

TO BE PUBLISHED

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

STEVEN M. BELL,
Plaintiff,

vs.

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

No. C11-4049-MWB

ORDER

On May 26, 2011, the plaintiff, Steven M. Bell, filed a complaint in this court seeking judicial review under 42 U.S.C. § 405(g) of a final decision of the Commissioner of Social Security (the Commissioner”) denying his application for disability insurance benefits (“DIB”) pursuant to Title II of the Social Security Act. On August 8, 2011, the Commissioner filed an answer and the administrative record (“AR”). Rather than filing a brief, the plaintiff filed a motion requesting the court to remand this case for the Commissioner to consider new evidence. Doc. No. 10. The Commissioner resisted the motion, contending that Bell is not entitled to remand under § 405(g). Doc. No. 11. The motion was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(A) for disposition. The matter is now fully submitted.

Background

Bell was born in 1959, has a college education, and previously worked as a telephone solicitor. AR 22, 38, 60, 213. On March 18, 2008, Bell applied for DIB, alleging disability beginning on September 16, 2005, due to diabetes, diabetic neuropathy,

and diabetic retinopathy. AR 14, 213-15, 258.¹ The Commissioner denied Bell's applications initially and again on reconsideration; consequently, Bell requested a hearing before an Administrative Law Judge ("ALJ"). AR 69-95.

On July 21, 2010, ALJ Jan Dutton held a hearing in which Bell and a vocational expert ("VE") testified. AR 31-68. At the hearing, the ALJ directed that within two weeks Bell's representative, Robert Edwards, was to submit responses to the ALJ's pre-hearing interrogatories together with any evidence regarding changes in Bell's condition. AR 66-67. Almost a month later, Mr. Edwards wrote to Bell's treating endocrinologist Dr. Tareq Khairalla and Dr. Michael Jennings, a family practitioner, requesting "[o]ffice notes, X-ray reports, and testings" from August 1, 2010, and July 17, 2010, respectively, to the present. AR 795, 798. Documents submitted in response to these requests were made part of the record as Exhibits 41 and 42. AR 796-802. Mr. Edwards did not, however, submit responses to the ALJ's interrogatories. Doc. No. 10-1 at 2.

On August 20, 2010, the ALJ issued a decision finding Bell not disabled since the alleged onset date of disability of September 16, 2005. AR 11-30. On September 14, 2010, Mr. Edwards withdrew as Bell's representative. AR 10. Represented by attorneys Roger Carter and Ruth Carter, Bell sought review of this decision by the Appeals Council, which denied review on March 31, 2011. AR 1-3, 7. The ALJ's decision thus became the final decision of the Commissioner. 20 C.F.R. § 404.981.

Summary of Evidence

The ALJ summarized the medical evidence in this case as follows:

A review of the medical evidence of record establishes that the claimant has a long-standing history of evaluation and treatment for diabetes.

¹ Bell previously applied for DIB in July and November 2006, alleging that he became disabled on July 1, 2005. AR 33, 187-203.

The claimant was diagnosed in August 2005 and treated with Avandamet, which was later switched to Glucotrol XL.

The claimant was seen in October 2005 by Michael Wadzinski, M.D., an ophthalmologist. This exam found the claimant to have no evidence of retinopathy in either eye and the claimant's best-corrected visual acuity was 20/30 OD and 20/20 OS. Visual fields were full to confrontation and he showed no abnormalities.

In July 2006, the claimant presented to the emergency room at St. Luke's Regional Medical Center for atypical chest pain. His laboratory results were negative. A chest x-ray was normal. His EKG did not show any significant change; however, because he was diabetic he was admitted for an overnight evaluation. He was seen by Jeffrey Zoelle, M.D. who suggested serial cardiac enzymes and repeat EKG; however, the claimant refused and signed out against medical advice without any positive findings.

The claimant sees William Blankenship, M.D., an endocrinologist, for management of his diabetes. When seen for an exam on January 30, 2006, Dr. Blankenship opined that he did not think that the claimant's sugars, which were all in the 100's and 200's were sufficiently elevated to cause the claimant sufficient difficulty to be disabled. [AR 356, 436.] Throughout 2006, the claimant has shown poor control of his diabetes mellitus. It was not clear if the claimant was not compliant or just did not understand how to control his blood sugars, but nonetheless, he was eventually switched to insulin versus oral therapy. However, he has a phobia of needles. Overall, the claimant reports feeling fine as reported by exams in June and September 2006, and his weight was stable.

The claimant sees Kathryn Lofgren, M.D., at Sergeant Bluff Family Medicine Center for diabetes. In August 2007, the claimant's sugars were doing better running a low of 130 to a high of mid 200's. They were averaging in the high 100's, which was an improvement. He complained of blurred vision, but he has not seen the eye doctor for quite some time. He was to go to Promised Jobs, but he tried to do a little bit around his father-in-law's house, became dizzy, and checked his blood sugar, which was at 288. Dr. Lofgren talked to the claimant about how it is unusual for someone not to be able to tolerate sugars in the 200's, but he has been very consistent

in knowing when his sugars are in the 200's by his symptomology. However, she advised him to try to do the new regimen.

On August 29, 2007, the claimant reported that due to his visual changes he has been unable to go back to work and is on disability from work. Dr. Lofgren gave the claimant a work/school release stating that due to his blood sugars, he has had difficulty seeing and thus he has been unable to work.

On October 29, 2007, the claimant was seen by Amir Andrawis, M.D. for his diabetes and completion of disability papers. He was previously seen by Kathy Lofgren, M.D.; however, she moved away. Upon exam, the claimant was in no acute distress. Dr. Andrawis did not complete the claimant's disability papers; however, he instructed the claimant to go to Occupational Medicine to have his papers completed.

On January 10, 2008, the claimant was seen by Amy Petersen, P.A., with Dr. Blankenship's office, for his diabetes. The claimant did not bring his meter. He reported it was broken and he needed a new one. Upon exam, the claimant had no pedal edema and no open areas or sores on the feet or lower extremities. Ms. Petersen adjusted the claimant's insulin and gave him a new meter. In addition to his diabetes, Ms. Petersen diagnosed the claimant with obesity, peripheral neuropathy with balance difficulties, type 4 hyperlipidemia, and diabetic neuropathy prevention.

The claimant was seen by Dr. Blankenship in May 2008, with complaints of peripheral neuropathy discomfort, but this was primarily numbness, gone to sleep sensation, rather than a pain or distress. The claimant was not taking his Lisinopril for nephropathy prevention. He had been given scripts for Lisinopril on several occasions as far back as October 2007, but he still was not taking this medication. Therefore, he was given another prescription. Beyond this, he cites no chest pain or palpitations, shortness of breath or cough, abdominal pain or diarrhea, extremity pain or edema, [or] syncope.

On August 26, 2008, the claimant was seen [by] Ms. Petersen for his diabetes. The claimant was tolerating his medications well and was instructed to continue with his current insulin regimen. Ms. Petersen

diagnosed the claimant with diabetes mellitus Type II with poor control, diabetic retinopathy, diabetic neuropathy, tooth abscess, and hypertension.

On July 30, 2009, the claimant was seen by Dr. Beth Bruening for any eye exam. Visual acuity without correction was 20/25 OD and 20/25(-2) OS and with correction 20/20(-2) OD and 20/20(-2) OS. Dr. Bruening stated that the claimant did not have an abnormality or limitation in his field of vision; however, he would have a limitation in detailed vision due to fluctuating blood sugars.

On August 31, 2009, the claimant was seen by Dr. Blankenship for his diabetes. The claimant asked Dr. Blankenship to write a letter regarding his disability status. However, Dr. Blankenship refused, informing the claimant that based on his current findings concerning his diabetes, he did not feel that the claimant's diabetes was disabling. [AR 743.] Dr. Blankenship has also been seeing the claimant due to his obesity. Upon exam, the claimant weighed 213 pounds. He did lose two pounds, but this appears to be under poor control and Dr. Blankenship stated he suspects that the claimant's calorie intake is excessive.

In March 2010, the claimant was seen by Marc Obbink, D.C. for two visits due to complaints of low back pain, sacroiliac joint pain, middle back stiffness, and left lower extremity pain. Mr. Obbink stated that the claimant's condition continued to improve after chiropractic care; however, the claimant could not continue with these visits due to lack of funds.

The claimant saw Michael Jennings, M.D., for back difficulties. Dr. Jennings requested that the claimant undergo an MRI, which was performed on June 1, 2010 and showed L3-4 mild right foraminal stenosis, L4-5 moderate left and mild right foraminal stenosis, and L5-S1 moderate-severe left and moderate right foraminal stenosis.

On July 16, 2010, the claimant was seen by James Weese, PAC, for complaints of back pain. The onset of pain has been sudden and has been occurring for approximately nine months. Exam was normal. Mr. Weese diagnosed the claimant with backache, unspecified.

AR 18-20 (citations omitted).

Exhibit 41 (AR 796-97)–Midlands Clinic, P.C.

On August 11, 2010, Tareq Khairalla, M.D., noted the following:

Mr. Bell returns for follow up on Type 2 diabetes. He was diagnosed in 2005 although he most likely has had it for much longer than that. Today Mr. Bell did not bring his meter and he did not have labs done. I did note on Dr. Blankenship's note three months ago that he also did the same thing. [AR 796.] However he says that he is complete[ly] compliant with insulin and his wife gives him all his shots. He does not think that he had missed any shots. He states that his average blood sugar is high in the 200's. His lowest blood sugar according to him was 189. [It] was not possible for me to verify that today.

Unfortunately he's been suffering from sciatic and severe L5-S1 disk disease. He is using a walker to ambulate now.

He states that he has seen the diabetes educator at St. Luke's and he's been checking his blood sugar four times a day.

AR 796.

Dr. Khairalla's diagnosis was Type 2 diabetes:

Unknown level of control but most likely poorly controlled. I am not completely certain that Mr. Bell has been taking his insulin. If his blood sugars are truly that high then he must have glucose toxicity and insulin resistance. However due to lack of data, I will only increase his insulin slightly and I asked him to come back in six weeks and bring his meter to review the numbers and make further recommendations. I also want him to have his labs checked.

Mr. Bell also has severe hyperlipidemia with very high triglyceride levels. There has not been any labs for some time.

He's also been complaining of numbness and diabetic neuropathy and I increased his Gabapentin to 600 mg twice daily.

AR 796-97.

Exhibit 42 (AR 799-802)–Family Health Care of Siouxland

On July 31, 2010, Bell complained of low back pain. AR 801. Ms. Walding, a registered nurse practitioner, prescribed increased fluids, rest, ibuprofen, and medication. AR 802.

On August 17, 2010, Bell saw Dr. Jennings for “refills on Xanax” and “a handicap sticker.” AR 799. Dr. Jennings noted the following:

The patient is a 50 year old male who presents for a recheck of back pain. The onset of the pain has been sudden and has been occurring in a persistent pattern for months (9). The pain is described as being located in the lumbar area. The pain radiates to the left thigh (Patient states that muscles in his inner left thigh is [sic] jumping). There are no precipitating factors. Back pain notes: Patient [complains of] lower bilateral calf pain. Has had epidural flood in the past for sciatica with no success.

AR 799.

Dr. Jennings also noted Bell’s complaint of anxiety: “The onset of the anxiety has been gradual and has been occurring for months. The course has been increasing. The symptoms have been associated with feeling of sadness and insomnia. Anxiety notes: [patient] reports more anxiety and depression due to chronic pain and financial constraints.” AR 799. Dr. Jennings prescribed Xanax with no refills, and Bell was to follow up in one month. AR 800.

Exhibit A of Plaintiff’s Motion for Remand

On July 5, 2011, Dr. Jennings completed a “Report on Incapacity” on a form furnished by the Iowa Department of Human Services and attached to Bell’s motion for remand as Exhibit A. Doc. No. 10-1 at 6-7 (“Exhibit A”). Dr. Jennings noted Bell’s diagnosis of “brittle diabetes mellitus,” which, although treated with insulin, was “progressive” and “permanent.” *Id.* at 6. Dr. Jennings last saw Bell on June 20, 2011, and his next recommended examination was in July or August 2011. “Uncontrolled blood sugars make it difficult to stabilize sugars.” *Id.* Bell required continuous in-home care

by his wife. *Id.* Bell was not able to care for his children in the home because of dizziness and uncontrolled sugars. *Id.* at 7. Dr. Jennings opined that Bell was not “able to perform work of any kind” and that the expected duration of limitation was for Bell’s “lifetime.” *Id.* According to Dr. Jennings, Bell had not been able to work since May 2010. *Id.* Dr. Jennings further opined that Bell was not able to participate classroom training or instruction because of “his neuropathy related to his diabetes”; “any lifting or simple tasks can cause severe pain.” Doc. No. 10-1 at 7. Dr. Jennings thus would recommend Bell for long-term disability benefits. *Id.*

Hearing Testimony

A. *Plaintiff’s Testimony*

The ALJ summarized Bell’s testimony as follows:

The claimant alleges he has been unable to sustain work activity due to diabetes, diabetic neuropathy, and diabetic retinopathy. The claimant further states he has difficulty controlling his diabetes. He has difficulty walking, standing, driving at night, reading, sleeping, concentrating when fatigued, working on computers, gripping, grasping, and performing fine motor skills. He has poor vision, numbness in his legs and right shoulder, feels tired all the time, and has pain in his back. The claimant reports that he takes his medication as prescribed. In addition to his medication, he uses hot baths to relieve the pain. The claimant reported he drives short distances. He describes his daily activities as taking his medicine, eating meals, watching TV, moving around frequently, taking a shower, taking a nap, and spending time with his family. The claimant stated he prepares simple meals and does some grocery shopping; however, he uses a motorized cart. He further reported that he has problems with personal hygiene and needs to sit down to put on his socks and shoes; takes his time getting in and out of the bathtub holding on to the shower door, often drop [sic] utensils when eating, and holds on to the vanity for support when getting on and off the toilet.

At the hearing, the claimant testified that he has been staying home for the last five years taking care of his young children along with his

mother-in-law. He reported that he last worked at Horizon Telemarketing in September 2005 when he fell into a diabetic coma. He then began receiving short-term disability, which rolled over into long-term disability benefits that he continues to receive. The claimant stated that he vacuums approximately once a month, socializes with friends and family, plays with his kids, watches movies, and drives when necessary.

AR 18 (citations omitted). “At the hearing, the claimant’s representative suggested that the claimant may need ‘medium size print’ due to times when his vision fluctuates and he would be unable to read a newspaper. . . . In addition, the claimant testified that he stays home and takes care of his children with some help from his mother-in-law.” AR 21.

B. VE’s Testimony

The VE testified that the claimant could return to his past work as a telemarketer if, according to the ALJ,

the claimant could occasionally lift or carry 20 pounds, frequently lift or carry 10 pounds; no restriction in stand, sit, or walk, he could do those at least six hours in an eight hour day; could occasionally do all postural activities: climb, balance, stoop, kneel, crouch, crawl, but not work on ladders, ropes, and scaffolds; could use hands for frequent but not constant handle, finger, feeling, and reaching; no restriction in vision; and avoid concentrated exposure to the hazards[,] the ladders, the dangerous equipment.

AR 60-61. An individual with such a residual functional capacity (“RFC”) also could work as an assembler, hand packer, or office helper. AR 61. Such an individual would have difficulty performing these jobs if the individual “had periods of time when their vision fluctuated and they were unable to focus on print the size of newsprint.” AR 64.

The ALJ thus summarized the VE’s testimony as follows: “At the hearing, the vocational expert testified that the claimant would be capable of performing his past work as a telephone solicitor. The vocational expert submitted a past relevant work summary stating that the skill level of this work would be semi-skilled and fall into the sedentary

exertional category.” AR 22, 346.² The ALJ “asked the vocational expert whether jobs exist in the national economy for an individual with the claimant’s age, education, work experience, and residual functional capacity. . . . The vocational expert testified that given all of these factors the individual would be able to perform the requirements of representative occupations such as” assembler, hand packer, and office helper. AR 23. “The vocational expert testified that considering the full range of unskilled light and sedentary work the claimant would retain at least 80 percent of the jobs at both the light and sedentary unskilled level.” AR 24.³ “Pursuant to SSR 00-4p, the vocational expert’s testimony is consistent with the information contained in the Dictionary of Occupational Titles.” AR 24.⁴

Summary of ALJ’s Decision

On August 20, 2010, the ALJ found that Bell (1) had not engaged in substantial gainful activity since the alleged onset date of disability of September 16, 2005; and (2) had an impairment or a combination of impairments considered to be “severe” on the basis of the requirements in the Code of Federal Regulations; but (3) did not have an

² “Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools.” 20 C.F.R. §§ 404.1567(a), 416.967(a).

³ “Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds.” 20 C.F.R. §§ 404.1567(b), 416.967(b).

⁴ The Commissioner has taken administrative notice of the Dictionary of Occupational Titles, or DOT, which is a Labor Department guide to job ability levels that has been approved for use in Social Security cases and is the Commissioner’s primary source of reliable job information. *Fines v. Apfel*, 149 F.3d 893, 895 (8th Cir. 1998); *see also* 20 C.F.R. §§ 404.1566(d)(1), 416.966(d)(1). “A DOT definition of a particular job represents a generic job description and offers the ‘approximate maximum requirements for each position.’” *Roe v. Chater*, 92 F.3d 672, 678 n.8 (8th Cir. 1996) (quoting *Jones v. Chater*, 72 F.3d 81, 82 (8th Cir. 1995)).

impairment or a combination of impairments meeting or equaling one of the impairments set forth in 20 C.F.R. Part 404, Subpart P, Appendix 1; and (4) was able to perform his past relevant work as a telephone solicitor. AR 16-22. Alternatively, the ALJ found that Bell could perform other work in the national economy such as an assembler, hand packer, or officer helper. AR 22-24. The ALJ accordingly found that he was not disabled from September 16, 2005, through the date of the ALJ's decision. AR 24.

In so finding, the ALJ found that the plaintiff had the RFC to perform light work and

could occasionally climb, balance, stoop, crouch, crawl, and kneel. He could use his hands for frequent, but not constant handling, fingering, feeling, and reaching. He could not work on ladders, ropes, or scaffolds and he should avoid concentrated exposure to hazards (i.e., ladders and dangerous equipment). The claimant has no restriction in his vision.

AR 17.

Regarding Bell's credibility, the ALJ found that his "medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not credible to the extent they are inconsistent with the [ALJ's] residual functional capacity assessment." AR 20. "In terms of the claimant's alleged diabetes with neuropathy and retinopathy, vision difficulties, and lumbar degenerative disk disease, the medical evidence of record shows that the claimant has not been entirely compliant in taking prescribed medications, which suggests that the symptoms may not have been as limiting as the claimant has alleged in connection with this application." AR 20-21. "Based on the total record, the claimant's symptoms and impairments are not as severe as alleged, and the undersigned has not given great weight to the claimant's implicit allegation that he is unable to engage in any and all kinds of full-time, competitive employment on a sustained basis." AR 22.

Regarding the various medical opinions, the ALJ noted that “Dr. Blankenship, the claimant’s treating physician who specializes in endocrinology, and has been seeing the claimant for management of his diabetes for approximately four and one-half years, opined that the claimant’s diabetes was not disabling.” AR 21 (citing AR 356, 743). The ALJ gave “significant weight to the opinions of Dr. Blankenship, Dr. Wadzinski, Dr. Andrawis, Dr. Bruening, and Ms. Petersen. All but Ms. Petersen are acceptable medical sources and treating or examining sources.” AR 22. “Ms. Petersen is not an acceptable medical source, but she is an examining source, and her opinion is entitled to weight, as provided by SSR 06-3p. The opinions are based on clinical findings, are consistent with each other, and are consistent with other substantial medical evidence of record.” AR 22.

Disability Determinations and the Burden of Proof

The Social Security Act defines a disability as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that 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, 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).

The Substantial Evidence Standard

The court reviews an ALJ's decision to determine whether the ALJ applied the correct legal standards and whether the factual findings are supported by substantial evidence on the record as a whole. *Page*, 484 F.3d at 1042. This review is deferential; the court "must affirm the Commissioner's decision 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 . . ."). Under this standard, substantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion. *Kluesner v. Astrue*, 607 F.3d 533, 536 (8th Cir. 2010); see *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427 (1971).

Moreover, substantial evidence "on the record as a whole" requires consideration of the record in its entirety, taking into account both "evidence that supports the Commissioner's decision as well as the evidence that detracts from it." *Kluesner*, 607 F.3d at 536 (quoting *Finch v. Astrue*, 547 F.3d 933, 935 (8th Cir. 2008)). 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*, 547 F.3d at 935). This is true even in cases where the court “might have weighed the evidence differently.” *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (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

Bell contends that this case should be remanded for the ALJ to consider the evidence obtained after the administrative hearing (Exhibits 41 and 42 of the administrative record and Exhibit A of Bell’s motion for remand) because good cause exists for its late submission; this evidence is non-cumulative, relevant, and probative of Bell’s condition;

and there is a reasonable likelihood that this evidence would have changed the administrative result. Doc. No. 10-1 at 4. The Commissioner points out that Bell does not argue that substantial evidence does not support the ALJ's decision, but only requests a remand for the ALJ to consider the additional evidence. Doc. No. 11 at 8. According to the Commissioner, good cause does not exist for Bell's failure to incorporate the evidence into the record earlier, but, in any event, the additional evidence is not material.

The sixth sentence of 42 U.S.C. § 405(g) provides in relevant part as follows:

The court . . . may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding

42 U.S.C. § 405(g).⁵ “To be considered material, the new evidence must be ‘non-cumulative, relevant, and probative of the claimant’s condition for the time period for which benefits were denied.’ Furthermore, it must be reasonably likely that the Commissioner’s consideration of this new evidence would have resulted in an award of benefits.” *Jones v. Callahan*, 122 F.3d 1148, 1154 (8th Cir. 1997) (internal citation omitted). The new evidence must “pertain to the time period for which benefits are sought” and “not concern later-acquired disabilities or subsequent deterioration of a previously non-disabling condition.” *Id.* “Additional evidence showing a deterioration in a claimant’s condition significantly after the date of the Commissioner’s final decision is not a material basis for remand, although it may be grounds for a new application for

⁵ “Under sentence six, ‘the district court does not affirm, modify, or reverse the [Commissioner’s] decision; it does not rule in any way as to the correctness of the administrative determination.’” *Travis v. Astrue*, 477 F.3d 1037, 1039-40 (8th Cir. 2007) (quoting *Melkonyan v. Sullivan*, 501 U.S. 89, 98, 111 S. Ct. 2157, 2163 (1991)); accord *Buckner v. Apfel*, 213 F.3d 1006, 1010 (8th Cir. 2000). The district court’s decision not to remand to the ALJ under sentence six is reviewed for an abuse of discretion. *Thomas v. Sullivan*, 928 F.2d 255, 260 n.6 (8th Cir. 1991); accord *Geigle v. Sullivan*, 961 F.2d 1395, 1397 (8th Cir. 1992).

benefits.” *Id.*; *see also Hanson v. Chater*, 895 F. Supp. 1279, 1287 (N.D. Iowa 1995) (“[M]aterial evidence must relate to the claimant’s condition on or before the date of the ALJ’s decision.” (citing *Goad v. Shalala*, 7 F.3d 1397, 1398 (8th Cir. 1993) (per curiam))). Good cause may be established where the claimant’s condition and associated records did not exist at the time of the ALJ’s hearing. *Thomas*, 928 F.2d at 260; *Goad*, 7 F.3d at 1398. *But see Mouser v. Astrue*, 545 F.3d 634, 637 (8th Cir. 2008); *Hepp v. Astrue*, 511 F.3d 798, 808 (8th Cir. 2008).

The Commissioner contends that Bell has not shown good cause for failing to timely submit his treatment records from Drs. Khairalla and Jennings that are found in Exhibits 41 and 42. Doc. No. 11 at 9. As noted above, the ALJ left the administrative record open for two weeks after the conclusion of the hearing for Bell’s representative to submit additional evidence of changes in Bell’s condition. AR 66-67. Bell’s representative did not request additional records from Drs. Khairalla and Jennings until almost a month after the hearing and well after the expiration of the ALJ’s two-week deadline. These exhibits nonetheless were made part of the administrative record, which, as the Commissioner points out, the Appeals Council considered in deciding whether to review the ALJ’s decision. Doc. No. 11 at 9 (citing AR 1-3 and 20 C.F.R. § 404.976(b)). “[O]nce the evidence is submitted to the Appeals Council it becomes part of the record, thus it would not make sense to require [Bell] to present good cause for failing to make it part of a prior proceeding’s record.” *Nelson v. Sullivan*, 966 F.2d 363, 366 n.5 (8th Cir. 1992).

These exhibits do not constitute “new” evidence within the meaning of § 405(g), however. *See Sullivan v. Finkelstein*, 496 U.S. 617, 626, 110 S. Ct. 2658, 2664 (1990) (noting that sentence-six remand is “appropriate when the district court learns of evidence not in existence or available to the claimant *at the time of the administrative proceeding* that might have changed the outcome of that proceeding” (emphasis added)). Furthermore, because the Appeals Council considered this evidence as part of the record in denying his

request for review, Bell fails to show a reasonable likelihood that remanding this matter for the ALJ to consider this evidence would result in an award of benefits. On August 11, 2010, Dr. Khairalla could not determine whether Bell's diabetes was controlled because he did not bring his glucose meter to his examination on that date. AR 796. Although Dr. Khairalla was "not completely certain that Mr. Bell [had] been taking his insulin," the doctor increased his insulin slightly. AR 796. As the Commissioner points out, the record contains treatment notes that are not substantially different from Dr. Khairalla's August 11, 2010, treatment note. Cf. AR 413, 421 (Ms. Petersen's treatment note on January 10, 2008: "[Bell] did not bring a meter as it is broken and he needs a new one though he does relate that he continue[s] to have very high blood sugars in the early morning as well as after lunch and supper"; insulin was increased); AR 414 (Dr. Blankenship's treatment note on May 28, 2008: "[Bell] reports that he did not bring his meter today, but he reports that the lowest blood sugar since he was here last in January was 160 and that generally he runs 180 to 270 in the morning before and after breakfast and 175 to 220 in the lunch, and 288 to 320 at supper"; insulin was increased); AR 416 (Dr. Blankenship's treatment note on August 26, 2008: "[Bell] did not bring in his glucose monitor today. He does report that he continues to have significant elevated sugars. . . . Denies any lows belows 140, but reports he gets nervous with a sugar of 140"; insulin regimen was not increased); AR 423 (Dr. Blankenship's treatment note on October 15, 2007: "[Bell] did not bring any meter with him today nor has he gone for any of the pre-ordered blood work. He tells me that his highest blood sugars were in the 300's, lowest in the 140 or 150 range, most in the 220 to 240 range"; insulin was increased); AR 793 (Dr. Blankenship's treatment note on May 24, 2010: "[Bell's] sugars were a little hard to judge, because he didn't go for labs and he didn't bring a meter. He says that the meter last showed an average of 213"; insulin was increased).

The record also contains treatment notes that are not substantially different from Bell's treatment notes in Exhibit 42, which refer to Bell's complaints to Dr. Jennings and his staff of back pain and anxiety on July 31 and August 17, 2010 (AR 799-802). *Cf.* AR 786-88 (relating to Dr. Jennings's treatment note on May 25, 2010, of Bell's complaint of back pain; medication for anxiety and backache was prescribed); AR 791-92 (relating to Dr. Jennings's treatment note on June 3, 2010, of Bell's complaint of back pain; Bell was referred to pain management); AR 794 (relating to Bell's complaint to physician's assistant on July 16, 2010 of back pain; Bell was referred to orthopedic surgeon).

In sum, Exhibits 41 and 42 do not constitute "new" evidence within the meaning of 42 U.S.C. § 405(g). In any event, Bell fails to demonstrate a reasonable likelihood that remanding this case for the ALJ to consider these exhibits would result in an award of benefits. A remand under the sixth sentence of 42 U.S.C. § 405(g) for the ALJ to consider this evidence thus is not warranted.

The court finds, however, that this case should be remanded for the ALJ to consider Dr. Jennings's opinion attached to Bell's motion as Exhibit A. Doc. No. 10-1 at 6-7. As noted above, on July 5, 2011, Dr. Jennings opined that Bell had not been able to perform work of any kind since May 2010, when he first treated Bell (AR 786). *Id.* at 7. Contrary to the Commissioner's assertion, Dr. Jennings's opinion relates to the period on or before the date of the ALJ's decision on August 20, 2010, and thus is material. *See Cunningham v. Apfel*, 222 F.3d 496, 502 (8th Cir. 2000). Furthermore, good cause exists for Bell's failure to include this opinion evidence in the administrative proceedings because it did not exist at the time of the hearing. *See Thomas*, 928 F.2d at 260.

The Commissioner maintains that the ALJ's consideration of Dr. Jennings's opinion of Bell's inability to work since May 2010 would not have resulted in an award of benefits. However, Dr. Jennings's opinion is probative of Bell's condition prior to and at the time of the hearing. This evidence suggests that Bell's impairments imposed limitations that

possibly were more severe during the relevant time period than the evidence before the ALJ indicated. *See Geigle*, 961 F.2d at 1397 (holding that district court abused its discretion in failing to remand case to Secretary of Health and Human Services for reconsideration on the basis of new, material evidence because evidence was probative of claimant's condition before hearing). Accordingly, Dr. Jennings's opinion attached to Bell's motion merits consideration by the ALJ under the sixth sentence of 42 U.S.C. § 405(g).

Conclusion

For the reasons stated above, Bell's motion for remand is **granted in part and denied in part**. This case is remanded under the sixth sentence of 42 U.S.C. § 405(g) for the ALJ to reconsider this case in light of the evidence of Dr. Jennings's opinion submitted as Exhibit A in Bell's motion for remand. Pursuant to § 405(g),

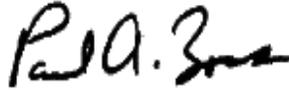
the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based.

42 U.S.C. § 405(g).

The court retains jurisdiction until the completion of post-remand proceedings. *Travis*, 477 F.3d at 1039; *Hanson*, 895 F. Supp. at 1288. The Clerk is directed to administratively close this case.

IT IS SO ORDERED.

DATED this 10th day of February, 2012.

A handwritten signature in black ink, appearing to read "Paul A. Zoss". The signature is written in a cursive style with a horizontal line underneath it.

PAUL A. ZOSS
CHIEF MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT