

as

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

SHAREE L. FISCHER-ROSS,)	
)	
Plaintiff,)	
)	
v.)	Case No. 03-4162-JAR
)	
JO ANNE B. BARNHART, Commissioner of Social Security,)	
)	
Defendant.)	
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MEMORANDUM & ORDER

Plaintiff Sharee L. Fischer-Ross brings this action pursuant to 42 U.S.C. § 405(g) seeking judicial review of Defendant Commissioner of Social Security’s denial of her application for a period of disability and disability insurance benefits under Title II of the Social Security Act (Act). According to plaintiff, defendant erred in his determination of whether plaintiff engaged in substantial gainful activity; failed to adequately support his decision that plaintiff’s impairments did not meet or equal a Listed Impairment; erred in the weight given to the physicians’ opinions; improperly determined plaintiff’s credibility; and erroneously determined plaintiff’s residual functional capacity. The Court finds no error in all but one of the challenged determinations. The defendant properly determined whether plaintiff was engaged in substantial gainful activity, gave proper weight to physicians’ opinions, and properly determined credibility and residual functional capacity. But, the Court cannot ascertain whether there is substantial evidence supporting defendant’s finding that plaintiff’s impairments did not meet or equal a Listed Impairment. Therefore the Court reverses and remands this case.

I. Procedural Background

On February 3, 1997, plaintiff filed her application for a period of disability and disability insurance benefits, claiming disability since March 31, 1991. Plaintiff is only insured for disability benefits through September 30, 1996, so she must prove she was disabled on or before that date to be entitled to benefits. However, because of prior applications plaintiff filed, her initial disability date can be no earlier than May 30, 1996.¹ Plaintiff's application alleges disability due to back pain, carpal tunnel syndrome in both hands, allergies, and migraines. The application was denied both initially and upon reconsideration. At plaintiff's request, an administrative law judge (ALJ) held a hearing, and on October 17, 1998, the ALJ denied all benefits. Plaintiff's request for review by the Appeals Council was denied. Plaintiff filed an appeal with this court, and on October 11, 2001, the court ordered a remand of the case for another ALJ hearing and disability determination.

A second ALJ hearing was held on April 16, 2003, at which plaintiff and her counsel were present. The ALJ rendered a decision on June 24, 2003, denying all benefits on the basis that plaintiff was not under a "disability" as defined in the Act. The Appeals Council denied plaintiff's request for review, so the ALJ's decision became the final decision of defendant. Plaintiff now appeals that ALJ's decision.

II. Standard of Review

Judicial review under 42 U.S.C. § 405(g) is limited to whether defendant's decision is

¹Plaintiff had previously filed for disability benefits on January 24, 1995. This application was denied initially, on reconsideration, and by an ALJ on May 30, 1996. Plaintiff did not appeal the final determination. Therefore, for purposes of this application, the onset date can be no earlier than May 31, 1996. *See* 20 C.F.R. § 404.987(a).

supported by substantial evidence in the record as a whole and whether defendant applied the correct legal standards.² The Tenth Circuit has defined “substantial evidence” as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”³ In the course of its review, the court may not reweigh the evidence or substitute its judgment for that of defendant.⁴

III. Relevant Framework for Analyzing Claim of Disability and the ALJ’s Findings

“Disability” is defined in the Act as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment”⁵ The Act further provides that an individual “shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he 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 the national economy”⁶

The Social Security Administration has established a five-step sequential evaluation process for determining whether a claimant is disabled,⁷ and the ALJ in this case followed the five-step process. If a determination can be made at any of the steps that a claimant is or is not

²See *White v. Massanari*, 271 F.3d 1256, 1257 (10th Cir. 2001) (citing *Castellano v. Sec’y of Health & Human Servs.*, 26 F.3d 1027, 1029 (10th Cir. 1994)).

³*Id.* (quoting *Castellano*, 26 F.3d at 1028).

⁴*Id.*

⁵*Williams v. Bowen*, 844 F.2d 748, 750 (10th Cir. 1988) (quoting 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A) (1982)).

⁶*Id.* (quoting 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B) (1982 & Supp. III 1985)).

