

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

GWENDOLYN COBBS,

Plaintiff,

vs.

**CIVIL ACTION
No. 03-2203-GTV**

**JO ANNE B. BARNHART,
Commissioner of Social Security,**

Defendant.

MEMORANDUM AND ORDER

Plaintiff Gwendolyn Cobbs brings this action pursuant to 42 U.S.C. §§ 405(g) and 1383(c) and D. Kan. Rule 83.7, seeking judicial review of the decision of the Commissioner of Social Security (“Commissioner”) to deny her applications for disability insurance benefits and supplemental security income benefits under Titles II and XVI of the Social Security Act. Plaintiff claims she is disabled due to a right ankle injury that she suffered from a motor vehicle accident. She has a high school education, and her past work experience includes employment as a retail cashier, a bank teller, an assembly worker, a secretary, a file clerk, and a customer service representative. For the reasons set forth below, the court affirms the Commissioner’s decision.

I. Procedural Background

On October 11, 2000, Plaintiff filed applications for disability benefits, claiming disability since September 12, 1998. The applications were denied both initially and upon reconsideration. At Plaintiff’s request, an administrative law judge (“ALJ”) held a hearing on October 20, 2002, at

which Plaintiff and her counsel were present. On January 6, 2003, the ALJ rendered a decision in which he determined that Plaintiff was not under a “disability” as defined by the Social Security Act. After the ALJ’s unfavorable decision, Plaintiff requested review by the Appeals Council. The Appeals Council denied Plaintiff’s request for review on February 24, 2003, rendering the ALJ’s decision the final decision of the Commissioner.

II. Standard of Review

The Commissioner’s findings are binding on this court if supported by substantial evidence. 42 U.S.C. § 405(g); Dixon v. Heckler, 811 F.2d 506, 508 (10th Cir. 1987). The court’s review is limited to determining whether the Commissioner’s decision is supported by substantial evidence in the record and whether the Commissioner properly applied relevant legal standards. Marshall v. Chater, 75 F.3d 1421, 1425 (10th Cir. 1996) (citing Castellano v. Sec’y of Health & Human Servs., 26 F.3d 1027, 1028 (10th Cir. 1994)). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Castellano, 26 F.3d at 1028 (citations and internal quotation marks omitted). The court may not reweigh the evidence or substitute its judgment for that of the ALJ or the Commissioner. Hamilton v. Sec’y of Health & Human Servs., 961 F.2d 1495, 1500 (10th Cir. 1992).

III. The ALJ’s Findings

In his January 6, 2003 decision, the ALJ made the following findings:

1. The claimant met the earnings requirements of the Act on September 12, 1998 and continued to meet them through the date of this decision.
2. The claimant has not engaged in substantial gainful activity since September 12, 1998.
3. The medical evidence establishes that the claimant has the following severe

impairments: is status post an external fixation of the right tibia and open reduction and internal fixation of the distal tibial pilon fracture, has some degenerative changes in the right ankle joint and is status post a laparoscopic cholecystectomy. Nevertheless, she does not have an impairment or combination of impairments listed in, or medically equal to one listed in 20 C.F.R. Part 404, Appendix 1, Subpart P.

4. The claimant's testimony is not found credible when considered in light of the medical signs and findings, history of medical treatment, reports of treating and examining physicians and the inconsistencies in the claimant's testimony, all of which is discussed more fully in the Rationale section of this decision.
5. The claimant had [sic] the residual functional capacity to perform work-related activities except for lifting or carrying more than ten pounds maximum occasionally and five pounds frequently and would require a sit/stand option in competitive employment (20 C.F.R. §§ 404.1545 and 416.945).
6. The claimant is unable to perform her past relevant work.
7. The claimant is a younger individual (20 C.F.R. §§ 404.1563 and 416.963) and has a high school education (20 C.F.R. §§ 404.1564 and 416.964).
8. The claimant has no acquired work skills that are transferable to semi-skilled or skilled work functions of other work within her residual functional capacity (20 C.F.R. §§ 404.1568 and 416.968).
9. After considering the claimant's above described residual functional capacity for a range of work and age, education and past relevant work, the undersigned Administrative Law Judge is persuaded that the claimant would be able to make a vocational adjustment to work which exists in significant numbers in the local and national economies.
10. The claimant has not been under a "disability" as defined in the Social Security Act, as amended, since September 12, 1998 and through the date of this decision (20 C.F.R. §§ 404.1520(f) and 416.920(f)).

IV. Discussion of Plaintiff's Claims

"The Secretary has established a five-step sequential evaluation process for determining whether a claimant is disabled." Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988). "If a determination can be made at any of the steps that a claimant is or is not disabled, evaluation under a subsequent step is not necessary." Id. Those five steps are as follows:

- (1) A person who is working is not disabled.
- (2) A person who does not have an impairment or combination of impairments severe enough to limit the ability to do basic work activities is not disabled.
- (3) A person whose impairment meets or equals one of the impairments listed in the regulations is conclusively presumed to be disabled.
- (4) A person who is able to perform work she has done in the past is not disabled.
- (5) A person whose impairment precludes performance of past work is disabled unless the [Commissioner] demonstrates that the person can perform other work. Factors to be considered are age, education, past work experience, and residual functional capacity.

Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988) (citing 20 C.F.R. § 416.920(a)-(f)) (internal citations omitted).

Plaintiff alleges that the ALJ committed errors at steps four and five. Specifically, she asserts that: (1) the ALJ failed to include her non-exertional impairments in determining her residual functional capacity (“RFC”); (2) the ALJ did not satisfy his burden of demonstrating that Plaintiff could perform other jobs in the national economy; and (3) the ALJ did not resolve the conflict between the vocational expert’s testimony and the Dictionary of Occupational Titles. The court will address each of these arguments in turn.

Claim 1: The ALJ Ignored Plaintiff’s Non-Exertional Impairments

Plaintiff first maintains that the ALJ ignored her non-exertional impairments in assessing her RFC at step four of the evaluation process. In particular, she contends that the ALJ failed to consider that the disabling pain in her ankle impairs her concentration, interferes with her ability to sleep at night, causes her fatigue, and requires her to lie down and elevate her leg for two to three hours in the daytime. Plaintiff also directs the court to her testimony at the hearing in which she stated that during a five-day workweek she would be incapacitated because of the ankle pain

for two days. In response, the Commissioner asserts that the only evidence supporting Plaintiff's allegations of pain, fatigue, and the need to lie down during the day is Plaintiff's own testimony. The Commissioner contends that the ALJ did not find these allegations credible, and thus, the ALJ properly omitted them from Plaintiff's RFC. While Plaintiff does not specifically challenge the ALJ's credibility determination, the Commissioner correctly points out that this is reason for the ALJ's failure to include Plaintiff's allegations of pain in her RFC. The court will therefore evaluate whether the ALJ's credibility determination is supported by substantial evidence.

Because the ALJ is "optimally positioned to observe and assess witness credibility," Adams v. Chater, 93 F.3d 712, 715 (10th Cir. 1996) (quoting Casias v. Sec'y of Health & Human Servs., 933 F.2d 799, 801 (10th Cir. 1991)), the court "may overturn such a credibility determination only when there is a conspicuous absence of credible evidence to support it," Patterson v. Apfel, 62 F. Supp. 2d 1212, 1217 (D. Kan. 1999) (citing Trimiar v. Sullivan, 966 F.2d 1326, 1329 (10th Cir. 1992)). Credibility determinations made by the ALJ are generally treated as binding upon review. See Talley v. Sullivan, 908 F.2d 585, 587 (10th Cir. 1990).

When evaluating the credibility of a claimant's complaints of disabling pain, the ALJ should ask the following questions: "(1) whether [the] [c]laimant established a pain-producing impairment by objective medical evidence; (2) if so, whether there is a "loose nexus" between the proven impairment and [the] [c]laimant's subjective allegations of pain; and (3) if so, whether, considering all the evidence, both objective and subjective, [the] [c]laimant's pain is in fact disabling." Musgrave v. Sullivan, 966 F.2d 1371, 1376 (10th Cir. 1992) (citing Luna v. Bowen, 834 F.2d 161, 163-64 (10th Cir. 1987)). In deciding whether the claimant's pain is disabling, the ALJ should

consider the following factors:

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.

Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir.1988). Overall, “an ALJ’s findings as to credibility should be closely and affirmatively linked to substantial evidence and not just a conclusion in the guise of findings.” Id. at 1133.

In his decision, the ALJ concluded that Plaintiff “exaggerated her symptoms,” and therefore, he could not find her allegation of total disability credible. The ALJ based his determination on Plaintiff’s medical history, work history, and the factors cited above in Huston. After reviewing the record and the ALJ’s decision, the court concludes that the ALJ’s credibility determination is supported by substantial evidence. The ALJ did not err by failing to include Plaintiff’s alleged non-exertional impairments in her RFC.

i. Plaintiff’s Medical History

The medical record before the ALJ indicates that between September 12, 1998, the date of Plaintiff’s accident, and October 1, 2002, one treating physician, one consultative physician, and one psychologist examined Plaintiff.

