



## Dunkle v. Apfel

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### MEMORANDUM OPINION AND ORDER

#### I. PROCEDURAL HISTORY

[§1] In an opinion dated July 8, 1997, Jon L. Lawritson, an Administrative Law Judge ("ALJ"), denied plaintiff Denise L. Dunkle ("Dunkle") disability benefits under Title II of the Social Security Act ("the Act"), 42 U.S.C. § 401-433. Dunkle then requested that the Appeals Council review the ALJ's decision, and the Appeals Council declined review. On September 18, 1998, Dunkle filed a complaint before this Court seeking review of the ALJ's decision. She now urges this Court to reverse the ALJ's decision and remand her case for a new hearing before a different ALJ (Docket #11). The Commissioner of Social Security ("Commissioner") filed his response seeking summary judgment as a matter of law (Docket # 13). Dunkle has filed her reply. This Court has jurisdiction to proceed pursuant to 42 U.S.C. § 405(g).

#### II. FACTS

[§2] Dunkle was born on April 12, 1963, and is currently 35 years of age. She has a high school education as well as a certificate in surgical technology. AR 32. She is married and has two children. Throughout much of her marriage, Dunkle's husband served in the military, necessitating frequent moves. Dunkle's work history includes positions as a sales cashier, filing clerk, and delivery driver. AR 119. Dunkle has not worked in her trained field of surgical technology due to its high stress level. AR 109.

[§3] Dunkle alleges that she became disabled on December 31, 1988, due to a panic disorder, anxiety disorder, and depression. AR 104. Dunkle's insured status expired on December 31, 1993. At the administrative hearing held on May 7, 1997, Dunkle testified that she has been afflicted with panic attacks since she was ten or eleven years of age. AR 33. She stated that at the time of the hearing she was suffering from panic attacks on a daily basis which lasted from twenty minutes to an entire day. Id. When asked to explain the effects of her panic attacks, Dunkle explained: "I can't concentrate on anything when I'm having them, it's like I just need to go, I need to get out and go somewhere . . . I usually go to the bathroom and, you know, try to concentrate on my breathing because I hyperventilate a lot, and then I just have to leave wherever I'm at." AR 34. Dunkle was diagnosed with a panic disorder as early as 1988. AR 148. Since that time she has been treated with various



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anti-depressant and anti-anxiety medications including Xanax, Zoloft, Paxil, Trazodone, and Prozac. Despite taking her medication regularly, Dunkle testified that on the whole they afford her little relief. AR 50-51.

### III. DECISION BY THE ALJ

[§4] In assessing the sequential process<sup>1</sup> which is required when determining if an individual is disabled and thus entitled to benefits, the ALJ concluded that Dunkle had not engaged in substantial gainful activity since December 31, 1988. AR 19. At the next step of the analysis, the ALJ found that Dunkle's panic attacks could not be considered to be "severe" as defined by the Act. Id. Given this determination, the ALJ concluded that Dunkle was not disabled and therefore not entitled to benefits.

[§5] Prior to his review of the medical evidence, the ALJ outlined the applicable standard he used in analyzing Dunkle's impairment: To establish a medically determinable impairment, there must be medical reports establishing the existence of anatomical, physiological or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques. A physical or mental impairment must be established by medical evidence consisting of signs, symptoms and laboratory findings and not merely by the claimant's own statements regarding symptoms (20 C.F.R. 404.1508). An impairment is deemed severe when it imposes a significant limitation upon the claimant's ability to perform work related activities (20 C.F.R. 404.1520(c)). AR 18.

Turning to the medical evidence in the record, the ALJ noted that Dunkle had "been treated only infrequently for this [panic attack] condition." AR 18. In addition, the ALJ pointed to what he viewed as a complete absence of treatment from August 1986 through March 1988, from December 1988 through December 1989, from July 1990 through December 1991, and from June 1993 through September 1995. Id. The ALJ went on to state that the administrative record contained "very little medical evidence concerning the period at issue in this case ... ." Id. Finally, the ALJ concluded that "the claimant has failed to meet her burden of proof with acceptable medical documentation that she had an impairment that met the definition of severity set forth above for at any time prior to the date last insured." AR 19.

### IV. STANDARD OF REVIEW

[§6] The decision of the ALJ must be upheld if it is supported by substantial evidence in the record as a whole. 42 U.S.C. § 405(g); *Metz v. Shalala*, 49 F.3d 374, 376 (8th Cir. 1995) (citing *Sullins v. Shalala*, 25 F.3d 601, 603 (8th Cir. 1994), cert. denied, 573 U.S. 1076, 115 S. Ct. 722, 130 L. Ed. 2d 627 (1995)); *Smith v. Shalala*, 987 F.2d 1371, 1373 (8th Cir. 1993). Substantial evidence is less than a preponderance, but enough evidence that a reasonable mind might find it adequate to support the Conclusion. *Fines v. Apfel*, 149 F.3d 893 (8th Cir. 1998) (citing *Oberst v. Shalala*, 2 F.3d 249, 250 (8th Cir. 1993)). See also *Shannon v. Chater*, 54 F.3d 484, 486 (8th Cir. 1995) (citing *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed. 2d 842 (1971)); *Onstead v. Sullivan*, 962 F.2d 803 (8th Cir. 1992) (quoting



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Whitehouse v. Sullivan, 949 F.2d 1005, 1007 (8th Cir. 1991)). Review by this Court extends beyond a limited search for the existence of evidence supporting the Commissioner's decision to include giving consideration to evidence in the record which fairly detracts from the decision. Brockman v. Sullivan, 987 F.2d 1344, 1346 (8th Cir. 1993); Locher v. Sullivan, 968 F.2d 725, 727 (8th Cir. 1992); Turley v. Sullivan, 939 F.2d 524, 528 (8th Cir. 1991).

[§7] However, the Court's role is to determine whether there is substantial evidence in the record as a whole to support the decision of the Commissioner and not to reweigh the evidence or try the issues de novo. Murphy v. Sullivan, 953 F.2d 383, 384 (8th Cir. 1992).

Furthermore, a reviewing court may not reverse the Commissioner's decision "merely because substantial evidence would have supported an opposite decision." Woolf v. Shalala, 3 F.3d 1210, 1213 (8th Cir. 1993); Smith v. Shalala, 987 F.2d at 1374 (citing Locher, 986 F.2d at 727 (quoting Baker v. Heckler, 730 F.2d 1147, 1150 (8th Cir. 1984))). The Court must review the Commissioner's decision to determine if an error of law has been committed. Smith v. Sullivan, 982 F.2d 308, 311 (8th Cir. 1992); Nettles v. Schweiker, 714 F.2d 833, 836 (8th Cir. 1983). The Commissioner's Conclusions of law are only persuasive, not binding, on the reviewing court. Smith v. Sullivan, 982 F.2d at 311; Satterfield v. Mathews, 483 F. Supp. 20, 22 (E.D. Ark. 1979), aff'd per curiam, 615 F.2d 1288, 1289 (8th Cir. 1980). As long as the ALJ's decision is supported by substantial evidence, then this Court cannot reverse the decision of the ALJ even if the Court would have decided it differently. Smith v. Shalala, 987 F.2d at 1374.

## V. DISCUSSION

[§8] In assessing whether or not the ALJ's decision was based upon substantial evidence on the record as a whole, the Court is guided by the following definition of a non-severe impairment:

"(a) An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities. "(b) When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs." 20 C.F.R. § 404.1521(a)-(b).

The "sequential evaluation process may only be terminated at step two when an impairment or combination of impairments would have no more than a minimal effect on the claimant's ability to work." Nguyen v. Chater, 75 F.3d 429, 431 (8th Cir. 1995) (citing Henderson v. Sullivan, 930 F.2d 19, 21 (8th Cir. 1991)). A denial of benefits at step two of the analysis is appropriate where the ALJ has reviewed the claimant's medical records and determined that her impairments are no more than "slight." Nguyen, 75 F.3d at 431.

Despite Dunkle's allegations to the contrary, the medical records available and presented by her at the administrative hearing show that her "panic attack" problems were sporadic and of limited duration. As such, medication such as Xanax and Prozac offered substantial relief.



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[§9] Upon a careful review of the administrative record in this case, and for the reasons stated herein, the Court concludes that the decision of the ALJ is supported by substantial evidence in the record as a whole.

[§10] This Court's review of the administrative hearing transcript shows that the ALJ set forth in detail the claimant's medical history. Certain records were unavailable at the time of the hearing. While it is the duty of the ALJ to develop the record, the fact that Dunkle's attorney did not obtain the records which the claimant asserted were needed does suggest the relative, perhaps minor, importance of such records. See, e.g., *Shannon v. Chater*, 54 F.3d 484, 488 (8th Cir. 1995). The ALJ examined in detail the medical treatment, including prescription medicine taken during the many years of such treatment.

[§11] Upon a complete review of the record, this Court finds that the decision of the ALJ is supported by substantial evidence in the record as a whole. Based upon the foregoing Discussion, it is hereby

[§12] ORDERED that Dunkle's motion seeking reversal of the ALJ's decision (Docket #11) is denied. The decision of the ALJ is affirmed.

[§13] IT IS FURTHER ORDERED that Dunkle's motion seeking appointment of a new ALJ is denied as moot.

[§14] IT IS FURTHER ORDERED that the Commissioner's motion for summary judgment (Docket #13) is granted. Judgment shall issue accordingly.

1. The steps are summarized as follows: "(1) First, a determination is made whether claimant is currently engaged in substantial gainful activity; if so, she must be found not disabled. "(2) If claimant is not engaged in substantial gainful activity, the next question is whether she is suffering from a severe impairment, defined as one that significantly limits the ability to perform basic work-related functions. If a severe impairment is not found, claimant must be found not disabled. "(3) If there is a severe impairment, and it is one listed in Appendix 1 to Subpart P, claimant is found disabled on the medical evidence alone. [ See Appendix 1 to Subpart P of Part 404, 20 C.F.R. §§ 404.1501 et seq. (1996)]. "(4) If the impairment is not listed in Appendix 1, the next inquiry is whether claimant can perform relevant past work. If she can, a finding of no disability is required. "(5) Finally, if claimant cannot perform relevant past work, the question then becomes whether she can nevertheless do other jobs that exist in the national economy, despite her having a severe impairment that prevents return to her previous work." *McCoy v. Schweiker*, 683 F.2d 1138, 1141-42 (8th Cir. 1982). See also 20 C.F.R. § 404.1520; 1 Harvey L. McCormick, *Social Security Claims and Procedures* § 410, at 346 (4th ed. 1991).

