

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

CONSUELO ORDONEZ,

Plaintiff,

vs.

LARRY G. MASSANARI ACTING
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. C00-4145-DEO

ORDER

I. INTRODUCTION

This case comes before the Court on Consuelo Ordonez's appeal of the Commissioner of Social Security's denial of her application for disability benefits pursuant to Title II of 42 U.S.C. §§ 401 et seq. After careful consideration of the parties' briefs and oral arguments, and the relevant case and statutory law, the Court remands the matter for further proceedings consistent with this Order.

A. PROCEDURAL BACKGROUND

Consuelo Ordonez filed for Title II benefits on June 16, 1997. (Tr. 107.) Her application was denied initially and upon reconsideration. (Tr. 77-82, 84-87.). Following the initial denial and the denial for reconsideration she requested a hearing. (Tr. 92.) A hearing was held by an Administrative Law Judge on December 9, 1998. (Tr. 41-64.). On April 21, 1999, the ALJ found Ordonez was not disabled as defined in the Social Security Act and denied her benefits on April 21, 1999. (Tr. 11-25.). Ordonez requested a review of the ALJ decision. (Tr. 9-10.). On August 31, 2000, the Appeals Council of the Social Security Administration declined to review the decision of the ALJ. (Tr. 5-8.). Having exhausted her administrative remedies, Ordonez filed for judicial review

in this Court. Both parties agree the application was timely filed. It is now appropriate for this Court to review Consuelo Ordonez's application pursuant to 42 U.S.C. § 405(g) and determine if the Commissioner's decision was supported by substantial evidence on the record as a whole.

B. FACTUAL BACKGROUND

1. INTRODUCTORY FACTS, DAILY ACTIVITIES, THIRD PARTY TESTIMONY, WORK AND MEDICAL HISTORY

Consuelo Ordonez was 54 years of age at the time of her hearing. (Tr. 38.). She testified that she is 5' 3" tall and weighs 155 pounds. (Tr. 249.). Ordonez testified she lived with her daughter. (Tr. 45-46.). Since about 1980, she has lived in the United States. (Tr. 38.). She is from Mexico and attended school in Mexico. (Tr. 39.). The educational schooling she received in Mexico would be equivalent to a ninth grade education in the United States. She is able to read and write in Spanish. (Tr. 39.) She does not have any difficulty with adding, subtracting, and doing general math. (Tr. 39.) Consuelo Ordonez claims she became disabled on April 26, 1997. (Tr. 40-41.). She has worked as a seamstress, in housekeeping and as a kitchen helper. (Tr. 39.). In the 1990s she worked in a cafeteria. (Tr. 51.). As a cafeteria helper she peeled food and made platters for banquets. (Tr. 51.). She testified that she did not think she could do the job of cafeteria helper again because she did not know if she could handle the cutting of the fruit over and over. (Tr. 52.). She stated that when she worked in the cafeteria that she would sometimes be required to lift a watermelon that could weigh between eight and ten pounds. (Tr. 52.). When she worked in the cafeteria she would sometimes have to clean the tables and floors. (Tr. 52.). When she cleaned the floors she would sweep and mop them. (Tr. 53.).

She testified that she had worked at Iowa Beef Packing (hereinafter IBP) from September of 1990 to April 22, 1997. (Tr. 162.). In December 1994, Ordonez was injured at IBP but later returned to work. (Tr. 164.). On September 8, 1995 she had another injury at IBP

causing a rotator cuff tear and she underwent surgery for impingement syndrome, degenerative arthritis, and spurring at the acromioclavicular¹ joint. (Tr. 219.). She was treated for some time by IBP doctors, who initially treated her according to the objective evidence, such as x-ray findings of degenerative changes of her neck, back, and right shoulder. (Tr. 208.). The IBP doctors' records cover the entire period of time from December 1994 through April 1997 but these records do not mention her September 8, 1995 surgery by Dr. Dougherty. (Tr. 219.). Consuelo Ordonez says that in her last job position at IBP that she was required to go up stairs. She testified that she had to use her upper body weight to help her up the stairs and that she was told by management at IBP not to go up the stairs or come down the stairs unless her supervisor was there to assist her. (Tr. 40.). This job required her to sit at a table and take pieces of meat that weighed between 10 and 12 pounds and turn the meat over looking for pieces of bone. (Tr. 40.). Ordonez says that she experienced sharp pain in her back that shot down her arm and the pain was so strong that she could not move. (Tr. 40.). On April 22, 1997, Ordonez says she told a nurse at IBP that she could no longer do the work because of the pain. Ordonez was given an appointment with the manager of personnel at IBP and that was her last day. (Tr. 40.). After Ordonez stopped working at IBP, she began watching her grandchildren for her daughter, Judith Bena. (Tr. 57.). Ordonez's daughter gave her \$100.00 per week for baby sitting. (Tr. 57.). Ordonez baby sat for her daughter until 1998 when she was no longer able to baby sit because of her pain. (Tr. 58.).

Ordonez testified that she is able to walk ok, but, that she can not twist from side to side or pick things up that are too heavy. (Tr. 42.). Ordonez testified during the hearing in front of the ALJ that she believed she could work as a cashier if it did not require twisting or turning. (Tr. 48.). She stated that she use to be able to do things around the house like cooking,

¹ Relating to the clavicle and ligaments between the clavicle and point of the shoulder. Stedmans Medical Dictionary 19 (26th Edition).

cleaning and house keeping but that she is not now able to do these things because of the pain. (Tr. 48.). On an average day Ordonez said she gets up at 6:30 a.m. and she takes a shower and makes coffee. (Tr. 50.). She stated she will make herself toast, bake some bread or make cereal. (Tr. 50.). She testified that sometimes she watches television and sometimes she reads. (Tr. 50.). She said that she might take a walk. (Tr. 50.). She testified that when she gets hungry she will make something for herself to eat. (Tr. 50.). She stated she is trying to learn English and will either listen to or watch tapes that teach the English language. (Tr. 50.). She testified that she use to sew a lot but now she can not sew because her fingers get stiff. (Tr. 50.). Ordonez stated she does not take any prescription medicine but she does take Advil or Ibuprofen for her pain. (Tr. 50.). She stated that the pain is up in her shoulders and her back between her shoulder blades and that both arms hurt to move them. (Tr. 51.).

Judith Bena, Ordonez's daughter, testified at the administrative hearing. (Tr. 55-63.). Bena testified that she had her mother baby sit for her in 1997 but that she had to hire another baby sitter when her mother could no longer carry the children, or do things for them. (Tr. 58.) Bena testified that if there was a box of cereal on top of the refrigerator her mother could no longer reach up and get it. (Tr. 58.). Bena also testified that her mother use to do all the housework but that now she would swell up and then she would be in pain for two or three days. (Tr. 59.). Bena testified that her mother, Consuelo Ordonez, currently lives with her. (Tr. 56.). Bena testified that her mother did not really read or speak any English at home and sometimes would watch television in English if that was what everyone else was watching on television. (Tr. 58.). Bena testified that she, her sister and brother had all interpreted on different occasions for their mother, Consuelo Ordonez, during Ordonez's doctor appointments. (Tr. 59.). Bena testified that now her mother, Consuelo Ordonez "basically just takes baths and stays at home." (Tr. 60.).

Consuelo Ordonez has had a history of treatment for right shoulder pain since at least 1994. (Tr. 215.). An exam by a doctor working for IBP in December 1994 revealed "a

significant narrowing of the [acromioclavicular] joint.” (Tr. 214.). Despite injections for pain relief and therapy, her complaints of pain continued. (Tr. 209-14.). She was placed on permanent restrictions by a doctor at IBP in May 1995. (Tr. 209.). In September of 1995, surgery was performed by Dr. Dougherty for impingement syndrome, degenerative arthritis, and spurring at the acromioclavicular joint of the right shoulder. (Tr. 219.). Ordonez’s permanent restrictions included “no above-the-shoulder lifting with the right; otherwise she fits all requirements for a medium physical demanding job.” (Tr. 211.). Even with permanent restrictions in place, Ordonez continued to seek medical attention for the pain. (Tr. 209-07.). On May 7, 1996 Ordonez was seen by an IBP doctor and her restrictions were changed:

Will have her do no bending, twisting, occasional pushing and pulling of no greater than 5 to 10 pounds and no reaching above the shoulder.

(Tr. 208.). On June 11, 1996 she was seen by an IBP doctor. (Tr. 206.). This doctor placed her on permanent restrictions as follows:

For overhead shoulder lifting. I believe she should be placed on 15-pound limit on an occasional basis. No lifting on a frequent or a constant basis. For routine torso, leg and 12-inch lift requiring a back and a leg lift, I think she would qualify for 30 pounds on an occasional basis, 15 pounds on a frequent basis, 6 pounds on a constant basis. As far as carrying, pushing and pulling is concerned, I believe she would qualify for 20 pounds on an occasional basis, 15 pounds on a frequent basis and 5-6 pounds on a constant basis. As far as the nonmaterial handling activities are concerned, above shoulder height, she would only qualify for very occasional things; below shoulder height, I think she would do much better. She qualified for constant sitting, standing, walking with only occasional bending, reaching, climbing, squatting, kneeling and crawling. Essentially, this placed her within the [light] physical demand classification for work. However, she does qualify for full-time.

(Tr. 206.).

On June 27, 1996 Ordonez was evaluated by an IBP doctor after she fell down some

steps at IBP. (Tr. 205.). An x-ray examination was performed and it revealed degenerative changes but no acute fracture or dislocation was identified. (Tr. 205.). The permanent restrictions were not changed and the doctor wrote, "I am not going to change her restrictions because her permanent restrictions, I think, would be fine for this particular situation." (Tr. 205.). After her fall, Ordonez saw the IBP doctors another three times in July as followup visits. (Tr. 203-04.). Ordonez was not seen again by IBP doctors until February 1997, some six months later, when Ordonez was seen twice by IBP doctors because her wrist was bothering her. (Tr. 202.). In March, Ordonez was seen by IBP doctors because of the pain she was experiencing with her wrist. (Tr. 200-01.). She was also seen by Dr. G.O. Harden on March 22, 1997. (Tr. 191.). His diagnosis was chest wall tenderness. The chest x-rays were negative. (Tr. 191.).

