

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES, for itself and as Trustee  
for the Zuni Indian Tribe, Navajo Nation and  
Ramah Band of Navajos,

and

STATE OF NEW MEXICO, *ex rel.*  
STATE ENGINEER,

and

ZUNI INDIAN TRIBE, NAVAJO NATION,

Plaintiffs-in-Intervention,

vs.

STATE OF NEW MEXICO COMMISSIONER  
OF PUBLIC LANDS,

and

A&R PRODUCTIONS,

and

AT&T, et al.

Defendants.

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**MOTION TO WITHDRAW AS COUNSEL**

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COMES NOW, Randolph H. Barnhouse, Jordan & Rosebrough, P.C., attorneys for Defendants, and asks the Court for permission to withdraw as counsel from the above-entitled action and for grounds state:

Randolph H. Barnhouse relocated to Albuquerque, New Mexico and no longer represents DELBERT & MARY BEAL, WILLIAM GOLDSMITH, and W.A. & JANET FAY SCOTT.

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No. 01CV00072-BDB-ACE

ZUNI RIVER BASIN

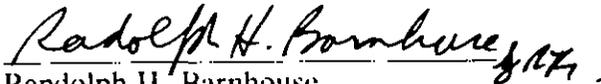
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THEREFORE Jordan & Rosebrough, P.C., asks the Court to allow counsel to withdraw.

Respectfully submitted,

  
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I certify that a true and correct copy of the foregoing pleading was mailed to the following parties of record on the attached Service List this 18<sup>th</sup> day of September, 2003.

  
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**Pleading Separator Sheet USDC NM**

**theresa Case Number: 2cv932**

**Aragon, SSA**

**Document #: 19**



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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

03 SEP 19 AM 9:16

LILLIAN G. ARAGON,

Plaintiff,

vs.

CIV 02-0932 WDS

JO ANNE B. BARNHART,  
Commissioner of Social Security,

Defendant.

**PLAINTIFF'S REPLY IN SUPPORT OF HER MOTION  
TO REVERSE OR REMAND ADMINISTRATIVE AGENCY DECISION**

Plaintiff, Lillian G. Aragon, respectfully replies as follows to the Defendant's Response to Plaintiff's Motion to Reverse or Remand Administrative Agency Decision (Def.'s Br.), filed on September 8, 2003.

**A. The Commissioner Fails To Respond To Several of Plaintiff's Claims of Error**

The Commissioner has offered no rebuttal to several of the claims of error raised in Plaintiff's initial Memorandum. In particular, the following issues are not briefed by the Commissioner:

(1) The ALJ erred by failing to consider in her RFC analysis the pain-producing nature and functional effects of the surgical removal of plica and cartilage from Plaintiff's right knee. Plaintiff's Memorandum in Support of her Motion to Reverse or Remand Administrative Decision (Pl.'s Br.) at 16.

(2) The ALJ erred by failing to consider the significance of Plaintiff's impending third knee surgery in her analysis of the severity and functional effects of the right knee impairment. Pl.'s Br. at 16-17.

(3) The ALJ erred in using her own lay opinion as the RFC finding. Pl.'s Br. at 17-18.

(4) The ALJ erred in arbitrarily relying on (as corroboration for her RFC finding) an outdated, factually unsupported state agency nonexamining medical reviewer report that, as a matter of law, does not provide substantial support for the finding. Pl.'s Br. at 18-20.

(5) The ALJ erred in failing to request information from Plaintiff's treating physicians regarding RFC, and in failing to request the reports of three treating physicians (Drs. Cavanaugh, Toner and Walker), resulting in a decision based on an incomplete medical record. Pl.'s Br. at 20-21.

Plaintiff respectfully submits that Commissioner's failure to rebut these points of error implies consent to the correctness of Plaintiff's arguments. See D.N.M.I.R-Civ.7.1(b) ("The failure of a party to file and serve a response in opposition to a motion within the time prescribed for doing so constitutes consent to grant the motion"). The Commissioner's failure or inability to counter Plaintiff's arguments indicates tacit agreement that the decision is not substantially supported and legally erroneous.

**B. The ALJ's Assessment of Plaintiff's RFC Contradicts Her Finding That Plaintiff Can Perform a Limited Range of Light Work and the Full Range of Sedentary Work**

Plaintiff asserted in her initial Memorandum that the ALJ's function-by-function findings contradicts the derivative finding that Plaintiff has the residual functional capacity (RFC) to perform a limited range of light work and the full range of sedentary work. Pl.'s Br., at 14-15. Specifically, the ALJ's finding limiting Plaintiff to lifting and carrying 5 to 10 pounds

demonstrates that Plaintiff cannot perform the full range of sedentary work (which requires the consistent ability to lift 10 pounds) or a limited range of light work (which requires the ability to lift 20 pounds, or to operate hand or foot controls requiring greater exertion than that required by sedentary work). *Id.* In response, the Commissioner agrees that the full range of sedentary work “involve[s] lifting no more than 10 pounds,” but states that Plaintiff is capable of performing this requirement under the ALJ’s lifting/carrying finding. *Def.’s Br.* at 4. The Commissioner appears to be assuming that a 5 to 10 pound lifting limitation is the equivalent of a 10 pound lifting limitation. *Id.* However, this assumption does not give full weight to the ALJ’s express determination. If the ALJ intended to find that Plaintiff could consistently lift 10 pounds, she surely would have assessed a straight, unmodified 10-pound lifting limit.

Although the ALJ’s assessed lifting limitation may not preclude all sedentary work, it does preclude (1) a finding that Plaintiff can perform the full range of sedentary work and (2) the application of the Grids. See *Pl.’s Br.* at 14-15, 25-26.

### **C. The ALJ Did Not Fully Consider the Severity of Plaintiff’s Knee Impairment**

Plaintiff next argued that the ALJ erred in finding that Plaintiff had “stable” osteochondritis of the right knee. *Pl.’s Br.* at 15-16. MRI studies between April 1998 and March 2000, and surgical findings from the second knee arthroscopy in March 2001, actually revealed significant progression of the condition. *Id.* The Commissioner counters by stating that RFC determinations are administrative assessments, not medical findings, and must be based on the totality of the evidence, citing *Soc.Sec.Ruling 96-8p*. *Def.’s Br.* at 4. However, *Soc.Sec.Ruling 96-8p* requires an ALJ, in making RFC findings, to “always consider and discuss medical source opinions, affording the appropriate weight to each source,” and to “explain why any medical opinion was not adopted.” *Soc.Sec.Ruling 96-8p*. The Commissioner does not explain why the

ALJ should be excused from compliance with this ruling with respect to the medical evidence establishing that Plaintiff's knee condition was worsening. Def.'s Br. at 4-5. Nor does the Commissioner point to evidence supporting the ALJ's finding of "stable" osteochondritis. *Id.* Instead, the Commissioner relies on brief periods of relative improvement in Plaintiff's symptoms. *Id.* Any evidence of improvement in the record is overwhelmed by the fact that Plaintiff requires more surgery and will eventually need knee replacement. *Id.*; see, R 225, 247. "Evidence is not substantial if it is overwhelmed by other evidence or if it is actually mere conclusion." *Ellison v. Sullivan*, 929 F.2d 534, 536 (10th Cir.1990).

In addition, the Commissioner does not fairly set forth the evidence she asserts as proof of improvement. Def.'s Br. at 4-5. Although Dr. Pachelli noted on August 17, 1998 that Plaintiff could return to regular duty work, one year later he uncovered additional abnormalities in her right knee. R 120. Similarly, although Dr. Harvie reported on June 8, 2001 that Plaintiff was "doing well," the Commissioner took the remark out of context. Def.'s Br. at 5. Dr. Harvie actually stated that, "[t]he patient states that she still has pain in her right knee - especially when weight bearing for long periods of time. Other than this, she is doing well." R 245. Hence, even when Plaintiff is doing relatively well, she still suffers right knee pain and difficulty with extended weight bearing.

The ALJ's and Commissioner's selective approach, i.e., giving little or no weight to medical evidence tending to show disability, without reasonable explanation, while giving enhanced weight to evidence tending to show nondisability, violates Soc.Sec.Ruling 96-8p and renders the decision not supported by substantial evidence.

**D. The ALJ's Credibility Finding is Not Supported By Substantial Evidence and Legally Erroneous**

Plaintiff additionally argued that the ALJ's credibility finding was not supported by

substantial evidence and based on error. Pl.'s Br. at 21-24. In particular, the record shows that Plaintiff did not experience lasting relief of her pain and other symptoms following surgery or physical therapy, as found by the ALJ. R 15; see Pl.'s Br. at 22-23. To the contrary, Plaintiff required a second surgery and was, at the time of the hearing, scheduled for a third surgery. R 208, 247. In response, the Commissioner states in conclusory fashion: "[H]ere, the ALJ determined that the record demonstrated that Plaintiff experienced pain and limitations following surgery, but the evidence did not support a finding that she continued to experience significant limitations since her alleged onset to preclude her from performing sedentary work (Tr. 16)." Def.'s Br. at 6. Like the ALJ, the Commissioner fails to closely and affirmatively link the credibility finding to substantial evidence, in violation of *Kepler v. Chater*, 68 F.3d 387, 391 (10th Cir.1995). *Id.*; R 16. Plaintiff respectfully submits that there is not substantial evidence in the record supporting the determination that Plaintiff can engage in two hours of standing and six hours of sitting per work day, on a regular and continuing basis.

The Commissioner also recites some of the factors that must be considered in credibility determinations (i.e., levels of medication and effectiveness, nature of daily activities, frequency of medical contacts, and the like), but cannot locate for the Court an analysis of these factors in the decision. Def.'s Br. at 6; see Pl.'s Br. at 24 for a related discussion. In fact, it does not appear that the ALJ considered any of the required factors in discounting Plaintiff's credibility. R 16. Where the ALJ fails to provide sufficient reasons for rejecting testimony, the testimony is accepted as a matter of law. *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir.1995).

The Commissioner attempts to supply a bit of the required credibility analysis by discussing Plaintiff's daily activities. Def.'s Br. at 7. However, the Commissioner does not accurately relate Plaintiff's statements about her activities, which are more limited than the Commissioner states. Compare *Id.* with R 88-89. Limited daily activities do not equate with an

ability to sustain work. *See Talbot v. Heckler*, 814 F.2d 1456, 1462 (10th Cir.1987). In any event, post hoc rationalizations by appellate counsel cannot rehabilitate an otherwise unlawful decision. *See, Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962)(a fundamental rule of administrative law is that a reviewing court must judge the propriety of administrative agency decisions solely by the grounds invoked by the agency); *Barbato v. Commissioner of Social Sec. Admin.*, 923 F.Supp. 1273, 1276 n. 2 (C.D.Cal.1996)(social security decisions “must stand or fall with the reasons set in forth in the ALJ’s decision, as adopted by the Appeals Council”); *Williams v. Bowen*, 664 F.Supp. 1200, 1207 (N.D.Ill.1987)(“If the [social security] decision on its face does not adequately explain how a conclusion was reached, that alone is grounds for a remand. And that is so even if [the administration] can offer proper post hoc explanations for such unexplained conclusions.”). The Tenth Circuit has also rejected the Commissioner’s post hoc arguments as a basis for affirming a denial of benefits. In *Knipe v. Heckler*, 755 F.2d 141, 149 n. 16 (10th Cir.1985), the Court rejected the argument that the claimant’s problems could be due to his smoking and his failure to take medication in part because the ALJ and the Appeals Council did not cite this as a reason for denying benefits.

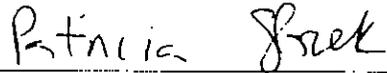
#### **E. The ALJ Erred in Applying the Grids**

Finally, Plaintiff argued that the ALJ erred in applying the Grids at step five of the disability process, on two grounds (1) Plaintiff has nonexertional as well as exertional pain; and (2) Plaintiff cannot perform the full range of sedentary work . Pl.’s Br. at 24-26. In response, the Commissioner refers back to the ALJ’s credibility and RFC findings. Def.’s Br. at 7-8. However, the ALJ’s findings are not evidence supporting the decision. The ALJ’s errors in assessing RFC and credibility resulted in an unlawful application of the Grids.

**CONCLUSION**

For these reasons, and for the reasons stated in her opening brief, Plaintiff respectfully requests a reversal or remand of the decision.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that a true copy of the foregoing was mailed to opposing counsel of record, Cynthia L. Weisman, Assistant United States Attorney, P. O. Box 607, Albuquerque, New Mexico 87103 on September 19, 2003.