On September 12, 1998, the day of Plaintiff’s motor vehicle accident, Dr. Thomas Samuelson, M.D., an orthopaedist at the Kansas City Bone and Joint Clinic, performed a closed reduction on Plaintiff’s right tibia. Two days later, Dr. Samuelson performed a second surgery on

Plaintiff to place an external fixer on her right tibia. On September 18, Dr. Samuelson discharged Plaintiff, noting that a physical therapist had instructed her on gait training and weightbearing and that “her wounds were healing well.”

On September 23, Plaintiff visited Dr. Samuelson for an evaluation. Dr. Samuelson noted some mild swelling in her ankle, some shortening of her right ankle joint, and that Plaintiff complained of pain. He recommended an additional surgery to improve the overall alignment in her fibula. Plaintiff underwent the advised surgery on September 28.

Plaintiff returned for a follow-up examination on October 7, 1998. Dr. Samuelson prescribed her Tylenol #3 for pain relief because she continued to experience pain and discomfort. On October 21, Dr. Samuelson again evaluated Plaintiff and opined that her fracture appeared stable and that she had no significant swelling. Plaintiff reported that she was “feeling much better.” On November 11, Dr. Samuelson reported that Plaintiff had some mild swelling in her ankle and instructed her to begin working on ankle motion.

On December 2, 1998, Dr. Samuelson evaluated Plaintiff and noted that no significant swelling appeared in her right ankle and that she could progress to partial weightbearing. Then on December 30, Plaintiff returned to see Dr. Samuelson. He observed that her fracture was healing, she had no complaints, and that she could increase her weightbearing to a tolerable level.

On January 27, 1999, Dr. Samuelson reported that Plaintiff could progress to full weightbearing and that she had no pain. He further noted that she was walking without crutches. Plaintiff reported some soreness in her ankle on February 15. Dr. Samuelson stated that the soreness appeared near the pins in her ankle and prescribed her Alleve as needed. X-rays taken on

March 15 indicated that Plaintiff's ankle healed well. On that day, Plaintiff did not have any complaints and Dr. Samuelson placed her in a cast boot. On April 5, Dr. Samuelson mentioned that Plaintiff had a "slight antalgic gait" and directed her to continue working on strengthening exercises for her ankle.

On June 3, 1999, Plaintiff complained of "persisting soreness" in her ankle. X-rays indicated a slight narrowing at her tibiotalar joint, and Dr. Samuelson noted that he would continue to look at this narrowing to make sure no progressive arthritis developed. Overall, he observed that Plaintiff was walking without much of a limp and that the x-rays showed that the fractures were healing well. He scheduled Plaintiff for surgery on June 15 in order to remove the four screws in her ankle. The screws were no longer serving their purpose and Plaintiff wanted them removed because they were bothering her. On June 15, Dr. Samuelson performed the surgery as scheduled.

Plaintiff returned to Dr. Samuelson for an evaluation on July 1, 1999. Dr. Samuelson observed that she had only slight discomfort in her ankle, that the swelling in her ankle was minimal, and that her ankle should feel better as the skin matured. Equally important, he observed that Plaintiff could "resume normal activities."

On September 30, 1999, Plaintiff complained that her right ankle was sore. Dr. Samuelson observed that she had slight swelling in her ankle and that the area Plaintiff complained of soreness was different from the area that she complained of before her screws were removed. He also mentioned that Plaintiff was not taking any medication for her ankle. X-rays revealed degenerative changes in her ankle joint that had progressed from previous x-rays. Dr. Samuelson reported that her fracture was "well healed" and that he would continue to monitor the degenerative changes.

He further stated that “if the arthritis progresses more and begins to cause her pain, something more aggressive may need to be done.”

Dr. Kamran Riaz performed a consultative examination on December 2, 2000. Dr. Riaz observed that: Plaintiff walked with a mild limp, but she did not use an assistive device; Plaintiff complained that the pain in her right ankle caused her to awaken three times per night, worsened with changes in the weather; and persisted if she walked or remained standing for a long time; and Plaintiff used Ibuprofen and took hot showers to relieve the pain. Dr. Riaz also reported that Plaintiff did not experience difficulty getting on or off the examining table, or squatting and arising from the sitting position. She did report, however, that Plaintiff experienced “severe” difficulty with heel and toe walking.

Dr. Riaz believed that Plaintiff suffered from “traumatic arthralgias.”¹ She concluded that:

[Plaintiff maintains a] limited range of motion without inflammatory changes, erythema, or hyperthermia. Gait favors the right and station is stable. No assistive device is mandatory. Despite surgery, she persists with pain. No obvious joint instability is noted. The patient, as well, has a history of carpal tunnel and is status post surgical repair without residual.

Finally, Plaintiff’s medical record reveals that on October 1, 2002, Dr. Elizabeth Campbell performed a psychological evaluation on Plaintiff. During the examination, Dr. Campbell observed that Plaintiff was in “great pain,” “walked quite haltingly,” and experienced difficulty in sitting for the tests.

In his decision, the ALJ reviewed the medical evidence summarized above and observed

¹ Arthralgia is defined as pain in the joint that is not inflammatory in character. Stedman’s Medical Dictionary 149 (27th ed. 2000).

that:

no treating or examining medical professional has indicated that the claimant's right ankle pain or swelling would restrict her to the degree alleged or that she would need to elevate her ankle for a couple of hours a day, sleep two to two and a half hours a day, lie down to relieve the pressure on her ankle or lie down two days a week in bed because of the residuals from her right ankle injury.

The ALJ focused on the progress notes Dr. Samuelson used to track Plaintiff's ankle fracture. He noted Dr. Samuelson's findings that Plaintiff's ankle was well healed, she could put full weight on the ankle, and that she could return to normal activities as of July 1, 1999. The ALJ further pointed out that Plaintiff had not had any surgery on her ankle since June 15, 1999, and had received minimal treatment on her ankle after that time. In fact, Plaintiff did not return to Dr. Samuelson for treatment after September 30, 1999. On her September 30 visit, Plaintiff complained of soreness. X-rays revealed degenerative changes in her ankle and the possibility of progressing arthritis. Although this provides some evidence of that Plaintiff's condition was worsening, Plaintiff never visited Dr. Samuelson again to receive treatment. The medical record does not indicate that she received any other medical attention until the December 2, 2000 consultative examination. The court concludes that the ALJ properly considered Plaintiff's failure to seek treatment and the lack of a medical opinion suggesting that she needs to restrict her daily activities as undermining her claim of disability.

ii. Plaintiff's Work History

The ALJ also found that Plaintiff's work activity after her alleged disability date, although not rising to the level of substantial gainful activity, constituted evidence of her ability to work and conflicted with her claim of total disability. The record shows that Plaintiff worked as a

shipping clerk from April 1999 until July 1999, worked in customer service for one month in November 1999 and again worked in customer service from May 2000 until July 2000. Plaintiff said that she left her shipping clerk job to have ankle surgery, and left the two customer service jobs because her ankle was bothering her. The court determines that Plaintiff's work history does not provide definitive evidence of her ability to return to work. But the court concludes that the ALJ did not err by relying on this evidence as an indicator of her capacity for work.

iii. The Huston Factors

Finally, the ALJ's decision discussed some of the factors listed in Huston to support his credibility determination. He first observed that as of October 30, 2000, the date of the hearing, Plaintiff testified that she took over the counter Ibuprofen two times a day and Celebrex once a day for her ankle pain. She stated that she had been using Celebrex for four months, and had stopped using Tylenol and Motrin for about three months. While the record does not reveal whether Plaintiff felt that the medications were effective for her pain relief, Plaintiff did testify that she did not suffer any side effects. Second, as part of her daily activities, Plaintiff testified that she does the smaller quantity grocery shopping and helps her family carry the groceries, drives to the grocery store, post office, and her mother's house, helps her children with dusting, vacuuming, cooking, dishes, and laundry, and takes care of her personal needs. Finally, the ALJ noted that Plaintiff did not provide any affidavits or testimony from third parties to support her allegations of severe pain. The court finds that the ALJ properly relied on this evidence to support his credibility determination.

Based on the evidence in the record, the ALJ concluded that Plaintiff's testimony

concerning the intensity of her ankle pain was not credible. The court holds that substantial evidence supports this decision. The ALJ did not err by excluding Plaintiff's pain from his analysis at step four.

Claim 2: The ALJ Failed to Show that Jobs Existed in the National Economy

Plaintiff next contends that, at step five, the ALJ did not satisfy his burden to show that jobs existed in the national economy that she could perform. See Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988) (At "step five, the Secretary bears the burden of showing that a claimant retains the capacity to perform other work and that such work exists in the national economy."). The court disagrees with Plaintiff's contention.

After reviewing the record, the court determines that Plaintiff's conclusory argument is unsupported.² The vocational expert at the hearing testified that Plaintiff possessed skills from her past employment that would transfer to sedentary or light work. The vocational expert noted that 6,000 data entry clerk positions existed in the state of Kansas, and 600,000 data entry clerk positions existed nationally. She reported that similar numbers of jobs were available on a state and national basis for receptionist positions. Moreover, the ALJ posed a hypothetical to the vocational expert, which contained a summary of Plaintiff's credible limitations. The vocational expert responded that the hypothetical claimant could perform sedentary work, including Plaintiff's past work in customer service and data entry. Overall, the vocational expert testified

² Plaintiff's brief does not provide any support for this argument. It merely quotes several passages from Eighth and Tenth Circuit cases that explain the Commissioner's burden at step five.

that over 7,000 sedentary, unskilled jobs were available in the state of Kansas, and over a million nationwide. Substantial evidence in the record demonstrates that positions existed in the local and national economies that Plaintiff could perform.

Claim 3: Potential Conflict Between the Vocational Expert's Testimony and the DOT

Finally, Plaintiff claims that the ALJ failed to ask the vocational expert whether the jobs she indicated Plaintiff could perform conflicted with the Dictionary of Occupational Titles ("DOT"). In support of her position, Plaintiff cites the Tenth Circuit's decision in Haddock v. Apfel, 196 F.3d 1084 (10th Cir. 1999) and Social Security Ruling 00-4p ("SSR 00-4p"), 2000 WL 1898704 (Dec. 4, 2000).

In Haddock v. Apfel, the Tenth Circuit held "that before an ALJ may rely on expert vocational evidence as substantial evidence to support a determination of nondisability, the ALJ must ask the expert how his or her testimony as to the exertional requirement of identified jobs corresponds with the Dictionary of Occupational Titles, and elicit a reasonable explanation for any discrepancy on this point." 196 F.3d at 1086. The court specified that the ALJ carried this burden to investigate and obtain a justification for any conflict. Id. at 1091.

After the Haddock decision, SSR 00-4p was enacted, which states, in part, that "[w]hen there is an apparent unresolved conflict between VE and VS evidence and the DOT, the adjudicator must elicit a reasonable explanation for the conflict before relying on the VE or VS evidence to support a determination or a decision about whether the claimant is disabled." 2000 WL 1898704, at *2.

During Plaintiff's hearing, the ALJ asked the vocational expert what jobs were available to a hypothetical individual with the same age, education, work experience and RFC as Plaintiff. As

mentioned earlier, the vocational expert testified that this hypothetical individual could perform sedentary, unskilled work, including the sedentary jobs of cashier, telephone solicitor, information clerk, and assembler. Even though the ALJ did not specifically inquire as to whether a conflict existed between the vocational expert's testimony and the DOT, the court holds that there is no reversible error because there was no apparent conflict. See Hodgson v. Barnhart, No. 03-185-B-W, 2004 WL 1529264, at *2 (D. Me. June 24, 2004) (“[T]he mere failure to ask such a question cannot by itself require remand; such an exercise would be an empty one if the vocational expert’s testimony were in fact consistent with the DOT.”). Notably, Plaintiff only asserts that the ALJ did not “make a detailed inquiry as to any possible conflict” between the vocational expert’s testimony and the DOT. Plaintiff does not direct to the court to an actual conflict between the vocational expert’s testimony and the DOT. The DOT classifies the jobs of cashier, telephone solicitor, and information clerk as sedentary. See United States Dep’t of Labor, Dictionary of Occupational Titles, Vols. I, II, 211.362-010 (cashier), 299.357-014 (telephone solicitor), 237.367-022 (information clerk), (4th ed. Rev. 1991). The DOT breaks the job of assembler down to specific areas, some of which require only a sedentary exertion level. See id. at 700.684-014 (jewelry assembler), 706.684-030 (atomizer assembler). Because no apparent conflict exists, the court finds no error for the ALJ’s failure to make such an inquiry.

IT IS, THEREFORE, BY THE COURT ORDERED that the Commissioner’s decision is affirmed.

The case is closed.

Copies of this order shall be transmitted to counsel of record.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 28th day of September 2004.

/s/ G.T. VanBebber
G. Thomas VanBebber
United States Senior District Judge