

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

KENNETH COLE,
Plaintiff,

vs.

MICHAEL J. ASTRUE,¹ Commissioner
of Social Security Administration,
Defendant.

No. C06-2060

ORDER

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¹This case was filed originally against Jo Anne B. Barnhart, who was at that time Commissioner of the Social Security Administration (SSA). On February 12, 2007, Michael J. Astrue became Commissioner of the SSA, and he hereby is substituted as the defendant in this action. See FED. R. CIV. P. 25(d)(1).

I. INTRODUCTION

This matter comes before the court on Plaintiff Kenneth Cole's request for judicial review of the Social Security Commissioner's decision to deny his January 17, 2003 application for Title II disability insurance benefits and Title XVI supplemental security income ("SSI") benefits (docket number 1). Cole asks the court to reverse the decision of the Commissioner of Social Security ("Commissioner") and to order the Commissioner to provide him disability insurance benefits and SSI benefits. In the alternative, Cole requests the court to remand with directions that a physical examination be scheduled to address his physical impairments. Finding no error in the Commissioner's decision, the court shall affirm.

II. PRIOR PROCEEDINGS

Cole applied for disability insurance benefits and SSI benefits on January 17, 2003. In his application, Cole alleged an inability to work since January 3, 2002 due to problems in both ears, back pain, knee and ankle pain, wrist, elbow and neck pain, decreased IQ function level, anger management and depression.² On February 28, 2003, Cole's application was denied. On April 23, 2003, his application was denied on reconsideration. On June 27, 2003, Cole requested an administrative hearing before an Administrative Law Judge ("ALJ"). On July 7, 2005, Cole appeared with counsel, via video conference, before ALJ John Johnson for an administrative hearing. Cole, Jan Heidemann, who is Cole's case manager, and Elizabeth Albrecht, who is a vocational expert, testified at the administrative hearing. In a decision dated September 22, 2005, the ALJ denied Cole's claims. The ALJ determined that Cole was not disabled and was not entitled to disability insurance benefits and/or SSI benefits because he can still perform his past relevant work. Cole appealed the ALJ's decision. On June 30, 2006, the Appeals Council denied Cole's

²Cole worked at IBP from July to August 2002, 6 days per week and 8 hours per day.

request for review. Consequently, the ALJ's September 22, 2005 decision was adopted as the Commissioner's final decision.

On August 30, 2006, Cole filed this action for judicial review. The Commissioner filed an answer on January 26, 2007. On February 26, 2007, Cole filed a brief, arguing that there is not substantial evidence on the record as a whole to support the finding that he is not disabled and has the functional ability to perform work. On April 25, 2007, the Commissioner filed a responsive brief, arguing that the ALJ's decision was correct and asking that the court affirm the ALJ's decision. On May 7, 2007, Cole filed a reply brief, arguing that the ALJ improperly discredited numerous witnesses and erred in not ordering a consultative examination on his wrist.

On January 11, 2007, both parties consented to proceed before a United States Magistrate Judge pursuant to the provisions set forth in 28 U.S.C. § 636(c). On March 19, 2007, the case was reassigned to the undersigned.

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. Testimony of Cole, Case Manager and Vocational Expert

Cole was born on February 16, 1968, and he was graduated from high school.³ Cole’s physical impairments include ear problems due to otitis media and bilateral functional hearing loss, wrist and joint pain and shoulder pain. His mental impairments include low IQ and depression. Prior to filing his disability insurance benefits and SSI applications, Cole was employed for three years as a dishwasher and janitor at the Red Fox Inn in Waverly, Iowa.⁴ After he applied for disability benefits, Cole began working part-

³Cole was in special education from 5th grade through 12th grade.

⁴Cole testified that he left this job to get ear surgery and never returned.

time as a material handler (also referred to as a “packer”) at a sheltered workshop through the Larrabee Center. Cole works at the Larrabee Center under the direct aid and supervision of three supervisors.

At the administrative hearing, Cole testified that he has no problems taking care of himself. He testified that he lives alone, pays his own bills and does his own cooking and cleaning. However, he testified that he has difficulty at work communicating, concentrating, understanding and following instructions. He further testified that he has many friends and a girlfriend and that he enjoys fishing and riding around. Cole testified that he is on several medications and is frequently ill.⁵

Jan Heidemann also testified at Cole’s administrative hearing before the ALJ. Jan Heidemann is Cole’s case manager through Bremer County Case Management. She described the Larrabee Center, which currently employs Cole, as a sheltered workshop where people can work under supervision and gain skills that will assist them in becoming employed in the community. She testified that she sees Cole every two to three months and that his current goals include improving his attendance record and communication skills. According to Jan Heidemann, Cole’s weaknesses are attendance and hygiene. At the time of the administrative hearing, Cole was maintaining a 68% attendance rate. Jan Heidemann opined that Cole’s physical health problems were the cause of his low attendance rate.

Elizabeth Albrecht, a vocational expert, also testified at the administrative hearing. The ALJ provided Elizabeth Albrecht with two hypotheticals.

⁵ Additionally, ten days after Cole filed his Social Security claim, Cole’s mother, Carole Lynn Cole, completed a third party questionnaire. Carole Lynn Cole stated that her son had no problems completing the household tasks that he normally performed. He continued to drive his mother to work and to her appointments, shop for his own groceries, and babysit for a three-year-old. Additionally, Carole Lynn Cole indicated that her son read and understood the newspaper and that he watched the news and other television programs. Carole Lynn Cole indicated that her son had some difficulty following directions.

[We have an individual who is 37 years old. He was 33 years old as of the alleged onset date of disability. He's a male. He had, he has a high school education, that was obtained through assistance in special education in a resource room. He has past relevant work . . . and he has the following impairments. He has chronic otitis media, status post-bilateral tympanoplasties, hypertension, a medically determinable impairment resulting in complaints of pain in multiple joints, including the wrists, elbows, and lower back. Borderline intellectual functioning . . . history of a depressive disorder, and a history of a learning disorder. . . . He cannot lift more than 50 pounds, routinely lift 25 pounds, he can walk or stand for six hours out of an eight hour day, or sit for at least six hours of an eight hour day. . . . [H]e can perform no work requiring fine hearing acuity in the presence of background noise. He is able to do only simple, routine, repetitive work that does not require decision-making. He does require occasional supervision, and this individual should not work at a regular pace -- have more than a regular pace, and that's using three speeds of pace being fast, regular, and slow.

Using the ALJ's hypothetical, Elizabeth Albrecht testified that such an individual could still perform the work of a kitchen helper and could also perform the work of a hand packer.

The ALJ then asked Elizabeth Albrecht to provide an assessment of work capabilities based on the following hypothetical:

[We have] an individual of the same age, sex, education, past relevant work, and impairments as previously specified. . . . This individual could not lift more than 50 pounds, routinely lift 25 pounds, stand or walk for six hours out of an eight hour day, sit for six hours out of an eight hour day, with only occasional pulling, no work requiring continuous handling, and by handling, I mean to use the wrists to twist or turn objects. This individual should perform no work which requires fine hearing acuity in the presence of background noise. He is able to do only simple routine repetitive work that does not require close attention to detail, or independent judgment for decision-making. He . . . does require occasional supervision. He should not work at more than a regular pace, or more than a mild to moderate level o[f] stress.

Elizabeth Albrecht responded that, because this hypothetical precludes the individual from doing continuous handling, he or she could not work as either a kitchen helper or a hand packer. She testified that such an individual could not transfer acquired skills but that such an individual was not entirely precluded from performing unskilled work activity.⁶

B. Cole's Medical History

1. Overview

Cole has been diagnosed with numerous physical and mental impairments. Since 1989, Cole has visited doctors repeatedly to address problems with his ears and with dizziness. He was diagnosed with Meniere's disease in 1993. In 2004, he was identified as having bilateral functional hearing loss. Additionally, Cole experiences frequent bouts of otitis media. He wears hearing aids, though he reports frequent problems with them.

Cole has also experienced ongoing issues with pain in his wrists, shoulders and back. At his administrative hearing, Cole testified that his greatest problems with pain arise from his wrists and hands.

2. Treating Sources

From October 17, 1990 to December 27, 1991, Cole was treated for chronic ear disease, dizziness and allergies. On January 17, 1991, Cole saw Dr. Megivern for complaints of muscle strain related to heavy lifting that he had done at work.

In 1992, Cole visited Dr. V. Thomas Riley, ENT, due to his recurrent otitis media and upper respiratory allergies. On March 11, 1992, Dr. V. Thomas Riley noted that Cole had mild sensorineural hearing loss in his right ear and moderate low frequency mixed loss with medium high frequency sensorineural hearing loss in his left ear. He also noted

⁶Elizabeth Albrecht testified that several categories of unskilled work were available to a person under the hypothetical, including the following: linen room attendant, under the category of storage and inventory clerk (750 in Iowa); hospital food service, under the category of food counter and related type food jobs (900 in Iowa); and hospital cleaner, under the category of maid and housekeeping cleaners (3,700 in Iowa).

Cole's history of visits for allergies, and he stated that Cole should stay away from work environments with fumes, dust and dirt. Cole also met with Dr. W.K. Chang in November and December of 1992. These visits were also related to Cole's bilateral otitis media.

In 1993, Cole began traveling to Iowa City to meet with physicians in the Department of Otolaryngology—Head and Neck Surgery at the University of Iowa Hospitals and Clinics (UIHC). On January 27, 1993, Dr. Brian F. McCabe and Resident Doctor Mary Susan Pruzinsky mailed a letter to Dr. V. Thomas Riley. This letter informed him that they had diagnosed Cole with Meniere's disease in the left ear. These physicians prescribed Dyazide, Cyclandelate and a 1500-mg sodium diet.

Cole returned to UIHC for treatment of his ear problems several times in 1994.⁷ In March of 1995, Cole visited the UIHC's Ambulatory Surgery Center. Dr. Brian F. McCabe and Dr. Margaret M. Browning gave Cole a clinical diagnosis of perilymphatic fistula AS and tympanic membrane perforation AS. They performed an exploratory tympanotomy with patching of the round and oval window and a repair of the tympanic membrane perforation. Cole was discharged on March 14, 1995 with prescribed eardrops. The record indicates that Cole returned to UIHC on April 14, 1995 for a follow up examination. Cole continued to receive treatment from the UIHC's Department of Laryngology following the surgery. He received hearing evaluations and treatment on November 14, 1995, January 9, 1996, July 11, 1996, April 17, 1997 and August 26, 1997.

Cole received treatment from Rohlf Memorial Clinic on sixteen occasions between December 14, 1995 and August 10, 1998. On each occasion, Cole presented one or more of the following symptoms: ear troubles, including pain and drainage; cold symptoms, including congestion, runny nose, and sore throat; dizziness and vertigo; sinus congestion and headache; intestinal cramping and nausea; and hypertension. In a letter to Disability

⁷The record indicates that Cole visited the UIHC on January 18, March 2, and April 18, 1994.

Determination Services (“DDS”) Examiner Susan Koerner that is dated August 10, 1998, Dr. Daniel Darnold of Rohlf Memorial Clinic wrote that Cole “continues to have severe problems occasionally . . . all we [at the clinic] do is deal with intermittent acute infections and treat with antibiotics.”

On February 26, 1998, Cole visited Dr. Sylven L. Schaffer, a physician in the Cedar Valley Medical Clinic’s Department of Otolaryngology. Cole was referred to Dr. Sylven L. Schaffer by DDS Examiner Chris Knutson in connection with an application for disability benefits preceding the current application. Dr. Sylven L. Schaffer noted that Cole had five previous ear surgeries. He found that Cole had moderate to severe mixed hearing loss and recommended that Cole get hearing aids.

Cole visited the UIHC’s Department of Radiology on April 16, 1998 for internal auditory canal x-rays. Technologists S.L. Walters and S. Heery reported that Cole appeared to have thickened tympanic membranes bilaterally with associated scarring of the tympanic membrane. According to the technologists, Cole’s scarring was worse in the left ear than in the right ear.

On September 18, 2000, Cole visited the Rohlf Memorial Clinic and was treated for tendinitis in his right wrist and arm. Cole was instructed to take 600 mg of Tylenol “q.i.d.” (four times a day) and to ice his wrist. On January 4, 2001, Dr. Daniel Darnold saw Cole at the Rohlf Memorial Clinic. According to the record, this visit was a follow up to a visit Cole had with Dr. Daniel Darnold in the emergency room over the previous weekend. Dr. Daniel Darnold remarked in Cole’s chart that Cole was “in the emergency room last weekend with pretty bad tendinitis, maybe even a de Quervains.” Dr. Daniel Darnold put Cole’s wrist in a splint over the weekend, and he removed the splint at the January 4, 2001 visit. Dr. Daniel Darnold limited Cole’s work for a week insofar as repetitive motion was concerned.

Cole attended the Covenant Clinic in 2001 for complaints of pain. On April 11, 2001, Cole presented with low back pain and paravertebral muscle spasms. The treating

physician noted that Cole had no tenderness or bony deformity along his spine and had no difficulty walking on his heels or on tiptoe. The physician noted that Cole was not using a proper lifting technique at work. Cole was placed on a lifting restriction of 25 pounds or less for two weeks.

Cole returned to Covenant Clinic on April 20, 2001. He reported pain in his right wrist. The treating physician detected slight erythema and swelling over Cole's wrist, distal forearm and hand with a decreased range of motion. The physician recommended that Cole wear his wrist splint. On May 2, 2001, Cole returned to Covenant Clinic. He reported pain in his left foot. The treating physician recommended that Cole get cushion insoles and additionally recommended that Cole perform stretching exercises and ice his foot.

Cole went to Community Memorial Hospital on May 30, 2002. He complained of joint pain and swelling. He was treated with ice and pain medication and was instructed how to perform scar massage.

In July of 2002, Cole began seeing nurse practitioner Lori Bauler, ARNP, at the Tripoli Clinic. On July 23, 2002, Cole presented in acute distress with complaints of pain in his right foot. Lori Bauler found that Cole's right great toe was inflamed. Lori Bauler gave Cole samples of Relafen for his pain and additionally gave Cole information sheets about gout and dietary changes.

Cole returned to Lori Bauler on October 1, 2001 for aches and pains in his hands, elbows, knees and low back. According to Lori Bauler's chart notes, Cole came in after working all day laying cement. He had full range of motion in all joints and had no visible swelling. Lori Bauler noted that Cole had osteoarthritis of his large joints. She prescribed Mobic and extra-strength Tylenol for his pain. On October 30, 2002, Cole returned to Lori Bauler and sought relief for pain in his right wrist and forearm. Lori Bauler prescribed 800 mg of ibuprofen three times daily.

Cole returned to see Lori Bauler on November 7, 2002. On this occasion, Cole was experiencing pain in his right foot. Cole also believed that he had a staph infection. Lori Bauler told Cole to take ibuprofen or Tylenol and Celebrex. She opined that his pain could be a sprain or strain as a result of extended periods of sitting without much activity followed by performing various odd jobs requiring great amounts of exertion.

On December 10, 2002, Cole presented to Lori Bauler with bilateral ear pain. Lori Bauler noted thick graying yellow drainage in Cole's left ear. She prescribed Zithromax as well as Zyrtec-D for a concurrent upper respiratory infection. On January 2, 2003, Cole presented with a stiffness in his neck and shoulders. Lori Bauler noted that Cole had good range of motion. She diagnosed him with cervical neck strain.

Lori Bauler wrote an undated letter regarding Cole's January 17, 2003 application for SSI benefits. In this letter, Lori Bauler noted Cole's low IQ, his reading and comprehension difficulties, his physical health problems, including hypertension, chronic otitis and difficulty hearing, his osteoarthritis and his depression.

Cole continued to see Lori Bauler for medical concerns in 2005. On January 31, 2005, when Cole reported with left wrist pain, Lori Bauler examined Cole's symptoms and made a differential diagnosis of cellulitis or gout. Cole returned to Lori Bauler on February 14, 2005. He complained of pain in his left thumb, wrist, elbow and shoulder. Lori Bauler placed Cole in a thumb spike splint, wrote him a prescription for Naproxen and gave him verbal permission to take up to 4000 mg of Tylenol per day. Lori Bauler later noted that Cole experiences pain when he does not wear his wrist splint.

On April 8, 2005, Cole returned to Lori Bauler. He reported pain in his left wrist. He stated that the day prior he had been raking lawns and had not been wearing his wrist splint. Additionally, Cole had not been wearing his splint at work. Lori Bauler noted that Cole, at that time, had carpal tunnel in his left wrist.

3. Consulting Sources

On February 11, 2003, licensed psychologist Dr. Lorne Johnson met with Cole on referral from DDS for the purpose of evaluating Cole for behavioral functioning and mental status. Dr. Lorne Johnson administered the Wechsler Adult Intelligence Scale III (WAIS-III) and a mental status examination to Cole. Dr. Lorne Johnson also conducted a clinical interview with him. The WAIS-III indicated Cole's mental ability was in the mild mental retardation to borderline range with a full-scale IQ of 70.

On February 27, 2003, Dr. Beverly Westra consulted and noted that Cole had mild ADL restriction, mild difficulty in maintaining social functioning and moderate difficulty in maintaining concentration, persistence or pace. However, Dr. Beverly Westra indicated that this evidence did not establish the presence of "C" criteria.⁸ Dr. Beverly Westra

⁸See 20 C.F.R. pt. 404, subpt. P, app. 1, §§ 12.02(c), 12.04(c). § 12.02(c) provides:

Medically documented history of a chronic organic mental disorder of at least 2 years' duration that has caused more than a minimal limitation of ability to do basic work activities, with symptoms or signs currently attenuated by medication or psychosocial support, and one of the following: (1) repeated episodes of decompensation, each of extended duration; or (2) a residual disease process that has resulted in such marginal adjustment that even a minimal increase in mental demands or change in the environment would be predicted to cause the individual to decompensate; or (3) current history of 1 or more years' inability to function outside a highly supportive living arrangement, with an indication of continued need for such an arrangement.

§ 12.04(c) provides:

Medically documented history of a chronic affective disorder of at least 2 years' duration that has caused more than a minimal limitation of ability to do basic work activities, with symptoms or signs currently attenuated by medication or psychosocial support, and one of the following: (1) repeated episodes of decompensation, each of extended duration; or

(continued...)

found that Cole lived alone and was able to cook, do chores and care for himself. Dr. Beverly Westra opined that Cole would have difficulty with highly complex tasks and maintaining a rapid pace.

On February 28, 2003, Cole received a consultative examination from Dr. John A. May. Dr. John A. May found the following: (1) Cole could occasionally lift 50 lbs.; (2) he could frequently lift 25 lbs.; (3) he could stand or walk for six hours in an eight hour workday with normal breaks; (4) he could sit for six hours in an eight hour workday with normal breaks; and (5) he had unlimited push and pull abilities. Dr. John A. May noted Cole's positive response to prescribed therapy for his otitis media. Further, he found that Cole had a full range of motion, with no swelling, redness or tenderness.

V. CONCLUSIONS OF LAW

A. ALJ's Disability Determination

The ALJ determined that Cole 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); *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

⁸(...continued)

(2) a residual disease process that has resulted in such marginal adjustment that even a minimal increase in mental demands or change in the environment would be predicted to cause the individual to decompensate; or (3) current history of 1 or more years' inability to function outside a highly supportive living arrangement, with an indication of continued need for such an arrangement.

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 (“RFC”) 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 Cole had not engaged in substantial gainful activity since his alleged onset date of January 3, 2002. At the second step, the ALJ concluded, from the medical evidence, that Cole had the following severe impairments:

[C]hronic otitis media status post bilateral tympanoplasties, hypertension, allegations of a medically determinable impairment resulting in complained of pain in multiple joints, borderline intellectual functioning, history of depressive disorder, and a history of a learning disorder.

At the third step, the ALJ found that Cole’s “impairments do not meet or equal in severity the requirements of any impairment set out in Appendix 1, Subpart P, Regulations No. 4 (the Listing of Impairments).” He further found that “[t]he allegations of [Cole] and [Jan Heidemann] could not be accorded full credibility due to the numerous inconsistencies in the record.” At the fourth step, the ALJ determined Cole’s RFC. Specifically, he stated:

The claimant retains the residual functional capacity to occasionally lift 50 pounds and frequently lift 25 pounds. He can walk, sit, or stand for 6 hours out of an 8 hour workday. Mr. Cole cannot perform work that requires fine hearing acuity in the presence of background noise. With occasional supervision he can perform simple, repetitive work that does not require constant attention to detail or use of independent judgment. Mr. Cole can work at a regular pace.

Using this RFC, the ALJ determined that Cole could perform his past relevant work as a kitchen helper.⁹ Because Cole failed to meet the criteria at the fourth step of the analysis, the process ended and the ALJ was not required to proceed to the fifth step of the analysis. *See Eichelberger*, 390 F.3d at 590-91. Therefore, the ALJ concluded that Cole was not disabled.

B. Cole’s Residual Functional Capacity

Cole alleges that the ALJ erred in several respects. First, Cole asserts that the ALJ applied an incorrect hypothetical and improperly concluded that he could perform past relevant work as a kitchen helper. Second, Cole argues that the ALJ improperly discredited and dismissed evidence from himself, his caseworker (Jan Heidemann), and medical sources. Third, Cole argues that the ALJ erred in failing to order a physical consultative examination for his wrist complaints. Given such arguments, Cole concludes

⁹Based on this RFC, the ALJ also found that Cole could perform his past relevant work as a hand packer. However, the ALJ indicated during the administrative hearing that Cole’s position as a hand packer was not considered past relevant work because it was his current job.

that the ALJ's decision is not supported by substantial evidence on the record as a whole. As relief, Cole requests a reversal and awarding of disability benefits. Alternatively, Cole asks that the court remand with instructions to schedule a physical consultative examination.

The Commissioner argues that the ALJ properly evaluated the medical opinions that are included in the record and Cole's credibility. Additionally, the Commissioner argues that the ALJ properly determined that Cole could return to his past relevant work, and such determination is supported by substantial evidence on the record as a whole. Thus, the Commissioner asserts that the decision of the ALJ should be affirmed.

1. Hypothetical

Cole argues that the ALJ erred in failing to set forth all of his impairments in the hypothetical that he posed to the vocational expert. He asserts that, because the vocational expert's determination that he could perform his past work as a kitchen helper was based on an inaccurate hypothetical, it is not substantial evidence on which to base a finding that he is not disabled. Additionally, Cole argues that his need for supervision at work, his cognitive difficulties, and his pace are not addressed by the ALJ in either hypothetical posed to the vocational expert. The Commissioner responds that the ALJ posed an accurate hypothetical to the vocational expert. The Commissioner argues that all of Cole's mental limitations are included in the ALJ's hypothetical, and that the ALJ determined the wrist impairment to not be a credible limitation on Cole's RFC.

Hypothetical questions posed to a vocational expert must set forth a claimant's physical and mental impairments. *Goff*, 421 F.3d at 794. However, the ALJ does not need to include all impairments that are suggested by the evidence. *Id.*, see also *Peterman v. Chater*, 946 F. Supp. 734, 738 (N.D. Iowa 1996). The ALJ may exclude from the hypothetical any impairment that the ALJ rejects as either "untrue or unsubstantiated." *Hunt v. Massanari*, 250 F.3d 622, 625 (8th Cir. 2001) (citing *Long v. Chater*, 108 F.3d 185, 187 (8th Cir. 1997)). Additionally, impairments that are controllable or amenable

to treatment do not support a finding of disability. *See Kelley v. Callahan*, 133 F.3d 583, 589 (8th Cir. 1998) (citing *Kisling v. Chater*, 105 F.3d 1255, 1257 (8th Cir. 1997)).

The ALJ determined that:

[Cole] retains the residual functional capacity to occasionally lift 50 pounds and frequently lift 25 pounds. He can walk, sit, or stand for 6 hours out of an 8 hour workday. Mr. Cole cannot perform work that requires fine hearing acuity in the presence of background noise. With occasional supervision he can perform simple, repetitive work that does not require constant attention to detail or use of independent judgment. Mr. Cole can work at a regular pace.

This RFC is included (in the form of a question) in both hypotheticals that the ALJ posed to the vocational expert. At the administrative hearing, the ALJ posed two hypotheticals to the vocational expert. One hypothetical included Cole's alleged wrist impairment as having a possible impact on his RFC, and the other hypothetical did not include such impairment. After considering the record as a whole, the ALJ determined that the first hypothetical he posed to the vocational expert, that is, the hypothetical which excluded the alleged wrist impairment, most closely reflected Cole's RFC. In making his determination, the ALJ stated that he found credible evidence supporting each component in the first hypothetical. Further, due to numerous inconsistencies in the record between Cole's subjective complaints of pain and (1) his testimony at the administrative hearing, (2) his activities of daily living and (3) the objective medical evidence, the ALJ found that Cole's allegations of wrist pain were not fully credible.

The record supports the ALJ's determination of Cole's RFC. The ALJ's determination that Cole can work at a regular pace is not inconsistent with Dr. Lorne Johnson's observation that Cole's pace is below average or non-examining state psychologist Dr. Carole Kazmierski's notation that Cole's pace is slower than average. Additionally, the Director of Cole's vocational program indicated in a July 6, 2005 letter that Cole works at an average pace.

With respect to Cole's alleged wrist impairment, chart notes from Cole's nurse practitioner, Lori Bauler, indicated that Cole does not always wear his wrist splint. Lori Bauler reported that Cole responded well to medications and the use of his splint. Additionally, she indicated that Cole retained a full range of motion in his wrists. Further, at the time of the administrative hearing, Cole indicated that he had let his prescription for pain medication run out. Cole himself indicated that he has had "no change in activities" due to any pain.

The court finds that the ALJ considered all of the evidence in this case, and that his decision to apply the first hypothetical is supported by substantial evidence on the record as a whole.

2. Credibility Determinations

An ALJ is required to make a credibility determination prior to making his or her RFC determination. *See Tellez*, 403 F.3d at 957. Cole argues that the ALJ improperly rejected his subjective complaints of pain and improperly discredited the testimony of his witness, Jan Heidemann, and the medical evidence of record. The Commissioner argues that the ALJ properly found Cole's complaints not credible by following the framework set forth in *Polaski v. Heckler*, 739 F.2d 1320 (8th Cir. 1984), and the regulations at 20 C.F.R. § 404.1529.

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 inconsistencies exist in the evidence as a whole. *Pelkey v. Barnhart*, 433 F.3d 575, 578 (8th Cir. 2006) (citing *Polaski*, 739 F.2d at 1322). However, the ALJ must give reasons for discrediting the claimant. *Id.* (citing *Strongson v. Barnhart*, 361 F.3d 1066, 1072 (8th Cir. 2004)). 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).

In finding Cole’s allegation of disability not fully credible, the ALJ determined that the objective medical evidence did not support a finding of total disability. Specifically, regarding the medical evidence, the ALJ found that: (1) Cole’s otitis media, hypertension and joint pain have all been successfully controlled or improved with medicine; (2) he has full range of motion throughout; (3) he cannot perform work that requires fine hearing acuity in the presence of background noise; and (4) Cole’s impairments were not sufficiently severe to satisfy the requirements of any impairment set out in Appendix 1, Subpart P, Regulations No. 4 (The Listing of Impairments). Based on these findings, the ALJ concluded that “[t]he claimant does have a medically determinable impairment, but it would not prevent him from performing work-like activities.”

There is substantial evidence on the record as a whole to support the ALJ’s conclusion that the objective medical evidence in this case does not support Cole’s subjective allegation of pain. The medical evidence in the record provides that Cole has full range of motion in all his joints, he has no difficulty walking, standing, or sitting, his hypertension poses no limitation on his capacity to work, he can remember and follow simple instructions and he has a fair ability to make judgments and give appropriate

responses in a work setting. *See Gowell*, 242 F.3d at 796 (the absence of objective medical evidence is a relevant factor for an ALJ to consider when making a credibility determination for a claimant's subjective pain complaints). Therefore, based on the evidence as a whole, the conclusions of Cole's treating and consulting physicians are inconsistent with Cole's claim of pain and the ALJ could properly discount Cole's subjective complaints. *See Pelkey*, 433 F.3d at 578.

The record further supports the ALJ's conclusion that inconsistencies between Cole's subjective complaints and his daily activities diminish his credibility. The ALJ noted that Cole lives independently and is able to cook, clean his house, and perform all activities of daily living. He drives, babysits, and spends his days helping a friend do mechanical work. *Cf. Forte v. Barnhart*, 377 F.3d 892, 896 (8th Cir. 2004) (finding the claimant's ability to drive and attend class inconsistent with his allegations of disabling pain). Additionally, the record supports the ALJ's conclusion that Cole's own inconsistent statements diminish his credibility. Cole claims that he is disabled in part because of joint pain. However, he reported that he had "no change in activities" due to his pain.

The court finds that the ALJ properly discounted Cole's complaints because there were significant inconsistencies in the evidence as a whole and he properly gave reasons for discrediting Cole. *Pelkey*, 433 F.3d at 578. Therefore, the court will not disturb the ALJ's credibility determination. *Johnson*, 240 F.3d at 1147 (citing *Polaski*, 739 F.2d 1320). After considering the evidence and balancing the elements supporting the ALJ's credibility determination against the elements in support of Cole's claim, the court finds that the ALJ's determination that Cole's allegation was not credible is supported by substantial evidence.

3. Physical Consultative Examination

Cole argues that the ALJ had insufficient evidence on which to base his determination that Cole's wrist impairment was not severe. He asserts that there is sufficient documentation in the record to warrant ordering a consultative examination to

more fully explore the extent of the wrist impairment. In response, the Commissioner asserts that the record includes substantial evidence that supports the ALJ's decision.

20 C.F.R. § 404.1519a requires the Commissioner to purchase a consultative examination in certain circumstances. The Commissioner may purchase an examination when the claimant's evidence "is not sufficient to support a decision on [his or her] claim." 20 C.F.R. § 404.1519a(b). Additionally, the Commissioner must order a consultative examination when additional evidence is needed to support a decision and such evidence "is not contained in the records of [the claimant's] medical sources." 20 C.F.R. § 404.1519a(b)(1).

In his decision, the ALJ stated that he considered the "evidence in the record as a whole." The ALJ found that Cole's allegations regarding his wrist impairment could not be afforded full credibility due to inconsistencies within Cole's testimony, inconsistencies between Cole's testimony and objective medical evidence, and inconsistencies between Cole's testimony and his activities of daily living. Further, the ALJ stated that the diagnosis of osteoarthritis that Cole received from his nurse practitioner did not come from an acceptable medical source,¹⁰ and that no lab studies or clinical findings were supportive of such a diagnosis.

There is substantial evidence on the record as a whole to support the ALJ's determination that Cole's wrist impairment was not severe. The record indicates that Cole retained a full range of motion in his wrist and that Cole's ailment responded well to medication and a wrist splint. The record shows that Cole visited his nurse practitioner on several occasions in 2005 complaining of wrist pain immediately following incidents

¹⁰See 20 C.F.R. § 404.1513(a) (acceptable medical sources for diagnosing medically determinable impairments include licensed physicians, licensed or certified psychologists, licensed optometrists, licensed podiatrists, and qualified speech-language pathologists).

of not wearing his wrist splint. The court finds that the ALJ did not err in his decision not to order a physical consultative examination.

VI. CONCLUSION

The court concludes that the ALJ considered all of the relevant evidence in this case, including the medical records of Cole's treating, examining, and evaluating sources, and Cole's description of his conditions. The ALJ's determination regarding Cole's RFC is consistent with the opinions of Cole's treating and consulting doctors and other sources, and it is supported by his finding that Cole was not fully credible. The ALJ's determination of the RFC is supported by substantial evidence on the record as a whole. The ALJ's conclusion, based on Cole's age, education, and RFC, that he could perform his past relevant work as a kitchen helper is supported by substantial evidence. Accordingly, the decision of the Commissioner 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 1) is **DISMISSED** with prejudice; and
- (3) The Clerk of Court is directed to enter judgment accordingly.

DATED this ____ day of _____, 2007.

JON STUART SCOLES
United States Magistrate Judge
NORTHERN DISTRICT OF IOWA