$796. Tollefson began receiving this disability pension on January 1, 2002. *See* Administrative Record at 290.

¹⁴ *See* Administrative Record at 290.

Using this RFC, the ALJ determined that Tollefson met his burden of proof at the fourth step, because he was unable to perform his past relevant work. However, at the fifth step, the ALJ determined that Tollefson, based on his age, education, previous work experience, and RFC, could work at jobs that exist in significant numbers in the national economy. Therefore, the ALJ concluded Tollefson was “not disabled.”

B. Tollefson’s DVA Disability Pension

Judge Jarvey’s Order, dated January 18, 2005, remanded this case to the ALJ for further development of the record with regard to the DVA’s determination that Tollefson is disabled.¹⁵ Tollefson argues that on remand, the ALJ failed to properly consider his entitlement to DVA pension benefits based on a total and permanent disability. Tollefson argues that the ALJ was incorrect in distinguishing the DVA’s method for determining disability from the Social Security Administration’s (“SSA”) method for determining disability. Instead, Tollefson suggests that “[c]ontrary to the ALJ’s assertion, the standard applied by the DVA is very similar to the standard utilized by the Commissioner as it generally requires the inability to do any substantial occupation or activity and is based on

¹⁵ Specifically, the Order provided:

In the present case, the record contains no information regarding [Tollefson’s] VA [(Veteran’s Administration)] disability, other than the fact that he receives monthly disability payments from the VA. The record contains no documents or testimony as to why the VA determined that [Tollefson] is disabled. Furthermore, the ALJ’s opinion contains no reference to [Tollefson’s] VA disability and provides no reasons for why the VA’s determination should be rejected. Therefore, the record is undeveloped with regards to the VA’s disability determination because no reasons for rejecting this determination are mentioned in the ALJ’s opinion nor are any reasons present in the record. Therefore, the case must be remanded for further investigation with regards to this matter.

See Administrative Record at 309-10.

the claimant's disabilities, age, education, and past work."¹⁶ Thus, Tollefson implies that the ALJ's decision lacks a full consideration of the DVA's finding that he is disabled and "unable to secure and follow a substantially gainful occupation due to disability."¹⁷

An ALJ should consider the DVA's finding of disability. *Pelkey v. Barnhart*, 433 F.3d 575, 579 (8th Cir. 2006) (citing *Morrison v. Apfel*, 146 F.3d 625, 628 (8th Cir. 1998)). An ALJ is not bound, however, by the disability determination of another agency when he or she is determining whether a claimant is disabled for purposes of social security benefits. *Pelkey*, 433 F.3d at 579; *see also* 20 C.F.R. § 404.1504 ("A decision by any nongovernmental agency or any other governmental agency about whether you are disabled . . . is based on its rules and is not our decision about whether you are disabled[.] . . . We must make a disability . . . determination based on social security law. Therefore, a determination made by another agency that you are disabled . . . is not binding on us.").

On remand, the ALJ stated:

In this case, [Tollefson] was found entitled to a non-service connected Veterans Administration pension based on his age of 50, his 12th grade education, his last work in 1998, and most importantly, his combined disability rating of 70%. As provided in 38 C.F.R. [§] 3.321(b)(2), a 'permanent and total disability rating for pension purposes' may be awarded in certain circumstances. The key to this is the '1945 Schedule for Rating Disabilities.' That Ratings Schedule provides the criteria for rating of individual impairments and the combining of those ratings to reach a combined rating. If an individual is not working, is 50 years old or older and has a combined rating of 70%, he or she is presumed to be 'permanently and totally disabled.' This is an entirely different method for determining disability than provided in the Social Security Act and Regulations.

To put the same case into the sequential evaluation: (1) The claimant is not working, that is, engaging in substantial gainful activity. (2) By reason of assigning percentage ratings based on

¹⁶ *See* Tollefson's Brief (docket number 12) at 10.

¹⁷ *See* Administrative Record at 323.

the ratings schedule, it is presumed that there is a finding of severe impairments. (3) There is no provision for presumptive disability as provided for in the listings in the case of Veterans Administration disability evaluation; although some individual impairments have provisions for 100% ratings. There is no consideration of formulation of residual functional capacity since the 1945 Schedule for Rating Disabilities is based on degree of impairment, not remaining capacity to perform basic work activities. (4) Likewise, there is no consideration as to the ability to return to past relevant work; merely not working is sufficient. (5) Finally, there is no consideration as to whether other work exists in significant numbers in the national economy that could be performed within the claimant's remaining residual functional capacity. Therefore, for Social Security Disability equation purposes, the Veterans Administration finding of permanent and total disability is based on different factors; for Social Security purposes, the Veterans Administration equation is incomplete. When it is completed under the Social Security equation, i.e., the sequential evaluation, the results would be the same; therefore, it has no impact.

(Administrative Record at 292-93)

An ALJ has a duty to develop the record fully and fairly. *Cox v. Astrue*, 495 F.3d 614, 618 (8th Cir. 2007); *Sneed v. Barnhart*, 360 F.3d 834, 838 (8th Cir. 2004); *Wilcutts v. Apfel*, 143 F.3d 1134, 1137 (8th Cir. 1998). Because an administrative hearing is a non-adversarial proceeding, the ALJ must develop the record fully and fairly in order that “deserving claimants who apply for benefits receive justice.” *Wilcutts*, 143 F.3d at 1138 (quoting *Battles v. Shalala*, 36 F.3d 43, 44 (8th Cir. 1994)).

Here, the ALJ explained the reasons for the DVA's decision to award disability pension benefits to Tollefson. The ALJ also pointed out the differences between the DVA's disability determination procedures and the procedures used by the SSA for determining disability. Based on this information, the ALJ concluded that for Social Security purposes, the DVA's procedure for determining disability is incomplete; and therefore, has no impact on Tollefson's disability determination when the SSA's five-step sequential evaluation is performed for Tollefson. The Court, having reviewed the record, finds that, on remand,

the ALJ considered the DVA's disability determination, fully and fairly developed the record on this issue, and explained his reasons for discounting the DVA's disability determination in accordance with Judge Jarvey's Order and the applicable law. *See Pelkey*, 433 F.3d at 579; 20 C.F.R. § 404.1504.

C. The ALJ's Consideration of Medical Evidence submitted on Remand

Tollefson argues that in making the disability determination on remand, the ALJ failed to consider evidence in the record after July, 2003. Specifically, Tollefson directs the Court to the evidence entered into the record at the second administrative hearing. In particular, Tollefson refers to the medical evidence discussed in section *IV.G* of this decision, including Dr. Shekar's concern regarding TIAs and his femoro-femoral bypass surgery. Tollefson maintains that the ALJ should have "addressed this evidence and stated whether it affected his prior determination."¹⁸ Tollefson request that his matter be remanded for further development of the record and consideration of the additional evidence.

In his decision, the ALJ acknowledged and accepted into the record new evidence from the second administrative hearing.¹⁹ At several places in his decision, the ALJ states that he considered the entire record and all of the evidence.²⁰ However, in his decision, the ALJ does not explicitly discuss, in detail, any of the new medical evidence accepted at the second administrative hearing. The ALJ implicitly discusses the new evidence, however, several times in his decision. In particular, when discussing Tollefson's impairments, the ALJ included Tollefson's diagnosis of peripheral vascular disease and his

¹⁸ *See* Tollefson's Brief (docket number 12) at 15.

¹⁹ "The Administrative Law Judge has carefully considered all the testimony at the hearing, the arguments made, and the documents identified as Exhibits 1A through 17F and 1SSI through 3SSI, inclusive. The testimony at the hearing and the exhibits of record are incorporated herein by reference." *See* Administrative Record at 287. It should be noted that Exhibits 1A - 17F include both evidence from the initial administrative hearing and new evidence from the second administrative hearing.

²⁰ *See* Administrative Record at 287, 288, 290, 291, 292.

subsequent femoro-femoral bypass surgery.²¹ The ALJ also discussed Tollefson's testimony from the second hearing regarding his leg problems and femoro-femoral bypass surgery. The ALJ also noted that the surgery helped Tollefson with his ability to walk.²²

An ALJ has a duty to develop the record fully and fairly. *Cox*, 495 F.3d at 618. Furthermore, because the RFC is a medical question, an "ALJ's finding must be supported by some medical evidence." *Guilliams*, 393 F.3d at 803 (citing *Masterson v. Barnhart*, 363 F.3d 731, 738 (8th Cir. 2004)). "Although required to develop the record fully and fairly, an ALJ is not required to discuss every piece of evidence submitted." *Black v. Apfel*, 143 F.3d 383, 386 (8th Cir. 1998) (citing *Miller v. Shalala*, 8 F.3d 611, 613 (8th Cir. 1993)). Failure to cite specific evidence does not indicate that the evidence was not considered by the ALJ. *Id.* (citing *Montgomery v. Chater*, 69 F.3d 273, 275 (8th Cir. 1995)).

While the Court would prefer it if the ALJ had discussed the new evidence offered at the second administrative hearing more thoroughly in his decision, the Court determines that the lack of discussion of this evidence does not warrant a remand. The ALJ declared at several points in his decision, that he considered the entire record and all of the evidence when making his disability determination. The ALJ's decision also contains implicit references to information contained in the new evidence.²³ More importantly, the Court notes that Tollefson offers no argument that the new medical evidence has any impact on the ALJ's previous or current disability determination. While it is true that the record contains medical evidence of possible TIAs and femoro-femoral bypass surgery, the record also demonstrates that after further evaluation, Dr. Shekar concluded that TIAs were an

²¹ See Administrative Record at 290.

²² *Id.*

²³ In his decision, the ALJ included Tollefson's diagnosis of peripheral vascular disease and his subsequent femoro-femoral bypass surgery, discussion of Tollefson's testimony from the second hearing regarding his leg problems and femoro-femoral bypass surgery, and information that surgery helped Tollefson with his ability to walk. See Administrative Record at 290.

unlikely diagnosis.²⁴ The record also contains “Progress Notes” from follow-up examinations after the femoro-femoral bypass surgery, which indicate that Tollefson’s ability to walk improved, he could walk six blocks without pain, and he could ride a bike. Although the ALJ did not expressly address this evidence, the Court finds no reason to remand this matter for further investigation because there is nothing in the new evidence which would change the ALJ’s disability determination, and Tollefson has asserted no argument that the new evidence would alter the ALJ’s disability determination requiring remand. Therefore, the Court determines that the ALJ should be affirmed on this issue.

D. Credibility Determination

Finally, Tollefson argues that the ALJ improperly discredited his testimony regarding his subjective allegations of pain, functional limitations, and total disability. Tollefson maintains that the ALJ misapplied the *Polaski* factors for determining the credibility of his testimony at the administrative hearing. Tollefson also argues that the ALJ’s *Polaski* analysis is flawed because he ignored all evidence after July, 2003. The Commissioner argues that the ALJ properly considered Tollefson’s subjective complaints.

When evaluating the credibility of a claimant’s subjective complaints, the ALJ may not disregard them “solely because the objective medical evidence does not fully support them.” *Polaski*, 739 F.2d at 1322. However, the absence of objective medical evidence to support a claimant’s subjective complaints is a relevant factor for an ALJ to consider. *Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citation omitted). “The [ALJ] must give full consideration to all 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; [and] (5) functional restrictions.” *Polaski*, 739 F.2d at 1322. Subjective complaints may be discounted if

²⁴ See Administrative Record at 410 (“Recurrent TIAs is now becoming a less likely possibility.”).

inconsistencies exist in the evidence as a whole. *Pelkey*, 433 F.3d at 578 (citing *Polaski*, 739 F.2d at 1322). However, the ALJ must give reasons for discrediting the claimant. *Id.* (citing *Strongson*, 361 F.3d at 1072). Where an ALJ seriously considers, but for good reason explicitly discredits a claimant's subjective complaints, the Court will not disturb the ALJ's credibility determination. *Johnson v. Apfel*, 240 F.3d 1145, 1148 (8th Cir. 2001) (citing *Pena v. Chater*, 76 F.3d 906, 908 (8th Cir. 1996)); *see also Williams*, 393 F.3d at 801 (explaining that deference to an ALJ's credibility determination is warranted if the determination is supported by good reasons and substantial evidence). "The credibility of a claimant's subjective testimony is primarily for the ALJ to decide, not the courts." *Wagner v. Astrue*, 499 F.3d 842, 851 (8th Cir. 2007) (quoting *Pearsall*, 274 F.3d at 1218).

In his decision, the ALJ provided the following reasons for discrediting Tollefson's subjective complaints: (1) Inconsistencies between Tollefson's subjective complaints and the medical evidence and record as a whole; (2) Tollefson's inconsistencies in seeking treatment and using prescribed medication; and (3) inconsistencies between subjective complaints and activities of daily living. The ALJ concluded:

After carefully considering all the evidence of the record, the Administrative Law Judge finds [Tollefson's] subjective complaints are not fully credible. Though [Tollefson's] impairments may create certain pain and discomfort, the record as a whole does not support a finding that [Tollefson's] impairments are as limiting as he alleges. There is nothing new in the record that would change the prior assessment of [Tollefson's] credibility that was accepted as accurate on review at the District Court level.

(Administrative Record at 292) Having reviewed the record, the Court finds that the ALJ seriously considered Tollefson's subjective allegations of pain, functional limitations, and total disability, applied the *Polaski* factors, and discredited his allegations for good reasons. *See Pelkey*, 433 F.3d at 578 (good reasons must be given for discrediting a complainant); *see also Tellez*, 403 F.3d at 957 (deference to and ALJ's findings regarding the credibility of a claimant is supported by an ALJ's finding that a claimant's activities of daily living are inconsistent with his or her allegations of total disability). Therefore, the court will not

disturb the ALJ's credibility determination. *Johnson*, 240 F.3d at 1147. After considering the weight of the evidence and balancing the factors supporting the ALJ's credibility determination against the factors in support of Tollefson's claim, the Court finds that the ALJ's determination that Tollefson's allegations of pain, functional limitations, and total disability were not credible is supported by substantial evidence. *See Vester*, 416 F.3d at 889.

VI. CONCLUSION

The court finds that the ALJ properly considered the DVA's disability determination, fully and fairly developed the record on that issue, and explained his reasons for discounting the DVA's disability determination in accordance with the Judge Jarvey's Order and the applicable law. *See Pelkey*, 433 F.3d at 579; 20 C.F.R. § 404.1504. The ALJ also sufficiently considered all of the relevant evidence in this case and properly weighed Tollefson's credibility with regard to his subjective allegations of pain, functional limitations, and total disability. Therefore, the Court determines that the ALJ's decision is supported by substantial evidence and shall be affirmed.

VII. ORDER

For the foregoing reasons, it is hereby **ORDERED**:

1. The final decision of the Commissioner of Social Security is **AFFIRMED**;
2. Plaintiff's Complaint (docket number 3) is **DISMISSED** with prejudice; and
3. The Clerk of Court is directed to enter judgment accordingly.

DATED this 7th day of March, 2008.



JON STUART SCOLES
United States Magistrate Judge
NORTHERN DISTRICT OF IOWA