

TO BE PUBLISHED

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

MICHELLE RENAE SCHNEE,

Plaintiff,

vs.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

No. C14-4035-MWB

**REPORT AND
RECOMMENDATION**

Plaintiff Michelle Renae Schnee seeks judicial review of a final decision of the Commissioner of Social Security (the Commissioner) denying her application for Supplemental Security Income benefits (SSI) under Title XVI of the Social Security Act, 42 U.S.C. § 401 *et seq.* (Act). Schnee contends that the administrative record (AR) does not contain substantial evidence to support the Commissioner's decision that she was not disabled during the relevant period of time. For the reasons that follow, I recommend that the Commissioner's decision be affirmed.

I. BACKGROUND

Schnee was born in 1966. AR 102. She completed one year of college and has past relevant work as a telemarketer, customer service representative and hand packager. AR 23, 68. She protectively filed her application for SSI on July 18, 2011, alleging disability since August 15, 2007.¹ AR 207-12. Her application was denied initially and on reconsideration. AR 58. Schnee then requested a hearing before an Administrative Law Judge (ALJ) and ALJ Jan E. Dutton conducted a hearing on December 12, 2012.

¹ Schnee later amended her alleged onset date to July 18, 2011. AR 308.

AR 11. Schnee testified, as did a vocational expert (VE). AR 16-54. On March 1, 2013, the ALJ issued a decision finding that Schnee was not disabled at any time from July 18, 2011, through the date of the decision. AR 58-71. The Appeals Council denied Schnee's request for review on March 22, 2014. AR 1-3. The ALJ's decision thus became the final decision of the Commissioner. AR 1; 20 C.F.R. § 416.1481.

On May 14, 2014, Schnee filed a complaint (Doc. No. 3) in this court seeking review of the Commissioner's decision. This case has been referred to me pursuant to 28 U.S.C. § 636(b)(1)(B) for the filing of a report and recommended disposition. The parties have briefed the issues and the matter is now fully submitted.

II. DISABILITY DETERMINATIONS AND THE BURDEN OF PROOF

A disability is defined as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or 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. § 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. § 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. § 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. §§ 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. § 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.* § 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. §§ 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 residual functional capacity (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. §§ 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. § 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. § 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.* § 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 show that there is other work that the claimant can do, given the claimant’s RFC as determined at Step Four, and his or her age, education, and work experience. *See Bladow v. Apfel*, 205 F.3d 356, 358-59 n.5 (8th Cir. 2000). The Commissioner must show 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. § 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. § 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).

III. THE ALJ'S FINDINGS

The ALJ made the following findings:

- (1) The claimant has not engaged in substantial gainful activity since July 18, 2011, the protective filing date of the application (20 CFR 416.971 *et seq.*).
- (2) The claimant has the following severe impairments: Depression; anxiety; hepatitis C, cirrhosis/kidney disease; and headaches (20 CFR 416.920(c)).
- (3) From the protective filing date of the application, July 18, 2011, until February 17, 2012, the onset date of her sobriety, the claimant's substance use disorder was a contributing factor material to disability.
- (4) The claimant does not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 416.920(d), 416.925 and 416.926).
- (5) With the substance use disorder, the claimant had the residual functional capacity to perform light work as defined at 20 CFR 416.967(b) except as follows. She could occasionally lift or carry 20 pounds; frequently lift or carry 10 pounds; and stand, sit, or walk for 6 hours in an 8-hour day. She could occasionally do postural activities, *i.e.*, climb, balance, stoop, kneel, crouch, or crawl. She should avoid working on ladders. She should avoid concentrated exposure to fumes but is noted to be a cigarette smoker. From a mental standpoint, deficits in concentration, persistence, and pace would cause her to be off-task 25% of the time and unable to sustain full-time work.
- (6) Without the substance use disorder, the claimant has the residual functional capacity to perform light work as defined in 20 CFR 416.967 (b) except as follows:

She could occasionally lift or carry 20 pounds; frequently lift or carry 10 pounds; and stand, sit, or walk for 6 hours in an 8-hour day. She could occasionally do postural activities, i.e., climb, balance, stoop, kneel, crouch, or crawl. She should avoid working on ladders. She should avoid concentrated exposure to fumes but is noted to be a cigarette smoker. From a mental standpoint, she is sober of drugs now and has the capacity to do unskilled work, not semiskilled, with an SVP of 1 or 2 routine repetitive work that does not require extended concentration or attention. The jobs should not involve dealing with changes or setting goals. She should avoid stressful situations, and social interaction should not be more than occasional with coworkers, supervisors, and the public. She should avoid constant, intense, frequent social interaction.

- (7) The claimant is unable to perform any past relevant work (20 CFR 416.965).
- (8) The claimant was born on July 5, 1966 and was 45 years old, which is defined as a younger individual age 18-49, on the date the application was protectively filed (20 CFR 416.963).
- (9) The claimant has at least a high school education and is able to communicate in English (20 CFR 416.964).
- (10) Transferability of job skills is not material to the determination of disability because using the Medical-Vocational Rules as a framework supports a finding that the claimant is “not disabled,” whether or not the claimant has transferable job skills (See SSR 82-41 and 20 CFR Part 404, Subpart P, Appendix 2).
- (11) Step 5 -- While abusing drugs and alcohol, from July 18, 2011 to February 17, 2012, the claimant was unable to perform jobs that exist in significant numbers in the national economy and was disabled within the framework of Medical-Vocational Rule 202.21, Appendix 2, Subpart P, 20 CFR 404.

- (12) However, drug addiction and/or alcoholism was a contributing factor material to disability from July 18, 2011 to February 17, 2012. Accordingly, the claimant is not eligible for supplemental security income during this period.
- (13) Step 5 -- without drug/alcohol abuse: Beginning February 17, 2012, considering the claimant's age, education, work experience, and residual functional capacity, there have been jobs that exist in significant numbers in the national economy that the claimant can perform (20 CFR 416.969 and 416.969(a)).
- (14) From July 18, 2011 to February 17, 2012, drug addiction and/or alcoholism was a contributing factor material to disability.
- (15) The claimant was not under a disability, as defined in the Social Security Act, from July 18, 2011, the date the application was protectively filed, through the date of this decision (20 CFR 416.920(g)).

AR 60-71.

IV. THE SUBSTANTIAL EVIDENCE STANDARD

The Commissioner's decision must be affirmed "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 . . ."). "Substantial evidence is less than a preponderance, but enough that a reasonable mind might accept as adequate to support a conclusion." *Lewis*, 353 F.3d at 645. The Eighth Circuit explains the standard as "something less than the weight of the evidence and [that] allows for the possibility of drawing two inconsistent conclusions, thus it embodies a zone of choice within which the [Commissioner] may decide to grant or deny benefits without being subject to reversal on appeal." *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994).

In determining whether the Commissioner’s decision meets this standard, the court considers “all of the evidence that was before the ALJ, but it [does] not re-weigh the evidence.” *Vester v. Barnhart*, 416 F.3d 886, 889 (8th Cir. 2005). The court considers both evidence which supports the Commissioner’s decision and evidence that detracts from it. *Kluesner v. Astrue*, 607 F.3d 533, 536 (8th Cir. 2010). 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 v. Astrue*, 547 F.3d 933, 935 (8th Cir. 2008)). This is true even in cases where the court “might have weighed the evidence differently.” *Culbertson*, 30 F.3d at 939 (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.”).

V. DISCUSSION

Schnee contends the ALJ's decision is flawed for two reasons:

1. The ALJ erred by claiming to determine that a substance use disorder was material to disability during a part of the relevant time, although failing to determine that Schnee has a medically determinable severe impairment of "substance use disorder."
2. There is not substantial evidence in this record to support the ALJ's determination that substance use was a contributing factor material to Schnee's disability.

Doc. No. 12. These arguments arise in the context of evaluating the effect of drug addiction or alcoholism (DAA) on a claim for Social Security benefits. Congress has eliminated DAA as a basis for obtaining Social Security benefits. Pub. L. No. 104-121, 110 Stat. 852-56 (1996). Thus, "[a]n individual shall not be considered disabled for purposes of this title if [DAA] would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled." 42 U.S.C. § 1382c(a)(3)(J). The claimant has the burden to prove that DAA is not a contributing factor. *Kluesner v. Astrue*, 607 F.3d 533, 537 (8th Cir. 2010); *Brueggemann v. Barnhart*, 348 F.3d 689, 693 (8th Cir. 2003); *Estes v. Barnhart*, 275 F.3d 722, 725 (8th Cir. 2002). With these principles in mind, I will discuss Schnee's arguments separately. I will then conclude by determining whether the ALJ's ultimate decision is supported by substantial evidence on the record as a whole.

A. *Is the ALJ's Decision Inconsistent?*

For her first argument, Schnee correctly notes that the ALJ did not, at Step Two, list DAA as a severe impairment. AR 60. She also notes, again correctly, that the ALJ found DAA was a contributing factor material to disability. *Id.* Schnee argues that these findings are inherently inconsistent. Among other things, she points out that an impairment is severe if it "...significantly limits [the claimant's] physical or mental ability

to do basic work activities.” Doc. No. 12 at 6 (citing 20 C.F.R. § 416.920(c)). Thus, Schnee reasons that if DAA did not rise to that level, then it could not have been a factor that contributed to Schnee’s disability.

The Commissioner argues that this alleged inconsistency is illusory. She notes that the ALJ’s Step Two finding was phrased in the present tense (“The claimant *has* the following severe impairments . . .”) and that the ALJ expressly referenced Schnee’s prior history of DAA, stating that Schnee “has abstained from alcohol, illegal drugs, and pain pills since February 17, 2012, with one short relapse.” Doc. No. 15 at 9 (citing AR 60) [emphasis added]. Thus, according to the Commissioner, the ALJ found that DAA was no longer a severe impairment as of the date of the decision (March 1, 2013) but necessarily concluded that DAA *was* a severe impairment prior to February 17, 2012. If the Commissioner’s interpretation is correct then there is no inconsistency, as a finding that DAA was not a severe impairment on the date of the decision does not mean it could not have been a severe impairment in the past.

After carefully reviewing the ALJ’s decision, I find that the Commissioner’s analysis is plainly correct. There is no doubt the ALJ found that when Schnee suffered from DAA, that impairment significantly limited her ability to do basic work activities. This is illustrated by the stark contrast between the ALJ’s “with DAA” and “without DAA” findings as to Schnee’s mental RFC. With DAA, the ALJ found that Schnee had substantial deficits in concentration, persistence and pace such that she was unable to sustain full-time work. AR 63. Without DAA, however, the ALJ found that Schnee had the mental RFC to perform unskilled work with an SVP of 1 or 2.² *Id.*

² “SVP” refers to Specific Vocational Preparation, defined in Appendix C of the *Dictionary of Occupational Titles* as being “the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.” A position with an SVP of 1 requires a short demonstration only while a position with an SVP of 2 requires vocational preparation up to and including one month. See *Dictionary of Occupational Titles*, Appendix C.

At other steps of the analysis, the ALJ likewise contrasted Schnee's capabilities with and without DAA. AR 61-62, 69-70. At Step Five, for example, the ALJ found that Schnee was unable to perform other work during the period of time she suffered from DAA (July 18, 2011, and February 17, 2012), but could perform other work once she recovered from DAA. AR 69. None of this means the ALJ's findings as to the effects of DAA are supported by the record. I will address that issue next. However, I reject Schnee's argument that the ALJ's decision is inconsistent. While the ALJ did not expressly state that DAA was a severe impairment, the ALJ's decision makes it very clear that the ALJ found DAA to be a severe impairment until February 17, 2012.

B. Does the Record Support the ALJ's Findings Concerning DAA?

Schnee next contends that the ALJ failed to properly analyze the evidence in concluding that DAA was a contributing factor material to disability. As I noted earlier, Congress has directed that an individual not be found disabled under the Act "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 Commissioner's regulations describe the process for evaluating DAA as follows:

(1) The key factor we will examine in determining whether drug addiction or alcoholism is a contributing factor material to the determination of disability is whether we would still find you disabled if you stopped using drugs or alcohol.

(2) In making this determination, we will evaluate which of your current physical and mental limitations, upon which we based our current disability determination, would remain if you stopped using drugs or alcohol and then determine whether any or all of your remaining limitations would be disabling.

(i) If we determine that your remaining limitations would not be disabling, we will find that your drug addiction or alcoholism is a contributing factor material to the determination of disability.

(ii) If we determine that your remaining limitations are disabling, you are disabled independent of your drug addiction or alcoholism and we will find that your drug addiction or alcoholism is not a contributing factor material to the determination of disability.

20 C.F.R. § 416.935.³ The claimant has the burden of proving substance abuse is not a contributing factor material to the disability determination. *Estes v. Barnhart*, 275 F.3d 722, 725 (8th Cir. 2002). If the ALJ is unable to decide whether substance use disorder is a contributing factor, an award of benefits must follow. *Brueggemann*, 348 F.3d at 695. Here, Schnee argues (a) the ALJ was correct in finding that she was disabled until February 17, 2012, but (b) the record does not support the ALJ's finding that her impairments improved significantly after that date. According to Schnee, if there is no evidence of improvement after DAA ended, then there was no basis for the ALJ to find that DAA was a contributing factor material to disability.

The first step, of course, is to determine whether substantial evidence supports the ALJ's finding that Schnee suffered from DAA. If not, then there is no basis to find that DAA was a contributing factor material to disability. Having reviewed the entire record, I find that there is substantial evidence supporting the ALJ's finding that Schnee suffered from DAA before February 17, 2012. For example, in June 2010 – about a year before her alleged onset date – a therapist at Jackson Recovery Centers found that Schnee met the DSM-IV criteria for opioid dependence, sedative dependence, amphetamine dependence and alcohol dependence. AR 1154. On August 26, 2011, another therapist recommended that she continue with 20 weeks of group therapy, with individual sessions

³ Schnee argues that the ALJ failed to follow the analytical steps described by the Commissioner in SSR 13-2p. However, that Social Security Ruling did not take effect until March 22, 2013, three weeks after the ALJ's ruling was issued. *See* SSR 13-2p, 2013 WL 621536, at *1, 15. Nonetheless, the ALJ made reference to SSR 13-2p in her decision, AR 69, thus demonstrating that the ALJ was aware of its requirements. Having carefully reviewed SSR 13-2p, I find that my analysis would not change even if it would have been in effect on the date of the ALJ's decision.

every other week, and that she attend at least one AA/NA meeting per week. AR 1150. On February 3, 2012, Philip Muller, D.O., diagnosed Schnee with opiate dependence and alcohol dependence. AR 1429. During the ALJ's hearing, Schnee acknowledged that she previously had a substance abuse problem, with pain pills being her "drug of choice." AR 27-28. She further testified that she completed recovery on January 5, 2012, but had a relapse that led to an additional 30-day program, and had not used or abused drugs since. AR 28.

In short, the record easily supports the ALJ's finding that Schnee suffered from DAA between the alleged onset date and February 17, 2012. This leads to question of whether substantial evidence supports the ALJ's conclusion that DAA was a contributing factor material to disability during that period of time. This is where Schnee's "before and after" argument kicks in. As noted above, she contends there is no evidence supporting the ALJ's finding that her impairments improved after her DAA ended. Thus, she argues, DAA could not have been a contributing factor material to disability if the disability continued after DAA stopped.

