UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DANIA MCKIVER,

PLAINTIFF,

v. No. 3:04CV1080 (SRU)(WIG)

JO ANNE B. BARNHART, COMMISSIONER, SOCIAL SECURITY ADMINISTRATION,

DEFENDANT.

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RECOMMENDED RULING ON PENDING MOTIONS

Plaintiff, Dania McKiver, has brought this action under § 205(g) of the Social Security Act, 42 U.S.C. § 405(g), seeking review of a final decision of the Commissioner of the Social Security Administration denying her disability insurance benefits. Plaintiff claims that she became disabled on or about December 31, 1992, due to an above-the-knee amputation of her left leg suffered in 1979, anxiety, depression, and obesity. (Pl.'s Comp. ¶ 4.) She has now moved for summary judgement **[Doc. #6]** seeking an order reversing the decision of the Commissioner. The Commissioner has answered, filed the administrative record, and has moved for an order affirming the decision of the Commissioner **[Doc. #11]**. For the reasons set forth below, the Undersigned recommends that the Commissioner's decision should be affirmed.

I. "Disability" under the Social Security Act

In order to establish an entitlement to disability benefits under the Social Security Act, a claimant must prove that he is "disabled" within the meaning of the Act. A claimant may be

considered disabled only if he cannot perform any substantial gainful work because of a medical or mental condition which can be expected to result in death or which has lasted or can be expected to last for a continuous period of at least twelve months. 42 U.S.C. § 423(d)(1)(A); Shaw v. Chater, 221 F.3d 126, 131 (2d Cir. 2000). The impairment must be of such severity that the claimant is not only unable to do his previous work but, additionally, considering his age, education, and work experience, he cannot engage in any other kind of substantial gainful employment which exists in the national economy, regardless of whether such work exists in the immediate area where he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. 42 U.S.C. § 423(d)(2)(A); see Heckler v. Campbell, 461 U.S. 458, 460 (1983). "Work which exists in the national economy" means work which exists in significant numbers either in the region where he lives or in several regions in the country. 42 U.S.C. § 423(d)(2)(A).

The Social Security Administration has promulgated regulations that set forth a sequential, five-step process for evaluating disability claims. 20 C.F.R. § 404.1520. First, the Administrative Law Judge ("ALJ") must determine whether the claimant is currently working. 20 C.F.R. § 404.1520(b). If the claimant is currently employed, the claim is disallowed. Id. If the claimant is not working, as a second step, the ALJ must make a finding as to the existence of a severe mental or physical impairment that significantly limits the ability to do basic work activities; if none exists, the claim is denied. 20 C.F.R. § 404.1520(c). Once the claimant is found to have a severe impairment, the third step is to compare the claimant's impairment with those in Appendix 1 of the regulations (the "listings"). 20 C.F.R. § 404.1520(d); Bowen v. Yuckert, 482 U.S. 137, 141 (1987). If the claimant's impairment meets or equals one of the

impairments in the listings, the claimant is presumed to be disabled. 20 C.F.R. § 404.1520(d); see Schaal v. Apfel, 134 F.3d 496, 501 (2d Cir. 1988); Berry v. Schweiker, 675 F.2d 464, 467 (2d Cir. 1982). If the claimant's impairment does not meet or equal one of the listed impairments, as a fourth step, he will have to show that he does not possess the "residual functional capacity" ("RFC") to perform his past relevant work. 20 C.F.R. § 404.1520(e). If the claimant cannot perform his former work, the burden then shifts to the Commissioner to show that the claimant is prevented from doing any other work. Butts v. Barnhart, 388 F.3d 377, 383 (2d Cir. 2004), amended on other grounds on reh'g, 416 F.3d 101 (2d Cir. 2005). A claimant is entitled to receive disability benefits only if he cannot perform any alternate gainful employment. 20 C.F.R. § 404.1520(f); see Perez v. Chater, 77 F.3d 41, 46 (2d Cir. 1996).

The initial burden of establishing disability is on the claimant. 42 U.S.C. § 423(d)(5); see Green-Younger v. Barnhart, 335 F.3d 99, 106 (2d Cir. 2003). Once the claimant demonstrates that he is incapable of performing his past work, the burden shifts to the Commissioner to show that the claimant has the residual functional capacity[1] to perform other substantial gainful activity in the national economy. See Curry v. Apfel, 209 F.3d 117, 123 (2d Cir. 2000); Bapp v. Bowen, 802 F.2d 601, 604 (2d Cir. 1986); Parker v. Harris, 626 F.2d 225, 231 (2d Cir. 1980).

[1] "Residual functional capacity" refers to what a claimant can still do in a work setting despite his physical and mental limitations caused by his impairments, including related symptoms such as pain. In assessing an individual's RFC, the ALJ is to consider his symptoms (such as pain), signs and laboratory findings together with the other evidence. See 20 C.F.R. § 404.1545. "Ordinarily, RFC is the individual's maximum remaining ability to do sustained work activities in an ordinary work setting on a regular and continuous basis, and the RFC assessment must include a discussion of the individual's abilities on that basis. A 'regular and continuing basis' means 8 hours a day, for 5 days a week, or an equivalent work schedule." Social Security Regulations (SSR) 96-8p; see Melville v. Apfel, 198 F.3d 45, 52 (2d Cir. 1999).

II. Background

A. Personal History

Ms. McKiver was born on April 6, 1966. She was thirteen years old when hit by a car in 1979 resulting in the amputation of her left leg above the knee. Her alleged onset of disability was on or around December 31, 1992, when she states that she was unable to continue working because the pain from the amputation became unbearable. (Tr. 305.)[2] Her date last insured is December 31, 1997.[3] She has a tenth grade education with a GED. (Tr. 324.) She held jobs after high school as a telemarketer and as a telephone operator up until 1992. Her last employment was with Pawtucket Rhode Island Answering Service from 1987 to 1992, where she worked as a telephone operator. Ms. McKiver described her work as answering phones, doing paperwork, and supervising her coworkers. (Tr. 308-313.) Ms. McKiver testified that she left her place of employment because she had a lot of pain and was having frequent panic attacks, trouble keeping her head up, and trouble concentrating. (Tr. 308-309, 314.)

Prior to her employment at Pawtucket Rhode Island Answering Service, Ms. McKiver worked at another answering service for a few months, from May to October, 1987, doing the same type of work. (Tr. 310-311.) Ms. McKiver testified that in 1987 she worked at EDR Industries for a couple of months "charging and setting jewelry," which entailed use of "some type of gun, it's like a glue we had to apply to jewelry and then put another piece together, assembling jewelry." (Tr. 310-311.) At EDR, Ms. McKiver stated that she sat down to do her

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[2] "(Tr.__)" refers to the pages of the Administrative Record.

[3] In order to qualify for Social Security Disability benefits, one must be both disabled and insured for disability benefits. 42 U.S.C. § 423(a)(1)(A) and (c); 20 C.F.R. § 404.101, § 404.120, and § 404.315(a). An individual must demonstrate onset of disability on or before his date last insured ("DLI") in order to qualify for Social Security Disability benefits. Claimant's DLI is December 31, 1997. (Tr. 136.)

work and did not have to lift anything heavy. (Tr. 310-311.) She testified that she left EDR because of phantom pain and trouble keeping her head straight. (Tr. 310-311.)

Prior to her work at EDR, Ms. McKiver was employed by Allstate Alarms in 1986, where she monitored home alarms from the company's office. She testified that an alarm would be triggered, notification would come into her location, and then she would report the alarm to the police and to people on a list. (Tr. 312-313.) Ms. McKiver was fired from that job. Ms. McKiver was also employed as a telemarketer at two companies in 1986, listed as the Children's Book Company and Telemarketer Resort Company. (Tr. 96.) As a telemarketer, Ms. McKiver took messages by typing them into a computer. She also said that she handled the complaints that came into the company, programmed information with the computers, re-booted the computers if there was a problem, and supervised other operators. (Tr. 96.) At her previous jobs, she stated that she walked approximately one hour per day, stood one hour per day, sat eight hours per day, and never really bent or did any reaching. She stated she did some lifting and carrying pieces of equipment, but did not specify how often.

B. Medical History

Plaintiff produced medical records from Memorial Hospital of Rhode Island Emergency Room, Roger Williams General Hospital, Connecticut Mental Health Center, Dr. Karen Dahl at Hill Health Center, Dr. Karin Michels-Ashwood and Ashley Beasley, R.N., at the Internal Medicine Clinic, Dr. Joseph Guarnaccia, Dr. Ahmed Syed, and Dr. Amy Hopkins.

The earliest medical record is from June 30, 1992, when Ms. McKiver went to the Memorial Hospital of Rhode Island Emergency Room with complaints of general body weakness which she had been experiencing for two days. She also complained that she was had suffered an

anxiety attack that day. She stated that she "always has headaches," which had increased over the past two days and described pain "rushing in [her] ears when she lays down." She also complained of neck discomfort. Because of her headaches and neck pain, a cervical spine x-ray was performed, which was normal. (Tr. 154-156.) The treating doctor's diagnosis was "headaches." He prescribed medication and a soft collar and recommended that she see an orthopedist in three days if the pain had not improved. (Tr. 156.)

On November 30, 1992, Ms. McKiver was treated at the emergency room at Roger Williams Hospital for severe headaches, accompanied by dizziness and nausea. (Tr. 248.) The examination revealed no positive clinical findings, and the doctor's impression was "chronic headaches, rule out viral syndrome." (Tr. 248.) Ms. McKiver was given a prescription, told to drink plenty of fluids, rest, and follow-up at the Medical Clinic. (Tr. 248.)

On December 9, 1992, Ms. McKiver was again seen at Roger Williams General Hospital for complaints of headaches, dizziness, trembling, lower back pain, neck pain, stomach pressure and burning. (Tr. 157.) She stated that she had been having these symptoms since her 1979 accident, most recently three times, two weeks earlier. (Tr. 157.) The doctor's impression was that her symptoms were most consistent with panic attacks and noted that she self-medicates with alcohol. (Tr. 157-158.) Ms. McKiver returned to Roger Williams on December 16, 1992, for follow-up, and was prescribed Nortriptyline and Ativan for her panic attacks and antacids for her stomach problems. (Tr. 159.) On January 13, 1993, she returned to Roger Williams for a follow-up visit for her continuing headaches and dizziness. It was noted that she had been non-compliant about taking her medications. She was referred to physical therapy for her neck and headache pain. (Tr. 160, 161.) At her February 10, 1993 follow-up appointment, she stated that

her panic attacks had subsided but that she was still experiencing neck and back pain, headaches, and a feeling of lightheadedness at times. The treating doctor noted that Ms. McKiver appeared to be responding to the medication for anxiety and noted that he would keep her on Nortriptyline but taper off the Ativan. He further noted that she had not been attending physical therapy and stated that he would wait until she had a few physical therapy sessions before further evaluating her back and neck pain. (Tr. 161.) She reported that she was not experiencing as much stomach pain. (Tr. 161.)

On April 6, 1994, Ms. McKiver presented at the Connecticut Mental Health Center in New Haven, Connecticut to get her disability forms completed by her social worker. (Tr. 173.) She complained of chronic depression, anxiety and panic attacks. She said that the thought of medication scared her and that while she had previously received Nortiptyline and Ativan, she did not take the medication and self-medicated with alcohol. (Tr. 173.) She was described as well-oriented and did not appear to have a depressive affect. Her preliminary diagnosis was adjustment disorder, alcohol dependence, and the need to rule out anxiety with panic attacks with post-traumatic stress disorder. (Tr. 173.) The social worker recommended detox and a referral to an anxiety clinic, although the latter would require her to quit drinking. Ms. McKiver agreed to consider detox and said that she would call or return. (Tr. 173.)

Dr. Karen Dahl, staff internist at the Hill Health Center, saw Ms. McKiver on May 7, 1996, August 22, 1996, October 22, 1996, November 12, 1996, February 25, 1997, and April 5, 1997. On her first visit, Dr. Dahl noted that Ms. McKiver had many problems, including morbid obesity, phantom pain, panic attacks since the age of 16, heavy smoker, history of alcoholism, and back, neck and shoulder pain. She stated that Ms. McKiver needed an hour's appointment,

which she could not provide. (Tr. 203.) Dr. Dahl suggested that she go to the Connecticut Mental Health Clinic for evaluation but Ms. McKiver declined to do so. (Tr. 203.) Ms. McKiver failed to show up for her next several appointments at the Hill Health Center. On October 22, 1996, Ms. McKiver presented at the Center's triage, reporting shooting pain in her right calf and asking for an appointment to rule out a blood clot and also to get new crutches. Dr. Dahl's examination revealed a small nodule on her right calf, which felt like a thrombostic varicose vein, for which she prescribed a Josst stocking and leg elevation. (R. 206.) She had a long discussion with Ms. McKiver about her weight, 266 pounds at 5'4", and suggested that she attempt using a prosthesis if her weight could remain stable. She also prescribed Ibuprofen and noted that Ms. McKiver still had not gone to the Mental Health Clinic. (Tr. 207.) At the next appointment on November 12, Dr. Dahl prescribed Elavil for her phantom pain. (Tr. 207.) On February 25, 1997, Ms. McKiver reported to Dr. Dahl that she had never filled her prescription for Elavil (Tr. 217.) She complained of a headache that had lasted two weeks. Dr. Dahl again prescribed Elavil and Methocarbamol, a medication to help with her musculoskeletal complaints. (Tr. 217.) Ms. McKiver saw Dr. Dahl again on April 15, 1997, at which time she continued to complain of persistent headaches. Dr. Dahl prescribed Varapamil, which is used for the treatment of migraine headaches, although Dr. Dahl indicated that she did not believe her headaches were migrainous, but rather related to chronic moderately severe muscle tension in her neck and shoulder girdle area. (Tr. 214, 222.)

On May 16, 1997, Dr. Dahl submitted a letter to plaintiff's attorney in which she described plaintiff's problems as obesity, an above-the-knee amputation of the left leg, phantom pain from the missing extremity, panic attacks since the age of 16 by history, alcohol abuse,

heavy smoking, chronic right knee and hip pain, diffuse back pain, chronic headaches, and urinary frequency. (Tr. 221.) Dr. Dahl opined that if Ms. McKiver could maintain her weight, a prosthesis would greatly alleviate her pains. (Tr. 222.) She also noted Ms. McKiver's refusal to undergo a mental health evaluation and her failure to have the suggested x-rays taken of her knee, hip, lumbar, sacral, thoracic and cervical spine. (Tr. 222.) Dr. Dahl noted her concern that Ms. McKiver's over-use of her right extremity would predispose her to disabling arthritis in both the right knee and hip, which might already be occurring. (Tr. 222.) She referred Ms. McKiver to the Gaylord Rehabilitation facility for a regime of rigorous physical therapy and prescribed a muscle relaxant and anti-inflammatory for pain relief. She concluded:

> Ms. McKiver should be able to perform any and all activities in the sitting position. If she could stabilize her weight, I believe she could be fitted with a left lower extremity prosthesis which would allow her to ambulate relatively normally and would certainly relieve some of the excess stress currently being placed on her right knee and hip joints. However, as long as her weight remains in flux and/or she is unwilling to be fitted for a prosthesis her activities must exclude walking, crawling, bending, stooping, squatting and prolonged standing. She should be able to do work sitting down as mentioned above. I have encouraged her to be evaluated at the Gaylord facility because I believe that she is intrinsically an intelligent, capable individual whose upper back and cervical pain could be significantly relieved with appropriate exercises in addition to physical conditioning. Weight loss of approximately 100 pounds has been stressed on numerous occasions. I believe in addition that there are substantial psychological factors hindering her adjustment to her physical condition. For this reason I have repeatedly encouraged her to seek psychiatric consultation which she has declined. Given all of the above I believe she will probably not be successfully employable in the near future.

(Tr. 223.)

The next medical record is dated January 13, 2000, from Dr. Karin Michels-Ashwood,

who had treated Ms. McKiver in September, October, and December of 1999,[4] who completed a Physical Residual Functional Capacity Questionnaire. (Tr. 267.) She stated that Ms. McKiver suffered from phantom pain, chronic neck and shoulder pain exacerbated by her constant use of crutches, low back and right hip pain, obesity, and panic attacks. (Tr. 267.) She described her prognosis as "fair with [decreased] weight/appropriate physical therapy." (Tr. 267.) She indicated that Ms. McKiver preferred not to take any medications. (Tr. 268.) She indicated that anxiety and panic attacks were psychological conditions affecting her symptoms and functional limitations. (Tr. 268.) Dr. Michels-Ashwood stated that Ms. McKiver could walk one or two city blocks without rest, she could sit or stand/walk continuously for one hour a day and up to two hours during the entire workday. (Tr. 269). She stated that her anxiety might decrease her ability to work. (Tr. 271.) In her transmittal letter to plaintiff's attorney, Dr. Michels-Ashwood stated:

> Ms. McKiver has had chronic pain . . . for many years, and will undoubtedly continue to experience pain and be unable to successfully sustain full-time work in the near future. I do believe that intense physical and occupational therapy (to include a left lower prosthesis) would improve her pain issues, as would weight loss. . . . A full evaluation and management by a pain specialty clinic would probably benefit her greatly, though Ms. McKiver has expressed concern about past unsatisfactory care at such a clinic.
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> Ms. McKiver also continues to experience debilitating panic attacks which affect her ability to be employed full-time. She has not been interested in an evaluation by a mental health specialist for her anxiety disorder, which is likely affecting her pain issues.
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> In conclusion, Ms. McKiver experiences chronic pain as well as an anxiety disorder that currently preclude gainful employment, though I believe that appropriate therapies as mentioned above

[4] Records from these visits are not part of the record.

could improve her condition.

(Tr. 266.)

C. Reports of State Agency Doctors

On November 8, 1993, Ms. McKiver was sent to a Social Security Administration Consultative Internist, Dr. Joseph Guarnaccia, for an internal medical evaluation. He noted that she had attempted to wear a prosthesis but said she "did not have patience with the device" because of skin irritations and when she gained weight, it "became stuck," so she had been walking with crutches ever since. (Tr. 165-167.) Ms. McKiver reported that she continued to have phantom pains which felt like spasms in her shins or in her big toe. (Tr. 165.) She said the phantom pain could last for days at a time and occurred one to two times per month. She stated that she did not take medications. (Tr. 165.) She said that since her accident she always had a low-grade feeling of anxiety which was punctuated by phantom pain. She admitted that because of the anxiety, she drank beer all the time, up to 40 ounces of beer per day. She also related that she experienced frequent headaches over her right face and neck region. She stated that when these headaches occurred her balance was not good. (Tr. 165.) She stated that she was depressed and had had suicidal thoughts in the past. She noted that she had never been treated by a mental health worker for depression or anxiety, although she was given medication at Roger Williams last year for anxiety but never took the pills. Dr. Guarnaccia observed that her stump was well healed and non-tender. After examining her, he stated that "her major limitation[ ] at this point is her history of anxiety." (Tr. 167.)

Ms. McKiver was also evaluated by Dr. Ahmed Syed, a Social Security Administration Consultative Psychiatrist, on November 16, 1993. When speaking with Dr. Syed, she admitted to

being an alcoholic and stated that "[w]hen I do not drink, I feel very anxious, very depressed . . . and I get panic attacks from time to time; many times I thought that I would die." (Tr. 168.) Dr. Syed noted that she was not taking any medications nor receiving any psychiatric treatment. (R. 170.) He noted that although Ms. McKiver reported she never had any notable physical problems, in the recent past she had been experiencing pain in her neck, hip, and back. (Tr. 170.) She also described headaches and dizziness since her leg amputation. (Tr. 170.) Dr. Syed wrote of Ms. McKiver's ability to work:

> This lady does have one leg but over the years she seems to have worked with this and though she stated that physically she is getting more limited, she does seem to have panic attacks and she also has depression and again, she has a problem with alcohol too, so these could interfere with her functioning in a job situation. And until she abstains from alcohol and undergoes treatment for her depression and family disorder, she may have difficulty going back to work.

(Tr. 170.) Dr. Syed noted that Ms. McKiver had the ability to relate and displayed normal thinking. Her concentration was fair, her memory was good, and her ability to perform simple and intelligent tasks was good. (Tr.170.) Dr. Syed also noted that "[d]uring the examination there were not too many findings of note and I think her case is mainly with the history." (Tr. 171.) He diagnosed panic disorder without agoraphobia but with depressive symptoms, and alcohol dependency and determined a Global Assessment of Functioning ("GAF") of 50 to 55. (Tr. 171, 172.) He recommended that she be treated for her panic attacks and depression and that it would be helpful if she abstained from drinking alcohol. (Tr. 172.)

D. Procedural History

Ms. McKiver filed her first application for disability insurance benefits ("DIB") on

September 22, 1993, listing an onset of disability on December 31, 1992. (Tr. 42.) The application was denied on initial review. (Tr. 47.) Ms. McKiver then sought reconsideration based upon her severe depression and alcoholism. (Tr. 76.) After review by a State agency physician and disability specialist, the application was again denied on reconsideration based upon a lack of sufficient medical evidence to support her claims. The decision also noted that Ms. McKiver had failed to report for her special examination. (Tr. 88-91.)

Ms. McKiver then filed the present application on May 18, 1995, alleging the same onset date, December 31, 1992. (Tr. 109-111.) That application was also denied initially and again on reconsideration. (Tr. 128-131.) Plaintiff then requested a hearing before an administrative law judge. (Tr. 132-133.)

The December 27, 1996 hearing was adjourned because Ms. McKiver was unrepresented and expressed her desire for an attorney. (Tr. 291-298.) A hearing was then held on April 4, 1997, in New Haven, Connecticut before ALJ Samuel Kanell,[5] at which time Ms. McKiver was again unrepresented but chose to proceed without counsel. On August 7, 1997, ALJ Kanell issued his written decision, in which he found that she retained the residual functional capacity ("RFC") for sedentary work, including her past relevant work as a telemarketer and telephone operator. Therefore, he found her not to be disabled within the meaning of the Social Security Act. (Tr. 227-231.)

Ms. McKiver then obtained counsel and requested the Appeals Council review the ALJ's decision. (Tr. 237-238.) By order dated November 19, 1999, the Appeals Council reversed ALJ

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[5] The record indicates that the "Cassette dated 4/4/97 is not available for inclusion." (Court Tr. Index.)

Kanell's decision and remanded the matter for further evaluation of her mental impairment and her obesity, including, if necessary, evidence from a medical expert clarifying whether her impairments met the listings, and to consider the non-examining State agency medical consultant opinions. (Tr. 244-245.)

A third hearing was held on February 16, 2000, before ALJ Robert E. Thorne in which Ms. McKiver, represented by counsel, and medical expert, Dr. Amy Hopkins, testified. (Tr. 299-384.) A "Claimant's Recent Medical Treatment Form" was completed by Ms. McKiver and submitted at the hearing. (Tr. 273-275.) Plaintiff stated that she had been told by her doctors that a great deal of the pain that she suffers is from use of crutches but that she had obtained a prosthesis and had been to physical therapy with it, although she was still experiencing pain. (Tr. 273.) She stated that she had been told that she might have arthritis in her hip and had a prescription to have x-rays taken. (Tr. 273.) She also reported that it had been suggested to her that she might need surgery for the phantom pain. (Tr. 273.) She stated that to relieve the pain, she used generic pain relievers, heat and ice. (Tr. 274.) She also stated that she drank beer whenever she felt a panic attack coming on. (Tr. 274.) She reported that she had an appointment scheduled with a psychiatrist after the hearing, on February 21, 2000, because she truly needed help with this problem. (Tr. 274.)

At the hearing, Ms. McKiver testified that she experienced pain every day, occurring upon sitting and standing, worse at times and affecting her concentration. (Tr. 313, 314 .) She testified that she experienced pain in her hips, head, shoulders, and back, which she had been told was from her use of crutches and possibly arthritis. (Tr. 316, 317.) She also stated that every day she suffered from sharp jabbing phantom pains, which she described as "well, it feels like my leg,

well, my foot and my toes, like my whole limb is still there, and . . . it feels like I'm actually having pain in like my, say, my left toe." (Tr. 319.) To alleviate these pains, she testified that she tightened up her stump. (Tr. 320.) She stated that the prosthesis neither caused nor helped relieve the pain. (Tr. 321, 330.) She was not taking any medications at the time of the hearing. (Tr. 320.) She stated that she had done everything the doctors suggested, losing weight (60 pounds, from 274 to 212) and getting a prosthesis in 1999, but that these things had not helped. (Tr. 321-322.) She did not feel that she could handle a job such as a security guard or librarian, where she was sitting all the time, because of the pain. (Tr. 318, 319.)

She also testified that she had suffered from panic attacks since she was a teenager, and that the panic attacks were in and of themselves disabling. (Tr. 316.) However, since she had quit work and was home, the panic attacks had subsided. (Tr. 317.)

Dr. Amy Hopkins, a board-certified internist, testified as a medical expert at the hearing. Dr. Hopkins acknowledged Ms. McKiver's phantom pain, stating that "it's not an uncommon finding in people with amputations" and that the shooting pain down the leg is not affected by position. (Tr. 331.) She opined that Ms. McKiver needed to go to a pain clinic for treatment of the phantom pain, but that it did not appear from the record that she had done so, and that Ms. McKiver had been non-compliant in taking the prescribed Elavil, which is commonly used to treat neurological pain. (Tr. 331, 332.)

Dr. Hopkins noted Ms. McKiver's complaints of hip, neck, and back pain, but that she had never followed through with the suggested x-rays, medication, physical therapy, or other treatment. (Tr. 332, 333.) She added that crutches, which can put a lot of strain on the body, could be an exacerbating factor in Ms. McKiver's pain. She also noted that "obesity will not

have an effect on phantom pain" but "may have an effect on musculoskeletal pain." (Tr. 340.)

With respect to plaintiff's panic attacks and alcoholism, she noted that other than an initial intake evaluation on April 6, 1994, at the Connecticut Mental Health Center, there was no other documentation of psychiatric treatment over the next six years, only references in the records that plaintiff did not follow up or was not interested in a psychiatric evaluation. (Tr. 334, 336, 338.) Therefore, she testified that she could not comment on whether plaintiff would respond to psychiatric treatment because there really never had been any treatment. (Tr. 336-337.)

Dr. Hopkins reviewed plaintiff's residual functional capacity questionnaire and questioned plaintiff's statement that she could not stand or sit for more than two hours in an eight-hour day. This response, in her opinion, implied that plaintiff spent most of her time lying down, which was not documented nor substantiated by any objective findings. (Tr. 338.) She also did not believe that the lifting, bending, and twisting restrictions were supported by any medical documentation. (Tr. 339.) Finally, as to the statement that her panic attacks decreased her ability to work, Dr. Hopkins stated that "we don't really know that and this with no failure of therapy. It hasn't really even been well quantified." (Tr. 339.)

After reviewing the medical records, as well as the Mental Residual Functional Capacity Assessment, Residual Physical Functional Capacity Assessment, and Psychiatric Review Technique from January 10, 1994, by the State Agency physicians, she opined that plaintiff should not climb ladders or stairs, but that she should be able to sit without limitation. (Tr. 348.) She was unable to make a determination about plaintiff's ability to stand or walk because no one had documented her gait or tested her ability to walk or her endurance. (Tr. 380, 347.) Dr.

Hopkins further found that there was "insufficient information" on plaintiff's mental limitations, including her alleged alcoholism, for her to form an opinion about the restrictions they imposed on her daily living. (Tr. 351-353.)

By written decision dated June 15, 2000, the ALJ found that Ms. McKiver was not disabled in that she retained the functional capacity to perform her past relevant work. (Tr. 18-36.) On July 5, 2000, Ms. McKiver filed a request with the Appeals Council to review the decision of ALJ Thorne. (Tr. 15-18.) By letter dated May 19, 2004, the Appeals Council declined to review Ms. McKiver's claim (Tr. 5-7), thus rendering the ALJ's June 15, 2000 decision the final decision of the Commissioner.

E. The ALJ's Decision

After consideration of the record and testimony at the hearing, the ALJ undertook the prescribed five-step analysis and made the following findings:

1. The claimant met the non-disability requirements for a period of disability and disability insurance benefits set forth in Section 216(i) of the Social Security Act only through December 31, 1997.

2. The plaintiff last performed substantial gainful activity in 1992.

3. The medical evidence establishes that the claimant has had an above the knee amputation of the left leg with related pain and suffers from obesity. These are severe impairments. 20 C.F.R. § 404.1520(c).

4. The medical evidence establishes that the claimant's non-exertional impairments, panic attacks and depression, are non-severe. 20 C.F.R. § 404.1521(a).

5. The claimant has no impairment that meets or equals the criteria of any impairment

listed in Appendix 1, Subpart P, Regulations No. 4.

6. The claimant retains the residual functional capacity for sedentary work. 20 C.F.R. § 404.1567(a).

7. The claimant's past relevant work as an answering service operator/supervisor did not require the performance of work-related activities precluded by her residual functional capacity. 20 C.F.R. § 404.1545.

8. The claimant's medically determinable impairments do not prevent her from performing her past relevant work. 20 C.F.R. § 404.1565.

9. The claimant was not under a "disability" as defined in the Social Security Act, at any time through the date of the decision. 20 C.F.R. § 404.1520(e).

(Tr. 27-28.)

Having determined that Ms. McKiver failed to meet the requirements of "disabled" at the fourth step, based on his finding that she retained the residual functional capacity to perform her past relevant work or other work which exists in significant numbers in the national economy, the ALJ did not reach the fifth step in the sequential evaluation process. Thus, he concluded that Ms. McKiver was not disabled, as defined by the Social Security Act, at any time through the date of his decision. (Tr. 28.)

III. Discussion

A. Standard of Review

Judicial review of the Commissioner's final decision denying social security benefits is limited. Yancey v. Apfel, 145 F.3d 106, 111 (2d Cir. 1998). It is not the court's function to determine de novo whether the claimant was disabled. Schaal, 134 F.3d at 501. Rather, a district

court must review the record to determine first whether the correct legal standard was applied and then whether the record contains "substantial evidence" to support the decision of the Commissioner. 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive...."); see Bubnis v. Apfel, 150 F.3d 177, 181 (2d Cir. 1998); Balsamo v. Chater, 142 F.3d 75, 79 (2d Cir. 1998). Substantial evidence is "more than a mere scintilla." Richardson v. Perales, 402 U.S. 389, 401 (1971) (internal citations and quotation marks omitted). It "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. Thus, the role of this court is not to decide the facts anew, nor to reevaluate the facts, nor to substitute its judgment for that of the ALJ, Appeals Council, or Commissioner. Rather, the decision of the Commissioner must be affirmed if it is based upon substantial evidence, even if the evidence would also support a decision for the claimant. Dobson v. Chater, 927 F. Supp. 1265, 1270 (D. Neb. 1996).

Plaintiff urges this court to reverse the finding of the Commissioner on the ground that the decision of the ALJ was not supported by substantial evidence and that the decision of the Commissioner of Social Security is contrary to the law. Specifically, she alleges (1) that the ALJ erred in finding at step two that she does not have a severe mental disability; (2) that the ALJ failed to properly consider Listing 1.05(B); and (3) that her credibility was not properly assessed. The Commissioner, on the other hand, asserts that the decision was supported by substantial evidence and urges this court to affirm the decision.

B. Whether the ALJ Applied the Correct Legal Standard in Finding that the Plaintiff Did Not Suffer From a Severe Mental Impairment and Whether His Finding is Supported by Substantial Evidence

To be found disabled at step two of the sequential evaluation process, an individual must

have a medically determinable "severe" physical or mental impairment or a combination of impairments that meet the duration requirement. 20 C.F.R. § 404.1521(a); SSR 96-3p. At step two, the individual claimant bears the burden of establishing that his impairment is severe. Williams v. Apfel, 204 F.3d 48, 49 (2d Cir. 1999). An impairment is severe if it imposes more than a slight limitation on an individual's ability to perform basic work activities; an impairment that is "not severe" must be a slight abnormality that has no more than a minimal effect on the ability to do basic work activities. SSR 96-3p. Basic mental work activities include understanding, remembering, and carrying out simple instructions; use of judgment; responding appropriately to coworkers, supervision and usual work situations; and dealing with changes in a routine work setting. 20 C.F.R. § 404.1521(b)(3), (4), (5), & (6).

Relying on Bowen v. Yuckert, 482 U.S. at 158, and Dixon v. Shalala, 54 F.3d 1019, 1030 (2d Cir. 1995), plaintiff argues that the ALJ, in finding that her mental impairments were not severe, misapplied the "severity regulation" at step two of the sequential evaluation process, which should be used to screen out only de minimis claims. Citing Dr. Syed's diagnoses of panic disorder and depression, and her GAF score of 50 to 55, reflecting moderate impairment in social, occupational or school functioning, she argues that her mental impairments were clearly more than de minimis.

While plaintiff is correct that the ALJ, at step two, should screen out only de minimis claims, the ALJ in this case did not screen out plaintiff's claim at step two. Rather, based on his finding of a severe physical impairment, he continued with the five-step sequential evaluation process, finding her "not disabled" at step four based upon her residual functional capacity to perform her past relevant work. Thus, his failure to find that her mental impairment was "severe"

or to consider a combination of her physical or mental impairments was, at worst, harmless error. See Jackson v. Heckler, 592 F. Supp. 1124, 1126 (N.D. Ill. 1984); Perkins v. Barnhart, 79 Fed. Appx. 512, 515 (3d Cir. 2003).

Moreover, even though the ALJ found that her mental impairments were not severe, it is clear that he did not ignore them in addressing subsequent issues in the sequential evaluation process. In response to the Appeals Council's instruction that her psychiatric condition be addressed on remand, he questioned at length the medical expert, Dr. Hopkins, about plaintiff's mental impairments. He noted that although there were medical records from 1992 and 1994 documenting plaintiff's complaints of panic attacks and her reports of alcoholism, she had rarely sought treatment and had not used the medication that had been prescribed for her.

Plaintiff also argues that the ALJ failed in his duty to develop the record concerning her mental impairments. Plaintiff, however, has failed to point to a single medical record that would have substantiated the severity of her mental impairment that was not considered by the ALJ. Indeed, when plaintiff's claim was reconsidered, plaintiff was asked to submit additional records for consideration by the ALJ. Presumably, plaintiff would have submitted all records substantiating her claim of a severe mental impairment. Additionally, the record is replete with references to plaintiff's failure to show up for psychiatric consultations, to see a mental health worker, and to take prescribed medications. According to her treating physician, Dr. Dahl, "[d]espite recurrent suggestions that she receive mental health evaluations the patient has not been willing to do this." (Tr. 222.) Thus, it is questionable what records, if any, the ALJ could have requested that he failed to consider.

Plaintiff next argues that the ALJ misinterpreted Dr. Syed's statement in 1993 that

plaintiff's case is "mainly with the history." (Tr. 171.) The ALJ interpreted this statement as meaning that the panic attacks were "more historic than current." (Tr. 26.) The court agrees with plaintiff that a more logical interpretation of this statement is that Dr. Syed did not observe a panic attack and, thus, had to rely on the "history" or account related by plaintiff. However, given the seven subsequent years of medical records that the ALJ and medical expert considered, as well as plaintiff's own testimony that her panic attacks had subsided since she quit work (Tr. 317), his misinterpretation of this one statement does not require reversal of his decision.

The ALJ determined that there was not enough evidence in the record to support a finding of a severe mental impairment. The ALJ is entitled to rely not only on what the medical record says, but also on what it does not say. See Dumas v. Schweiker, 712 F.2d 1545, 1553 (2d Cir. 1983). The Court concludes that the ALJ's determination that plaintiff's mental impairments were not "severe" is supported by substantial evidence in the record, including plaintiff's own testimony.

C. Whether The ALJ Properly Considered Whether the Plaintiff Met or Equaled Medical Listing 1.05(B)

The claimant bears the burden of proving disability at the third step of the sequential evaluation by showing that his impairment meets or equals in severity an impairment found in 20 C.F.R. Part 404, subpart P, Appendix 1 ("the listings"); Shaw v. Chater, 221 F.3d at 132; Curry v. Apfel, 209 F.3d at 122 (quoting Rosa v. Callahan, 168 F.3d 72, 77 (2d Cir. 1999)). In order to meet Listing 1.05(B), an individual needs to show an amputation, due to any cause, of one or both lower extremities at or above the tarsal region, with stump complications resulting in medical inability to use a prosthetic device to ambulate effectively, as defined in 1.00B2b, which

have lasted or are expected to last for at least twelve months. 20 C.F.R. Part 404, Subpart P, Appendix 1, Section 1.05(B).

Plaintiff alleges that the ALJ failed to properly consider whether Ms. McKiver met Listing 1.05(B) because both pain and obesity are important and applicable factors that were not evaluated. See 20 C.F.R. Subpart P, Appendix 1, Section 1.00(B)(2). Plaintiff asserts that her phantom pain was well documented and that it exacerbated her inability to ambulate effectively with a prosthesis.

The record, however, indicates that plaintiff only used a prosthesis in 1980 for "[p]robably a year or two, maybe a year" (Tr. 363), in 1984 for "maybe a few months" (Tr. 363), and then in the summer of 1999, when she used it for a few months for a half hour up to three or four hours a day. (Tr. 363-365.) She was not wearing it at the time of the hearing because it did not fit properly. (Tr. 364-365.) She also stated she was discouraged because it did not seem to resolve any of her other problems, including her hip problems. (Tr. 366.) Plaintiff, however, made no mention of phantom pain or her obesity as reasons why in 2000 she could not ambulate with her prosthesis.

The record further indicates that plaintiff's stump was well healed with no complications. (Tr 165.) There is no evidence in the record of "stump complications resulting in medical inability to use a prosthetic device to ambulate effectively" as required to meet Listing 1.05(B). See Puckett v. Chater, 100 F.3d 730. 732 (10th Cir. 1996) (holding that this listing (formerly 1.10C.3) plainly requires stump complications, not problems with prosthetic fit).

Additionally, plaintiff testified that the phantom pain she experienced was not affected by position and could occur while sitting just as likely as while standing or walking. (Tr. 314.)

Thus, while pain certainly is a factor to consider, it does not appear that the phantom pain specifically impacted her ability to wear the prosthesis for purposes of walking. Further, her objections to the prosthesis were that it "irritated her skin" and "became stuck," not that she could not use if because of stump complications. (Tr. 165.)

With respect to the issue of plaintiff's obesity having an effect on Listing 1.05(B), while obesity is no longer an independent listing, it is a factor to be considered in conjunction with other listings in the Appendix. SSR 00-3p; SSR 02-01p; see Revised Listing 1.00Q (musculoskeletal system), 3.00I (respiratory system), and 4.00F (cardiovascular system); see Cherry v. Barnhart, 327 F. Supp. 2d 1347, 1354 & n.4 (N.D. Okla. 2004). As plaintiff points out, "the combined effects of obesity with other impairments may be greater than might be expected without obesity." SSR 02-01p. The record, however, indicates that it was not plaintiff's obesity that caused the problem with ability to wear a prosthesis as much as it was the fluctuation in her weight. Plaintiff's treating physician, Dr. Dahl, noted that as long as her weight fluctuated, she would have a hard time being fitted for a prosthesis. Dr. Dahl did not say that plaintiff could not use a prosthesis while obese. (Tr.206.) In fact, Dr. Dahl specifically stated that "[i]f she could stabilize her weight, I believe she could be fitted with a left lower extremity prosthesis, which would allow her to ambulate relatively normally." (Tr. 223 (emphasis added).) The Medical Expert, Dr. Hopkins, found no indication in the record that obesity would affect plaintiff's phantom pain but might have an effect on her musculoskeletal pain. (Tr. 340.) Dr. Hopkins stated that obesity along with the constant crutching could cause problems but that these problems could be avoided if plaintiff would use a prosthesis. (Tr. 341.) Dr. Hopkins suggested that plaintiff's use of crutches was probably more likely a contributor to her musculoskeletal pain

than her obesity.

The Court finds substantial evidence in the record to support the ALJ's conclusion that plaintiff's impairment did not meet the requirements of Listing 1.05(B), which requires a "stump complication" resulting in a medical inability to use a prosthesis to ambulate effectively. The record in this case does not support a finding that the requirements of this listing were met.

D. Whether the ALJ Erred in Discrediting Claimant's Complaints of Pain at Step Four

To evaluate a claimant's residual functional capacity at step four, the Commissioner may examine objective medical facts and "statements and reports from [the claimant] and his physicians, relevant to how his impairments and related symptoms affect his ability to work." Butts v. Barnhart, 388 F.3d at 380 (citing 20 C.F.R. § 404.1529). In that regard, the ALJ has discretion to evaluate a claimant's credibility regarding his subjective complaints of pain, but that evaluation must be made in conjunction with an assessment of the medical evidence. See Mimms v. Hecker, 750 F.2d 180, 186 (2d Cir. 1984). Credibility findings are required "[w]here there is conflicting evidence about a claimant's pain." Snell v. Apfel, 177 F.3d 128, 135 (2d Cir. 1999). Moreover, it is the function of the ALJ and not the reviewing court to appraise the credibility of the claimant. 42 U.S.C. § 405(g); Carroll v. Secretary of HHS, 705 F. 2d 638, 642 (2d Cir. 1983). His findings, if supported by substantial evidence, must be affirmed. Balsamo v. Chater, 142 F.3d at 81.

When evaluating a claimant's symptoms and their effect on the individual's functional limitations, the ALJ applies a two-part standard. SSR 96-7p. First, the ALJ must determine whether the medical evidence establishes the presence of an impairment which could reasonably

be expected to give rise to the symptoms alleged. If so, the ALJ must then assess the extent to which the symptoms interfere with the individual's ability to perform work-related tasks, considering factors such as the objective medical evidence, the claimant's daily activities, precipitating factors, medications taken, treatment other than medication, and other measures taken by the claimant to relieve the symptoms. Id.

Here, there is no question that the medical evidence established the presence of an impairment which could reasonably be expected to give rise to phantom pain and musculoskeletal pain. The more difficult issue is the degree to which plaintiff's pain interfered with her ability to perform work-related tasks.

Plaintiff argues that, in assessing her RFC to perform her past relevant work, the ALJ discredited her complaints of pain on three grounds: (1) that she had worked for five years after the accident with these pains; (2) that regular use of a prosthesis might relieve the pain; and (3) that she might be able to control the pain through regular use of prescribed medication. The court finds that these factors were properly considered by the ALJ.

First, the record indicates that plaintiff did in fact work for five years during which time she experienced phantom pain from her amputated limb, a pain that she testified she had experienced ever since the accident. The ALJ was entitled to take this consideration. Plaintiff testified that the pain had not "lessened" since she left her last job (Tr. 317), although she also testified that she quit her last job in 1992 because she was in a lot of pain and also was having frequent panic attacks. (Tr. 309.)

Second, there was ample evidence in the record to support the ALJ's conclusion that regular use of a prosthesis might relieve the musculoskeletal pain from which plaintiff suffered

as a result of her prolonged use of crutches. Dr. Dahl (Tr. 222-223), Dr. Michels-Ashwood (Tr. 267), and Dr. Hopkins (Tr. 332-333) were of the opinion that plaintiff's use of crutches was an exacerbating factor in her back, knee, hip, and neck pain, and that use of a prosthesis could greatly alleviate this pain. See 20 C.F.R. § 404.1529(c)(3) (stating that in assessing a claimant's pain, the ALJ may consider what precipitates or aggravates the symptoms, what medications, treatments or other methods the claimant uses to alleviate them, and how the symptoms affect daily living).

Third, there was also substantial evidence in the record that medication was available and had been prescribed for plaintiff to provide pain relief, but that plaintiff had been non-compliant in getting prescriptions filled and in taking the medication. See Id. Dr. Dahl prescribed Elavil and Methocarbamol, to help with her pain, but plaintiff advised him that she had not even filled the prescription. (Tr. 217, 222.) Dr. Michels-Ashwood noted that plaintiff preferred not to take medication. (Tr. 268.) Dr. Hopkins testified, based on her review of the medical records, that plaintiff had been non-compliant in taking medication commonly used to treat neurological pain. (Tr. 331, 332.)

Additionally, the ALJ was entitled to evaluate plaintiff's credibility concerning her allegations of pain in light of the contradictions between the medical records and her testimony at trial. For example, contrary to the numerous references in the medical records concerning plaintiff's refusal to take prescribed pain medications, plaintiff testified at the hearing that she had taken medication off and on for about three years. (Tr. 355-356.). Further, despite statements from her treating physicians and the medical expert that there were medications available to help alleviate her pain, Ms. McKiver testified that there was no medication that

would relieve the phantom pain she experienced (Tr. 320), even though Elavil had been prescribed on multiple occasions, which Dr. Hopkins testified was "a drug commonly used for neurologic pain." (Tr. 331.) The ALJ was entitled to assess claimant's credibility in light of the record, and to "resolve conflicts in the record and make determinations of credibility." Schaal v. Apfel, 134 F.3d at 504. The court finds substantial evidence in the record to support the ALJ's finding that plaintiff's allegations of pain were not entirely credible.

Last, plaintiff argues that, in assessing the severity of her pain, the ALJ was not entitled to rely on her lack of compliance with her doctors' prescribed treatments because the ALJ did not afford plaintiff with an opportunity to show just cause for her non-compliance as required by SSR 82-59. SSR 82-59 provides that before a claimant's failure to follow prescribed treatment can be used as a basis for finding that the claimant is not disabled, the ALJ must provide the claimant with an opportunity to undergo the prescribed treatment or to show justifiable cause for failing to do so. The requirements of SSR 82-59, however, apply only when "the evidence establishes that the individual's impairment precludes engaging in any substantial gainful activity." Here, the ALJ did not rely on plaintiff's non-compliance to disqualify her from receiving disability benefits. Instead, plaintiff's non-compliance with measures that might alleviate her pain was just one of several factors the ALJ considered in his assessment of her residual functional capacity to perform sedentary work.

A Residual Physical Functional Capacity ("RPFC") exam was performed on January 17, 1994 in which it was determined that plaintiff could lift or carry up to ten pounds, stand and walk two hours in a work day, sit six hours, and was limited in using her left leg controls. (Tr. 53-60.) Plaintiff had postural limitations with climbing. On crutches, it was determined that she could

perform sedentary work, and if she had a prosthesis, she could perform more work. Id. Another RPFC was performed by Dr. Michels-Ashwood on January 13, 2000, in which she concluded that plaintiff could sit or stand/walk for one hour a day continuously, and up to two hours in a workday. (Tr. 269.)

Given all of the factors the ALJ considered, including the RPFCs, the testimony of plaintiff and the medical consultant, plaintiff's medical records, her work history after the amputation, her lack of medication and non-compliance with prescribed treatment, the court finds substantial evidence in the record to support the ALJ's determination that plaintiff retained the RFC to perform her past relevant, sedentary work.[6]

The court notes that it issues this ruling with some regret. Ms. McKiver has clearly suffered misfortune in her life, an it is impossible not to feel sympathy for her. Nevertheless, on the record before the court and under the law that must be followed, the court must affirm the Commissioner's denial of benefits.

IV. Conclusion

Accordingly, because the Court finds that the decision of the Commissioner was supported by substantial evidence, the Court recommends granting the Commissioner's Motion to Affirm **[Doc. #11]** and denying the Plaintiff's Motion for Summary Judgment seeking a

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[6] Sedentary work involves lifting no more than ten pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is one that involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met. 20 C.F.R. § 404.1567(a). "[S]edentary work is the least rigorous of the five categories of work recognized by SSA regulations....[B]y its very nature 'sedentary' work requires a person to sit for long periods of time even though standing and walking are occasionally required." Curry v. Apfel, 209 F. 3d at 123.

reversal of the decision of the Commissioner **[Doc.#6]**.

Any objections to this recommended ruling must be filed with the Clerk of the Court within ten (10) days of the receipt of this order. Failure to object within ten (10) days may preclude appellate review. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; D. Conn. L. Civ. R. 72 for Magistrate Judges; FDIC v. Hillcrest Assocs., 66 F.3d 566, 569 (2d Cir. 1995).

SO ORDERED, this 16th day of September, 2005, at Bridgeport, Connecticut.

/s/ *William I. Garfinkel*
WILLIAM I. GARFINKEL,
United States Magistrate Judge