⁷See *id.* (citing 20 C.F.R. §§ 404.1520, 416.920 (1986)).

disabled, evaluation under a subsequent step is not necessary.⁸ At step one it is determined whether the claimant is presently engaged in substantial gainful activity.⁹ If she is, disability benefits are denied.¹⁰ If she is not, the decision maker must proceed to the second step.¹¹ Here, the ALJ determined that plaintiff was not engaged in substantial gainful activity and, thus, properly proceeded to the second step.

The second step of the evaluation process involves a determination of whether “the claimant has a medically severe impairment or combination of impairments.”¹² This determination is governed by certain “severity regulations,” is based on medical factors alone, and consequently, does not include consideration of such vocational factors as age, education, and work experience.¹³ Pursuant to the severity regulations, the claimant must make a threshold showing that her medically determinable impairment or combination of impairments significantly limits her ability to do basic work activities.¹⁴ If the claimant is unable to show that her impairments would have more than a minimal effect on her ability to do basic work activities, she is not eligible for disability benefits.¹⁵ If, on the other hand, the claimant presents medical evidence and makes the de minimis showing of medical severity, the decision maker proceeds to

⁸*Id.*

⁹*Id.*

¹⁰*Id.*

¹¹*Id.*

¹²*Id.* (quoting *Bowen v. Yuckert*, 482 U.S. 137, 140-41 (1987)).

¹³*Id.* (citing 20 C.F.R. §§ 404.1520(c), 416.920(c) (1986)).

¹⁴*Id.* at 750-51 (citing 20 C.F.R. §§ 404.1521(b), 416.921(b) (1986)).

¹⁵*Id.* at 751.

step three.¹⁶ The ALJ in this case concluded that plaintiff’s migraines, gout, and immune system deficiencies were not severe, but plaintiff satisfied the severity requirement based on her carpal tunnel syndrome, lumbar spondylosis with a status two back operations in the 1980’s, and allergic rhinitis. Thus, the ALJ proceeded to step three.

In step three, the ALJ “determines whether the impairment is equivalent to one of a number of listed impairments that the Secretary acknowledges are so severe as to preclude substantial gainful activity.”¹⁷ If the impairment is listed and thus conclusively presumed to be disabling, the claimant is entitled to benefits.¹⁸ If not, the evaluation proceeds to the fourth step, where the claimant must show that the “impairment prevents [the claimant] from performing work he has performed in the past.”¹⁹ If the claimant is able to perform her previous work, she is not disabled.²⁰ With respect to the third step of the process in this case, the ALJ determined that plaintiff’s impairments were not listed or medically equivalent to those listed in the relevant regulations. At the fourth step, the ALJ concluded that plaintiff was not disabled because she was able to perform her past relevant work as a cashier/checker and as a desk clerk.

Although the ALJ determined plaintiff was not disabled at step four, he proceeded to the fifth and final step of the sequential evaluation process—determining whether the claimant has the residual functional capacity (RFC) “to perform other work in the national economy in view of his

¹⁶*Id.*

¹⁷*Id.* (citing 20 C.F.R. §§ 404.1520(d), 416.920(d) (1986); *Bowen v. Yuckert*, 482 U.S. at 141).

¹⁸*Id.*

¹⁹*Id.* (citing 20 C.F.R. §§ 404.1520(e), 416.920(e) (1986); *Bowen v. Yuckert*, 482 U.S. at 141).

²⁰*Id.*

age, education, and work experience.”²¹ An ALJ is allowed to make a step five determination even if he finds that plaintiff is not disabled at step four.²² At this point, the ALJ properly shifted the burden of proof to defendant to establish that plaintiff retains the capacity “to perform an alternative work activity and that this specific type of job exists in the national economy.”²³ At this step, the ALJ also concluded that plaintiff was not disabled, finding that plaintiff could perform a significant number of jobs in the economy, including information clerk/appointment clerk, general office clerk, and order clerk.

IV. Analysis of Plaintiff’s Specific Arguments

In her motion, plaintiff contends that the ALJ erred in: determining whether she engaged in substantial gainful activity; evaluating whether her impairments met or equaled a Listed Impairment; weighing the physicians’ opinions; finding her testimony not credible; and determining her RFC. The Court addresses each of these arguments in turn.

