

To be published

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

BRIAN L. HIGGINBOTTOM,

Plaintiff,

vs.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

No. C11-4009-MWB

REPORT AND RECOMMENDATION

Introduction

The plaintiff, Brian L. Higginbottom, seeks judicial review of a final decision of the Commissioner of Social Security (the “Commissioner”) denying his application for Supplemental Security Income (“SSI”) pursuant to Title XVI of the Social Security Act. 42 U.S.C. § 1383(c)(3). Higginbottom contends that the administrative record (“AR”) does not contain substantial evidence to support the Commissioner’s decision that he is not disabled. For the reasons that follow, the undersigned recommends that the Commissioner’s decision be reversed and this case remanded for further proceedings.

Background

Higginbottom was born in 1969, has a GED, and has no past relevant work. AR 16, 31, 56, 121. On February 10, 2006, Higginbottom applied for SSI, alleging disability beginning on December 1, 2000 (later amended to January 1, 2008), due to bipolar disorder and alcoholism. AR 9, 28, 121-27, 136, 141. The Commissioner denied Higginbottom’s application initially and again on reconsideration; consequently, Higginbottom requested a hearing before an Administrative Law Judge (“ALJ”). AR 61-

74. On February 9, 2009, ALJ Jan Dutton held a hearing in which Higginbottom and a vocational expert (“VE”) testified. AR 24-60. On March 19, 2009, the ALJ issued a decision finding Higginbottom not disabled since the application date of February 10, 2006. AR 6-18. On March 24, 2009, Higginbottom sought review of this decision by the Appeals Council and, while that request for review was pending, filed a subsequent application for SSI on April 27, 2009. AR 2, 22-23. On January 4, 2011, the Appeals Council denied Higginbottom’s request for review. AR 1-5. The ALJ’s decision thus became the final decision of the Commissioner. 20 C.F.R. § 416.1481.

On January 28, 2011, Higginbottom filed a complaint in this court seeking review of the ALJ’s decision. This matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) for the filing of a report and recommended disposition of the case. The parties have briefed the issues, and the matter is now fully submitted.

Summary of Evidence

A. West Iowa Community Mental Health Center

On March 8, 2006, Higginbottom underwent a psychiatric evaluation at West Iowa Community Health Center, complaining of “mood swings, insomnia, anxiety and [being] stressed and having a mental breakdown.” AR 233. Jo Anne Macasaet, M.D., a psychiatrist, summarized Higginbottom’s illness:

According to the patient he has been having a mental breakdown even before he was having all these legal charges on Sept. 24, 2005 where he was arrested for public intoxication, his 5th offense. He also had another arrest where he was drinking and driving and rear-ended another vehicle in Lincoln, Nebraska. He stated he is under probation and he has been obsessing and getting worried about it. He states the reason he drank is because he is easily frustrated and cannot tolerate stress. He indicated to me that he was diagnosed with Bipolar Disorder in 2000 after he was seen here by Karen Stoos, ARNP. He was prescribed Zyprexa but says he felt like a

zombie and stopped taking the medication. He said he has been sober for four years, except that day in September 24, 2005.

AR 233. According to Higginbottom, he “was in a special class and quit school in the 9th grade.” AR 234. At the time of the evaluation, he worked part time. AR 234.

Dr. Macasaet noted that Higginbottom had “[n]o prior psychiatric hospitalization nor has he been seen by anyone. He did have treatment for alcoholism.” AR 233. Dr. Macasaet’s mental status examination of Higginbottom revealed the following:

His speech was pressured. He was alert and oriented. He was having mood swings, problems sleeping. His eye contact was good, affect appropriate. Concentration poor. Sometimes he thinks of suicide but has no plan of hurting himself or others. No overt hallucinations. He is afraid to go out of the house, afraid to mingle with people, unable to face stress and poor problem solving.

AR 235. Dr. Macasaet’s diagnoses included bipolar disorder, adjustment disorder with mixed emotion and conduct, history of alcohol abuse, personality disorder with obsessive traits, mixed anxiety and depressive disorder, and a GAF score of 40.¹ AR 235.

The record reflects further treatment in 2008 at West Iowa Community Mental Health Center in a series of treatment notes signed by Albert Okine, a certified physician assistant, and Rodney Dean, M.D, a psychiatrist. On January 25, 2008, a treatment note stated:

Mr. Higginbottom has a long history of Bipolar I Disorder and alcohol dependence. He had been following with Dr. Macasaet here in our office. Mr. Higginbottom felt that the medication being prescribed for his disorder was not working. . . . His relationship with Dr. Macasaet was terminated

¹ The GAF, or global assessment of functioning, scale rates psychological, social, and occupational functioning; it is divided into ten ranges of functioning. Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 32 (4th ed. text rev. 2000). A GAF rating of 31 through 40 is characterized by some impairment in reality testing or communication or major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood. *Id.* at 34; *see also Halverson v. Astrue*, 600 F.3d 922, 927 n.5 (8th Cir. 2010).

here at West Iowa Community Mental Health Center on 12/19/07. He was then referred to see me.

Mr. Higginbottom relates to me that he was diagnosed in 2000 with Bipolar I Disorder with Psychosis at the time. He said he has been tried on Zyprexa, Abilify, Malleril, and a few other medications, which generally just shuts him down and doesn't really seem to work with him. He indicates that he continues to have severe mood swings. He has not been able to socialize because of his mood swings. He is currently on Lexapro 10 mg q am. He stated that the Lexapro has been helping him with his sleep. He however has periods of depression that could last about one week and periods of elated mood that could last about four to five days. He has currently been verbally aggressive towards his spouse and others. He is easily frustrated, quick tempered, easily distracted, indecisive, racing thoughts, flight of ideas and hyper verbal. He reported he has had this severe or chronic problem all his life. He has had numerous incarcerations. He served three years in jail for stealing a car. Most of his problems have been alcohol related. He said alcohol made him whole socially and took him out of his introverted self.

Patient denied any problems with concentration, appetite, as well as feelings of guilt. He admits to feeling quite restless. He denies any suicidal or homicidal ideation intent or plan. He also denies any obsessions, compulsions or phobias. He admits to getting very anxious at times.

AR 282.

Regarding his past psychiatric history, Higginbottom denied any prior psychiatric hospitalizations, but he "has had alcohol dependency treatment in Carroll. He is currently going through another bout of alcohol treatment program in Carroll, following an arrest for public intoxication in October of 2007." AR 283. Higginbottom related that "he had been sober from alcohol use from February of 2006 until October of 2007." AR 283.

Higginbottom's social history was noted as follows:

[Higginbottom] was in special education when he was in school. He quit school in the ninth grade. However he has been able to go back and get his GED. . . . He currently works as a garbage helper in Deloit one day per week. Otherwise he is home most of the time working in his shop. He said

he has been denied on two occasions for disability, but currently has a pending case in court to get his social security disability. He has worked for the city part time. He denies any current health benefits. His wife is the main source of income for the family at this time.

AR 283.

Regarding his substance abuse history, Higginbottom had an “[e]xtensive history of alcohol use. He said he has experimented with all kinds of illegal drugs with the exception of [heroin].” AR 284.

Higginbottom’s mental status examination revealed that his thought process “was logical and goal oriented,” but his thought content “was significant for having severe mood swings and symptoms consistent with bipolar [disorder].” AR 284. He “[h]as had suicidal thoughts in the past, but currently denies any suicidal or homicidal ideation[,] intent or plan. . . . He does worry strongly about socializing with people because of his mood swings.” AR 284.

Higginbottom’s diagnoses included “Bipolar I Disorder, Most Recent Episode Mixed, without Psychotic Features,” alcohol dependence in partial remission, and a GAF score of 40. AR 284. He was given samples of Seroquel. AR 285.

On February 22, 2008, Higginbottom reported becoming “too sedated” on Seroquel, so he stopped taking the medication. AR 280. The treatment note stated:

Today in the office he tells me that he does better just being with his wife, and dog. He is OK with not having to go out and socialize with others. He said the stress of having to deal with people sets off his mood symptoms; he likes things the way they are. He would like to have his current medication tweaked a little because he does have residual anxiety symptoms as well as other depressive symptoms. He is sleeping OK and has no problems with appetite.

AR 280. The dosage of Higginbottom’s Lexapro medication was increased. AR 281.

On March 28, 2008, Higginbottom reported that he desired “to continue on Lexapro for his disorder at this point. He said Lexapro tends to take the edge off for him. He has continued to have anxiety symptoms that do not seem to abate.” AR 278.

He reports isolating a lot of time but feels that was okay for him because he is able to abstain from trouble that way. However, he reports feeling jittery, having heart palpitations, sweating, being forgetful, at times he is foggy, and his wife added he tends to get a lot of anger outburst [sic] usually during those times. . . . His appetite has been good. He denies symptoms consistent with depression.

AR 278. The treatment note also reflected that Higginbottom was “also under going [an] outpatient chemical dependency treatment program with New Opportunities Inc. Report from his counselor, Norma Dipietro, indicated he was attending his treatment and was doing well. He is at a Care Level where he will be looking at how his diagnosis of bipolar interacts with his drinking behaviors.” AR 278. Higginbottom was prescribed Klonopin to help with his anxiety symptoms. AR 279.

The treatment note on April 25, 2008, stated the following:

Patient reports today that he continues to do fairly well with the Lexapro coupled with having to withdraw from things in a way he considers positive. He said his wife’s family was okay with him not partaking in family gatherings because they know he does not do well in dealing with people. When he is stressed, he gets very anxious, has inappropriate behaviors with yelling and screaming, and self medicates with alcohol. These types of behaviors have precluded him from being able to work. Currently he works part-time doing garbage collection about two hours a week in Deloit. He does not have to deal with people with that job. He reported today he was almost done with his chemical dependency treatment program. He has to go one more time and that will be for his release from the program. . . . In spring and summer the patient seems to do better with his illness. He is concerned about the winter time when there is not much to do outside.

AR 276. Higginbottom’s Klonopin medication was discontinued because he reported improvement in his sleep. AR 276-77.

On June 6, 2008, Higginbottom reported that “he was having some problems and was getting back to drinking.” AR 274.

Patient stated this morning that he and his wife are probably in the process of getting a divorce. He is still living in the house until he is able to find a place to move to. He is hoping they will be able to work these things out. With these surmounting stressors he has wanted to just leave and start drinking again. He is extremely agitated. He just quit his part-time job collecting garbage. He reports mood swings. He stated that the Lexapro works for him as long as everything seems to be going smooth and he doesn't have to interact with other people. Beyond that[,] the Lexapro doesn't seem to do much for him. His sleep has been fluctuating. His appetite seems to be okay. The patient has not been very receptive to trying some medications that will require blood work probably because he doesn't have the finances.

AR 274.

Examination of Higginbottom's mental status reflected that he “was actually calm. . . . Thought content was significant for mood swings, extreme irritability, problems with sleep and possibly losing his marriage. He has been quite stressed with that.” AR 274.

On July 16, 2008, Higginbottom visited the mental health center for medication management. AR 272. The treatment note stated the following:

Patient tells me today that he likes the Seroquel XR and the way it helps to stabilize his mood, he said he doesn't seem to get as anxious. . . . Patient stated that alternating the Seroquel XR and the Lexapro seems to be keeping things at bay and he seems to be pleased with the way things are going. He has been struggling with the recent divorce from his wife. . . . He has been sleeping okay and appetite has been the same. He is currently doing “odds and ends” for a friend; he has not been able to sustain a regular job.

AR 272. Higginbottom was given a month's supply of medications. AR 273.

The treatment note dated September 17, 2008, indicated the following:

When asked how he was doing the patient stated “it's going.” He was doing odds and ends and has been helping his dad at Deloit where he lives. He

continues to live with his ex-wife. . . . He reported that his depression is not bad at all. He stated that the combination of the Seroquel XR 300 mg and Lexapro 20 mg seems to have helped greatly with his mood symptoms. He also reported he used to have some paranoid ideations. . . . [S]ince being on Seroquel that has decreased greatly. . . . He rated his mood at about a 6-7 out of 10 on a 0-10 scale, 10 being the best mood.

AR 270. Higginbottom further denied having any unmanageable depressive or manic symptoms. AR 270. His medication regimen was continued, and he received a month's supply of his medications. AR 271.

B. State Agency Medical Consultants

On May 15, 2006, Beverly Westra, Ph.D., a state agency medical consultant, completed a psychiatric review technique form (AR 246-59) in which she opined that Higginbottom's mental impairment caused him to experience (1) mild restriction in activities of daily living; (2) moderate difficulties in maintaining social functioning; and (3) moderate difficulties in maintaining concentration, persistence, or pace; but (4) no episodes of decompensation of extended duration. AR 256.

Dr. Westra also assessed Higginbottom's mental residual functional capacity ("RFC") (AR 242-45) and opined that he was moderately limited in his ability to (1) work in coordination with, or proximity to, others without being distracted by them; (2) complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods; (3) interact appropriately with the general public; (4) accept instructions and respond appropriately to criticism from supervisors; (5) get along with coworkers or peers without distracting them or exhibiting behavioral extremes; and (6) respond appropriately to changes in the work setting. Higginbottom was not otherwise significantly limited. AR 242-43. Dr. Westra also found as follows:

Evidence is insufficient until 3/8/06 when claimant self referred for mood swings, insomnia, anxiety and "having a mental breakdown." He had

a couple of alcohol related arrests in 2005 but claims he was “having a mental breakdown” even before the legal charges. He said he drinks because he cannot handle stress. He claimed he’s been sober for four years except one day 9/24/05 when he was arrested for public intoxication, his 5th offense. He reported being in a special class and quitting school in the 9th grade, inconsistent with his 3368 when he reported four or more years of college. [AR 145, 233-35.] [Mental status examination] reflected pressured speech and poor concentration. [The psychiatrist] said he was afraid to leave the house. He was diagnosed with Bipolar disorder, mixed anxiety and depressive disorder, Adjustment disorder with mixed emotion and conduct, history of alcohol abuse and Personality disorder with obsessive traits. GAF was 40. He was started on [medications] and referred to substance abuse treatment. [AR 235.]

[Activities of daily living] are grossly intact. Claimant cares for his dog and does the vacuuming but his wife does the other chores and handles the finances. He says he shops every two weeks. He reports no difficulty getting along with others but says it’s getting impossible to deal with people. He reports difficulty handling stress, paying attention and following instructions. [AR 157-66.] Third party report is consistent. [AR 167-76.]

Claimant says he is afraid to leave the house or be around people, yet he walks his dog daily, shops every other week and works three days a week. [AR 159, 162-63, 235.] There is no evidence of treatment until very recently. The inconsistencies and lack of treatment erode his credibility to some extent.

Claimant is capable of performing simple, routine tasks in low stress environments with limited social demands. He will have moderate restrictions for cognitively demanding tasks, persistence and close interaction with coworkers or the public. Adaptation also appears moderately limited.

AR 244.

On October 11, 2006, David Christiansen, Ph.D., another state agency consultant, “affirmed [Dr. Westra’s assessment] as written.” AR 265.

C. *New Opportunities*

On November 10, 2008, Jamie Anderson, a counselor, evaluated Higginbottom for chemical abuse/dependence. AR 212-13, 325-26. The counselor's findings, as amended on January 8, 2009, were as follows:

The event that led the client to obtain an evaluation is being arrested for Public Intox in October of 2008. The client reported that he had stopped taking his medication for his bipolar [disorder], and he then drank a fifth of vodka one afternoon and was out in the public walking around his town and was arrested for Public Intox. During the interview, the client identified alcohol as his primary drug of choice. The client reports the last date of his usage as the date of his arrest. During the evaluation the client did appear to be honest about his substance usage. He discussed that in his life he has been a very heavy drinker, and he did report himself as an alcoholic. There were times in his past where he was a daily drinker. His longest period of sobriety has been 4 years. The evening the client was arrested was the first time the client had drunk in approximately 1 year, and that night he drank a fifth of vodka. The client reports no other usage of any other substances. The client reports consequences of his alcohol use as: using to self medicate before he knew he had bipolar disorder, being arrested numerous times for Public Intox, and the legal troubles and fines and times that he spent in jail. The client also self reported that he has a great amount of tolerance[;] at the time of his arrest his alcohol level was .28. Through the client's self report, it was also indicated that he has experienced withdrawal symptoms, some very severe, including alcohol-related seizures from his past during withdrawal times, a loss of control and being unable to stop usage. The client has been in numerous treatment facilities all over the country. The client has drunk since he completed both outpatient and inpatient treatment stays. Recently the client reports on average of drinking one time a year for the past several years. Client has had significant interferences in his life due to his usage. The client also seems very active in his own recovery and in his own mental health services. Client has been able to identify that this pattern of drinking tends to occur once a year when the weather changes. That is something he would really like to explore and that is something he would like to explore with a mental health therapist.

AR 324.

The counselor recommended the following:

At this time there will not be any recommendations for Substance Abuse Treatment. This is based on the client's self report, results of diagnostic tools, on-site substance tests and collateral information. The client does identify having mental health issues that seem to supersede the alcohol usage. At this time the client would benefit from speaking with a mental health counselor on a regular basis to identify issues that occur prior to his drinking episodes.

AR 324.

D. Counseling Services, LLC

On December 8, 2008, Higginbottom saw Jim Coats, a licensed independent social worker, at Counseling Services, LLC, reporting that "he gets depressed in the fall and will stop taking his medications, which then results in emotional flooding and drinking. This occurred in October of this year, and it resulted in legal difficulty for him." AR 309. According to Higginbottom, "his life was chaotic before he found out he had bipolar disorder." AR 309.

Higginbottom reported that he liked "staying at home, having his dog, walking in the country, and watching movies," but did not like social gatherings because of high anxiety. AR 309. He also reported that he had "not been able to work for many years because the pressure of work is too much for him," and had "never been able to perform full time work." AR 310.

Regarding his legal history, Higginbottom reported that "he got a public intoxication charge in October [2008] and in the fall of 2007. He had a DUI in 2006, and a public intoxication charge in 2005." AR 310. "He reports this is the result of his bipolar disorder illness when he stops taking his psychiatric medication. He says he has sentencing in March, 2009 for his recent public intoxication charge." AR 310.

Regarding his substance abuse history, Higginbottom reportedly

drank one day in 2008, one day in 2007, one day in 2006, and one day in 2005. Before that he reports that he had not drunk for five years. He believes his drinking was done to medicate his mental illness. He has had

very limited street drug usage, only experimental usage when he was much younger. He quit smoking 13 years ago.

AR 310.

Regarding Higginbottom's treatment history, he reportedly

was diagnosed with bipolar disorder in 2000. He receives psychiatric care from Dr. Okine through the West Iowa Community Mental Health Center in Denison, Iowa. He has had numerous alcohol treatment experiences and reports he has had numerous counseling experiences. He successfully completed an intensive outpatient program for drinking at New Opportunities in Carroll, IA, in 2006. He says he does not attend AA meetings because his anxiety does not allow him to attend them. He says he does follow the Alcoholics Anonymous book.

AR 311.

Examination of Higginbottom's mental status revealed the following:

[His] [s]peech is logical and goal directed, pacing of speech is normal. Brian at times in the fall season dwells on his life difficulties and will get depressed. Then he will go off his medications, will then experience emotional flooding, paranoid feelings, racing thoughts and says that he will then use alcohol because it will make him feel better. He wants to avoid further occurrences of this pattern. He says his mood is generally stable on medication. He is motivated to live a stable life and says he gets done what he has to do. He is content in the country or at home and does not like social situations, and will get anxious and have symptoms of panic in social situations. He says appetite and sleep are good at this time. He denies suicidal or homicidal ideation.

AR 311.

Higginbottom's diagnoses included "Bipolar I Disorder, most recent episode unspecified, severe with mood congruent psychotic features, with seasonal pattern"; panic disorder with agoraphobia; and a GAF score of 40. AR 311.

On January 12, 2009, Higginbottom reportedly was "fairly emotional stable," despite the "major disappointment" from his representative's withdrawal from his Social

Security disability case. AR 308. He also reported that he was “satisfied with [the] medication management of Dr. Okine.” AR 308.

On February 4, 2009, Higginbottom reported to Mr. Coats that he was “doing reasonably well at this point,” and Mr. Coats noted that his mood was stable. AR 307.

E. Crawford County Clinic

On April 21, 2008, Higginbottom was seen at the Crawford County Clinic “for a consultation regarding his weight gain.” AR 315.

He had gained 28 pounds since August 2006 He said he had let himself go this winter. He was not exercising and he was going to start again. He was going for walks with his dog but now that winter was over with he could start doing this again. He also had an exercise bike. He worked one day per week doing garbage collection in Deloit. He said that he ate junk food at night watching television and ate a lot of popcorn. He was doing some exercise lawnmowing, doing the weed eater and trimming. . . . He has not been drinking alcohol lately.

AR 315.

F. Albert Okine, PA-C

On March 11, 2009, Mr. Okine assessed Higginbottom’s mental RFC (AR 327-32) on a questionnaire and opined that he had a “marked limitation”² in his “ability to deal with work stress (e.g., normal pace of work expected by employers, deadlines, quotas, etc.).” AR 327. Mr. Okine also opined that Higginbottom had a “marked limitation” in his ability to accept instructions and to respond appropriately to criticism from supervisors or co-workers. AR 328. Further, Higginbottom had an “extreme limitation”³ in his ability to get along with co-workers or peers without distracting them or exhibiting behavioral extremes. AR 330. In support of his opinion, Mr. Okine noted that Higginbottom

² The questionnaire defined a “marked” limitation as a “serious limitation in this area. There is a substantial loss in the ability to effectively function.” AR 327.

³ The questionnaire defined a “extreme” limitation as a “major limitation in this area. There is no useful ability to function in this area.” AR 327.

“reports prevalence of severe mood swings, easily frustrated, quick tempered, easily distracted and indecisive, subsequent difficulty with coping and meeting deadlines.” AR 327.

Mr. Okine further opined that Higginbottom had a “moderate limitation”⁴ in his ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods. AR 328. According to Mr. Okine, Higginbottom “seems like [he] could work in isolation and at his own pace. His major restriction is the mental/psychological stress of dealing with others whilst working.” AR 328.

Because of Higginbottom’s difficulty in maintaining employment, Mr. Okine opined that he had a “moderate limitation” in his ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances. AR 328.

Mr. Okine opined that Higginbottom had a “marked limitation” in his ability to interact appropriately with the general public because he had “indicated difficulty dealing with crowds, even with family gatherings.” AR 330.

Mr. Okine also opined that Higginbottom had “a residual disease process that has resulted in such marginal adjustment that even a minimal increase in mental demands or change in the environment would be predicted to cause [him] to decompensate.” AR 330.

According to Mr. Okine, the “nature and severity of [Higginbottom’s] mental illness limited [his] ability to use good [judgment] regarding compliance with medications/medical treatment” when he was “occasionally . . . non-compliant with medications and/or medical treatment,” as evidenced by Higginbottom’s arrest and charge of public intoxication. AR 329.

⁴ The questionnaire defined a “moderate” limitation as “more than a slight limitation in this area but the patient is still able to function satisfactorily.” AR 327.

Mr. Okine opined that Higginbottom would be disabled or likely to be disabled if he were to discontinue abusing alcohol, as he “has serious mental symptomology when not under the influence of alcohol/drug abuse.” AR 329. In addition, Higginbottom would be capable of handling and managing Social Security benefits if they were to awarded. AR 329.

Mr. Okine further found that Higginbottom had generalized persistent anxiety accompanied by autonomic hyperactivity and apprehensive expectation. AR 331. He found insufficient evidence of a persistent, irrational fear of a specific object, activity, or situation resulting in a compelling desire to avoid the dreaded object, activity, or situation. AR 331.

Mr. Okine also found that Higginbottom had inflexible and maladaptive personality traits causing either significant impairment in social or occupational functioning or subjective distress, as evidenced by (1) pathologically inappropriate suspiciousness or hostility; (2) persistent disturbances of mood or affect; (3) pathological dependence, passivity, or aggressivity; and (4) intense and unstable interpersonal relationships and impulsive and damaging behavior. AR 332.

Hearing Testimony

A. Plaintiff's Testimony

The ALJ summarized Higginbottom's testimony as follows:

At the hearing, the claimant testified that he has lived in Deloit, Iowa (population 300) since 1990. He lives with his ex-wife who is a cook at a retirement home. They divorced last year but he did not move out. He completed his GED in 1990, is of average intelligence and is able to read, write and perform basic math. He moved around a lot as a child and was in foster homes and shelters. He dropped out of school in the 9th grade. At age 17 he went to Denison Job Corps and studied painting but quit the program. Thereafter, he went on the streets and described himself as a

“hobo” and “alcoholic.” At the end of the 1990s he met his wife and she let him move in.

He testified that he has tried several different jobs but they all “ended negatively” and he would “get to the point where I couldn’t handle it.” He would experience stress and anxiety. Before he was diagnosed as bipolar in 2000, he felt it was “due to my own weakness.” During the marriage, his wife “made the money” and he did housekeeping duties and odd jobs around town. They do not have any children. His wife has provided him with money for his drinking. In October of 2008 the claimant was charged with public intoxication and he is currently involved in the Court system. He had consumed 1/5 of Vodka. He testified that when he gets drunk he socializes and is not a violent drunk but “I just get out of my head.”

In 2006 he received a DUI conviction. Currently, he has a driver’s license and he drives his wife’s car. He takes his dog out for runs in the country or walks with him for 30 minutes a day. His ex-wife works from 10:30 A.M. to 7 P.M. She works in Denison and he drives her there so he has the car. Due to a dislike of groups he doesn’t attend AA.

The claimant has a history of treatment for alcohol abuse after the DUI. For the last 3 or 4 years he has “fallen off the wagon” annually between September and October. At these times his anxiety and depression “overwhelms me.” This has a duration of one day (when he gets drunk). When queried, he said alcohol “doesn’t have anything to do with my disability.” He has a current charge pending for [an] alcohol related offense[;] he thinks he will be fined and maybe put on probation. The public defender sent him to Carroll for an alcohol evaluation in November and “they said it isn’t alcohol issue that it is mental.” He was then referred to Jim Coates, a counselor.

In addition, he testified that he has been seen “off and on” at Western Iowa Mental Health since 2000. He does see some improvement with medications but doesn’t like to take them. Sometimes he helps his father who lives up the street. He works on lawn mowers. His father is a Vietnam Veteran who is 100% disabled and a former alcoholic. After he met his wife in 1998 he was able to be sober for 4 years. The record indicates that the claimant had a job at Wesco and the claimant explained that he had to perform 30 hours of community service in lieu of a fine due to public

intoxication. He said he has had 11 public intoxication charges since 1990. Finally, he testified that 2 to 3 times a month his anxiety is so bad that he doesn't leave the house.

AR 13.

B. VE's Testimony

The ALJ found that Higginbottom's "ability to perform work at all exertional levels has been compromised by non-exertional limitations." AR 17. The ALJ summarized the VE's testimony as follows:

To determine the extent to which these limitations erode the occupational base of unskilled work at all exertional levels, the Administrative Law Judge asked the vocational expert whether jobs existed in the national economy for an individual with the claimant's age, education, work experience, and residual functional capacity. The vocational expert testified that given all of these factors the individual would be able to perform the requirements of representative, medium, unskilled svp 2 occupations such as [linen room attendant, industrial janitor, and machine packager.]

AR 17. "In addition, [Higginbottom] could do 90-95% of all unskilled work at various exertional levels. Pursuant to SSR 00-4p, the vocational expert's testimony is consistent with the information contained in the Dictionary of Occupational Titles." AR 17.

However, if Higginbottom's testimony were considered credible, the VE testified:

Based on his testimony I would say that he would be able to obtain jobs but would be unable to keep those jobs because of his indication that there are times when he feels the symptoms of anxiety to such a level that he's unable to leave the house. And he indicated that, that can happen up to two to three times a month. So, he would be considered an unreliable employee and would be unable to keep the jobs.

AR 58.

Finally, the VE testified that Higginbottom would "be able to obtain jobs but would not be able to continue with them" if her were "markedly limited to complete a normal work day and work week without interruptions from psychologically based symptoms and

to perform at a consistent pace without an unreasonable number and length of rest periods.” AR 58.

Summary of ALJ’s Decision

On March 19, 2009, the ALJ found that Higginbottom (1) had not engaged in substantial gainful activity since the application date of February 10, 2006; and (2) had an impairment or a combination of impairments considered to be “severe” on the basis of the requirements in the Code of Federal Regulations; but (3) did not have an impairment or a combination of impairments meeting or equaling one of the impairments set forth in 20 C.F.R. Part 404, Subpart P, Appendix 1; and (4) had no past relevant work; but (5) could perform work in the national economy as a linen room attendant, industrial janitor, or machine packager. AR 11-17. The ALJ found that Higginbottom’s “alcohol use materially contributes to his disability but cannot be a basis for a finding of disability under the Regulations.” AR 11. The ALJ accordingly found that he was not disabled since February 10, 2006. AR 17.

In so finding, the ALJ found that Higginbottom had only a mild restriction in activities of daily living, moderate difficulties in social functioning, and mild difficulties in maintaining concentration, persistence, or pace. AR 12. Further, Higginbottom experienced no episodes of decompensation of extended duration. AR 12. The ALJ thus found that Higginbottom’s mental impairment did not meet or medically equal the criteria of paragraph B of 20 C.F.R. pt. 404, subpt. P, app. 1, §§ 12.03, 12.04, 12.08, and 12.09. AR 11. The ALJ also found that the evidence in the record failed to establish the criteria of paragraph C of the listings. AR 12.

The ALJ found that Higginbottom had the RFC to perform a full range of work at all exertional levels, except he was “limited to unskilled, svp 1-2 routine, repetitive work that should not require dealing with job changes or setting goals. His social interaction

with the general public, co-workers and supervisors needs to be limited to not more than occasional (brief or superficial) and should not be constant, intense or frequent.” AR 12. “The claimant is at least capable of performing simple, routine tasks in a low stress environment with limited social demands.” AR 16.

Regarding Higginbottom’s credibility, the ALJ found that his “medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, [his] statements concerning the intensity, persistence and limiting effects of these symptoms are not credible to the extent they are inconsistent with the [ALJ’s] residual functional capacity assessment.” AR 14.

After reviewing the medical evidence, the ALJ found the following:

It is clear from the above medical evidence that [Higginbottom] has had a pattern in the past of doing well when he is sober and compliant with his medications but once he goes off of his medications his symptoms return and he self medicates with alcohol; he describes a pattern of binge drinking with attendant consequences. He has a very long history of struggling with alcohol addiction. His alcohol use has resulted in numerous legal charges and he has spent time in jail. He has recently gone through divorce although he still lives in the same home as his ex-wife.

No treating source has opined that he is precluded from all work activity due to his mental illness. He has a very poor work history and does not appear to be an individual who is motivated to obtain or maintain employment. Certainly, his alcohol use has not helped him in his efforts to obtain or maintain employment. He is supported by his ex-wife and lives with her so he doesn’t appear to need a job. He seems to seek mental health treatment when he has legal problems most likely to appease the Court before sentencing. He was performing garbage collection work which did not require much contact with people. The undersigned has taken this factor into consideration in arriving at the residual functional capacity findings.

[Higginbottom] is able to take his dog for 30 minute walks and care for it. He does the vacuuming and shops [every] 2 weeks. He has been able to help his father repair mowers and he has a driver’s license. . . . The testimony of [Higginbottom’s] wife is also not credible for the same reasons

and due to the fact that she clearly has a pecuniary interest in the outcome of the case.

Sadly [Higginbottom] admits that he can't find work in his home town because people know his reputation as an alcoholic. He only seems motivated to seek alcohol treatment when he has criminal charges pending, and his arrests are, by his own account, an annual event. He admits he functions better when he is compliant with medication, but seems resigned to "falling off the wagon" periodically. At age 39 he seems to have resigned himself to the role of the chronic alcoholic.

AR 15-16 (citation omitted).

Disability Determinations and the Burden of Proof

The Social Security Act defines a disability as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A); 20 C.F.R. §§ 404.1505, 416.905. A claimant has a disability when the claimant 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 significant numbers either in the region where such individual lives or in several regions of the country." 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step sequential evaluation process outlined in the regulations. 20 C.F.R. §§ 404.1520, 416.920; *see Kirby v. Astrue*, 500 F.3d 705, 707 (8th Cir. 2007). First, the Commissioner will consider a claimant's work activity. If the claimant is engaged in substantial gainful activity, then the claimant is not disabled. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i).

Second, if the claimant is not engaged in substantial gainful activity, the Commissioner looks to see “whether the claimant has a severe impairment that significantly limits the claimant’s physical or mental ability to perform basic work activities.” *Dixon v. Barnhart*, 353 F.3d 602, 605 (8th Cir. 2003). “An impairment is not severe if it amounts only to a slight abnormality that would not significantly limit the claimant’s physical or mental ability to do basic work activities.” *Kirby*, 500 F.3d at 707; *see* 20 C.F.R. §§ 404.1520(c), 404.1521(a), 416.920(c), 416.921(a).

The ability to do basic work activities is defined as “the abilities and aptitudes necessary to do most jobs.” 20 C.F.R. §§ 404.1521(b), 416.921(b). These abilities and aptitudes include (1) physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; (2) capacities for seeing, hearing, and speaking; (3) understanding, carrying out, and remembering simple instructions; (4) use of judgment; (5) responding appropriately to supervision, co-workers, and usual work situations; and (6) dealing with changes in a routine work setting. *Id.* §§ 404.1521(b)(1)-(6), 416.921(b)(1)-(6); *see Bowen v. Yuckert*, 482 U.S. 137, 141, 107 S. Ct. 2287, 2291 (1987). “The sequential evaluation process may be terminated at step two only when the claimant’s impairment or combination of impairments would have no more than a minimal impact on her ability to work.” *Page v. Astrue*, 484 F.3d 1040, 1043 (8th Cir. 2007) (internal quotation marks omitted).

Third, if the claimant has a severe impairment, then the Commissioner will consider the medical severity of the impairment. If the impairment meets or equals one of the presumptively disabling impairments listed in the regulations, then the claimant is considered disabled, regardless of age, education, and work experience. 20 C.F.R. §§ 404.1520(a)(4)(iii), 404.1520(d), 416.920(a)(4)(iii), 416.920(d); *see Kelley v. Callahan*, 133 F.3d 583, 588 (8th Cir. 1998).

Fourth, if the claimant's impairment is severe, but it does not meet or equal one of the presumptively disabling impairments, then the Commissioner will assess the claimant's RFC to determine the claimant's "ability to meet the physical, mental, sensory, and other requirements" of the claimant's past relevant work. 20 C.F.R. §§ 404.1520(a)(4)(iv), 404.1545(a)(4), 416.920(a)(4)(iv), 416.945(a)(4). "RFC is a medical question defined wholly in terms of the claimant's physical ability to perform exertional tasks or, in other words, what the claimant can still do despite his or her physical or mental limitations." *Lewis v. Barnhart*, 353 F.3d 642, 646 (8th Cir. 2003) (internal quotation marks omitted); see 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1). The claimant is responsible for providing evidence the Commissioner will use to make a finding as to the claimant's RFC, but the Commissioner is responsible for developing the claimant's "complete medical history, including arranging for a consultative examination(s) if necessary, and making every reasonable effort to help [the claimant] get medical reports from [the claimant's] own medical sources." 20 C.F.R. §§ 404.1545(a)(3), 416.945(a)(3). The Commissioner also will consider certain non-medical evidence and other evidence listed in the regulations. *See id.* If a claimant retains the RFC to perform past relevant work, then the claimant is not disabled. *Id.* §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

Fifth, if the claimant's RFC as determined in step four will not allow the claimant to perform past relevant work, then the burden shifts to the Commissioner to prove that there is other work that the claimant can do, given the claimant's RFC as determined at step four, age, education, and work experience. *See Bladow v. Apfel*, 205 F.3d 356, 358-59 n.5 (8th Cir. 2000). The Commissioner must prove not only that the claimant's RFC will allow the claimant to make an adjustment to other work, but also that the other work exists in significant numbers in the national economy. *Eichelberger v. Barnhart*, 390 F.3d 584, 591 (8th Cir. 2004); 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). If the claimant can make an adjustment to other work that exists in significant numbers in the

national economy, then the Commissioner will find the claimant is not disabled. If the claimant cannot make an adjustment to other work, then the Commissioner will find that the claimant is disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). At step five, even though the burden of production shifts to the Commissioner, the burden of persuasion to prove disability remains on the claimant. *Stormo v. Barnhart*, 377 F.3d 801, 806 (8th Cir. 2004).

The Substantial Evidence Standard

The court reviews an ALJ's decision to determine whether the ALJ applied the correct legal standards and whether the factual findings are supported by substantial evidence on the record as a whole. *Page*, 484 F.3d at 1042. This review is deferential; the court "must affirm the Commissioner's decision if it is supported by substantial evidence on the record as a whole." *Pelkey v. Barnhart*, 433 F.3d 575, 577 (8th Cir. 2006); see 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 . . ."). Under this standard, substantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion. *Kluesner v. Astrue*, 607 F.3d 533, 536 (8th Cir. 2010); see *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427 (1971).

Moreover, substantial evidence "on the record as a whole" requires consideration of the record in its entirety, taking into account both "evidence that supports the Commissioner's decision as well as the evidence that detracts from it." *Kluesner*, 607 F.3d at 536 (quoting *Finch v. Astrue*, 547 F.3d 933, 935 (8th Cir. 2008)). The court must "search the record for evidence contradicting the [Commissioner's] decision and give that evidence appropriate weight when determining whether the overall evidence in support is

substantial.” *Baldwin v. Barnhart*, 349 F.3d 549, 555 (8th Cir. 2003) (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Sec’y of Health & Human Servs.*, 879 F.2d 441, 444 (8th Cir. 1989). The court, however, does not “reweigh the evidence presented to the ALJ,” *Baldwin*, 349 F.3d at 555 (citing *Bates v. Chater*, 54 F.3d 529, 532 (8th Cir. 1995)), or “review the factual record de novo.” *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (citing *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it “possible to draw two inconsistent positions from the evidence and one of those positions represents the Commissioner’s findings, [the court] must affirm the [Commissioner’s] denial of benefits.” *Kluesner*, 607 F.3d at 536 (quoting *Finch*, 547 F.3d at 935). This is true even in cases where the court “might have weighed the evidence differently.” *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (quoting *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)). The court may not reverse the Commissioner’s decision “merely because substantial evidence would have supported an opposite decision.” *Baker v. Heckler*, 730 F.2d 1147, 1150 (8th Cir. 1984); see *Goff v. Barnhart*, 421 F.3d 785, 789 (8th Cir. 2005) (“[A]n administrative decision is not subject to reversal simply because some evidence may support the opposite conclusion.”).

Discussion

A. The ALJ’s Determination of Plaintiff’s Credibility

Higginbottom maintains that “[i]t was error for the ALJ to back into a required credibility assessment by simply stating that [his] credibility was inconsistent with the ALJ’s predetermined RFC. This was not harmless error and remand would be appropriate to correct this procedural defect.” Doc. No. 14 at 13. The Commissioner contends that

substantial evidence in the record supports the ALJ's credibility findings, including inconsistencies in the record, the efficacy of Higginbottom's medications and treatment in controlling his impairment, his reported activities of daily living, and his poor work history. Doc. No. 15 at 10-13.

"The credibility of a claimant's subjective testimony is primarily for the ALJ to decide, not the courts." *Pearsall v. Massanari*, 274 F.3d 1211, 1218 (8th Cir. 2001). Accordingly, the court must "defer to the ALJ's determinations regarding the credibility of testimony, so long as they are supported by good reasons and substantial evidence." *Guilliams v. Barnhart*, 393 F.3d 798, 801 (8th Cir. 2005). In this regard, an ALJ may discount a claimant's subjective complaints if there are inconsistencies in the record as a whole. *Id.* When evaluating a claimant's subjective complaints, the ALJ must consider 1) the claimant's daily activities; 2) the duration, frequency and intensity of the pain; 3) precipitating and aggravating factors; 4) dosage, effectiveness and side effects of medication; and 5) functional restrictions. *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984); *see* 20 C.F.R. §§ 404.1529(c)(3)(i)-(vii), 416.929(c)(3)(i)-(vii) (codifying *Polaski* factors). Other factors include the claimant's relevant work history and the absence of objective medical evidence to support the complaints. *Wildman v. Astrue*, 596 F.3d 959, 968 (8th Cir. 2010). Thus, although an ALJ may not discount a claimant's subjective complaints solely because they are unsupported by objective medical evidence, *Halverson*, 600 F.3d at 931-32, such evidence is one factor that the ALJ may consider. *Ford v. Astrue*, 518 F.3d 979, 982 (8th Cir. 2008); *see Jones v. Astrue*, 619 F.3d 963, 975 (8th Cir. 2010) (noting that an ALJ is entitled to make a factual determination that a claimant's subjective pain complaints are not credible in light of objective medical evidence to the contrary). Further, an ALJ need not explicitly discuss each *Polaski* factor; it is sufficient if the ALJ acknowledges and considers those factors before discounting a claimant's subjective complaints. *Heino v. Astrue*, 578 F.3d 873, 881 (8th Cir. 2009); *see*

Dunahoo v. Apfel, 241 F.3d 1033, 1038 (8th Cir. 2001) (“If the ALJ discredits a claimant’s credibility and gives a good reason for doing so, we will defer to its judgment even if every factor is not discussed in depth.”).

In assessing Higginbottom’s credibility, the ALJ first acknowledged the above factors. AR 12 (citing 20 C.F.R. § 416.929 and Social Security Ruling 96-7p). The ALJ then pointed to the lack of objective medical evidence in discounting Higginbottom’s subjective complaints. AR 13-15.

As noted above, the ALJ found that Higginbottom “has had a pattern in the past of doing well when he is sober and compliant with his medications but once he goes off of his medications his symptoms return and he self medicates with alcohol; he describes a pattern of binge drinking with attendant consequences.” AR 15. A claimant’s improvement following treatment is a valid reason to discount the claimant’s subjective complaints. *See Johnson v. Astrue*, 628 F.3d 991, 995-96 (8th Cir. 2011) (treating physicians’ reports that claimant was “doing well” were inconsistent with levels of pain and fatigue claimant described at hearing, which justified ALJ’s discounting of claimant’s subjective complaints of disabling pain); *Hutton v. Apfel*, 175 F.3d 651, 655 (8th Cir. 1999) (“Impairments that are controllable or amenable to treatment do not support a finding of total disability.”); *Jenkins v. Chater*, 76 F.3d 231, 233 (8th Cir. 1996) (claimant’s reported improvement with treatment was proper basis to discount subjective complaints).

Substantial evidence in the record supports the ALJ’s finding in this regard. In March 2008, Higginbottom reported that his medication “tend[ed] to take the edge off.” AR 278. In April 2008, he continued to do “fairly well” on medication. AR 276. In July 2008, he reported that his medication helped stabilize his mood and seemed “to be keeping things at bay.” AR 15, 272. He reported having less anxiety and seemed “pleased with the way things [were] going.” AR 272. In September 2008, Higginbottom reported that

his depression was “not bad at all” and that his medications “seem[ed] to have helped greatly with his mood symptoms.” AR 15, 270. He also denied having any unmanageable depressive or manic symptoms. AR 270. In October 2008, Higginbottom stopped taking his medication, started drinking, and was arrested for public intoxication. AR 310. In December 2008, Higginbottom related that his mood was “generally stable on medication.” AR 311. In January 2009, Mr. Coats, Higginbottom’s counselor, noted that he had been “fairly emotionally stable” despite the “major disappointment” from his representative’s withdrawal from his Social Security disability case. AR 308. In February 2009, Higginbottom reported that he was “doing reasonably well at this point,” and Mr. Coats noted that his mood was stable. AR 307.

Furthermore, the ALJ found that Higginbottom’s activities of daily living belied his claim of disability. AR 16. Inconsistencies between subjective complaints of pain and daily living patterns may diminish credibility. *Casey v. Astrue*, 503 F.3d 687, 696 (8th Cir. 2007). In particular, “acts such as cooking, vacuuming, washing dishes, doing laundry, shopping, driving, and walking, are inconsistent with subjective complaints of disabling pain.” *Medhaug v. Astrue*, 578 F.3d 805, 817 (8th Cir. 2009); *see also Tippie v. Astrue*, 791 F. Supp. 2d 638, 651-52 (N.D. Iowa 2011) (collecting cases). On the other hand, a claimant need not prove he is bedridden or completely helpless to be found disabled. *Reed v. Barnhart*, 399 F.3d 917, 923 (8th Cir. 2005). Rather, “[i]n evaluating a claimant’s RFC, consideration should be given to the quality of the daily activities and the ability to sustain activities, interests, and relate to others *over a period of time* and the frequency, appropriateness, and independence of the activities must also be considered.” *Wagner v. Astrue*, 499 F.3d 842, 851 (8th Cir. 2007).

In this case, substantial evidence in the record of Higginbottom’s reported activities supports the adverse credibility determination of the ALJ, who found that Higginbottom “is able to take his dog for 30 minute walks and care for it. He does the vacuuming and

shops every 2 weeks. He has been able to help his father repair mowers and he has a driver's license." AR 16. Although a claimant need not be bedridden before he can be determined to be disabled, Higginbottom's "daily activities can nonetheless be seen as inconsistent with his subjective complaints of a disabling impairment and may be considered in judging the credibility of complaints." *Teague v. Astrue*, No. 4:09CV948MLM, 2010 WL 2653472, at *8 (E.D. Mo. June 29, 2010) (collecting cases), *aff'd*, 638 F.3d 611 (8th Cir. 2011). In addition, Higginbottom's testimony that he did not believe that alcohol "[had] anything to do with [his] being disabled" (AR 13, 42) contradicted his claim on his application for SSI that bipolar disorder and alcoholism limited his ability to work (AR 141), and "[t]he ALJ may discredit a claimant based on inconsistencies in the evidence." *Partee v. Astrue*, 638 F.3d 860, 865 (8th Cir. 2011).

In discounting Higginbottom's credibility, the ALJ also appropriately found that Higginbottom "has a very poor work history and does not appear to be an individual who is motivated to obtain or maintain employment" (AR 15). *See Pearsall*, 274 F.3d at 1218 ("A lack of work history may indicate a lack of motivation to work rather than a lack of ability."); *Wolf v. Shalala*, 3 F.3d 1210, 1214 (8th Cir. 1993) (claimant's credibility is lessened by a poor work history).

In sum, substantial evidence in the record as a whole supports the ALJ's discounting of Higginbottom's credibility.

B. Plaintiff's Alcoholism

As noted above, the ALJ found that Higginbottom's "alcohol use materially contributes to his disability but cannot be a basis for a finding of disability under the Regulations." AR 11. Higginbottom argues that the ALJ erred in finding that his alcohol use was a contributing factor material to the determination of disability. Doc. No. 14 at 16-19. A claimant bears the burden of proving that his substance abuse was not a

contributing factor material to the alleged disability. *Estes v. Barnhart*, 275 F.3d 722, 725 (8th Cir. 2002) (citing *Mittlestedt v. Apfel*, 204 F.3d 847, 852 (8th Cir. 2000)).

Alcoholism and drug addiction are no longer a basis for obtaining Social Security benefits. Pub.L. No. 104-121, 110 Stat. 852-56 (1996). An “individual shall not be considered disabled for purposes of this title if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner’s determination that the individual is disabled.” 42 U.S.C. §§ 423(d)(2)(C), 1382c(a)(3)(J). The claimant has the burden of proving that alcoholism or drug addiction is not a contributing factor. *Kluesner*, 607 F.3d at 537; *Estes*, 275 F.3d at 725. “If the ALJ is unable to determine whether substance use disorders are a contributing factor material to the claimant’s otherwise-acknowledged disability, the claimant’s burden has been met and an award of benefits must follow.” *Kluesner*, 607 at 537 (quoting *Brueggemann v. Barnhart*, 348 F.3d 689, 693 (8th Cir. 2003)). That is, in the matter of a tie, the claimant wins. *Id.*

In the case of alcoholism and drug addiction, an ALJ must first determine if a claimant’s symptoms, regardless of cause, constitute disability. *Kluesner*, 607 F.3d at 537; *Brueggemann*, 348 F.3d at 694; 20 C.F.R. §§ 404.1535(a), 416.935. If the ALJ finds a disability and evidence of substance abuse, the next step is to determine whether those disabilities would exist in the absence of the substance abuse. *Kluesner*, 607 F.3d at 537; *Brueggemann*, 348 F.3d at 694-95.

The record demonstrates that Higginbottom functioned well when he was sober. As noted above, although he complained of experiencing anxiety, mood swings, and difficulty interacting with others, Higginbottom reported improvement with medication. AR 270-85, 307-12. The record does not establish any difficulty with mental health symptoms when Higginbottom abstained from using alcohol and took his prescribed medication as directed. Therefore, he has failed to meet his burden of establishing that his alcohol use was not a contributing factor material to his disability.

C. New and Material Evidence

As noted above, on March 11, 2009, Mr. Okine completed a mental RFC assessment. AR 327-32. On March 19, 2009, the ALJ issued her decision denying Higginbottom's application for SSI. AR 6-18. On January 4, 2011, the Appeals Council denied Higginbottom's request for review after it considered additional evidence, including Mr. Okine's mental RFC assessment, but "found that this information does not provide a basis for changing the Administrative Law Judge's decision." AR 2. Higginbottom contends that the Commissioner failed to consider properly Mr. Okine's mental RFC assessment. According to Higginbottom, "[t]he ALJ decision was clearly issued before Mr. Okine's report was submitted. Arguably, the ALJ should have at least waited until that report was filed in furtherance of her duty to develop the record." Doc. No. 14 at 11. "[T]he ALJ should have considered the RFC opinions of Albert Okine, PA-C, because the file lacks a significant RFC assessment by any treating source." *Id.* Higginbottom further contends "[i]t was error for the Appeals Council to ignore this evidence" of Mr. Okine's RFC assessment. *Id.* at 12.

The Commissioner does not dispute Higginbottom's contention that the Commissioner did not consider this evidence until it was submitted to the Appeals Council, which considered it but denied review. The Commissioner nonetheless contends that the ALJ's decision is supported by substantial evidence, even in light of the new evidence that Higginbottom presented to the Appeals Council. Doc. No. 15 at 18. The Commissioner apparently asserts Higginbottom did not establish good cause for not presenting this new but immaterial evidence to the ALJ, thereby not warranting a remand under sentence six of 42 U.S.C. § 405(g). *Id.* at 18-19. In reply, Higginbottom maintains that, because he

is seeking a remand under sentence four, rather than sentence six, of 42 U.S.C. § 405(g), he is not required to demonstrate good cause.⁵ Doc. No. 16 at 1-2.

The Commissioner's regulations provide that the Appeals Council must consider "new and material evidence" that "relates to the period on or before the date of the [ALJ] hearing decision." 20 C.F.R. § 404.970(b). "To be 'new,' evidence must be more than merely cumulative of other evidence in the record." *Bergmann v. Apfel*, 207 F.3d 1065, 1069 (8th Cir. 2000). Additional evidence submitted to the Appeals Council is material when it is "relevant to [the] claimant's condition for the time period for which benefits were denied." *Lamp v. Astrue*, 531 F.3d 629, 632 (8th Cir. 2008) (quoting *Bergmann*, 207 F.3d at 1069); see *Williams v. Sullivan*, 905 F.2d 214, 216 (8th Cir. 1990) ("Medical evidence obtained after an ALJ decision is material if it relates to the claimant's condition on or before the date of the ALJ's decision."). "Thus, to qualify as 'material,' the additional evidence must not merely detail after-acquired conditions or post-decision deterioration of a pre-existing condition." *Bergmann*, 207 F.3d at 1069-70.

The Eighth Circuit interprets a statement by the Appeals Council that additional evidence "did not provide a basis for changing the ALJ's decision" as a finding that the evidence in question was not material. *Aulston v. Astrue*, 277 F. App'x 663, 664 (8th Cir. 2008) (citing *Bergmann*, 207 F.3d at 1069-70). Thus, if the Appeals Council considered the new evidence but declined to review the case, the court reviews the ALJ's decision and

⁵ The fourth sentence of 42 U.S.C. § 405(g) provides: "The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." The sixth sentence of 42 U.S.C. § 405(g) provides, in part:

The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding

determines “whether there is substantial evidence in the administrative record, which now includes the new evidence, to support the ALJ’s decision.” *Nelson v. Sullivan*, 966 F.2d 363, 366 (8th Cir. 1992) (citing *Browning v. Sullivan*, 958 F.2d 817, 823 (8th Cir. 1992)); *see also Hovenga v. Astrue*, 715 F. Supp. 2d 848, 868 (N.D. Iowa 2010). “Of necessity, that means that [the court] must speculate to some extent on how the administrative law judge would have weighed the newly submitted reports if they had been available for the original hearing,” which is “a peculiar task for a reviewing court.” *Riley v. Shalala*, 18 F.3d 619, 622 (8th Cir. 1994). Furthermore, “once the evidence is submitted to the Appeals Council it becomes part of the record, thus it would not make sense to require [the claimant] to present good cause for failing to make it part of a prior proceeding’s record.” *Nelson*, 966 F.2d at 366 n.5. Accordingly, this court must review Mr. Okine’s assessment and consider its materiality, regardless of whether the claimant has established good cause for failing to submit it to the ALJ.

According to the Commissioner, there is no reasonable likelihood that Mr. Okine’s assessment would have change the ALJ’s decision. The Commissioner contends that the ALJ’s RFC assessment “already accommodated the restrictions indicated by Mr. Okine” because Mr. Okine’s opinion that Higginbottom had “marked” limitations in dealing with work stress, “moderate” limitations in completing a normal workday without interruption from his psychologically based symptoms, and “moderate” limitations in his ability to maintain a schedule (AR 328) is consistent with the ALJ’s RFC assessment restricting Higginbottom to unskilled work that is routine and repetitive and requires no job changes or goal setting (AR 12). Doc. No. 15 at 19. The Commissioner further maintains that Higginbottom’s social limitations as opined by Mr. Okine are consistent with the ALJ’s restriction of Higginbottom to only “occasional” interaction with the general public, co-workers, and supervisors. *Id.* The Commissioner also asserts that, as a physician

assistant, Mr. Okine's opinion is entitled to less weight. *Id.* at 20 (citing *Tindell v. Barnhart*, 444 F.3d 1002, 1005 (8th Cir. 2006); 20 C.F.R. § 416.913(d)).

The court finds that Mr. Okine's assessment of Higginbottom's mental RFC is non-cumulative, relates to Higginbottom's condition on or before the date of the ALJ's decision, and is relevant to his condition for the time period for which benefits were denied. "Social Security separates information sources into two main groups: *acceptable medical sources* and *other sources*. It then divides *other sources* into two groups: *medical sources* and *non-medical sources*." *Sloan v. Astrue*, 499 F.3d 883, 888 (8th Cir. 2007) (citing 20 C.F.R. §§ 404.1502, 416.902). "*Acceptable medical sources* include licensed physicians (medical or osteopathic doctors) and licensed or certified psychologists." *Id.* (citing 20 C.F.R. §§ 404.1513(a), 416.913(a)). Only "acceptable medical sources" can (1) provide evidence to establish the existence of a medically determinable impairment (20 C.F.R. §§ 404.1513(a), 416.913(a)); (2) provide medical opinions (20 C.F.R. §§ 404.1527(a)(2), 416.927(a)(2)); and (3) be considered treating sources (20 C.F.R. §§ 404.1527(d), 416.927(d)). *See id.*

"Other medical sources" include "nurse practitioners, physician assistants, licensed clinical social workers, naturopaths, chiropractors, audiologists, and therapists." *Id.* (citing 20 C.F.R. §§ 404.1513(d), 416.913(d)). "Information from these 'other sources' cannot establish the existence of a medically determinable impairment." Social Security Ruling⁶ ("SSR") 06-3p, 2006 WL 2329939, at *2. "Instead, there must be evidence from an 'acceptable medical source' for this purpose. However, information from such 'other sources' may be based on special knowledge of the individual and may provide insight into

⁶ Social Security Rulings are "final opinions and orders and statements of policy and interpretations" that the Social Security Administration has adopted. 20 C.F.R. § 402.35(b)(1). Once published, these rulings are binding on all components of the Social Security Administration. *Heckler v. Edwards*, 465 U.S. 870, 873 n.3, 104 S. Ct. 1532, 1534 n.3 (1984); *Grebenick v. Chater*, 121 F.3d 1193, 1200 (8th Cir. 1997); 20 C.F.R. § 402.35(b)(1).

the severity of the impairment(s) and how it affects the individual's ability to function.”
Id.

The Social Security Administration explained as follows:

With the growth of managed health care in recent years and the emphasis on containing medical costs, medical sources who are not “acceptable medical sources,” such as nurse practitioners, physician assistants, and licensed clinical social workers, have increasingly assumed a greater percentage of the treatment and evaluation functions previously handled primarily by physicians and psychologists. Opinions from these medical sources, who are not technically deemed “acceptable medical sources” under our rules, are important and should be evaluated on key issues such as impairment severity and functional effects, along with the other relevant evidence in the file.

Id. at *3. According to SSR 06-3p, these opinions are important because, “depending on the particular facts in a case, and after applying the factors for weighing opinion evidence, an opinion from a medical source who is not an ‘acceptable medical source’ may outweigh the opinion of an ‘acceptable medical source,’ including the medical opinion of a treating source.” *Id.* at *5. A medical source who is not an “acceptable medical source” may be given more weight if that source has “seen the individual more often than the treating source and has provided better supporting evidence and a better explanation for his or her opinion.” *Id.*; *see also Garcia v. Astrue*, No. 1:10-CV-00542-SKO, 2011 WL 3875483, at *11-17 (E.D. Cal. Sept. 1, 2011) (reviewing SSR 06-3p); *Clark v. Astrue*, 769 F. Supp. 2d 1172, 1186-87 (N.D. Iowa 2011) (same).

In this case, Mr. Okine, a physician assistant, is not an “acceptable medical source” and thus can neither provide a medical opinion nor establish the existence of an impairment, although his testimony can be used to understand how an impairment might affect Higginbottom's ability to function. Mr. Okine indicated that Higginbottom had a “marked limitation” in his “ability to deal with work stress (e.g., normal pace of work expected by employers, deadlines, quotas, etc.)” because he was easily frustrated, distracted, and indecisive; suffered from severe mood swings; and had difficulty with

coping and meeting deadlines. AR 327. Mr. Okine further opined that Higginbottom had a “marked limitation” in his ability to accept instructions and to respond appropriately to criticism from supervisors or co-workers. AR 328. Furthermore, Higginbottom had an “extreme limitation” in his ability to get along with co-workers or peers without distracting them or exhibiting behavioral extremes. AR 330. According to the VE, if Higginbottom’s concentration and persistence were markedly limited, then he would “be able to obtain jobs but would not be able to continue with them.” AR 58. The ALJ found, however, that Higginbottom suffered from only moderate difficulties in maintaining social functioning and mild difficulties in maintaining concentration, persistence, or pace. AR 12. Thus, Mr. Okine’s opinion regarding Higginbottom’s marked and extreme limitations in social functioning and concentration, persistence, or pace, if credited pursuant to SSR 06-3p, might well persuade the ALJ that Higginbottom is unable to perform any work. *See Gartman v. Apfel*, 220 F.3d 918, 922 (8th Cir. 2000) (remanding for ALJ to consider and weigh new, material evidence of claimant’s treating physician’s opinion that claimant could not work unless she was able to elevate her leg periodically; opinion “if credited, might well persuade the ALJ that [the claimant] could not return” to her past relevant work). Accordingly, it is recommended that the Commissioner’s decision be reversed and this case remanded for the ALJ to consider Mr. Okine’s opinion pursuant to SSR 06-3p.

D. Plaintiff’s GAF Scores

Higginbottom maintains that the ALJ’s RFC determination “does not address [his] consistently low GAF scores.” Doc. No. 14 at 15. The Commissioner contends that “the ALJ cited several of plaintiff’s GAF scores, but properly considered the substance of plaintiff’s treatment notes, rather than focusing purely on plaintiff’s numerical GAF scores.” Doc. No. 15 at 15 (citing AR 11-16). “Thus, the ALJ properly determined plaintiff’s RFC.” *Id.*

As noted previously, Higginbottom's GAF was assessed at 40 on March 8, 2006, January 25, 2008, and December 8, 2008, which the ALJ noted in her decision but did not otherwise explain the weight given to this evidence. AR 14-15, 235, 284, 311. A GAF score of 40 indicates some impairment in reality testing or communication or major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood. *See supra* note 1. "While . . . the Commissioner has declined to endorse the GAF scale for 'use in the Social Security and SSI disability programs,' the GAF scores may still be used to assist the ALJ in assessing the level of a claimant's functioning." *Halverson*, 600 F.3d at 930-31 (citation omitted). Courts differ in their opinions of whether such a GAF score indicates an inability to work. *Compare Campbell v. Astrue*, 627 F.3d 299, 306-07 (7th Cir. 2010) ("An ALJ may not selectively discuss portions of a physician's report that support a finding of non-disability while ignoring other portions that suggest a disability. . . . A GAF rating of 50 does not represent functioning within normal limits. Nor does it support a conclusion that [the claimant] was mentally capable of sustaining work.") *with Smith v. Comm'r of Soc. Sec.*, 482 F.3d 873, 877 (6th Cir. 2007) ("[The claimant] complains that the mental RFC determination must be defective because she has been rated 45-50 on the [GAF] scale. Even assuming GAF scores are determinative, the record supports a GAF in the high 40s to mid 50s, which would not preclude her from having the mental capacity to hold at least some jobs in the national economy."). In any event, the ALJ's decision is silent as to why the ALJ rejected this evidence. The ALJ may have believed that evidence in the record, including Higginbottom's activities of daily living, indicates a level of functioning that belies his GAF scores. Alternatively, the ALJ may have found that the opinions of Higginbottom's medical sources regarding his GAF scores are inconsistent internally or with other evidence. *See Perkins v. Astrue*, 648 F.3d 892, 897-98 (8th Cir. 2011). The ALJ, however, made no such findings, and the court can only consider the rationale relied upon

by the agency when reviewing an agency's decision. *Banks v. Massanari*, 258 F.3d 820, 824 (8th Cir. 2001) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 63 S. Ct. 454 (1943)). Although an ALJ need not discuss all evidence presented, the ALJ must explain why significant probative evidence has been rejected. *Vincent ex rel. Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984) (per curiam). Accordingly, in light of the recommendation that this case be remanded for the ALJ to consider Mr. Okine's opinion in assessing Higginbottom's mental RFC, it is further recommended that, on remand, the ALJ should explain the weight given to the evidence of Higginbottom's GAF scores and determine whether these scores reveal an inability to work. *See Pate-Fires v. Astrue*, 564 F.3d 935, 944 (8th Cir. 2009) (finding that, in light of claimant's history of GAF scores below 50, a consulting psychiatrist's assessment of claimant's GAF score at 58 did not constitute substantial evidence supporting ALJ's conclusion that claimant was not disabled).

Recommendation

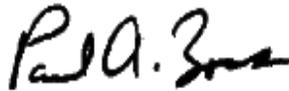
For the reasons discussed above, the court finds that the Commissioner's decision is neither supported by substantial evidence in the record as a whole nor based on proper legal standards. Accordingly, IT IS RESPECTFULLY RECOMMENDED that the Commissioner's decision be **reversed**, this case be **remanded** for further proceedings consistent with this report, and judgment be entered in favor of Higginbottom and against the Commissioner.

Objections to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b) must be filed within fourteen (14) days of the service of a copy of this Report and Recommendation. Objections must specify the parts of the Report and Recommendation to which objections are made, as well as the parts of the record forming the basis for the objections. *See* Fed. R. Civ. P. 72. Failure to object

to the Report and Recommendation waives the right to *de novo* review by the district court of any portion of the Report and Recommendation as well as the right to appeal from the findings of fact contained therein. *United States v. Wise*, 588 F.3d 531, 537 n.5 (8th Cir. 2009).

IT IS SO ORDERED.

DATED this 29th day of November, 2011.



PAUL A. ZOSS
CHIEF MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT