IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

Nancy L. Drejka,	:	
Plaintiff,	:	
v.	:	Civil Action No. 01-587-MPT
Jo Anne B. Barnhart, Commissioner of Social Security,	:	
Defendant.	:	

OPINION

John S. Grady, Esquire, Grady & Hampton, P.A., 6 North Bradford Street, Dover, Delaware, 19904, attorney for plaintiff

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Dated: April 18, 2002

Wilmington, Delaware

Thynge, U.S. Magistrate Judge

I. Introduction

Plaintiff, Nancy L. Drejka, filed this action against defendant, Jo Anne B. Barnhart, the Commissioner of Social Security, ("Commissioner") on August 30, 2001. *D.I.* 3. Plaintiff seeks judicial review of an adverse decision by the defendant, pursuant to 42 U.S.C. 405(g), denying her claim for social security disability benefits under the Social Security Act. Presently before the court are the parties' cross-motions for summary judgment. For the reasons stated below, the plaintiff's motion is **DENIED** and the defendant's motion is **GRANTED**.

II. Procedural History

Drejka filed an application for Supplemental Security Income ("SSI") pursuant to Title XVI of the Social Security Act on October 26, 1999. 42 U.S.C. §§ 1381-1383f (2002). She alleged she has been disabled since October 15, 1998. *D.I.* 13 at 70-74. Plaintiff contends she is disabled due to an inability to handle stress and depression, which limits her ability to work. *Id.* at 93-94. Her initial claim was denied by the Commissioner, as was the request for reconsideration. *Id.* at 56-66. Plaintiff timely appealed to an administrative law judge ("ALJ"), who heard the case on November 3, 2000. *Id.* at 27. Plaintiff, Daniel Snianecki, the plaintiff's boyfriend, and Dr. Steve Gumerman, a vocational expert testified at this hearing. *Id.* at 27-55. On February 13, 2001, after considering the entire record, the ALJ concluded that the plaintiff was not disabled as defined by Section 1614(a)(3)(A) of the Social Security Act. *Id.* at 12-19.

Plaintiff then sought review of the ALJ's determination by the Appeals Council. *Id.* at 4-5. On March 14, 2001, the Appeals Council denied plaintiff's request for review,

concluding that there was no basis under 20 CFR § 416.1470 to grant the request. *Id.* Therefore, the decision of the ALJ was the final decision of the Commissioner of Social Security. *Id.* at 4. Plaintiff has sought review of the final judgment before this court pursuant to 42 U.S.C. § 405(g).

III. Plaintiff Background

Nancy Drejka was 38 years old at the time of her hearing. *Id* at 13. She has a tenth grade education and attended special education classes. *Id.* Plaintiff's past work experience included employment as a dishwasher, housekeeper and newspaper inserter. *Id.* Plaintiff continued to work in these capacities intermittently through September 29, 1999. *Id.* at 94-95. Plaintiff testified that she has become disabled from all substantial gainful activity due to depression and an inability to handle stress. *Id.* at 30-32.[1] Drejka testified that she has a bad temper, which she controls with medication. *Id.* at 108.

Plaintiff had a child in August of 1999, but testified that she had to relinquish custody because she was not able to handle the stress associated with caring for the child. *Id.* at 42. The father of the infant, Daniel Snianecki, who lives with the plaintiff, testified that he aided in the child's care, and also that the child was removed from their custody by the State of Delaware. *Id.* at 47. Additionally, nine of her other children were removed from plaintiff's care, following the sexual abuse of at least one of her children. *Id.* at 140.

[1] Plaintiff also testified that she was disabled due to back pains and could not lift much weight. *D.I.* 13 at 31-32, 40. However, the ALJ found that the plaintiff's back impairment was non-severe and the plaintiff did not challenge this finding. *D.I.* 13 at 14.

IV. Medical Evidence

The transcript of the hearing before the ALJ, indicates that Drejka has been examined and treated by a number of medical care providers for mental health concerns. A clinical psychologist, Dr. Bugglin, completed a psychological evaluation of plaintiff, dated October 1, 1996, to determine if her intellectual capabilities were adequate to provide care for her children. *Id.* at 129-138. Dr. Bugglin reported that plaintiff had a verbal IQ of 74, a performance IQ of 79, and full scale IQ of 75, which placed her at the high end of borderline intellectual functioning, above "Mental Retardation" but below "Average," and that her ability to deal with social situations was poor. *Id.* at 132-133. Dr. Bugglin further reported that plaintiff was able to read and write was taking classes to obtain her GED. *Id.* at 131-132. Dr. Bugglin also related that Drejka had a variety of situational stressors in her life including the incarceration of her ex-husband for molesting at least one of her children, the history of other male friends sexually abusing her children, the loss of her home due to fire, and car and financial troubles. *Id.* at 136. Dr. Bugglin opined that Drejka suffered from major depression, borderline intellectual functioning, and had a Global Assessment of Functioning ("GAF") score of fifty-five.[2] *Id.* at 136.

[2] Psychiatrists and Psychologists classify mental disorders along a diagnostic system consisting of five axes. American Psychiatric Association, THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH EDITION (DSM-IV) 32 (4th ed. 1994). The GAF rating scale, the fifth axis to assess how well the individual is able to function in her environment, considers psychological, social, and occupational functioning on a continuum of mental health to mental illness. A GAF score varies from 0-100 according to the severity of the mental illness. An individual with a score ranging between 0-10 is deemed to be a persistent danger of hurting herself and cannot maintain standard of self-care, while an individual with a score from 91-100 is deemed to be happy, healthy and content. A score of 41-50 indicates serious symptoms (suicidal ideation but low risk) and a serious impairment in one analyzed area. A score of 51-60 indicates the individual suffers from moderate symptoms in most analyzed areas. An individual with a score between 61-70 suffers mild symptoms and is able to function with some problems in relationships and work. *Id.*

Dr. Bugglin completed a psychosocial assessment of Drejka on November 10, 1997. *Id.* at 139-140. Accordingly, plaintiff continued to have situational stressors relating to the removal of her children from her care and the pending termination of her parental rights by the State of Delaware. *Id.* at 140. Dr. Bugglin noted that plaintiff had improved her parenting skills, but that she was not ready to regain custody of her children. *Id.* Dr. Bugglin determined that Drejka suffered from an adjustment disorder with depressed mood, but also noted that her GAF score had increased to sixty-five. *Id.* at 139-140.

Between October 19, 1998 and January 11, 1999, Drejka was examined by her primary care physician, Leonard Selter, M.D., on six occasions. *Id.* at 215-216. On October 19, 1998, Dr. Seltzer, reported that plaintiff requested some “nerve” pills and prescribed Serzone and Klonopin. *Id.* at 216. On November 2, 1998, Dr. Seltzer noted that plaintiff felt better with the medication. *Id.* at 216. On November 30, 1998, he reported that Drejka’s health continued to improve. *Id.* at 215. On December 28, 1998, Dr. Seltzer again observed that plaintiff was feeling better and prescribed Clonaxazepam for stress. *Id.* On January 11, 1999, Dr. Seltzer noted that Drejka may be pregnant. *Id.*

On January 12, 1999, Drejka was examined by a psychiatrist, Harold Graff, M.D. *Id.* at 188. Plaintiff complained that she was short tempered all of her life, was depressed, and concerned about her children in foster care. *Id.* Dr. Graff reported that plaintiff was cooperative, maintained good eye contact, was able to think and speak coherently, had no evidence of delusions or hallucinations, but was mildly depressed.

Id. Dr. Graff opined that plaintiff's GAF score was fifty-five. *Id.* at 187.

On February 9, 1999, Dr. Graff reported that plaintiff just learned that she was pregnant, and therefore, stopped all of her medications. Dr. Graff further reported that he would not need to see the plaintiff again until after the baby was born. *Id.* at 186. On August 6, 1999, plaintiff gave birth to her child. *Id.* at 103.

On October 1, 1999, Dr. Graff resumed plaintiff's medications after noting that the medications "worked well for her." *Id.* at 186. On December 1, 1999, Dr. Graff reported that Drejka complained of depression and that she remained angry at the State of Delaware for placing her children in foster care.

On December 13, 1999, Patricia Lifrak, M.D., a psychiatrist, interviewed Drejka and reviewed the records proved by the Delaware Disability Determination Services. *Id.* at 160-164. Dr. Lifrak reported that plaintiff had not worked since October 1999, and was living with her current boyfriend, Mr. Snianecki and their four-month old child. *Id.* at 160. Dr. Lifrak reported that plaintiff complained of depression, anger and has difficulty concentrating. *Id.* at 160. Drejka denied any problem with work-absenteeism, but stated that she just was not able to do all the work assigned to her *Id.* at 161.

Dr. Lifrak observed that plaintiff had fair grooming and hygiene, appeared "somewhat" anxious, her speech and attention span were normal, and was able to focus and remain on task. *Id.* at 162-163. In the report, Lifrak, noted that Drejka also appeared to be introverted and have low self-esteem, but remained logical and goal-directed. *Id* at 163. Plaintiff also had no looseness of association, flight of ideas, psychosis, delusions/hallucinations, or homicidal/suicidal ideations. *Id.* Dr. Lifrak made this finding despite Drejka's revelations to Dr. Lifrak that she had an extensive past

psychiatric history, which included three in-patient admissions, intermittent out-patient psychiatric care since she was eight years old, thirty to forty suicide attempts, and a history of criminal assaults. *Id.* Although plaintiff had poor memory, Dr. Lifrak opined that plaintiff had below average intelligence, depression, post-traumatic stress disorder, alcohol dependence that was in partial remission, and several situational stressors. *Id.* at 163-164. Dr. Lifrak further concluded that plaintiff had a GAF score of fifty. *Id*. at 164.

On April 27, 2000, Drejka told Dr. Graff that she was better able to control her anger and was doing well on medication. *Id.* at 219. However, on June 21, 2000, Dr. Graff reported that plaintiff was still depressed and increased her medication. *Id.* On August 29, 2000, Dr. Graf reported that plaintiff was still angry and getting into fights. *Id.* On October 4, 2000, Dr. Graff completed the social security questionnaire stating that Ms. Drejka was not able to work due to emotional instability. *Id.* at 212.

V. Standard of Review

a. Jurisdiction

A district court's jurisdiction to review of an ALJ's decision regarding disability benefits is controlled by 42 U.S.C. § 405(g). This statute provides "[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party…may obtain review of such decision by a civil action." 42 U.S.C. § 405(g)(2002). A decision of the Commissioner becomes final when the Appeals Counsel affirms an ALJ decision, denies review of an ALJ decision, or when a claimant fails to pursue the available administrative remedies. *Aversa v. Secretary of Health & Human Services,* 672 F.Supp. 775, 777 (D. N.J. 1987); *see also* 20 C.F.R. § 404.905

(2002). The Commissioner's decision became final when the Appeals Counsel affirmed the ALJ's denial of benefits. Thus, this court has jurisdiction to review the ALJ's decision.

b. Standard Applicable to Review Commissioner's Decision

A district court's review of the Commissioner's decision is limited to whether the decision is supported by substantial evidence. *Jesurum v. Sec'y of the United States Department of Health & Human Servs.,* 48 F.3d 114, 117 (3d. Cir. 1995) (citing *Brown v. Bowen,* 845 F.2d 1211, 1213 (3d. Cir. 1988)); *see also* 42 U.S.C. § 405(g). If the decision is supported by substantial evidence, then the court is bound by those factual findings. *Plummer v. Apfel*, 186 F.3d 422, 427 (3d Cir. 1999). Substantial evidence has been defined as less than a preponderance, but "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Ventura v. Shalala*, 55 F.3d 900, 901(3d. Cir. 1995)(quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

This standard has also been embraced by the Supreme Court for determining the availability of summary judgment pursuant to Fed. R. Civ. Pro. 56. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250-251 (1986); *see also Williams v. Apfel*, 2000 U.S. Dist. LEXIS 4888 at *17 (D. Del. March 30, 2000), *vacated by, Williams v. Apfel*, 2001 U.S. Dist. LEXIS 9048 (D. Del. March 30, 2001). Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

"By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson,* 477 U.S. at 247-48. There is a genuine issue of fact when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248 (citations omitted). Additionally, summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an [essential element]...on which that party will bear the burden of proof at trial…since a complete failure of proof concerning an essential element of [that]...party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986).

The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact. *Id.* at 323. A moving party can meet its burden if the party can show the district court "that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. On the other hand, "a party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of his pleadings, but…must set forth specific facts showing that there is a genuine issue for trial.'" *Id.* at 321 (citing *Catrett v. Johns-Manville Sales Corp.,* 756 F.2d 181, 184 (1985)).

When reviewing a motion for summary judgment, a court must evaluate the facts in a light most favorable to the nonmoving party drawing all reasonable inferences in that party's favor. *Anderson, 477 U.S.* at 255. The court should grant the motion "unless the evidence be of such a character that it would warrant the jury in finding a

verdict in favor of that party." *Id.* at 251. In deciding a motion the court should apply the evidentiary standard of the underlying cause of action. *Id.* at 251-52.

> "In every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed…The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." *Id.* at 251.

Where for example, the countervailing evidence consists primarily of the plaintiff's subjective complaints of mental disability, the Commissioner must consider the subjective complaints and "specify his reasons for rejecting these claims and support his conclusion with medical evidence in the record." *Matullo v. Bowen*, 926 F.2d 240, 245 (3d. Cir. 1990). Despite the deference due to administrative decisions in disability benefit cases, "appellate courts retain a responsibility to scrutinize the entire record and to reverse or remand if the [Commissioner]'s decision is not supported by substantial evidence." *Smith v. Califano*, 637 F.2d 968, 970 (3d. Cir. 1981).

V. Discussion

a. Standard for Determining Disability

The Supplemental Social Security Income Program was enacted in 1972 to assist "individuals who have attained the age of 65 or are blind or disabled" by setting a minimum income level for qualified individuals. *Sullivan v. Zebley*, 493 U.S. 521, 524 (1990) (citing 42 U.S.C. § 1381 (1982 ed.)). In order to establish eligibility for social security benefits, a claimant has the burden of demonstrating that he or she is unable "to engage in any substantial gainful activity by reason of any 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 12 months." 42 U.S.C. § 423(d)(1)(A)(2002). An individual is disabled "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." 42 U.S.C. § 423(d)(2)(A). Furthermore, "a physical or mental impairment is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(2)(B).

To determine whether an individual is disabled in order to be entitled to disability benefits, the Commissioner applies a five-step inquiry pursuant to 20 C.F.R § 416.920 (2002). The five-step evaluation requires the following sequential analysis:

> "The [Commissioner] determines first whether an individual is currently engaged in substantial gainful activity. If that individual is engaged in substantial gainful activity, he [or she] will be found not disabled regardless of the medical findings. If an individual is found not to be engaged in substantial gainful activity, the [Commissioner] will determine whether the medical evidence indicates that the claimant suffers from a severe impairment. If the [Commissioner] determines that the claimant suffers from a severe impairment, the [Commissioner] will next determine whether the impairment meets or equals a list of impairments in Appendix 1 of sub-part P of Regulations No. 4 of the Code of Regulations. If the individual meets or equals the list of impairments, the claimant will be found disabled. If he [or she] does not, the [Commissioner] must determine if the individual is capable of performing his [or her] past relevant work considering his [or her] severe impairment. If the [Commissioner] determines that the individual is not capable of performing his [or her] past relevant work, then he must determine whether, considering the claimant's age, education, past work experience and residual functional capacity, he [or she] is capable of performing other work which exists in the national economy." *Morales v.* Apfel, 225 F.3d 310, 315-16 (2000) (quoting Brewster *v. Heckler*, 786 F.2d 581, 583-84 (3d. Cir. 1986)).

In this case, the ALJ concluded that Drejka retained the ability to perform her past relevant work as a housekeeper, dishwasher, and newspaper inserter. Plaintiff bears the burden of establishing that she is incapable of performing her past relevant work due to a physical or mental impairment. *See Kent v. Schweiker*, 710 F.2d 110, 114 (3d Cir. 1983).

b. Application of the Five-Step Test

On February 13, 2001, the ALJ issued his decision, finding that Drejka was not disabled. *D.I.* 13 at 12. In reaching this conclusion, the ALJ applied the five-step sequential evaluation process to the evidence on the record and found:

> "1) Claimant has not engaged in substantial gainful activity since the alleged onset of disability.
> 2) Claimant's borderline intellectual functioning, depression and post traumatic stress disorder are impairments considered "severe" based on the requirements in the Regulations 20 CFR § 416.920(b).
> 3) These medically determinable impairments, considered alone and in combination, do not meet or medically equal one of the listed impairments in Appendix 1, Subpart P, Regulation No. 4.
> 4) Claimant's residual function capacity resulted in moderate limitations in the ability to: understand and remember detailed instructions; maintain attention and concentration for extended periods; complete a normal workday and workweek without interruption from psychologically based symptoms; accept instructions and respond appropriately to criticism from supervisors; and respond appropriately to changes in the work setting.
> 5) Claimant's allegations regarding her limitations are not totally credible for the reasons set forth in the body of the decision.
> 6) Claimant has no exertional limitations (20 CFR § 416.945).
> 7) Claimant's past relevant work as a dishwasher, housekeeper and newspaper inserter did not require the performance of work-related activities precluded by her residual functional capacity (20 CFR § 416.965).

> 8) Claimant's medically determinable impairments do not prevent her from performing her past relevant work.
> 9) Claimant was not under a "disability" in the Social Security Act, at any time through the date of the decision (20 CFR § 416.920(e))."
> *D.I.* 13 at 18-19.

Thus, the ALJ concluded that Drejka was not eligible for Supplemental Security Income under Sections 1602 and 1614(a)(3)(A) of the Social Security Act. *Id* at 19. As set forth below, the ALJ's conclusion to deny plaintiff Social Security benefits was based on substantial evidence.

c. The ALJ Evaluated the Plaintiff's Credibility in Compliance with the Regulations

Plaintiff argues that the ALJ, in assessing her overall vocational abilities, improperly discounted the credibility of her testimony, specifically her claim that she could not read and write. When reviewing a decision, the district court must defer to the ALJ's determinations on the credibility of the witnesses and on whether the claimant has satisfied the burden of proof. *Murry v. Apfel,* 1999 U.S. App. LEXIS 28911 at *3 (9th Cir. Nov. 2, 1999)*; Davis v. Califano,* 439 F. Supp. 94, 98 (E.D. Pa. 1977); *see also Van Horn v. Schweiker*, 717 F.2d 871, 873 (3d. Cir. 1983)(the ALJ as the fact-finder, has full authority to pass on a claimant's credibility). "Great deference is given [to the ALJ's] judgment as fact-finder, since he actually heard the witnesses' testimony and observed their demeanor. 'Most particularly, the administrative law judge to whom the Secretary delegated fact finding responsibilities, must decide issues of credibility and appropriate

weight to be given the exhibits.'" *Davis,* 439 F. Supp. at 98. However, "a finding that a witness is not credible must be set forth with sufficient specificity to permit the court to engage in an intelligible review of the record." *Hanratty v. Chater,* 1997 U.S. Dist. LEXIS 15488, at *24-25 (W.D.N.Y. Aug. 11, 1997)(citations omitted).

This court cannot conclude that the ALJ's negative assessment of the plaintiff's credibility violated the regulations. The ALJ has adequately explained his finding that Drejka's testimony was not totally credible. At the hearing, Drejka testified that she could read a little but could not write at all. The ALJ found that Ms. Drejka's testimony was directly contradicted by medical evidence, specifically, in a 1996 psychological evaluation from Dr. Buglin. *D.I.* 13 at 16. The examiner noted that although the plaintiff took a long time to complete a questionnaire, she wrote in rather long sentences in her responses. *Id.* at 16, 131. Dr. Bugglin, in her psychological evaluation, also noted that plaintiff was reading legal text to get a better understanding on the law. *Id.* at 132.

In light of this contradictory objective evidence, the ALJ also assigned limited credibility to Drejka's allegations, based on the lack of medical support, for her purportedly disabling mental impairments discussed below.

d. The ALJ Finding that the Claimant Not Disabled by Weighing All the Medical Evidence is in Accordance with the Regulations

Plaintiff further contends that the ALJ improperly ignored the opinions of her treating physicians in reaching the decision to deny benefits. Specifically, plaintiff

argues that the ALJ improperly ignored the opinion of Dr. Graff. It is the ALJ's duty to make findings of fact and resolve evidentiary conflicts. *Monsour Medical Ctr. v. Heckler*, 806 F.2d 1185, 1190 (3d Cir. 1986), *cert. denied* 482 U.S. 905 (1987). The regulations provide that an ALJ can discount a treating physician's opinion where the physician's opinion is not well-supported by medically accepted clinical and laboratory diagnostic techniques, and is not inconsistent with other substantial evidence on the record. 20 C.F.R. § 416.927(d)(2) (2002). The factors to be applied to determine the appropriate weight to be given to the treating physician's opinion are: (1) length of treatment relationship and frequency of examination, (2) nature and extent of the treatment relationship, (3) supportability of the opinion by relevant evidence or explanation, (4) consistency of the opinion with the record as a whole, (5) whether the treating physician is a specialist, and (6) other factors which tend to support or contradict the opinion. 20 C.F.R. 404.1527(d)(2)(2002).

The ALJ's based his decision to discount the opinion of Dr. Graff, expressed in the October 4, 2000 questionnaire, on its inconsistency with other medical evidence on the record. Drejka was initially evaluated for psychiatric treatment by Dr. Graff, on January 12, 1999 and was thereafter seen on a number of occasions through January 31, 2000. As stated herein, Dr. Graff's medical evaluations indicate the plaintiff suffers from mild to moderate levels of impairment which tended to improve with increased

consultation and medication, but later subjectively worsened.

The ALJ did not ignore the treating physician's opinion expressed in the questionnaire, but conversely understood the importance of Dr. Graff's opinion by stating that a treating physician's opinions "are afforded great or even controlling weight regarding the nature and severity of the impairments when they are supported by and consistent with other evidence of the record." *D.I.* 13 at 16. Consequently, the ALJ determined that the earlier contemporaneous assessments conducted by Dr. Graff more accurately reflected the medical evidence based on the entire record.

The ALJ found that the other medical evidence in the record established that Drejka does suffer from impairments, which are severe within the meaning of the regulations, but not severe enough to meet or medically equal one of the impairments listed in Appexdix 1, Subpart P, Regulations No. 4. The ALJ considered the Supplemental Questionnaire as to Residual Functional Capacity that was completed in conjunction to the consultive psychiatric examination by Dr. Lifrak on December 13, 1999, which indicated that plaintiff suffers from a moderate degree of impairment. "A moderate impairment is defined as affecting but not precluding the ability to function." *Id.* at 16.

The ALJ also considered the reports of the state agency medical consultants who reviewed Drejka's file, but did not examine her. The consultant concluded that Drejka

was not limited in her daily activities, which at the time, consisted of caring for her child, socializing, and traveling independent. *Id.* at 17. The consultant found that plaintiff had moderate limitations in her ability to sustain concentration, persistence and pace and to adapt to the demands of a work setting. *Id.* Similarly, the reviewing State agency psychologist assessed that Drejka had moderate impairments in the ability to: “understand and remember detailed instructions; maintain attention and concentration for extended periods; complete a normal workday and workweek without interruptions from psychologically based symptoms; accept instructions and respond appropriately to criticism from supervisor; and respond appropriately to changes in the work setting.” *Id.* In noting that a moderately severe or severe rating was not given in the assessments, the ALJ concluded that these assessments were consistent with the evidence presented as a whole and also with the contemporaneous assessments of the treating psychiatrist. *Id.* at 16.

Although the medical opinions regarding the plaintiff’s condition vary, it is the ALJ, not this court who is to determine conflicts in competing evidence. Therefore, this court finds that the ALJ has applied the appropriate analysis to evaluate a treating physician’s opinion and the ALJ’s findings were based on substantial evidence.

e. The Vocational Testimony from the Expert

Plaintiff contends that a portion of the transcript is fatally flawed requiring a new

hearing to be ordered. Her argument is centered on the testimony of the vocational expert, in which one question presented to the expert contains a number of "inaudibles." *D.I.* 13 at 51. During the vocational expert's testimony, the ALJ's posed a hypothetical question relating to the plaintiff's ability to perform past employment. Before relying on the opinion of the vocational expert, the ALJ already determined the residual functional capacity of the plaintiff. In accordance with the five step analysis, after the ALJ determines the residual functional capacity, he must determine whether the claimant can perform any of her past relevant work. In order to constitute "past relevant work" the work must have been performed within the last 15 years or the 15 years prior to the date that disability is established. In addition, the work must have lasted long enough for the claimant to learn to do the job and meet the definition of substantial gainful activity. *See* 20 CFR § 416.965 (2002).

The government argues that the vocational expert's testimony was not material until the fifth step of the evaluation process, after there was a determination that plaintiff could not perform her past relevant work. However, the ALJ utilized testimony of the vocational expert in determining that Drejka could return to her past work, as a dishwasher, housekeeper and newspaper inserter based upon the her residual functional capacity. *D.I.* 13 at 17. Contrary to the government's position, the ALJ utilized the vocational expert's testimony at the fourth step of the sequential analysis in

finding that the Drejka can return to past work.

However, based on the remainder of the vocational expert's testimony, the "inaudibles" are immaterial to the ALJ's finding that plaintiff was not disabled under the regulations. The remainder of vocational expert's testimony sufficiently supported the ALJ's finding that Drejka could perform work as a housekeeper, dishwasher, or other jobs which are light exertionally and unskilled. *Id.* at 51-52. It was this testimony that the ALJ utilized in making the determination that the plaintiff was not disabled, not the hypothetical. Therefore, the mere fact that there were "inaudibles" in the transcript did not make it fatally flawed to require remand.

VI. Conclusion

For the reasons discussed, this court finds that substantial evidence supported the ALJ's decision to deny disability benefits and supplemental security benefits. Viewing all the relevant facts in a light most favorable to the plaintiff, the Commissioner's decision was based on substantial evidence. Consequently, the defendant's motion for summary judgment is **GRANTED**, and the plaintiff's motion for summary judgment is therefore **DENIED**. An order consistent with this opinion will follow.