A. The ALJ’s Step One Evaluation

Plaintiff argues that the ALJ’s evaluation of whether she had engaged in substantial gainful activity was erroneous. Yet the ALJ found in plaintiff’s favor, that she was not engaged in substantial gainful activity. Plaintiff challenges the ALJ’s reliance on a treating physician’s statement that she was working full time on her farm and his reliance on plaintiff’s part time work in 1994 and 1995. Because plaintiff also contends that the ALJ’s credibility analysis was flawed by his reliance on this evidence, the Court will examine these challenges in the context of

²¹*See id.* (quoting *Bowen v. Yuckert*, 482 U.S. at 142).

²²*Murrell v. Shalala*, 43 F.3d 1388 (10th Cir. 1994).

²³*See Williams*, 844 F.2d at 751 (citations omitted); *accord White*, 271 F.3d at 1258 (at fifth step, burden of proof shifts to Commissioner to show that claimant retains the functional capacity to do specific jobs).

evaluating the ALJ's credibility analysis. As discussed below, the ALJ properly weighed and evaluated the credibility of this evidence, and his findings concerning the nature and duration of plaintiff's work on the farm, as well as her work in a part time position find support in the evidence. Thus, there was no error at step one of the analysis.

B. The Listing of Impairments

Plaintiff argues that the ALJ erred when he determined that her condition did not meet a Listed Impairment under 20 C.F.R. Pt. 404, Subpt. P, App. 1, without discussing the particular evidence he relied on, as required by *Clifton v. Chater*.²⁴ In *Clifton*, the Tenth Circuit held that it was a reversible error for the ALJ to not "discuss the evidence or his reasons for determining that [plaintiff] was not disabled at step three, or even identify the relevant Listing or Listings."²⁵

Without referencing or discussing any evidence, the ALJ stated that "a review of the medical evidence fails to reveal the existence of an impairment or combination of impairments which specifically meets or equals the criteria of any [Listed Impairment]." This summary conclusion is insufficient, because "[s]uch a bare conclusion is beyond meaningful judicial review."²⁶

Defendant argues that this was a harmless error, because in her brief or at the administrative hearing, Plaintiff did not allege that she met a specific Listed Impairment. But whether the ALJ's error was harmless depends on whether "based on material the ALJ did at least consider (just not properly), [a court] could confidently say that no reasonable

²⁴79 F.3d 1007 (10th Cir. 1996).

²⁵*Id.* at 1009.

²⁶*Id.*

administrative factfinder, following the correct analysis, could have resolved the factual matter in any other way.”²⁷ Because the record contains nothing more than a summary conclusion that plaintiff did not meet a listed impairment, this Court is unable to ascertain whether a reasonable fact finder would have decided otherwise. The Court cannot determine what evidence or Listing the ALJ considered, nor how he analyzed the evidence. Therefore the Court must remand for the ALJ to make further findings at step three of the sequential evaluation process.

B. Physicians’ Opinions

Plaintiff contends that the ALJ gave too little weight to the May 3, 1996 RFC opinion of treating physician Dr. Hutfless, and gave too much weight to the RFC opinions of the State agency physicians who merely reviewed the medical records. In this case the ALJ did not reject Dr. Hutfless’s opinion entirely, but gave the opinion “little weight.” The ALJ gave weight to Dr. Hutfless’s opinion that plaintiff can lift 10 pounds frequently and 11-20 pounds occasionally and that plaintiff should not be exposed to fumes and dust. But the ALJ rejected Dr. Hutfless’s opinion that plaintiff could work only two hours of an eight hour work day.

The ALJ must give “controlling weight” to the opinion of a treating physician, provided that the opinion is “well-supported by medically acceptable clinical and laboratory diagnostic techniques.”²⁸ If the opinion is well supported, then the ALJ must confirm that it is consistent with other substantial evidence in the record.²⁹ If these requirements are not present, the opinion

²⁷*Allen v. Barnhart*, 357 F.3d 1140, 1145 (10th Cir. 2004).

²⁸*Watkins v. Barnhart*, 350 F.3d 1297, 1300 (10th Cir. 2003) (quoting Soc. Sec. Rul. 96-2p, 1996 WL 374188, at *2)).

²⁹*Id.*

is not entitled to controlling weight.³⁰ If, after this determination, the ALJ decides the treating source's opinion is not entitled to controlling weight, the opinion is still entitled to deference and must be weighed using factors such as: the length of the treatment relationship, the frequency of examination, nature and extent of treatment provided, the extent to which the opinion is supported by objective medical evidence, the opinion's consistency with the record as a whole, and other factors brought to the attention of the ALJ that tend to support or contradict the opinion.³¹ In short, the ALJ cannot disregard a treating source's opinion without giving legitimate and specific reasons for doing so.³²

The ALJ properly rejected Dr. Hutfless's opinion that plaintiff could work only two hours of an eight hour workday. The ALJ determined that this opinion was not well supported by medically acceptable clinical and laboratory diagnostic techniques. The ALJ specifically noted that Dr. Hutfless's treatment notes lacked any objective findings consistent with a two hour a day work limitation. Plaintiff argues that the ALJ used boilerplate language, failing to state the evidence to which he was referring. But a review of the record reveals that the ALJ was correct, and there were no severely limiting findings in Dr. Hutfless's notes.

Plaintiff further argues that, based on his finding that Dr. Hutfless's opinion did not match his treatment notes, the ALJ had the duty to re-contact the physician to obtain more information. As the Tenth Circuit held in *White v. Barnhart*,³³ the duty to re-contact is triggered

³⁰*Id.*

³¹*Robinson v. Barnhart*, 366 F.3d 1078, 1082 (10th Cir. 2004) (quoting *Watkins*, 350 F.3d at 1300-01; Soc. Sec. Rul. 96-2p)).

³²*Id.*

³³287 F.3d 903, 908 (10th Cir. 2001)(citing 20 C.F.R. §416.912(e)).

by the inadequacy of the evidence received from the treating physician. But when there is sufficient evidence in the record to evaluate the physician's opinion, there is no duty to re-contact the physician. Here there was sufficient evidence in the record to evaluate the validity of Dr. Hutfless's opinion of plaintiff's RFC. The record includes Dr. Hutfless's own treatment notes and the results of tests he performed after plaintiff advised him that she was applying for disability benefits. Neither Dr. Hutfless's treatment notes, nor the results of his test support his opinion that plaintiff was limited to two hours of work during an eight hour work day. Moreover, there was no indication that re-contacting Dr. Hutfless would yield additional information relevant to plaintiff's disability determination.

The ALJ also gave Dr. Hutfless's opinion "little weight" because it was similarly not supported by, and inconsistent with, other objective evidence in the record as a whole. The other objective evidence included: evidence that plaintiff was able to work after her alleged onset date; plaintiff's statement that she could ride for 50 miles; as well as the other physicians' opinions about plaintiff's condition. Although, as plaintiff notes, the ALJ did not identify by name the other physicians whose opinions he relied on, it is clear that he was referring to the other treating and reviewing physicians whose findings he discussed in his opinion. The ALJ did not err in relying on this other objective medical and non-medical evidence, to accord little weight to Dr. Hutfless's opinion about the two hour work limitation. Nor did the ALJ err, as plaintiff posits, in considering the fact that Dr. Hutfless did not have the entire record in formulating his opinion. In short, the ALJ gave sufficient reasons for giving little weight to Dr. Hutfless's opinion that plaintiff could only work two hours of an eight hour work day. Plaintiff further contends that the ALJ gave too much weight to the opinions of the State agency physicians who reviewed

plaintiff's records. The ALJ gave great weight to their opinions concerning plaintiff's RFC. Generally the ALJ must give the most weight to a treating physician's opinion; opinions of physicians who have examined the claimant are given less weight; and opinions of physicians who merely review the claimant's records are to be given the least amount of weight.³⁴

Having discredited Dr. Hutfless's opinion, it was proper for the ALJ to give greater weight to the opinions of the reviewing physicians, so long as the ALJ considered the same specific factors used in evaluating a treating physician's opinion, which includes: the length of the treatment relationship; the frequency of examination; and the extent to which the opinion is supported by objective medical evidence.³⁵ The ALJ properly considered these factors in determining what weight to give the opinions of these reviewing physicians. Because the opinions of these reviewing physicians were consistent with each other and supported by substantial evidence in the record, the ALJ did not err in giving them great weight.

C. Assessment of Plaintiff's Credibility

Plaintiff contends that the ALJ did not evaluate her credibility in accordance with Social Security Ruling 96-7p and the Tenth Circuit's opinion in *Luna v. Bowen*.³⁶ Under *Luna*, the ALJ must apply a three part test. First, the ALJ must determine whether the claimant has a pain producing impairment.³⁷ Second, the ALJ must determine whether there is a loose nexus

³⁴*Talbot v. Heckler*, 814 F.2d 1456, 1463 (10th Cir. 1987).

³⁵*Goatcher v. U.S. Dep't of Health & Human Servs.*, 52 F.3d 288, 290 (10th Cir. 1995).

³⁶834 F.2d 161 (10th Cir. 1987).

³⁷*Id.* at 164.

between the pain alleged and the impairment.³⁸ Third, the ALJ must determine whether the claimant's subjective complaints are credible, considering the objective medical evidence and such factors as: the claimant's persistent attempts to find relief and her willingness to try any treatment prescribed; whether the claimant has regular contact with a doctor; the claimant's daily activities; and the dosage, effectiveness, and side effects of the claimant's medication.³⁹ Moreover, the ALJ must give specific reasons for rejecting a claimant's subjective complaints.⁴⁰ Ultimately, credibility determinations "are peculiarly the province of the finder of fact," and should not be upset if supported by substantial evidence.⁴¹

A review of the ALJ's decision in this case reveals that he properly assessed plaintiff's credibility. The ALJ's assessment was based on several specific factors, including: the objective medical evidence; plaintiff's work after her alleged onset date; the absence of persistent complaints by plaintiff; the physicians' opinions; inconsistencies in plaintiff's testimony; and the absence of side effects from medication. And the Court finds no merit in plaintiff's challenges of the ALJ's findings concerning several of these credibility factors.

Plaintiff challenges certain findings concerning the nature and duration of her work after the *alleged* onset date.⁴² Plaintiff urges that her desire to work is not indicative of her ability to work. But plaintiff did not just have the desire to work, she actually worked part time after her

³⁸*Id.*

³⁹*Barnett v. Apfel*, 231 F.3d 687, 690 (10th Cir. 2000) (citing *Luna*, 834 F.2d at 165-66).

⁴⁰*White v. Massanari*, 271 F.3d 1256, 1261 (10th Cir. 2001) (citing *Kepler v. Chater*, 68 F.3d 387, 390-91 (10th Cir. 1995)).

⁴¹*Id.* (citing *Kepler*, 68 F.3d at 390-91).

⁴²For the reasons outlined in footnote 1, plaintiff's onset date can be no earlier than May 31, 1996; but she alleges a much earlier onset date.

alleged onset of disability. And such work has been held to be highly probative of a claimant's ability to work.⁴³

Thus the ALJ properly discounted plaintiff's credibility, in finding that plaintiff's part time work for one or two years in 1994 and 1995, was indicative of plaintiff's "involvement in a range of daily activity not consistent with disability. . . ." Plaintiff challenges this finding, based on her testimony that she actually only worked for about eight months. But the ALJ relied on plaintiff's own statement and testimony that she worked part time for about one or two years. The ALJ is in the best position to evaluate plaintiff's credibility in light of her inconsistent statements and testimony. In any event, plaintiff worked after her alleged onset date and it was proper for the ALJ to rely on this in evaluating credibility.

Plaintiff also contends that the ALJ improperly mixed his credibility analysis with his analysis of severity. At step two, the ALJ found some of plaintiff's impairments severe and some not severe. Plaintiff does not challenge this severity determination. But, plaintiff argues that the ALJ improperly discounted her credibility on the basis of her claim of impairments that the ALJ found were not severe. Plaintiff argues that this is not an acceptable credibility factor from *Luna*; however, that list of factors is not exclusive, and the ALJ's reliance on this factor does not render his credibility analysis improper.

There are weaknesses in the ALJ's credibility analysis. As Plaintiff points out, the ALJ determined that plaintiff's work history did not weigh for or against her credibility because although she had a steady work history prior to her alleged onset, she did not have substantial

⁴³*Williams v. Chater*, 923 F. Supp. 1373, 1379 (D. Kan. 1996) (citing 20 C.F.R. §§ 404.1571, 416.971).

earnings. Yet a claimant's positive work history can weigh in favor of her credibility.⁴⁴ And, the ALJ perceived an inherent inconsistency in plaintiff's testimony (and a treating physician's similar note) that she could only sit for 20 minutes at a time, but could ride for 50 miles. Yet, this was not necessarily an inconsistency; for plaintiff also testified that she had to take rest breaks while driving to both of her hearings. Despite these weaknesses in the credibility analysis, however, there remains substantial evidence weighing against plaintiff's credibility.

For example, in discounting her credibility, the ALJ found that objective evidence refuted plaintiff's sworn testimony that she had *never* worked on a farm, except for a few hours of bookkeeping every year through 1995. A December 19, 1992 treatment note from Dr. Ransom indicates that plaintiff was working full time on the farm. And a physician treating plaintiff in October 1990 for allergies, noted that plaintiff was hauling grain to the elevator, helping take care of cattle, and moving hay. Although plaintiff argues that the ALJ should have given her sworn testimony more weight, the ALJ is in the best position to evaluate the credibility of plaintiff's testimony. The ALJ did not err in determining that this inconsistency weighed against plaintiff's credibility.

The ALJ's findings concerning other *Luna* factors also support his credibility determination. Plaintiff contends that the ALJ did not properly consider her subjective complaints of pain. Although plaintiff testified that she received only some relief from a narcotic prescribed for mild to moderate pain, the ALJ noted that plaintiff did not persistently and

⁴⁴See *Ward v. Apfel*, 65 F. Supp. 2d 1208, 1214 (D. Kan. 1999) (internal citations omitted)(plaintiff had been successfully employed for almost fifteen years before her illness, had made numerous attempts to return to work on a part-time basis, and treating physicians had noted her frustration at not working and her courageous effort to return to work).

consistently complain of pain to her physicians, did not pursue a third surgery recommended by one physician, and that the medication had no side effects that produced disabling symptoms. The ALJ properly considered these relevant factors in evaluating plaintiff's subjective complaints of pain. The ALJ also properly considered objective medical findings that weighed against plaintiff's subjective complaints. Plaintiff attributes this objective medical evidence to her having good days and bad days. But it is the ALJ's duty to weigh the evidence; and he concluded these records weighed against plaintiff's credibility. Ultimately the ALJ properly determined that plaintiff's allegations of pain were not fully credible.

In short, the ALJ considered the entire record, set forth the specific evidence he relied upon, applied the correct legal standards in evaluating plaintiff's testimony, and based his determination on substantial evidence in the record as required. Because credibility determinations are ultimately left to the ALJ when based on substantial evidence, the Court finds that the ALJ's decision regarding plaintiff's credibility is not erroneous.

B. RFC Determination

Plaintiff finally contends that the ALJ erred in the RFC determination, by failing to include all of her limitations. This contention is of course derivative of plaintiff's contention that the ALJ erred in his analysis of plaintiff's credibility and in the relative weight given to various physicians' opinions. Given the Court's conclusion that the ALJ gave proper weight to the physicians' opinions and properly evaluated plaintiff's credibility, the Court finds no error in the RFC determination. Plaintiff's request for remand for an immediate award of benefits is without merit.

V. Conclusion

Therefore, the Court finds that this action should be reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) to conduct further proceedings as follows:

Upon receiving the court's final order of remand, the Appeals Council of the Social Security Administration will remand this case and direct the ALJ to reassess the severity of plaintiff's impairments in accordance with the statutes and regulations. The ALJ should reconsider whether plaintiff's impairments meet or equal a Listed Impairment, explaining which Listing(s) he considers and detailing the evidence he relies on when making the determination. If the ALJ is able to make this determination by examining the medical records, another hearing may not be required.

IT IS THEREFORE ORDERED BY THE COURT THAT defendant's decision denying plaintiff disability benefits is **REVERSED AND REMANDED** pursuant to the fourth sentence of 42 U.S.C. § 405(g) for further proceedings in accordance with this Memorandum and Order.

IT IS SO ORDERED.

Dated this 23rd day of September, 2004, at Topeka, Kansas.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge