

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

KAY E. BUSMA,

Plaintiff,

vs.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

No. C01-3003-DEO

ORDER

This case comes before the Court on plaintiff Kay E. Busma's application for Social Security benefits pursuant to Titles II 42 U.S.C. § 405(g) and § 1383(c)(3). After consideration of the parties' briefs and oral arguments, and the relevant case and statutory law, the Court finds this case should be reversed and disability benefits awarded to Busma.

I. INTRODUCTION

A. PROCEDURAL BACKGROUND

On April 24, 1998, Kay E. Busma, filed an application for

¹ Jo Anne B. Barnhart became the Acting Commissioner of Social Security on November 14, 2001. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Jo Anne B. Barnhart should be substituted for Larry G. Massanari as the defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. §405(g).

disability benefits. She is alleging disability as of December 12, 1997, based upon severe degenerative changes of the lumbar spine with complaints of low back pain, a history of tendinitis of the right shoulder, congenital dwarfism, and a history of depression. (Tr. 103-08). Her application was denied initially on June 15, 1998 and on reconsideration on January 14, 1999. (Tr. 69, 76). Busma requested a hearing before an ALJ and the ALJ issued an order denying her benefits on July 30, 1999. (Tr. 13-22). She requested a review of the ALJ's decision and the Appeals Council affirmed the ALJ's decision. (Tr. 9, 4). Having exhausted her administrative remedies, Busma filed for judicial review in this Court. It is now appropriate for this Court to review Busma's application pursuant to 42 U.S.C. § 405 (g).

B. FACTUAL BACKGROUND

1. INTRODUCTORY FACTS AND DAILY ACTIVITIES

Kay E. Busma was born March 23, 1950. (Tr. 43). At the time of the administrative hearing held on May 5, 1999, she testified she was 49 years old. (Tr. 43). She testified that she was approximately 4'3" tall and weighed 143 pounds. (Tr. 43). She stated that she has a valid driver's license with no restrictions and drives approximately 30 to 40 miles a week.

(Tr. 43-44).

Busma testified that she gets up between 8:00 a.m. and 9:00 a.m. and that she goes to bed between 10:00 p.m. and 11:00 p.m. (Tr. 56). She stated these times vary depending if she is "hurting really bad." (Tr. 56). She testified that she has problems sleeping because of the pain. (Tr. 56). She stated that she does not have problems performing activities such as bathing, dressing and feeding herself. (Tr. 56). She testified that she spends her day straightening up the house, doing dishes, walking, having coffee with friends, watching TV, relaxing and working on jigsaw puzzles. (Tr. 57). She testified that she no longer mows the lawn and that her brother and his wife do her vacuuming and other similar jobs. (Tr. 58).

She stated that she cannot sleep when she is in pain because she has to get up and move around and then she may lay down and sleep again until the pain comes back. (Tr. 58).

2. BUSMA'S VOCATIONAL AND WORK HISTORY

Busma has her high school diploma. (Tr. 43). She went through a training program and became a certified nursing aide. (Tr. 48).

Busma was employed at Franklin General Hospital where she worked as a nurse's aide. (Tr. 46). Busma testified that she worked as a nurse's aide for "25 years, going on 26." (Tr. 46). Her duties included feeding, bathing, turning, walking, and repositioning residents. (Tr. 47). At this job she would have to lift patients, some weighing between 150 and 250 pounds. (Tr. 47). During 1995-1996 she also worked as a ward secretary, until the job was eliminated. (Tr. 47). As a ward secretary she would do "charting," and answer the phone. (Tr. 49). At the time she was ward secretary, she also assisted the nurse's aides. For about one year, 1995-1996 she was also board secretary. (Tr. 48). This job involved helping put patients back to bed. She testified that the work included, "help[ing] the aides lift patients back into bed or taking someone to the bathroom." (Tr. 48). In 1997 her job as ward secretary was eliminated at the hospital. (Tr. 49). In 1997, after she hurt her back turning a patient, she left her position as a nurse's aide. (Tr. 49).

Her last job was part-time when she worked for one week at a place called the Pumper. (Tr. 44). She worked part-time and spent most of this time behind the register. She testified that

she had to leave that job because her lower back could not take the pain. (Tr. 44). She testified that her employer tried to fix up a support system for her feet but that this support system did not help with the pain she experienced when she sat for long periods of time. (Tr. 45). She testified that the problem with the position at the Pumper was that she was sitting for long periods of time. (Tr. 46).

3. BUSMA'S MEDICAL HISTORY

Busma testified that she was injured in 1997 when she was trying to turn a patient. (Tr. 49). She was seen by Dr. Dennis who made an appointment for her to meet with Dr. Beck. (Tr. 49). After Dr. Beck examined Busma he advised her that he could not do anything for her because her spine was too short to do surgery on it. (Tr. 50). Dr. Beck advised her to try therapy. (Tr. 50). Dr. Dennis advised her to stop working because her back was not going to get better and working would just make it worse. (Tr. 50). Busma takes Naproxen² for pain. (Tr. 52). She testified that she sometimes takes it once a day or twice a

² Naproxen: a nonsteroidal anti-inflammatory analgesic agent used in the treatment of rheumatoid conditions. Stedman's Medical Dictionary 1176 (26th Edition).

day as needed for the pain. (Tr. 52). She testified that she also takes Tylenol "maybe once every two days or it depends on if [she] is aching or something." (Tr. 53).

4. VOCATIONAL EXPERT'S TESTIMONY

At the hearing on May 5, 1999, Jeff L. Johnson testified as a vocational expert. The ALJ's first hypothetical provided:

[A]n individual who is 49 years old. She was 47 years old as of the alleged onset date of disability. She's a female. She has a highschool education, plus additional training as a certified nurse['s] aide and past relevant work as you've indicated in Exhibit 9-E and she has the following impairments. She has degenerative changes of the lumbar spine with complaints of low back pain, history of tendinitis of the right shoulder, congenital dwarfism and there's a history of depression. As a result of a combination of those impairments, she has the residual functional capacity as follows. She cannot lift more than five to ten pounds, no standing of more than 60 minutes at a time, no sitting of more than 60 minutes at a time and no walking of more than 60 minutes at a time with no repetitive bending, stooping, squatting, kneeling, crawling or climbing.

(Tr. 62).

The ALJ then asked, "Would this individual be able to perform any jobs she previously worked at, either as she

performed it or as it is generally performed within the national economy?" (Tr. 62). The vocational expert answered by saying:

No, Your Honor. It would be my opinion that the past relevant work would be precluded, either as the claimant performed the positions or as generally performed in the national economy, mainly due to the lifting limitations of five to ten pounds and the standing limitation of 60 minutes.

(Tr. 63).

The ALJ asked if there were "any skills" that Busma had acquired "from her past work which she should be able to transfer to other work within the national economy." (Tr. 63). The vocational expert replied, "No, Your Honor." (Tr. 63). The ALJ asked whether "within the parameters of the hypothetical, would the claimant be able to perform the full and/or wide range of unskilled work activity." (Tr. 63). The vocational expert answered, "The hypothetical would allow for a less than full range of light and sedentary work activities, Your Honor." (Tr. 63).

The ALJ then asked, "Would there remain unskilled jobs which have been administratively noticed which the claimant could perform within the limitations of the hypothetical?" (Tr. 63). The vocational expert answered that some examples were a charge

account clerk, office helper and surveillance monitor. (Tr. 64).

The ALJ asked his second hypothetical question:

[A]n individual of the same age, sex education, past relevant work and impairments as previously specified and this would be an individual who would have the residual functional capacity as follows. This individual could not lift more than five to ten pounds, with no standing of more than 15 at a time, no walking of more than a half to one block at a time with no repetitive bending or stooping, no repetitive pushing or pulling or working with the arm overhead on the right. Assume this individual could not return to past relevant work, transfer acquired work skills or perform the full and/or wide range of unskilled work.

(Tr. 64).

The vocational expert asked the ALJ, "Was there a sitting limitation on hypothetical number two?" (Tr. 64). The ALJ answered, "No, there isn't. Would there remain unskilled jobs which have been administratively noticed which the claimant could perform within the limitations of the hypothetical?" (Tr. 64). The vocational expert answered, "Within hypothetical number 2, Your Honor, essentially a full range of sedentary work activities could be performed." (Tr. 64). The vocational

expert gave the examples of charge account clerk, surveillance monitor and order clerk. (Tr. 64). The ALJ asked the vocational expert if there were other factors which would affect vocational placement which have not been previously reflected in the hypothetical questions asked. (Tr. 64-65). The vocational expert replied, "Not to my knowledge, Your Honor." (Tr. 65).

