

Not To Be Published:

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

KEVIN M. ENGLING,

Plaintiff,

vs.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

No. C03-4067-MWB

**ORDER REGARDING
MAGISTRATE JUDGE’S REPORT
AND RECOMMENDATION AND
DEFENDANT’S OBJECTIONS TO
REPORT AND RECOMMENDATION**

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I. INTRODUCTION

The plaintiff Kevin M. Engling (“Engling”) seeks judicial review of the final decision of the Commissioner of Social Security denying his application for Title XVI supplemental security income (SSI) and Title II disability insurance (“DI”) benefits. This matter was referred to United States Magistrate Judge Paul A. Zoss. Judge Zoss recommended judgment be entered in favor of Engling and against the Commissioner. (Doc. No. 17). The Commissioner filed objections to the Report and Recommendation. (Doc. No. 18). Engling filed no response to the Commissioner’s objections.

II. BACKGROUND

Engling filed protectively his applications for SSI and DI benefits on May 8, 2001 with an onset date of June 21, 2000. He alleges disability due to Bipolar I Disorder/Manic Depression. (R. at 75). Engling’s application was denied on August 24, 2001 (R. at 43, 45-48), and denied again upon reconsideration, on February 14, 2002. (R. at 65, 71-74). On February 27, 2002, Engling requested a hearing before an ALJ. (R. at 57). A hearing was held on November 27, 2002. (R. at 317-55). On April 25, 2003, Engling’s claim was denied by the ALJ. (R. at 11-26). Engling filed a request for review by the Appeals Council. On May 30, 2003, the Appeals Council denied Engling’s request for review (R. at 6-8), making the ALJ’s decision the final decision of the Commissioner. Engling filed a timely request for review in this court on July 22, 2003. (Doc. No. 4).

Judge Zoss, in his Report and Recommendation, concluded the ALJ’s decision to deny Engling’s application for benefits was not supported by substantial evidence on the record as a whole. Judge Zoss further found:

Of note, however, is the fact that the record lacks substantial evidence to support a conclusion that Engling has been disabled since June 2000. Although it appears he left his last job as an electrician in June 2000, he did not seek any type of mental health treatment until March 21, 2001, when he checked himself into CMHI. The record contains no evidence whatsoever regarding his mental health condition from the time he left that job until March 2001. The court therefore finds Engling's disability onset date to be March 21, 2001, rather than June 21, 2000, as alleged.

Report and Recommendation, Doc. No. 17 at 28.

Judge Zoss recommended that judgment be entered in favor of Engling and against the Commissioner for calculation and award of benefits from and after March 21, 2001. On June 10, 2004, the Commissioner filed her objections with the court. (Doc. No. 18). The court waited to see if Engling would file a reply to the Commissioner's objections. The court has received no reply and finds the matter is now fully submitted for consideration.

III. LEGAL ANALYSIS

A. Standards of Review

The standard of review to be applied by the district court to a report and recommendation of a magistrate judge is established by statute:

A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate

judge's report where such review is required. *See, e.g., Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir. 1996) (citing 28 U.S.C. § 636(b)(1)); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)). The Commissioner has made specific, timely objections in this case. Therefore, *de novo* review of "those portions of the report or specified proposed findings or recommendations to which objection is made" is required here. *See* 28 U.S.C. § 636(b)(1).

The standard of judicial review for cases involving the denial of social security benefits is based on 42 U.S.C. § 405(g), which provides that "[t]he findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive." This standard of review was explained by the Eighth Circuit Court of Appeals as follows:

Our standard of review is narrow. "We will affirm the ALJ's findings if supported by substantial evidence on the record as a whole." *Beckley v. Apfel*, 152 F.3d 1056, 1059 (8th Cir. 1998). "Substantial evidence is less than a preponderance, but is enough that a reasonable mind would find it adequate to support a decision." *Id.* If, after reviewing the record, the Court finds that it is 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 decision.

See Young v. Apfel, 221 F.3d 1065, 1068 (8th Cir. 2000).

The Eighth Circuit Court of Appeals also has explained, "In reviewing administrative decisions, it is the duty of the Court to evaluate all of the evidence in the record, taking into account whatever in the record fairly detracts from the ALJ's decision." *Hutsell v. Massanari*, 259 F.3d 707, 714 (8th Cir. 2001) (quoting *Easter v. Bowen*, 867 F.2d 1128, 1131 (8th Cir. 1989)); *Howard v. Massanari*, 255 F.3d 577, 581 (8th Cir. 2001) ("In assessing the substantiality of the evidence, we must consider evidence that

detracts from the Commissioner’s decision as well as evidence that supports it.”) (quoting *Black v. Apfel*, 143 F.3d 383, 385 (8th Cir. 1998), with internal quotations and citations omitted). Accordingly, in reviewing the record in this case, the court must determine whether there is substantial evidence on the record as a whole to support the ALJ’s decision.

B. The Commissioner’s Objections

The Commissioner objects to Judge Zoss’s finding that the ALJ failed to accord proper weight to social worker Mr. Gary Lewis’s opinion, and that the ALJ improperly relied on Dr. Michael Baker’s consultative opinion. In addition, the Commissioner objects to Judge Zoss’s finding that the ALJ erred in finding Engling’s subjective complaints were not credible.

C. Discussion

As stated above, a district court’s standard of review is narrow and the court will affirm an ALJ’s findings if the findings are supported by substantial evidence on the record as a whole. *Beckley v. Apfel*, 152 F.3d 1056, 1059 (8th Cir. 1998). “Substantial evidence is less than a preponderance, but enough so that a reasonable mind might find it adequate to support the conclusion.” *Johnson v. Apfel*, 240 F.3d 1145, 1147 (8th Cir. 2001). After a district court reviews the record, if the court finds that it is “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 decision.” *See Young v. Apfel*, 221 F.3d 1065, 1068 (8th Cir. 2000).

1. Opinion Evidence

The Commissioner argues that contrary to Judge Zoss’s Report and Recommendation, the ALJ considered Mr. Lewis’s treating records and stated legally sufficient reasons for discrediting the residual functional capacity (“RFC”) described by

Mr. Lewis. The Commissioner asserts that Mr. Lewis's opinion is inconsistent with the substantial evidence in the record as a whole. Further, the Commissioner contends that the regulations do not require the ALJ to adopt the opinion of a treating social worker merely because the individual has seen the claimant more often than the consultative examiner when the social worker's opinion is inconsistent with the substantial evidence on the record as a whole. Therefore, the Commissioner asks this court to find that the ALJ properly discounted Mr. Lewis's opinion and did not err in relying on the consultative opinion of Dr. Baker, a licensed psychologist, because the ALJ determined that Mr. Lewis's opinion was not consistent with the record and Dr. Baker's opinion was consistent with the record.

The court notes that it is true that not only may an ALJ reject the opinion of a social worker but the ALJ may reject the opinion of any medical expert where it is inconsistent with the medical record as a whole. *Estes v. Barnhart*, 275 F.3d 722, 725 (8th Cir. 2002). The regulations state that if a treating source's opinion regarding the "nature and severity" of the impairment is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence" in the case, the treating source's opinion will be given "controlling weight." 20 C.F.R. §404.1527. Mr. Lewis is not a "treating source" but an "other medical source." Engling was seen by both Mr. Lewis and Ms. Judy Buss for counseling treatment. Both Ms. Buss and Mr. Lewis provided counseling services through the Siouxland Mental Health Center ("SMHC"). (R. at -255). Engling was seen monthly from April 2001 through November 2002. During this time the progress notes contained comments such as, "he feels like he is doing pretty well" and "problems with primary support, social environment, and occupational problems." (R. at 253). In September 2001, progress note comments included, "he no longer has the anger outbursts and doesn't feel the urge to yell at anyone"

and “he feels down because he can’t find a job but he is looking forward to finding one” (R. at 248); and, it was noted, “he is having no side effects.” (R. at 248). On October 29, 2001, Ms. Buss referred Engling to Mr. Lewis. (R. at 245). In Mr. Lewis’s intake he stated, “coping with chronic illness, living with parents, no income, and feeling ‘bad’ about being disabled.” (R. at 245). The notes regarding Engling’s intake also indicated:

Previous Psychiatric/Therapy Services depressed and actively suicidal and was hosp. in 1993 at Marian Health Center, was released and over-dosed and sent to Cherokee MHI, upon release, overdosed and hosp. at Norfolk, Nebr., Regional Center, moved to Lincoln Regional Center for 5 months, out in 1994 and became more active in his additive behavior, then rehosp. in Cherokee MHI for 2 weeks in 2001. Came to this Center started medications for Bipolar Disorder in April 2001.

(R. at 244). On October 29, 2001, Mr. Lewis also noted on Engling’s intake form “occupational problems (Specify):unable to work,” (R. at 243) and “vocational - - not able to work.” (R. at 244). Mr. Lewis’s initial treatment plan was “individual therapy to assist pt. dealing with loss, and coping with chronic mental illness.” (R. at 242). Mr. Lewis’s progress notes did indicate that Engling appeared to be in partial remission. (R. at 240). Mr. Lewis also noted that Engling “said he was not taking his meds. this week on time.” (R. at 241). On April 15, 2002, Mr. Lewis called Engling to remind him of his appointment and noted the following:

I called his house to remind of the appointment, his mother answered stating she is concerned that he will be suicidal if he misses his meds. 2 or 3 times. I have no release of information. so I gave no comment. Pt. appeared and suggested he consider a release so that if his mother is concerned about him, I can help her better understand which may have positive results for him. . . he said he missed his meds. 2 or 3 times this week., but said he feels well at this time and denied any indices of psychoses, as well as symptoms

of suicidology, and no homicidal thinking. He is helping his brothers do a roofing job for a family member and he said he can't keep up with them on the job. I reminded him not overdo it as he takes meds. for a disability.

(R. at 283). On June 3, 2002, Mr. Lewis noted that Engling, "said he doesn't feel like doing anything, is inactive, stays in the house, (living with parents), has not yet applied for food stamps." (R. at 282). On July 15, 2002, Mr. Lewis noted that Engling "does not follow through due to his lethargy and difficulty with concentration." (R. at 280).

Prior to Mr. Lewis's treatment, Engling was hospitalized for two weeks in 2001 and started Bipolar Disorder medications in April 2001. Dr. Osuntokun was the physician overseeing Engling's treatment when he was admitted to the locked, intensive care ward and placed on Ativan and Lithobid. (R. at 195). At this time, Engling also began a trial of Lithium. (R. at 196). Dr. Osuntokun diagnosed Engling with Bipolar I Disorder, current episode mixed. (R. at 195). Dr. Osuntokun's records stated, "He has had homicidal and suicidal thoughts, and stated he was troubled by these thoughts." (R. 197). Engling reported during this time that he voluntarily quit a \$60,000 a year job because of not wanting others to tell him what to do. (R. at 202-203). In May 2001, Ms. Judy Buss provided counseling treatment. She noted that Engling, "has been able to maintain employment sporadically as an electrician" (R. at 207) and that "he has had suicidal thoughts but has no specific plan and denies suicidal ideation at the present time." (R. at 207). Ms. Buss reviewed her impression with Dr. Brink and continued Engling on Lithium, Ambien and added Zyprexa.¹ (R. at 207).

After Engling filed for benefits he was seen by a medical consultant, Dr. Herbert

¹ Zyprexa: alone or in combination with Lithium for the short term treatment of acute manic episodes associated with Bipolar I Disorder. *Drug Facts and Comparisons* 1088 (58th ed. 2004).

L. Notch. Dr. Notch noted that Engling has received no psychiatric treatment for the past seven years. (R. at 229). Dr. Notch also noted that Engling “did not believe he had a mental illness and was able to maintain employment until recently when he lost his job opportunity in Sioux City because of a UA drug screen being positive for marijuana.” (R. at 229). Dr. Notch found:

Based on the evidence the claimant is stabilized on his medication regime and appears able to do work like activities without significant interference from his mental impairment or functional limitations. GAF 55 according to the treating psychiatrist.

The claimant’s allegations are credible. Since discharge from the hospital and continued treatment with his treating psychiatrist the claimant has made good gains. His current medications include Lithium and Zyprexa and he is maintaining in a stable fashion.

The medical and non-medical evidence is consistent. The claimant is able to perform work-like activities on at least a simple routine basis.

(R. at 230). Dr. Michael P. Baker conducted a consultative psychodiagnostic mental status exam. (R. at 310-315). Dr. Baker noted:

Mr. Engling is an individual who has been diagnosed with Bipolar I Disorder with mixed episodes over a number of years. Presently, medication is lessening the fluctuation of mood. He remains at considerable risk for symptom development.

(R. at 314). Further, Dr. Baker noted:

Under stressful conditions and without adherence to medication regimen, as well as with the possibility of relapse regarding mood altering substance use, judgment and responding appropriately in the work place could be impaired.

(R. at 315). As noted by Judge Zoss, “given the fluctuating nature of Bipolar disease, there is no way to tell whether Engling’s performance on the one-time testing performed by Dr. Baker accurately predicted his ability to function in a work setting over time.” As noted by the Commissioner, Dr. Baker did acknowledge that Engling “remains at considerable risk for symptom development.” (R. at 314). The Commissioner argues that Dr. Baker, as a licensed psychologist, certainly would have been familiar with the nature of Bipolar Disorder and would have considered the potential for relapse when opining about Engling’s functional abilities. The court does not agree. While the court agrees that Engling’s behavior should be considered by the court, the difficulty, in this case, is that Engling’s mental illness may not necessarily manifest itself at any particular time. This is precisely why a treating physician or a counselor who has seen the claimant over a long period of time is in a better position to assess the claimant’s condition than an examining psychologist who sees the claimant only one time. The court finds that Dr. Baker’s one time consultative exam is inconsistent with the record as a whole. Dr. Baker’s opinion is especially inconsistent with the opinions expressed in months of treatment records submitted by Engling’s treatment team. The court agrees with Judge Zoss that the ALJ did not properly consider Mr. Lewis’s opinions. Mr. Lewis’s records provided opinions over a period of time and were not the result of a one time consultative examination. Additionally, the one observation made by Dr. Baker that was consistent with the record as a whole was the possibility of relapse.

Further, the ALJ commented:

It is also clear from the record that when the claimant maintains his medication regimen he has very good results with functional ability that are very good. Gary E. Lewis, the claimant’s social worker, reported on several occasions that the claimant was in fairly good remission from the hard

symptoms of his illness.

(R. at 22). Mr. Lewis's opinion that Engling is in "fairly good" remission for the "hard symptoms" is not opining that Engling has the capability of sustaining gainful employment. This court finds that the majority of Dr. Baker's opinion is inconsistent with the record as a whole and Mr. Lewis's months of treatment records is supported by substantial evidence in the record as a whole. Further, the court agrees with the opinions that acknowledge that Engling remains at a high risk for redevelopment of symptoms.

With regard to mental disorders, the Commissioner's decision "must take into account evidence indicating that the claimant's true functional ability may be substantially less than the claimant asserts or wishes." *Parsons v. Heckler*, 739 F.2d 1334, 1341 (8th Cir. 1984). This was noted by not only Engling's treating counselors and physician but also the consultative physicians. This court notes that given the unpredictable course of mental illness, "[s]ymptom-free intervals and brief remissions are generally of uncertain duration and marked by the impending possibility of relapse." *Andler v. Chater*, 100 F.3d 1389, 1393 (8th Cir. 1996). Moreover, "[i]ndividuals with chronic psychotic disorders commonly have their lives structured in such a way as to minimize stress and reduce their signs and symptoms." 20 C.F.R. Pt. 440, Subpt. P., App. 1, § 12.00(E)(2004). "Such individuals may be much more impaired for work than their signs and symptoms would indicate." *Id.*

The court finds that such is the situation in Engling's case. The record indicates that when Engling's illness is in a manic phase, he wants to work and may believe that he no longer needs medication. The manic phase of Engling's illness, however, does not last, and after a time Engling returns to the depressive phase and is lethargic. Engling is approximately forty years of age, yet, lives at home with his parents, in a highly supportive environment, and at times he may appear to function normally. The court notes

that even though Engling has a child to support and expresses concern for the child that Engling walked away from a job paying \$60,000.00 which also indicates abnormal functioning. In addition, the record indicates that Engling has held employment sporadically and it appears that he has been fired from most of his jobs for performance problems. The record clearly establishes that Engling has never been successful in any attempt at work. The record demonstrates that Engling is not capable of following his medication regime because of his mental illness.² The record of the case has been fully developed and the court finds that the overwhelming weight of the evidence supports Engling's claim.

Mr. Lewis's opinions consistently describe Engling as an individual having "chronic mental illness." Additionally, Dr. Baker's opinion supports a finding that when he is placed in a stressful environment Engling risks decompensation. There is not substantial evidence in the record as a whole to support the ALJ's decision. When the record is viewed as a whole, beginning in March 2001, the hospitalization and treatment records, not only of Mr. Lewis, but of Ms. Buss, Dr. Osuntokun, and Dr. Notch, and even Dr.

² This case is similar to the case of *Pagan v. Bowen*, 862 F.2d 340 (D.C.Cir. 1988). In *Pagan*, the claimant suffered from schizophrenia. When Pagan was not suffering from severe symptoms, her illness was ameliorated by medication and she exhibited symptoms of a lesser magnitude. During such times, she was described in treatment records as alert and well oriented, and she demonstrated an ability to function, to a limited degree, in daily life. During such times she performed household chores, shopped, rode on public transit, sewed, read for pleasure and played cards. However, there was evidence indicating that her medication caused drowsiness and decreased psychomotor activity as well as an inability to concentrate. Further, her physician said that she was at significant risk of relapse which could be triggered by stress or anxiety. *Id.* at 345. A Bipolar Disorder is a mental impairment that can persist despite attenuation by medication.

Baker's records to a degree, support a finding that Engling is unable to sustain gainful employment.

As stated above, the evidence in this case supports the opinions of Engling's treatment team composed of a treating physician and counselors. The opinions that Engling suffers from a chronic mental illness, namely Bipolar Disorder, were not given proper consideration. Further, according to his treating physician, counselors and even the consultative experts, even if Engling currently was stable, Engling risks decompensation and, therefore, is not able to work on a consistent basis and the vocational expert testified that when Engling's limitations are considered he would not be able to sustain work. (R. at 353). Therefore, as to this issue, the Commissioner's objection is overruled.

2. Credibility

Engling has been consistently diagnosed with a Bipolar I Disorder limitation. (R. at 312). The severity of his limitation, however, is at issue. The Commissioner objects to Judge Zoss's finding that the ALJ erred in determining that Engling was not credible. It is true that the ALJ is responsible for determining a claimant's credibility. In this case, the ALJ found Engling was not credible based on:

The claimant's history of sexual assault when in the Army, the fact that he was divorced after numerous affairs, and the loss of his driver's license because he failed to make child support payments in combination lessen the claimant's credibility. Further support for lack of credibility is that the claimant lost his job because he abused drugs and alcohol.

(R. at 23). The events surrounding Engling's military discharge occurred nearly twenty years before this application for benefits. Further, an observation from 1993 that Engling exaggerated the severity of his psychopathology is an observation made eleven years prior to this claim. The loss of Engling's driver's license for nonpayment of child support is a

result of Engling's Bipolar Disorder. Engling has not consistently held a job and has had no source of income to pay child support because of his Bipolar Disorder condition. Therefore, this type of information, as to Engling's credibility, is irrelevant to the issue of whether Engling was providing a truthful account of his symptoms. The ALJ also found Engling's report of his daily activities to be inconsistent with his assertion that he was unable to work. Engling reported that he goes to a support center once a week and that his social worker provides transportation. He reports that he cannot maintain a budget and would need help in doing so. He says that on a normal day his mother makes a list of things to do around the house but that he usually watches television. Engling reports that he has driven his father to the grocery store and visits a couple friends. He also reported that he has no motivation to leave the house and that by staying at home his self-harm feelings level out. (R. at 21). These types of daily activities do not support a finding that Engling could sustain substantial gainful employment.

The substantial evidence in the record as a whole consistently indicates that Engling would be unable to sustain gainful employment. There are times that Engling has failed to follow his medication regimen and this could weigh against a finding of disability but the failure to follow the regimen appears to be a result of his Bipolar Disorder condition. In fact, Dr. Notch, a consultative physician, found that Engling's allegations were credible. The court finds that the ALJ erred in finding Engling was not credible and that the record does not support the ALJ's rejection of Engling's complaints. Therefore, as to this issue, the Commissioner's objection is overruled.

IV. CONCLUSION

Upon *de novo* determination of those portions of the Report and Recommendation, or specified proposed findings or recommendations to which the Commissioner has made objections, *see* 28 U.S.C. § 636(b)(1), the court finds that the Commissioner's objections must be **overruled**. Therefore, the court **adopts** Judge Zoss's Report and Recommendation and orders **the ALJ's decision be reversed, judgment be entered for Engling, and this matter is remanded to the Commissioner for the purpose of calculating and awarding benefits³ from and after March 21, 2001**. This order shall constitute the entry of a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

DATED this 8th day of September, 2004.



MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

³ The court usually does not comment regarding a claimant's ability to manage funds but in this case the court wants to note its concern regarding Engling's ability to handle his own funds. Engling stated he cannot budget or manage money. When asked if he could manage some kind of income Engling stated, "I would have probably needed help with that." (R. at 332). He stated his mother has to assist him so he knows the correct medication to take and the correct time to take the medication. Engling stated he cannot remember appointments. His mother testified that she was concerned with her son's ability to manage his own funds. When the ALJ asked if she thought her son could manage his own funds she stated, "I don't know. I was going to ask him if he would go with me to a lawyer to get, make me his guardian. I haven't done that yet." (R. at 346). This is a case where serious consideration should be given as to whether the Commissioner should appoint a representative payee.

