

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

JUDITH A. MURPHY,

Plaintiff,

v.

**COMMISSIONER OF SOCIAL
SECURITY ADMINISTRATION,**

Defendant.

CIVIL ACTION

No. 02-2489-CM

MEMORANDUM AND ORDER

This is an action to review the final decision of the defendant Commissioner of Social Security (Commissioner) denying plaintiff's application for disability insurance benefits under Title II of the Social Security Act. When the case became ripe for decision upon the filing of the parties' briefs pursuant to D. Kan. Rule 83.7, the district court referred the case to the magistrate judge for a report and recommendation. On August 29, 2003, the magistrate judge filed his proposed findings of fact and conclusions of law recommending that the district court remand the decision, which had denied the claimant's application, and proceed directly to step five of the sequential five-step evaluation process. The case now comes before the district court upon the defendant's timely filed objections to the magistrate judge's report and recommendation. (Doc. 18). Plaintiff has filed nothing in response to the defendant's objections.

I. Background

The facts and procedural history of this case are accurately set forth in the magistrate's report and recommendation. The court will therefore restate only those facts relevant to this opinion.

Plaintiff is 62 years of age and has worked in the hair care industry, working exclusively out of her home since 1984. Plaintiff alleges she became disabled, unable to work, and eligible for disability insurance benefits on March 1, 1999, due to spinal stenosis at L3-4 and L4-5, degenerative disc disease at C6-7, left knee arthritis, and hemorrhoids.

In his decision of April 11, 2002, the Administrative Law Judge (ALJ) concluded that plaintiff's allegations regarding her limitations were not totally credible, plaintiff could perform her past relevant work and, as such, plaintiff was not disabled as defined under the Social Security Act.

With respect to plaintiff's credibility, the ALJ found that the medical evidence demonstrated that plaintiff's complaints were exaggerated, at least to the extent these problems prevented her from performing light work prior to her date last insured of March 31, 1999. (Tr. 17-18). The ALJ also questioned plaintiff's credibility because "[t]here is no evidence of record that claimant suffered any significant adverse side effects of medication prior to her date last insured" and based on plaintiff's "rather inconsistent work history with lower income levels and many years with little or no reported earnings, suggesting that she is not highly motivated for work." (Tr. 18). Plaintiff contends that the ALJ erred in finding her testimony not totally credible, arguing that the ALJ did not apply the correct legal standard to evaluate her testimony.

The magistrate determined that the three reasons cited in the ALJ's decision explaining his credibility determination are not legitimate reasons for finding plaintiff's allegations not totally credible. The magistrate further concluded: "Because the ALJ's credibility determination was erroneous, the Court has no choice but to find Plaintiff's testimony credible." (Report and Recommendation 13).

II. Standard of Review

“De novo review is statutorily and constitutionally required when written objections to a magistrate’s report are timely filed with the district court.” *Summers v. State of Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991) (citations omitted). Rule 72(b) of the Federal Rules of Civil Procedure require a district judge to “make a de novo determination upon the record . . . of any portion of the magistrate judge’s disposition to which specific written objection has been made in accordance with this rule.” Those parts of the report and recommendation to which there has been no objection are taken as true and judged on the applicable law. *See Campbell v. United States District Court for the N. Dist. of California*, 501 F.2d 196, 206 (9th Cir. 1974). The district court has considerable judicial discretion in choosing what reliance to place on the magistrate judge’s findings and recommendations. *See Andrews v. Deland*, 943 F.2d 1162, 1170 (10th Cir. 1991) (citing *United States v. Raddatz*, 447 U.S. 667 (1980)). When review is de novo, the district court is “free to follow . . . or wholly . . . ignore” the magistrate judge’s recommendation, but it “should make an independent determination of the issues” without giving “any special weight to the prior” recommendation. *Andrews*, 943 F.2d at 1170 (quoting *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1464 (10th Cir. 1988)). In short, the district court may accept, reject, or modify the magistrate judge’s findings, or recommit the matter to the magistrate with instructions. *See 28 U.S.C. § 636(b)(1)(C)* (1994).

III. Discussion

A. Credibility Determination

“Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence.” *McGoffin v. Barnhart*, 288 F.3d 1248,

1254 (10th Cir. 2002) (quoting *Kepler v. Chater*, 68 F.3d 387, 391 (10th Cir. 1995)). The court therefore examines whether there exists substantial evidence in the record to support the ALJ's credibility determination. Great deference should be given to the ALJ's conclusion as to credibility. *Campbell v. Bowen*, 822 F.2d 1518, 1522 (10th Cir. 1987).

The ALJ first stated that the medical evidence demonstrated that plaintiff's complaints were exaggerated. As noted by the ALJ, magnetic resonance imaging showed stenosis at L3-4 and L4-5 with some mild disc bulging in the lumbar spine (Tr. 17, 118); epidural injections provided plaintiff with some relief of her pain (Tr. 18); and x-rays showed some degenerative disc disease at C6-7 and osteoarthritis of the knee (Tr. 18). In his decision, the ALJ reported that plaintiff testified that she must use a cane when walking, she cannot stand more than five to ten minutes, she cannot walk two hundred feet, and she cannot lift more than a gallon of milk. (Tr. 17). In addition, she testified that she has problems with her hands and arms, alleging that they "go to sleep." (Tr. 17). The ALJ also noted that plaintiff described extensive treatment for her pain, including epidural injections and back surgery, but she testified that her pain continues. (Tr. 17).

Plaintiff maintains that the medical evidence supports her allegations of disabling symptoms. Yet, most of the treatment noted by plaintiff does not pertain to the relevant period. Plaintiff alleged that she became disabled on March 1, 1999, and she was last insured on March 31, 1999. On June 7, 1999, plaintiff underwent back surgery, a lumbar decompression bone graft and posterior lateral fusion. Although plaintiff points out that Dr. Hess found in April 1999 that she was a good surgical candidate, this surgery took place nearly three months after the date she was last insured. Moreover, as the ALJ noted, follow-up treatment notes indicated that plaintiff's surgery was a success, with significant improvement in back and leg

pain. Indeed, just six months after her surgery, plaintiff's doctor noted that plaintiff would be able to return to light duty work within a few months (Tr. 155). The court concludes that there is evidence in the record to support the ALJ's finding regarding a lack of objective medical evidence to support plaintiff's allegations of pain.

However, direct medical evidence of the cause and effect relationship between an impairment and the degree of claimant's subjective complaints is not required. *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987). The absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to a claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot justify disregarding those allegations. Thus, when determining the credibility of pain testimony, the ALJ should consider the levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence. *Thompson v. Sullivan*, 987 F.2d 1482, 1489 (10th Cir. 1993).

Accordingly, in addition to his statement that he found the medical evidence demonstrated plaintiff's complaints to be exaggerated, the ALJ supported his credibility determination by stating that "[t]here is no evidence of record that claimant suffered any significant adverse side effects of medication prior to her date last insured." (Tr. 18) As pointed out in the report and recommendation, the ALJ did not provide any further explanation of why or how this caused him to find her allegations not totally credible. The court therefore disregards this statement as a basis for his credibility determination.

The ALJ also noted that plaintiff has a “rather inconsistent work history with lower income levels and many years with little or no reported earnings, suggesting that she is not highly motivated for work.” (Tr. 18). Plaintiff contends that this is an improper basis for finding her testimony not credible because the ALJ incorrectly assumed her limited earnings were due to her lack of motivation to work, without making any effort to determine why they were in fact low. Plaintiff argues that her inconsistent history of low reported earnings was due to the limited number of hairdressing clients she could service in her home because she only has one chair, one basin and two dryers for client use. However, as plaintiff concedes, her low earnings “could be interpreted as a lack of motivation to work,” but urges the court to consider that “it also could very easily be interpreted as being caused by the limited number of clients [she] has been able to service in her home.” (Plaintiff’s Brief at 14).

In its report and recommendation, the magistrate determined that there are other reasonable interpretations of why plaintiff has a work history of low reported earnings and that, as a result, the ALJ improperly relied upon this basis. Upon review of plaintiff’s work history, the court notes that plaintiff’s reported earnings are indeed low in some years, but there also are years in which plaintiff reported *no* earnings. While plaintiff’s rationale of a limited client base might explain years with limited earnings, it certainly cannot account for those years in which plaintiff reported no earnings. The court concludes that the ALJ’s finding, that plaintiff’s work history suggests plaintiff is not highly motivated for work, is supported by substantial evidence in the record. Moreover, a prior work history characterized by fairly low earnings and significant breaks in employment can be considered by an ALJ in determining whether a claimant’s subjective complaints of pain are credible. *See Schaal v. Apfel*, 134 F.3d 496, 502 (2d Cir. 1998); *Comstock v. Chater*, 91 F.3d 1143, 1147 (8th Cir. 1996); *Archer v. Apfel*, 66 Fed. Appx. 121, 122 (9th

Cir. 2003). Accordingly, the ALJ properly relied on this finding as a basis for determining that plaintiff was not credible.

The ALJ also noted that plaintiff continued to work as a hairdresser after the date of plaintiff's alleged disability. The ALJ correctly determined that this work activity did not constitute substantial gainful activity. However, in making a credibility determination, the ALJ is entitled to consider the extent of a claimant's daily activities. *Kepler v. Chater*, 68 F.3d 387, 391 (10th Cir. 1995). Accordingly, the ALJ properly considered the fact that plaintiff continued to perform hair dressing functions as an example of plaintiff's daily activities in which plaintiff was able to engage after the date plaintiff alleged she became disabled.

In sum, the ALJ's findings regarding the lack of objective medical evidence, plaintiff's prior work history of low reported earnings, and plaintiff's daily activities post-alleged disability are supported by substantial evidence on the record as a whole. Moreover, the ALJ properly relied on these factors in determining that plaintiff's subjective complaints of pain were not credible. The court affirms the ALJ's credibility determination.

B. Past Relevant Work

Based on the evidence, the ALJ determined that plaintiff retained the residual functional capacity to perform light work, including occasionally lifting up to 20 pounds, frequently lifting up to ten pounds, standing and/or walking for at least six hours of an eight-hour workday, sitting for at least six hours in an eight-hour workday, performing gross and fine manipulation, and bending and pushing/pulling without limitation. (Tr. 18). The ALJ found that plaintiff would be able to perform her past relevant work as a cosmetologist/hairdresser.

Plaintiff argues that the vocational expert testified that she would not be able to perform her past relevant work. However, upon review of the transcript in the underlying proceeding, the court points out that the vocational expert testified that plaintiff would not be able to perform her past relevant work *if* all of her allegations were credible. Specifically, the questioning of the vocational expert went as follows:

ALJ: Now if I should find that the Claimant's impairments are the way she is described in her testimony here today, do you want to state or can you express an opinion as to how such impairments would impact her ability to return to work as a cosmetologist?

VE: She would not be able to return to work as a cosmetologist.

(Tr. 292). Accordingly, the vocational expert's testimony was in response to a hypothetical question that included all of plaintiff's alleged limitations. Such testimony is not evidence of plaintiff's alleged inability to work in light of the ALJ's credibility findings.

The vocational expert testified that plaintiff's past work as a cosmetologist/hairdresser was light work. (Tr. 292). In his decision, the ALJ determined that plaintiff retained the residual functional capacity for light work. Thus, the ALJ properly found that plaintiff was able to perform her past relevant work.

Plaintiff also argues that an application of the Medical Vocational Guidelines would direct a finding of "disabled" in her case. However, the Medical Vocational Guidelines are not applicable in these circumstances. Pursuant to step four in the five-step process for determining whether a claimant is disabled, the ALJ must decide whether the claimant's impairments prevent her from performing her past relevant work. If a claimant can return to her past relevant work, the claim is denied at this step. 20 C.F.R. § 404.1520. Only if a claimant establishes that she is not able to return to her past relevant work, does the burden of proof shift to the Commissioner to show that the claimant can perform work existing in significant numbers in the national economy.

In this case, plaintiff did not meet her burden of proving the existence of an impairment that precluded her from performing her past work. Accordingly, the ALJ properly determined that plaintiff was not under a disability.

IT IS THEREFORE ORDERED that plaintiff's Motions for Judgment (Docs. 8 & 12) are denied.

Dated this 9 day of March 2004, at Kansas City, Kansas.

s/ Carlos Murguia _____
CARLOS MURGUIA
United States District Judge