Busma's attorney then added a third hypothetical question that was a combination of the second and first hypothetical questions with additional limitations added to it:

[T]hat would be the factor of intermittent to constant pain while sitting, walking or standing.

(Tr. 65).

The vocational expert responded that he would, "need some limitations which would be derived from the pain itself." (Tr. 65). Busma's attorney responded this constant pain would cause, "The inability to concentrate, the inability to remain at the job position, perform whatever function, even sedentary job is involved." (Tr. 65). The vocational expert responded that he would look at that as the ". . . inability to remain on task or the need for unscheduled work breaks. If that were the case, that would preclude employment." (emphasis added)(Tr. 65).

Busma's attorney then asked, "So, some special consideration would have to be made?" (Tr. 65). The vocational expert answered, "Yes." (Tr. 65). After this question the vocational expert was not asked any further questions and the hearing closed. (Tr. 65).

5. THE ALJ'S DECISION

The ALJ found that Busma was not disabled. (Tr. 14). In his decision, the ALJ concluded that:

No one doubts the claimant experiences some pain and discomfort. The issue to be determined is if the severity of the claimant's pain with resultant functional limitations constitutes a disabling condition within the meaning of the social Security Act. While the claimant's allegations of limitation are basically credible, the limitations that she admits to, and that her doctor's have indicated for her, do not equate to total disability for purposes of the Social Security Act.

(Tr. 19).

The ALJ considered Busma's subjective complaints of pain and determined that he could discount her complaints because 1) the objective medical evidence did "not fully support" her complaints of pain, 2) the objective medical findings typically associated with pain did "not fully corroborate" her complaints

of pain, and 3) the "inconsistencies in the evidence as a whole" justified disregarding Busma's subjective complaints. (Tr. 18). The ALJ adopted hypothetical question number two, Tr. 64, which reflected the limitations that the ALJ determined to be supported by substantial evidence in the record as a whole. This hypothetical did not include any limitation that Busma must avoid prolonged sitting which will be discussed later in this order.

The ALJ reviewed the evidence and testimony in the record and concluded as to Busma's Residual Functional Capacity (RFC) as follows:

[T]he claimant retains the residual functional capacity to lift up to 10 pounds. She can stand up to 15 minutes at a time and walk up to one block. She cannot do any repetitive bending or stooping, nor can she do repetitive pushing or pulling on the right. She also cannot do repetitive overhead work with her arms. This assessment is based on the claimant's testimony concerning her abilities at the hearing.

(Tr. 19).

The ALJ found that statements made by Busma during the hearing were inconsistent with the objective medical evidence, her pursuit of treatment, the type of medication she took for

pain, and her daily activities. (Tr. 18-19). The ALJ determined that:

While the claimant's allegations of limitation are basically credible, the limitations that she admits to, and that her doctor's have indicated for her, do not equate to total disability for purposes of the Social Security Act. Both she, her treating physicians (including Dr. Dennis by his own objective findings), and examining physicians indicate the claimant is capable of sedentary work.

(Tr. 19).

The ALJ determined that Busma could not return to her past relevant work and that she had no transferable skills. (Tr. 19). The Commissioner upon review of the ALJ's decision found that the ALJ's hypothetical question number two contained limitations that were consistent with the objective and subjective evidence in the record. (Tr. 20). The vocational expert testified that there were jobs that existed in significant numbers in the national economy that the claimant was capable of performing, such as charge account clerk, surveillance monitor, and order clerk, therefore the ALJ concluded that the claimant was "not disabled" as defined in the Social Security Act. (Tr. 20).

C. THE COURT'S JURISDICTIONAL BASIS

The Court will next review its jurisdictional basis for adjudicating this case.

In Bowen v. Yuckert, 482 U.S. 137 (1987), the United States Supreme Court delineated the steps which precede a district court's review of a Social Security appeal:

The initial disability determination is made by a state agency acting under the authority and supervision of the Secretary. 42 U.S.C. § 421(a), 1383b(a); 20 C.F.R. §§ 404.1503, 416.903 (1986). If the state agency denies the disability claim, the claimant may pursue a three-stage administrative review process. First, the determination is reconsidered de novo by the state agency. §§ 404.909(a), 416.1409(a). Second, the claimant is entitled to a hearing before an administrative law judge (ALJ) within the Bureau of Hearings and Appeals of the Social Security Administration. 42 U.S.C. §§ 405(b)(1), 1383(c)(1) (1982 ed. and Supp. III); 20 C.F.R. §§ 404.929, 416.1429, 422.201 et seq. (1986). Third, the claimant may seek review by the Appeals Council. 20 C.F.R. §§ 404.967 et seq., 416.1467 et seq. (1986). Once the claimant has exhausted these administrative remedies, he may seek review in federal district court. 42 U.S.C. §405(g).

Yuckert, 482 U.S. 137, 142, 107 S. Ct. 2287, 2291 96 L. Ed. 2d 119 (1987).

Section 1383(c)(3) of Title 42 of the United States Code

provides, "The final determination of the Secretary after a hearing . . . shall be subject to judicial review as provided in section 405(g) of this title. . . ." In pertinent part, 42 U.S.C. § 405(g) provides:

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions

42 U.S.C. § 405(g) (Supp. 1995). Accordingly, this Court may affirm, reverse or remand the ALJ's decision.

II. CONTENTION OF THE PARTIES

Busma argued that the administrative law judge (ALJ) erred by discounting her treating physician's opinion, by discounting her own subjective complaints of pain and by relying on hypothetical question number two that failed to contain limitations that were supported by substantial evidence in the record as a whole. Further she argues that the ALJ improperly relied on the answers to that hypothetical question in making his determination that Busma should be denied benefits. In response, the Commissioner argued that there exists substantial evidence on the record as a whole to uphold the ALJ's decision.

A. THE "SUBSTANTIAL EVIDENCE" STANDARD

The Eighth Circuit has made clear its standard of review in Social Security cases. If supported by substantial evidence in the record as a whole, the Secretary's findings are conclusive and must be affirmed. Pickney v. Chater, 96 F.3d 294, 296 (8th Cir. 1996); Smith v. Shalala, 31 F.3d 715, 717 (8th Cir. 1994) (citing Richardson v. Perales, 402 U.S. 389, 401 (1971); 42 U.S.C. § 405(g) (Supp. 1995)). "Substantial evidence 'is less than a preponderance, but enough so that a reasonable mind might find it adequate to support the conclusion.'" Roe v. Chatter,

92 F.3d 672, 675 (8th Cir. 1996) (quoting Oberst v. Shalala, 2 F.3d 249, 250 (8th Cir. 1993)). In the words of the Supreme Court, substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

The Eighth Circuit has taken pains to emphasize that, "A notable difference exists between 'substantial evidence' and 'substantial evidence on the record as a whole.'" Wilson v. Sullivan, 886 F.2d 172, 175 (8th Cir. 1989) (quoting Jackson v. Bowen, 873 F.2d 1111, 1113 (8th Cir. 1989)).

"Substantial evidence" is merely such "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." "Substantial evidence on the record as a whole," however, requires a more scrutinizing analysis. In the review of an administrative decision, "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." Thus, the court must also take into consideration the weight of the evidence in the record and apply a balancing test to evidence which is contradictory.

Id.

Put simply, in reviewing the decision below, the Court must "encompass evidence that detracts from the decision as well as evidence that supports it." Andler v. Chater, 100 F.3d 1389, 1392 (8th Cir. 1996) (citing Comstock v. Chater, 91 F.3d 1143, 1145 (8th Cir. 1996)). The Court, however, does "'not reweigh the evidence or review the factual record de novo.'" Roe, 92 F.3d at 675 (quoting Naber v. Shalala, 22 F.3d 186, 188 (8th Cir. 1994)). Likewise, it is not this Court's task to review the evidence and make an independent decision. Ostronski v. Chater, 94 F.3d 413 (8th Cir. 1996) (citing Mapes v. Chater, 82 F.3d 259, 262 (8th Cir. 1996)). If, after review, it is possible to draw two inconsistent positions from the evidence and one of those positions represents the Commissioner's findings, the Court must affirm the denial of benefits. Id. In other words, this Court "may not reverse merely because substantial evidence exists for the opposite decision." Johnson v. Chater, 87 F.3d 1015, 1017 (8th Cir. 1996) (citing Woolf v. Shalala, 3 F.3d 1210, 1213 (8th Cir. 1993)). Even in the case where this Court "might have weighed the evidence differently, [it] may not reverse the Commissioner's decision when there is enough evidence in the record to support either outcome."

Culbertson v. Shalala, 30 F.3d 934, 939 (8th Cir. 1994) (citing Browning v. Sullivan, 958 F.2d 817, 822 (8th Cir. 1992)).

The process, however, is not stacked in the Commissioner's favor because, "[t]he standard requires a scrutinizing analysis, not merely a 'rubber stamp' of the [Commissioner]'s action." Cooper v. Secretary, 919 F.2d 1317, 1320 (8th Cir. 1990) (citing Thomas v. Sullivan, 876 F.2d 666, 669 (8th Cir. 1989)). In cases where the Commissioner's position is not supported by substantial evidence in the record as a whole, the Court must reverse. See Lannie v. Shalala, 51 F.3d 160, 164 (8th Cir. 1995). "[T]he goals of the Secretary and the advocates should be the same: that deserving claimants who apply for benefits receive justice." Battles v. Shalala, 36 F.3d 43, 44 (8th Cir. 1994) (quoting Sears v. Bowen, 840 F.2d 394, 402 (7th Cir. 1988)).

B. DETERMINATION OF DISABILITY

Social Security Disability Benefits may be awarded to disabled individuals who meet certain income and resource guidelines. 42 U.S.C.A. § 423 (d)(1)(A). In connection with the award of such benefits to an adult:

[A]n individual shall be considered to be

disabled . . . if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.

42 U.S.C.A. § 423 (d)(1)(A).

An impairment will only be considered of such severity if the individual 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 activity which exists in the national economy. . . ." 42 U.S.C.A. § 423 (d)(2)(A).

Determination of a claimant's disability involves a five step analysis. 20 C.F.R. § 404.1520 (a-f). At the fifth and final step of the analysis, the burden of proof shifts to the Social Security Commission to prove that there are a significant number of jobs in the national economy that a person of the same age, education, past work experience, and physical and mental residual functional capacity can perform. 20 C.F.R. § 404.1520 (f).

"To establish a disability claim, the claimant bears the initial burden of proof to show that he is unable to perform his

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)).

C. THE POLASKI STANDARD

The seminal case for evaluating a claimant's subjective complaints of pain in Social Security cases is Polaski v. Heckler, 739 F.2d 1320 (8th Cir. 1984) (supplemented, 751 F.2d 943 (8th Cir. 1984), vacated, 476 U.S. 1167, adhered to on remand, 804 F.2d 456 (8th Cir. 1986), cert. denied, 482 U.S. 927 (1987)). In Polaksi, the Eighth Circuit held:

The adjudicator may not disregard a claimant's subjective complaints solely because the objective medical evidence does not fully support them.

The absence of an objective medical basis which supports the degree of severity of subjective complaints alleged is just one factor to be considered in evaluating the credibility of the testimony and complaints. The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:

1. the claimant's daily activities;
2. the duration, frequency and intensity of the pain;

3. precipitating and aggravating factors;
4. dosages, effectiveness and side effects of medication;
5. functional restrictions.

The adjudicator is not free to accept or reject the claimant's subjective complaints solely on the basis of personal observations. Subjective complaints may be discounted if there are inconsistencies in the evidence as a whole.

Polaski, 739 F.2d at 1322.

To conduct the proper Polaski analysis, "Merely quoting Polaski is not good enough, especially when an ALJ rejects a claimant's subjective complaints of pain." Hall v. Chater, 62 F.3d 220, 223 (8th Cir. 1995). Instead, "Polaski requires that an ALJ give full consideration to all of the evidence presented relating to subjective complaints." Ramey v. Shalala, 26 F.3d 58, 59 (8th Cir. 1994). To that end, "When making a determination based on these factors to reject an individual's complaints, the ALJ must make an express credibility finding and give his reasons for discrediting the testimony." Shelton v. Chater, 87 F.3d 992, 995 (8th Cir. 1996) (citing Hall v. Chater, 62 F.3d 220, 223 (8th Cir. 1995)). Such a finding is required to demonstrate the ALJ considered and evaluated all of the relevant evidence. See Marciniak v. Shalala, 49 F.3d 1350, 1354

(8th Cir. 1995) (citing Ricketts v. Secretary of Health and Human Servs., 902 F.2d 661, 664 (8th Cir. 1990)). However, if "the ALJ did not explicitly discuss each Polaski factor in a methodical fashion," but "acknowledged and considered those factors before discounting [the claimant's] subjective complaints of pain. . . . An arguable deficiency in opinion-writing technique is not a sufficient reason for setting aside an administrative finding where . . . the deficiency probably had no practical effect on the outcome of the case." Brown v. Chater, 87 F.3d 963, 966 (8th Cir. 1996) (citing Benskin v. Bowen, 830 F.2d 878, 883 (8th Cir. 1987)).

D. REVIEW OF THE ALJ'S DECISION

In this case the ALJ rejected the opinion of Busma's treating physician, Dr. Dennis, that Busma should avoid prolonged sitting. (Tr. 137-38). The ALJ also rejected Busma's subjective complaints of pain, more specifically, that she experiences severe pain if she has to sit for long periods of time. The ALJ adopted hypothetical question number two which failed to include the limitation that Busma should avoid prolonged sitting. The vocational expert asked the ALJ:

"Was there a sitting limitation on

hypothetical number two?" (Tr. 64).

The ALJ answered:

"No, there isn't. (Tr. 64).

The ALJ findings of fact, based upon hypothetical question number two, included the following determination:

5. The claimant has the residual functional capacity to perform the physical exertional and nonexertional requirements of work except for lifting up to 10 pounds. She can stand up to 15 minutes at a time and walk up to one block. She cannot do any repetitive bending or stooping, nor can she do repetitive pushing or pulling on the right. She also cannot do repetitive overhead work with her arms.

. . .

7. The claimant's residual functional capacity for the full range of sedentary work is reduced by the limitations noted in Findings of Fact No. 5 above.

(Tr. 21).

As mentioned, the ALJ failed to include the sitting limitation which was a clear part of the opinion made by her treating physician. In addition, the ALJ erred when he discounted Busma's testimony when she said, "But if I sit too long or stand too long, I do have pain," and when she described that pain she said, "It's a sharp back pain." (Tr. 51).

**1. WHETHER THE ALJ IMPROPERLY DISCOUNTED
THE OPINION OF BUSMA'S TREATING PHYSICIAN**

Busma contends that the ALJ improperly discounted Dr. Dennis's opinion when the ALJ determined:

Dr. Dennis' opinion regarding the claimant's ability to work is inconsistent with his own objective findings.

(Tr. 16).

The ALJ further stated in his findings:

While the undersigned recognizes a treating physician's obligation to his patient, a physician's desire to treat his patient in the most effective manner possible, and the necessity to accept the patient's symptomatic allegations of impairment as worthy of belief in order to appropriately treat the patient, the undersigned does not give great weight to the opinion of Dr. Dennis that the claimant is disabled within the meaning of the Social Security Act on this record.

(Tr. 16).

The ALJ apparently determined that even though Dr. Dennis was Busma's family doctor his opinion could be discounted because the ALJ determined that it was "inconsistent with the objective findings." Dr. Dennis opinion was:

I do feel that she is disabled for many jobs that would involve lifting, stooping, kneeling, crawling, or **prolonged sitting**.

Despite resting her back and being able to be off [work], the patient still has continued back discomfort and she certainly would if she were to [re]turn to activities as noted above.

(emphasis added)(Tr. 131).

As stated above, the ALJ concluded that this opinion was not supported by objective findings. (Tr. 16). However, Dr. Dennis' opinion included objective findings such as: "significant wedging of [Busma's] lumbar vertebra and she has lipping and spurring of the thoracic area. She also has changes throughout the lumbar spine showing spinal stenosis throughout this area." (Tr. 131).

Further, Dr. Dennis wrote:

Busma has modest congenital wedging of L-1, 2, and 3 with degenerative narrowing of the L2-3 disc space. Also has levoscoliosis. MRI scan shows the patient to have disc bulging at T-11, 12 discs and has a mild acquired central stenosis L-1, L-2 disc space. She has L1-2 facet hypertrophy and has a moderate sized herniation of disc L-2-L3 to the right of midline. This gaps to the right neural foramina, fairly pronounced stenosis at this L2-3 level. Patient has mild acquired stenosis L3-4, posterior right hypertrophy. She has moderate acquired stenosis of L4-5 and some posterior element hypertrophy.

. . .

Patient was treated conservatively and attempts were made to get her back to work. She simply has too much pain to do that.

. . .

In light of these findings and ongoing examination of her I really feel that she should be disqualified from what she has been doing as a nurse's aide, and I think total disability is certainly appropriate for her.

(Tr. 129-30).

There is substantial evidence in the record as a whole that reveals that not only was Dr. Dennis opinion based on objective findings that support a limitation of sitting as to Busma but other consultative and nonexamining doctors opined as well that prolonged sitting should be avoided.

For example, Dr. Dankle, at the request of the Disability Determination Services Bureau, conducted a physical examination of Busma. He stated her back showed "tenderness at the lumbar spine with mild spasm." (Tr. 138). Dr. Dankle stated Busma "should avoid prolonged standing, moving about, walking and sitting." (emphasis added)(Tr. 139). Further, Dr. Sims, at the request of Disability Determination, conducted a nonexamining review of the medical records. (Tr. 141). He wrote in his

report:

Restrictions are similar to the T.P. [treating physician] plus no stooping, kneeling, **prolonged** standing or **sitting**. The opinions of the TP and CE were found to be of greater value because the TP had examined the claimant multiple time and because these opinions were more consistent with radiographic evidence. The overall trend of the medical and nonmedical **evidence supported** the **validity** of the **claimant's symptoms**.

(emphasis added)(Tr. 143).

The ALJ erred in discounting not only the treating physician's opinion but also the Disability Determination Services examining and nonexamining physicians' opinions.

The Eighth Circuit Court of Appeals has stated:

We conclude that the absence of an opinion does not constitute substantial evidence supporting the ALJ's findings. Cf. Rosa v. Callahan, 168 F.3d 72, 81 (2d Cir. 1999)(consultant's reports that were "silent on the issue" did not meet commissioner's burden of establishing that claimant could perform sedentary work).

Lauer v. Apfel, 245 F.3d 700, 705 (8th Cir. 2001).

In Busma's case the ALJ had before him three medical opinions, Dr. Dennis, Dr. Dankle and Dr. Sims, as set out above, that flatly support Busma's claim that she could not sit for

prolong periods of time and was disabled. These physicians' reports were not silent on the issue, yet, the ALJ left out the sitting limitation that the doctors opined was supported by the objective and subjective examinations of Busma. The ALJ's decision that Busma was not disabled was not supported by substantial evidence. When the ALJ did not include a sitting limitation in his adopted hypothetical question he erred as will be discussed in section 3. below.

**2. WHETHER THE ALJ IMPROPERLY DISCREDITED BUSMA'S
SUBJECTIVE COMPLAINTS OF PAIN**

Busma contends that the ALJ erred in discrediting her subjective complaints of pain. This Court goes no further in this analysis because, as stated by the Disability Determination Service's own physician, the evidence supports Busma's claims. During her hearing in front of the ALJ, Busma testified that she cannot sit for long periods of time and told how previous employers have tried to accommodate her. (Tr. 46). She testified that she tried to seek help for the pain but she was told that "nothing" could be done because her "spine was too short to do surgery on it." (Tr. 50). She described the "sharp pain" and "numbness" she experiences from sitting too long. (Tr.

51, 53).

When the ALJ's discounted Busma's testimony as to the pain she experiences from sitting too long and concluded that he did not have to include a sitting limitation in his hypothetical question he erred as will be discussed in section 3. below.

3. WHETHER THE ALJ IMPROPERLY RELIED ON A HYPOTHETICAL QUESTION AND ANSWERS TO THAT QUESTION

"The point of the hypothetical question is to clearly present to the VE [vocational expert] a set of limitations that mirror those of the claimant." Roe, 92 F.3d at 676 (citing Hogg v. Shalala, 45 F.3d 276, 279 (8th Cir. 1995)). Testimony from a vocational expert constitutes substantial evidence only when based on a properly phrased hypothetical question. Pickney, 96 F.3d at 296 (citing Cruze v. Chater, 85 F.3d 1320, 1323 (8th Cir. 1996)). When a hypothetical question does not encompass all relevant impairments, the vocational expert's testimony does not constitute substantial evidence. Id. (citing Hinchey v. Shalala, 29 F.3d 428, 432 (8th Cir. 1994)). For this reason, "[T]he ALJ must set forth all of the claimant's disabilities when posing a hypothetical question to the VE." Ostronski, 94 F.3d at 420 (citing Greene v. Sullivan, 923 F.2d 99, 101 (8th

Cir. 1991)). However, "all" of the claimant's disabilities "include only those impairments that the ALJ finds are substantially supported by the record as a whole." Roe, 92 F.3d at 675 (quoting Stout v. Shalala, 988 F.2d 853, 855 (8th Cir. 1993)). That is to say, "[T]he hypothetical is sufficient if it sets forth the impairments that the ALJ has found the claimant to have." Ostronski, 94 F.3d at 420 (emphasis added) (citing Rappoport v. Sullivan, 942 F.2d 1320, 1323 (8th Cir. 1991)).

Busma argued that the ALJ failed to include a sitting limitation in his adopted hypothetical question number two. This Court has set out, in some detail, on pages 21, 22, 23, 24, 25 and 26 the precise reasons why the ALJ erred in relying on hypothetical question number two which did not include any limitation on her ability to sit.

The Commissioner argues that the ALJ's determination is supported by the record and that the ALJ carefully considered the entire record. This Court is persuaded that had the ALJ properly considered the medically supported restrictions in the hypothetical he would have found that Dr. Dennis' "sitting" restrictions were supported by substantial evidence on the record. In addition, had the ALJ given proper consideration to

Busma's subjective complaints of pain, which were supported by the opinions and findings of her treating physician and the Disability Determination Services' examining and nonexamining physicians, he would have included a limitation on sitting.

This Court recognizes that the ALJ need only include limitations and impairments the ALJ accepts as being validly supported by the record. Young v. Apfel, No. 99-1784 (8th Cir. 2000). As mentioned, this Court finds that the record is replete with evidence supporting Busma's disability. The ALJ is not allowed to simply substitute the ALJ's judgment for the judgment of doctors and medical practitioners. Pratt v. Sullivan, 956 F.2d 830, 834-835 (8th Cir. 1992.)

The Court concludes that Dr. Dennis' restrictions were properly included by Busma's attorney:

Attorney: Now, [adding] the factor of intermittent to constant pain while sitting, walking or standing?

Vocational Expert: I actually need some limitations which would be derived from the pain itself.

Attorney: The inability to concentrate, the inability to remain at the job position, perform whatever function, even sedentary job is involved? [sic]

Vocational Expert: I guess the way I would

look at that would be the inability to remain on task or the need for unscheduled work breaks. If that were the case, that would preclude employment.

(Tr. 65).

It is apparent to this Court that had the ALJ properly included a sitting limitation he would have found that the claimant would not be able to perform a "full range of sedentary work" and would have had to accept the vocational expert's conclusion that there are no jobs in the national economy which Busma could satisfactorily perform.

III. CONCLUSION

This Court has carefully considered the arguments of the parties and has closely examined the record and is persuaded that there is not substantial evidence on the record as a whole to support the position taken by the ALJ. Busma had been evaluated by her treating physician. She had been evaluated by the Disability Determination Services examining and nonexamining physicians. These other medical professionals and their medical reports did not contradict the testimony of Busma nor the opinion of her treating physician as to the restriction on Busma's ability to sit. In fact they supported it.

This Court is persuaded that the ALJ erred: 1) in discounting Busma's treating physician's opinion, 2) in discounting Busma's subjective complaints of pain, and 3) in not adopting the answer to hypothetical question number 3, Tr. 65, which included Busma's sitting limitation which is fully supported by substantial evidence in the record as a whole. Busma, therefore she is entitled to benefits.

This Court has reviewed the record and determines Busma's onset date to be August 3, 1998, the date Dr. Dennis concluded, "I think total disability is certainly appropriate for her." (Tr. 130.) It is clear to this Court that Busma had many medical problems and was experiencing much pain prior to that date, however, this is the date that her treating physician considered all the objective and subjective medical evidence, determined that she was not a candidate for operative intervention, and opined that Busma was disabled. (Tr. 129).

Upon the foregoing,

IT IS ORDERED that the decision of the ALJ is reversed and the Commissioner is directed to compute and award disability benefits to Busma with an onset date of August 3, 1998.

DATED THIS _____ DAY OF JANUARY 2002.

Donald E. O'Brien, Senior Judge
United States District Court
Northern District of Iowa