April 17, 1997, Ordonez was seen by an IBP doctor to check on the condition of her wrist. (Tr. 199.). The doctor examined Ordonez and decided to release her to her former position or to a position she wanted to bid on. (Tr. 199.). The bid position was to pick and trim meat. (Tr. 199.). This was the last time Ordonez was seen by an IBP doctor. (Tr. 199.). Ordonez left IBP on April 22, 1997 after she told a nurse she could no longer do the work. Ordonez filed a workers' compensation claim against IBP. In July 1997, Dr. Dougherty wrote:

The patient was last seen by me on 3-18-96. She was getting along only so so, but I felt she could probably go back to work to her regular job, although I was going to restrict her lifting by not more than 10 pounds and not working with anything above her head. I have not seen or heard from the patient since. I do not know if she went back to work and if she went back to work, I don't know how well she is doing.

It would be my opinion that this patient is not totally disabled, although she might still be having some difficulty in her right shoulder. I think there are probably many things that she could be doing. Therefore, unless she is still having enough problems I

would not feel she is totally impaired and if she is still having problems, she probably should be seen again.

(Tr. 219.).

On November 10, 1997, Ordonez and IBP entered into a settlement agreement under the Iowa Workers' Compensation law for a lump sum payment of \$24,000.00 (Tr. 186-87.). The only medical records available to the Court from November 1997 to September 1998 are those from consultative examinations or examinations conducted in order to determine Ordonez's residual functional capacity. On December 3, 1997, Dr. Martin conducted an exam for the Iowa Department of Disability Determination Services. (Tr. 228-30.). Dr. Martin wrote:

I would be of the opinion that permanent restrictions that were placed on her during the course of my treating her in occupational medicine venue would still hold. Her restrictions are as follows: For overhead and shoulder lifting, she should be placed on a 15 pound limit on an occasional basis and no lifting on a frequent basis. For torso, leg and 12 inching requiring the back and the legs, she should be able to do 30 pounds on an occasional basis, 15 pounds on a frequent basis and 6 pounds on a constant basis. For carrying, pushing and pulling, she would be able to qualify for 20 pounds on an occasional basis, 15 pounds on a frequent basis, and 5-6 pounds on a constant basis. For handling objects above shoulder height, she would qualify for very occasional things, and below shoulder height, I do not have any concerns.

(Tr. 229.).

The most recent medical records available to the Court consists of the medical records from the SiouxLand Community Health Center. The records indicate that Ordonez was seen September 9, 1998, October 12, 1998, October 19, 1998, November 2, 1998 and November 9, 1998 at the SiouxLand Community Health Center. (Tr. 248, 250, 251, 252, 253). A nurse practitioner, M. Standifer, saw Ordonez from September 1998 to November 1998. Ordonez primary complaints were for treatment of hiatal hernia and gastritis. (Tr. 248-59.). Ordonez

was questioned about her overall health problems and she denied any chest tightness but did state that on occasion she did complain of overall muscle weakness “when she gets the headaches and neck pain.” (Tr. 248-49.). The medical records for the months of September 1998 through November 1998 include no indication that Ordonez had any complaints of severe shoulder or back pain.

2. VOCATIONAL EXPERT'S TESTIMONY

Vocational expert William B. Tucker testified at the hearing. (Tr. 63-67, 71-75.). The ALJ asked Tucker to address Ordonez’s ability to return to her past work if:

[S]he is able on an occasional basis to lift or carry 20 pounds frequently, 10 pounds occasionally, if she could stand and/or walk for six hours out of an eight hour work day, could sit with normal breaks for six hours out of an eight hour work day, postural activities on an occasional basis, should not do overhead reaching with her right shoulder, that’s her dominant shoulder and I would also ask you to incorporate page 2 of this specific functional capacity finding of Dr. Martin, who is her treating doctor and that was December 4, 1997. If that’s not consistent with the functional capacity that I describe I want you to define those [too]. Can she return to her past work?

(Tr. 71.). Given this hypothetical, the vocational expert testified that he did not think that Dr. Martin’s restrictions were any more restrictive than the restrictions as adopted (used) by the ALJ. (Tr. 71.). The vocational expert testified that he did not think that Ordonez could return to the past relevant work she did at the packing plant (IBP) but he did think that she would be able to return to her past relevant work as a cafeteria attendant and also work as a child monitor “as she performed it.” (Tr. 71.). The vocational expert also testified that he thought Ordonez could work as a cook helper. (Tr. 71.). The vocational expert clarified that the positions were as Ordonez performed them, not as the jobs would be generally performed. (Tr. 72.). The ALJ then asked:

But, based on her testimony and that of her daughter, you would probably preclude cafeteria and cook helper and leave in child

monitor.

(Tr. 72-73.).

The vocation expert stated:

I think child monitor might still be in there, yes.

(Tr. 73.).

The attorney for Ordonez asked the vocational expert to assume that the hypothetical person has a restriction of not lifting any more than ten pounds, not working with anything heavy above her head, and whether that changed the opinion of the vocational expert as to the ability of that person to do the cafeteria attendant work and child monitor work. (Tr. 74.). The vocational expert testified that by changing the exertional aspect to no more than 10 pounds would eliminate the job of cafeteria attendant, child monitor, and cook helper. (Tr. 74.). The attorney argued that Dr. Dougherty placed the 10 pound restriction on the claimant. (Tr. 75.). During the hearing before the ALJ, both the ALJ and the attorney for Ordonez failed to include the restriction of an inability to speak and understand the English language. The vocational expert was never asked to consider a limitation on Ordonez's alleged inability to grasp the English language and whether this would hamper her performing past jobs or obtaining jobs available in significant number in the national economy.

3. THE ALJ'S CONCLUSIONS

The finding by the ALJ was that Ordonez "has not engaged in substantial gainful activity since April 26, 1997." (Tr. 24.). The ALJ determined that the medical evidence established that Ordonez "has a right shoulder impingement, cervical degenerative disc disease and thoracic degenerative disc disease, impairments which are severe but which do not meet or equal the criteria of any of the impairments listed." (Tr. 24.). The ALJ found that Ordonez's "statements concerning her impairments and their impact on her ability to work [were] not credible." (Tr. 25.). Furthermore, the ALJ stated that:

The claimant has the residual functional capacity to lift and carry

no more than 20 pounds occasionally and no more than 10 pounds frequently, sit, stand or walk for up to six hours of an eight-hour day. Her ability to push and/or pull is unlimited, other than as shown for lift and/or carry. The claimant is limited to occasionally climbing, balancing, stooping, kneeling, crouching, and crawling. She should perform no overhead reaching with the right shoulder.

(Tr. 25.).

The ALJ found the “claimant can thus perform the exertional demands of light work.

(Tr. 23.). The ALJ concluded:

[T]hat because the claimant’s past work as a child monitor, cook helper, and cafeteria monitor did not require the performance of work activities precluded by her medically determinable impairments, she is able to perform the type of work she performed in the past.

(Tr. 24.). The ALJ was “not convinced” that the testimony of Judith Bena, Ordonez’s daughter, accurately reflected the extent of the limitations claimed. (Tr. 22.) The ALJ wrote:

[T]he undersigned is not persuaded by the testimony of this witness. As a lay person, she can only report her observations of the claimant’s behavior and can only report her observations of the claimant’s behavior and limitations. Her testimony is dependent in large measure on the claimant’s complaints of subjective symptoms and on observing the claimant’s behavior. The fact that Ms. Bena observed the claimant behave in a certain manner or that the claimant has complained of restrictions in her daily activities, does not establish that such behavior is medically imposed.

(Tr. 22.). The ALJ determined that Ordonez’s past relevant jobs, “as she performed them,” did not require the performance of work functions precluded by her medically determinable impairment. (Tr. 25.). The ALJ found that Ordonez’s statements concerning her impairments and their impact on her ability to work were not credible. (Tr. 25.). Based on this testimony and the substantial evidence in the record the ALJ concluded Consuelo Ordonez’s impairments

did not “prevent her from performing her past relevant work.” (Tr. 25).²

II. THE COURT'S JURISDICTIONAL BASIS

In Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (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.

Yuckert, 482 U.S. at 142, 107 S.Ct. at 2291. 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

² See *infra* page 17. If the ALJ determines that the claimant can return to past relevant work the ALJ denies the claim at step four of the evaluation process. If the ALJ determines that the claimant can not return to past relevant work the ALJ must proceed to step five.

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). The Court may affirm, modify, reverse or may remand the cause for a rehearing.

IV. ANALYSIS

A. THE "SUBSTANTIAL EVIDENCE" STANDARD

The Eighth Circuit's standard of review in Social Security cases is abundantly documented. 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, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (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). Or, 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, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 59

S.Ct. 206, 217, 83 L.Ed. 126 (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)(citing Jackson v. Bowen, 873 F.2d 1111, 1113 (8th Cir. 1989)). Substantial evidence on the record as a whole requires the Court to “take into account whatever in the record fairly detracts from [the] weight” of the administrative decision, consider 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 the 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)).

One should not be misled into believing the process is stacked in the Commissioner's favor, bear in mind that, “The 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). In those cases where a full and fair record does not exist, the Court must remand to the Commissioner. See Highfill v. Bowen, 832 F.2d 112, 115 (8th Cir. 1987)(citing Kane v. Heckler, 731 F.2d 1216, 1219 (5th Cir. 1984) and Dorsey v. Heckler, 702 F.2d 597, 605 (5th Cir. 1983)). Remand is not appropriate, however, if it would merely delay benefits. Andler v. Chater, 100 F.3d 1389, 1394 (8th Cir. 1996)(citing Parsons v. Heckler, 739 F.2d 1334, 1341 (8th Cir. 1984)).

It is also important to consider the ALJ’s “‘duty to fully and fairly develop the record even if . . . the claimant is represented by counsel.’” Battles v. Sullivan, 36 F.3d 43, 44 (8th Cir. 1994)(quoting Boyd v. Sullivan, 960 F.2d 733, 736 (8th Cir. 1992)). This duty exists to insure “‘a just determination of disability Claimants, especially those not represented by counsel, can hardly be expected to be familiar with the intricacies of the Secretary's Guidelines.’” Clark v. Shalala, 28 F.3d 828, 830 (citing McCoy v. Schweiker, 683 F.2d 1138, 1147 (8th Cir. 1982) (en banc)). “[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. RELATIVE BURDENS OF PROOF

To be awarded disability benefits, a person must be legally disabled.

The Social Security Act defines “disability” as the inability to engage in any substantial gainful activity by reason of a 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. § 423(d)(1)(A)(1994).

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 work which exists in [significant numbers in] the national economy . . . either in the region in which such individual lives or in several regions of the country.” 42 U.S.C. § 423(d)(2)(1994). To simplify these definitions, Code drafters developed a sequential evaluation process to analyze disability claims:

- (1) Is the claimant currently engaged in substantial gainful activity? If "Yes," the claim is denied. If "No," go to Step 2.
- (2) Is the claimant's medical impairment or combination of impairments severe enough that it significantly limits physical or mental ability to do basic work activities? If "Yes," go to Step 3. If "No," the claim is denied.
- (3) Does the claimant have an impairment or combination of impairments which meets or equals the duration requirement and is contained in the listing of impairments? If "Yes," the claim is approved. If "No," go to Step 4.
- (4) Does the claimant have an impairment or combination of impairments which prevents past relevant work? If "Yes," go to Step 5. If "No," the claim is denied.
- (5) Can the claimant, given his residual functional

capacity and his age, education and past work experience perform any other work which exists in substantial numbers in the national economy? If "Yes," claim is denied. If "No," claim is approved.

See 20 C.F.R. § 404.1520(a)-(f)(1)(1994); Williams v. Sullivan, 960 F.2d 86, 88 (8th Cir. 1992).

The claimant bears the burden of making a prima facie case of disability, which includes proof of no substantial gainful activity under Step 1 and proof of severity under Step 2. See 20 C.F.R. § 404.1512(c)(1994); Williams, 960 F.2d at 88. At Step 3, it is the job of a medical or psychological consultant employed by the Social Security Administration to determine whether a claimant's impairments meet or equal a listing. 20 C.F.R. § 404.1526(b)(1994), see also Cruze, 85 F.3d at 1322. At Step 4, the claimant has the burden of proving that he cannot return to his past relevant work. See Baumgarten v. Chater, 75 F.3d 366, 368 (8th Cir. 1996)(citing Locher v. Sullivan, 968 F.2d 725, 727 (8th Cir. 1992)). If the claimant meets his burden of proof at Step 4, the burden shifts to the Commissioner to establish the claimant's ability to perform other work in Step 5. Id.

C. REVIEW OF THE ALJ'S DECISION

The ALJ found that Ordonez was able to perform her past relevant work, and that she retained the residual functional capacity to perform the jobs of child monitor, cook helper, and cafeteria attendant, "as she performed them" and did not require the performance of work functions precluded by her medically determinable impairments." (Tr. 25.). Ordonez raised several issues in support of her position that the ALJ erred in denying her claim for disability benefits.

First, she argued that there was no substantial evidence to support the ALJ's findings and conclusions as to what jobs constituted her past relevant work and the physical exertional demands of her past relevant work. Second, she argued there was no substantial

evidence to support the ALJ's findings and conclusion that she could perform any of her past relevant jobs, even if she had the physical functional capacity found by the ALJ. Third, she argued there was no substantial evidence to support the ALJ's findings and conclusion as to her remaining physical functional capacity. Fourth, she argued that there was no evidence that she retained a physical functional capacity to perform other jobs that exist in significant numbers in the national economy. Finally, in her brief, she argued that the ALJ erred in not finding and concluding that she was disabled according to the ALJ's own medical-vocational guidelines. During oral arguments before this Court the plaintiff argued that the ALJ also erred by not including in the hypothetical questions the restriction of plaintiff's limited ability to speak and understand English. She argued that this restriction was supported by substantial evidence in the record as a whole and that the ALJ ignored this obvious restriction.

1. PAST RELEVANT WORK AND ORDONEZ'S ABILITY TO PERFORM HER PAST RELEVANT WORK

The ALJ found that Ordonez is able to do her past relevant work as child monitor and cafeteria attendant. Ordonez argues that the record does not support a finding that baby sitting her grandchildren is equivalent to working as a child monitor. She contends that her work in a cafeteria was incorrectly labeled as cafeteria attendant. Ordonez also contends that she is unable to perform the exertional demands of cook helper.

The ALJ's decision states:

After examining the vocational evidence and listening to the testimony, the vocational expert stated that the claimant had worked in the relevant past as an animal skinner, an occupation requiring medium levels of exertion both as the job is usually performed in the economy and as the claimant performed. She also worked as a cafeteria attendant, an occupation requiring light levels of exertion both as the job is usually performed in the economy and as the claimant performed it. Lastly, Dr. Tucker stated that she had worked as a child monitor, and as a

cook helper, both occupations that require a “medium” level of exertion as the job is usually performed in the economy and a “light” level of exertion as the claimant performed them.

(Tr. 23-24.). The ALJ eliminated the past relevant job of animal skinner finding that job was “now precluded by her medically determinable impairments.” (Tr. 24.).

Ordonez argued that baby sitting her grandchildren should not be identified as being equivalent to working as a child monitor. Ordonez testified she baby sat for her daughter from approximately January 1997 until December 1997, a period of eleven months. (Tr. 43.). She stated that she did not feed the children or give the baths. (Tr. 44-45.). She testified that her daughter would make dinner and that all she had to do was sit with the children and talk, and be there when they were sleeping. (Tr. 45.). The ages of the children were three and four at the time she baby sat them. (Tr. 46.). Ordonez argued that even though her daughter paid her to watch the children, that this does not amount to substantial gainful activity and should not be considered past relevant work. (Docket Number 9, petitioner’s brief, pp. 9-10.).

In support of her position Ordonez refers the Court to 20 C.F.R. § 416.975. This section states in pertinent part:

[Social Security] determine[s] whether you have engaged in substantial gainful activity by applying three tests. If you have not engaged in substantial gainful activity under test one, then [Social Security] will consider tests two and three. The tests are as follows:

(1) Test One: You have engaged in substantial gainful activity if you render services that are significant to the operation of the business and receive a substantial income form the business.

(2) Test Two: You have engaged in substantial gainful activity if your work activity, in terms of factors such as hours, skills, energy output, efficiency, duties and responsibility is comparable to that of unimpaired individuals who are in you community who are in the same or similar businesses as their

means of livelihood.

(3) Test Three: You have engaged in substantial gainful activity if your work activity, although not comparable to that of unimpaired individual, is clearly worth the amount shown . . . when compared to the salary that an owner would pay to an employee to do the work you are doing.

Ordonez had costs, expenses, and/or other deductions taken from the amount her daughter was paying her and arrived at a taxable income of \$592.00. (Docket Number 9, petitioner's brief, p. 10.). Even if the Court counted her gross reported earnings of \$433.00 per month, for approximately eleven months, January thru November, for a total of \$4,763.00, this would not be enough income (less than \$6,000.00) to qualify as substantial gainful employment. 20 C.F.R. § 416.974. This is true, especially when the ALJ concluded that only the first four months of that period, January to April 26, 1997, involved "substantial gainful activity." (Tr. 24.).³ After reviewing the record this Court can not agree that watching two grandchildren, ages three and four, in the evening hours constitutes past relevant work, especially when the ALJ concluded that after April 26, 1997 Ordonez did not engage in, while doing the same babysitting, substantial gainful activity. (Tr. 24.). This Court finds that the ALJ erred in identifying "child monitor" as past relevant work.

As stated above, the vocational expert identified the job of cafeteria attendant as past

³ Remember, as set out on page 19 hereof the facts show that Ordonez babysat for her grandchildren from approximately January 1997 until December 1997, a period of eleven months. (Tr. 43.). The ALJ found that Ordonez had not engaged in substantial gainful activity since April 26, 1997. From January thru April 26, 1997 would be the first four months of the eleven month period mentioned above. Yet, the ALJ found that Ordonez's babysitting was equivalent to past relevant work which the ALJ defined as "child monitor." The Court is forced to concluded that the ALJ considered the four months prior to April 26, 1997, while Ordonez was watching her daughter's children, to be substantial gainful activity and not the last seven months of the period. As previously discussed on page 20 of this order, there are certain tests that Social Security applies to determine if a claimant has engaged in substantial gainful activity and Ordonez does not meet any of these tests.

relevant work. The vocational expert identified the exertional requirement of this job as “light.” Ordonez argued that the vocational expert was in error and that her past relevant work was closer to that of “dining room attendant.” Ordonez testified that she was required to clean floors in a large cafeteria. (Tr.52.). The jobs of cafeteria attendant does not contain in its description, cleaning floors. Ordonez argued that her past relevant work was dining room attendant and that this job required a physical exertional level of medium rather than light, even as she performed the job. The jobs of cafeteria attendant or dining room attendant, as Ordonez “performed the job,” required the ability to stand, walk and carry; and was never described as being performed while seated, for even part of an eight hour day. (Tr. 51-53.). This Court agrees with Ordonez that the exertional requirement of her past relevant work is more accurately described as a dining room attendant which requires a physical exertional level of medium.

Ordonez testified that her work in the kitchen, classified as “cook helper” by the ALJ, required her to “lift” and “peel about five watermelons” per day at approximately ten pounds each; clean tables and clean the floor which included sweeping and mopping, moving a bucket of water on rollers). (Tr. 22-23.). There is no substantial evidence in the record as a whole that she did this past relevant work in a seated position at any time. This Court agrees with Ordonez that the job of cook helper as she formerly performed it required exertional requirements beyond what she is capable of performing as of the date of the hearing held before the ALJ on December 9, 1998. (Tr.29.).

This Court finds that the ALJ erred in the classification of Ordonez’s past relevant work and in the physical exertional requirements that would be required of her to perform her past relevant work. There is not substantial evidence in the record on the whole to support the ALJ’s findings and conclusions that Ordonez’s past relevant work was in the light range. This Court finds that the ALJ erred and that Ordonez is unable to do any of her past relevant work.

The burden of proof now shifts to the Commissioner to prove, first of all, with medical evidence that Ordonez has a residual functional capacity to do other kinds of work,

and secondly that other work exists in the national economy that Ordonez is able to do in her impaired condition.

2. ORDONEZ'S RESIDUAL FUNCTIONAL CAPACITY FOUND BY THE ALJ.

In determining whether a claimant can return to her past relevant work, the Eight Circuit has held:

A claimant will be found to be not disabled if she retains the residual functional capacity to perform:

1. The actual functional demands and job duties of a particular past relevant job; or
2. The functional demands and job duties of the occupation as generally required by employers throughout the national economy.

Jones v. Chater, 86 F.3d 823, 826 (8th Cir. 1996) (citations omitted).

When determining a claimant's residual functional capacity, the Eighth Circuit has stated:

Residual functional capacity ("RFC") involves a medical evaluation of physical, mental, and other impairments. In addition to any formal medical evidence, the ALJ may consider other evidence of any limitations, which may include testimony by the claimant himself. The ALJ then evaluates whether the claimant still has the ability to perform his past work in view of the remaining functional capacity. This decision is often critical and every effort must be made to secure evidence that resolves the issue as clearly and explicitly as circumstances permit.

Martin v. Sullivan, 901 F.2d 650, 652 (8th Cir. 1990) (internal citations omitted).

The doctors at IBP saw Ordonez several times between December 1994 and April 1997 and the restrictions placed upon Ordonez were determined based upon the IBP doctor's who physically examined Ordonez and frequently met with Ordonez. Dr. Dougherty, performed shoulder surgery on Ordonez and gave this opinion in July 1997. He had last physically examined Ordonez in March 1996. (Tr. 219.). The ALJ's decision indicates that he did not rely on Dr. Dougherty's comment about restricting Ordonez to lifting not more than 10 pounds frequently nor did he rely heavily on the doctors from IBP. The ALJ stated she gave "significant weight" to a nonexamining medical consultant of the disability determination services. The ALJ stated:

[R]egarding the claimant's functional limitations and capabilities is well supported by the medical evidence of record and is consistent with the objective findings and opinions of other treating and examining health professionals who are acceptable medical sources under the regulations set forth in the Social Security Act. The undersigned accordingly assigns Dr. Hunter's opinion great weight and determines this opinion to constitute the claimant's exertional residual functional capacity.

(Tr. 23.).

Ordonez argued that she could not perform her past relevant work as she had performed it and that the ALJ's RFC assessment does not match the requirements of her previous performed relevant jobs. Specifically, she contends that her past relevant jobs required her to stand for more than six hours per day, that she would be required to reach over her head and that she have the ability to frequently lift ten pounds or more. Although Ordonez disagrees that her babysitting "job" can be considered past relevant work, she also argues this type of job would require her to reach above her head. Ordonez argued that the ALJ found that, "She should perform no overhead reaching with the right shoulder." (Tr. 12.). The ALJ's RFC assessment capped Ordonez's lifting abilities at twenty pounds occasionally.

Ordonez further argues that the ALJ should have given substantial weight to the IBP doctors, or the specialist orthopedic surgeon, Dr. Dougherty, who treated her and not to a nonexamining and nontreating doctor, Dr. Hunter. Ordonez argues that the code demands that certain factors be considered in determining how much weight to give a medical opinion. These factors include whether the evidence is inconsistent with other evidence or is internally inconsistent and how much knowledge the source has about the claimant's impairments, and how much support there is for the opinion. 20 C.F.R. § 404.1527 (c), (d).

Ordonez was examined by Dr. Dougherty, a specialist and orthopedic surgeon, in March 1996 approximately one year prior to when he gave his opinion in July 1997. There is no evidence that Ordonez was somehow healed or improved since he examined her. The ALJ determined Ordonez could perform light work but failed to correctly identify what her past relevant employment consisted of and failed to correctly identify the physical exertional requirements of her past relevant work.

In spite of her multiple impairments the ALJ determined that Ordonez could perform more than sedentary work. In the record is radiological evidence of Ordonez's impairments, and there is objective evidence of a right wrist ganglion cyst. After Ordonez had been hurt at IBP, the IBP doctors began to use the term "symptom magnification." (Tr. 201). It was only after Ordonez began to seek medical assistance for her injuries and pains that the doctors at IBP began to conclude that her pain and symptoms were "not work related" and also stated to Ordonez that she would have to see her family doctor to take care of her at her own expense. (Tr. 200.). The record shows that IBP became the adversary in a worker's compensation case filed by Ordonez against IBP and that this would indicate that the weight given to the IBP doctors would be questionable considering the "symptom magnification" comments began soon after Ordonez seemed to be experiencing injuries caused by her work at IBP. In an attempt to discredit Ordonez as she prepared for her worker's compensation case, the IBP doctors emphasized suspicion that Ordonez was just

pretending not to be able to speak English and therefore she might also be pretending to have physical pain. This, of course, is not consistent with their later conclusions that what she was experiencing was not work related.

3. THE GRIDS AND THE LIMITED ABILITY TO SPEAK AND UNDERSTAND ENGLISH.

The ALJ did not include the restriction of a limited ability to speak English. Ordonez argues that, because of her age and inability to speak and understand the English language that the application of the grids would support an award of benefits. Ordonez is incorrect in her claims that she should get relief by use of the grids at step four of the evaluation process. The grids must be considered by the ALJ only if the ALJ determines that Ordonez can not do past relevant work and continues to step five of the evaluation process:

The following rules reflect the major functional and vocational patterns which are encountered in cases which cannot be evaluated on medical considerations alone, where an individual with a severe medically determinable physical or mental impairment(s) is not engaging in substantial gainful activity and the individual's impairment(s) prevents the performance of his or her vocationally relevant past work.

20 C.F.R. Pt. 404, Subpt. P, App. 2.

As mentioned, Ordonez argued that the ALJ failed to consider her inability to speak and understand the English language and that the ALJ erred in failing to include this limitation in the hypothetical questions presented to the vocational expert. The Court notes that neither the ALJ nor the attorney for Ordonez included in any of the hypothetical questions posed to the vocational expert the impact of a limited ability to speak and understand English. Ordonez contends this limitation would also have caused the ALJ to reach a different conclusion as to her ability to do other work in the national economy. This argument was raised during oral arguments before this Court but not in the briefs

submitted to this Court.

It is difficult for this Court to accept the argument that the ALJ's hypothetical questions were flawed, because there was substantial evidence in the record as a whole, to support adding the limitation of Ordonez's ability to speak and understand English when Ordonez's own counsel failed to argue this limitation before the ALJ. An ALJ only has to consider a claimant's limited ability to speak and understand English if the ALJ determines that the claimant can not perform previous relevant work. As previously mentioned, the ALJ never got to step five in the disability determination process because the ALJ determined that Ordonez could return to past relevant work. Although there are some references in the transcript indicating Ordonez's limited ability with the English language the vocational expert was never given the opportunity to consider this limitation.

This Court finds that the conclusion of the ALJ, that Ordonez could return to past relevant work to be in error, therefore, Ordonez's ability to speak and understand English may be relevant to her ability to perform work in the national economy because it pertains to her "education," one of the factors mentioned in the fifth step of the benefits granting process. Garcia v. Secretary of Health and Human Servs., 46 F.3d 552, 555-56 (6th Cir. 1995)(holding that the ability to speak English is not a factor for consideration in the fourth step of the benefits process because, unlike the fifth step where "education" is specifically mentioned, no such requirement exists at the fourth step). Ordonez's attorney argues that this limitation should also be considered when determining past relevant work. This argument is incorrect. As stated in Garcia:

In interpreting the disability definition, the Secretary has provided that vocational factors, such as education, will not be considered at step four. (citations omitted) The inability to communicate in English is an element of the vocational factor of education.

...

Congress clearly intended the Secretary to consider education when determining whether the claimant can perform other substantial gainful work which exists in the national economy, but not when considering the claimant's ability to do his previous work.

Id. at 554-55.

“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)). This is because, “A vocational expert cannot be assumed to remember all of a claimant's impairments from the record.” Newton v. Chater, 92 F.3d 688, 694 (8th Cir. 1996)(citing Whitmore v. Bowen, 785 F.2d 262, 263-64 (8th Cir. 1986)). 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 (citing 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 320, 1323 (8th Cir. 1991)). If the ALJ's hypothetical is different, but not materially different from the restrictions described by the doctor, there is no error. See, Miller v. Shalala, 8 F.3d 611, 614 (8th Cir. 1993).

IV. CONCLUSION

The Court has carefully considered the arguments of the parties and has closely examined the record and is persuaded that there is not substantial evidence in the record as a whole to support the ALJ decision. The Court is persuaded that the ALJ erred in finding that Ordonez could return to her past relevant work. Further, the ALJ erred in finding that Ordonez's residual functional capacity was such that she could meet the exertional demand's of her "past relevant" work.

As set out in this Order, the ALJ made some errors in deciding this case. Not the least of which is why the period from January 1997 to April 26, 1997 is considered by the ALJ to be a period of "substantial gainful activity" and the period after April 26, 1997 to December 1997, when the babysitting ended is not so considered. The ALJ determined, incorrectly, that Ordonez could return to past relevant work and therefore never reached step five. The Court is persuaded that the best that can be done for Ordonez is to remand this case for correction of the errors committed by the ALJ and direct the ALJ to get to step five. The Court is persuaded it is appropriate to remand this case pursuant to the fourth sentence of 42 U.S.C. § 405(g). The Court is aware that there has been a long delay and that this delay is not fair to Ordonez. The Court is therefore persuaded that this matter should be handled on an expedited basis and directs that this matter shall be considered by the ALJ and returned to this Court as ordered below. Accordingly, judgment shall be entered remanding Ordonez's application for further proceedings consistent with this Order.

Upon the foregoing,

IT IS THEREFORE HEREBY ORDERED that Ordonez's application is remanded for correction of errors identified above.

IT IS FURTHER ORDERED that any decision made by the ALJ and/or appellate review by the Commissioner's staff shall be completed no later than sixty (60) days from the date of this Order, and at that time, or prior to that time, the decision of the ALJ shall be filed in this Court. As a practical matter this remand, and the Commissioner's right to

consider it will end after the said sixty (60) days and thereafter this Court will have jurisdiction to further act.

IT IS FURTHER ORDERED that unless such a new ruling is received by this Court on or before November 12, 2001, absent a showing that the delay was caused by Ordonez, this Court will, as requested by Ordonez, reverse this case and award the benefits for which Ordonez has prayed.

DATED THIS 13th DAY OF SEPTEMBER, 2001.

Donald E. O'Brien, Senior Judge
UNITED STATES DISTRICT COURT