The Commissioner argues that Schnee improperly seeks to shift the burden of proof, noting that Schnee has the burden to prove both (a) that DAA was not a contributing factor material to disability and (b) her RFC. According to the Commissioner, if the ALJ correctly found that Schnee's other impairments were not disabling while she suffered from DAA, then the ALJ was not required to consider whether the other impairments improved after DAA ended.

To untangle these arguments, I will address each time period separately. First, I will consider whether substantial evidence supports the ALJ's findings concerning Schnee's RFC from the onset date to February 17, 2012, when she suffered from DAA. Next, I will evaluate the ALJ's RFC findings for the period of time after DAA ended.

1. Before February 17, 2012

In determining Schnee's RFC during the time she suffered from DAA, the ALJ started by pointing out that a state agency medical consultant who reviewed Schnee's records found that she was not disabled as of January 27, 2012. AR 64 (citing AR 138-39). The ALJ also pointed to the state agency's finding that DAA was not a contributing factor material to disability. *Id.* (citing AR 102-13, 115-27). In fact, on December 19, 2011, a state agency medical consultant prepared a report stating, among other things: "DAA is involved, but is NOT material." AR 127. The ALJ noted, however, that on May 12, 2010, in considering a previous application, a state agency consultant reported that Schnee's mental RFC was significantly improved when she was not suffering from DAA. *Id.* (citing AR 845-52). The consultant determined that when under the effects of DAA, Schnee would have marked limitations in concentration, persistence or pace, and would have marked limitations in several areas of work-related mental functioning. AR 845-47. However, when not suffering from DAA, Schnee would be able to adequately perform work-related mental functions. AR 849-52.

The ALJ also considered medical evidence pre-dating February 17, 2012, including "several emergency room visits related to substance use disorder" and a hospitalization caused by an overdose of methadone. AR 64. The ALJ noted that Schnee missed medical appointments due to substance abuse and was actually dropped as a patient by one provider due to noncompliance and missed appointments. AR 65. In January 2012, having just successfully completed a drug abuse treatment program, Schnee reported methadone use and had to be hospitalized due to panic attacks, suicidal ideation and other issues. AR 64-65. Even as late as February 2, 2012, Schnee was hospitalized for three days due to multiple psychiatric diagnoses, including opiate dependence and alcohol dependence. AR 65 (citing AR 1419).

Substantial evidence on the record as a whole supports the ALJ's findings that (a) Schnee was disabled prior to February 17, 2012, and (b) DAA was a contributing factor

material to disability. Thus, I will turn to Schnee's period of sobriety, which began February 17, 2012.

2. *After February 17, 2012*

The ALJ discussed medical evidence covering a period of more than two years prior to November 27, 2012, and found nothing to establish that Schnee suffered from any disabling physical or mental impairments, other than DAA, for at least twelve consecutive months. AR 64-67. The ALJ also referenced Schnee's testimony that she has had fewer kidney infections, and no emergency room visits, since abstaining from drugs. AR 34-35, 67. The ALJ noted that in December 2012, Schnee reported that she could walk three to four blocks at a time, could stand for up to 30 minutes at a time and could sit for 60 minutes at a time. AR 68 (citing AR 309). As the ALJ pointed out, the record contains no opinion from any treating source concerning Schnee's work-related abilities. AR 65. However, the state agency medical consultants who reviewed Schnee's records concluded that she was not disabled because she could do work that was simple and repetitive in nature. AR 109-10, 123-25.

Having carefully reviewed the record, I find that it substantially supports the ALJ's findings concerning Schnee's RFC after February 17, 2012. It was Schnee's burden to establish her RFC. *Baldwin*, 349 F.3d at 556. The evidence of record simply fails to demonstrate that she suffered from any impairment – other than DAA – that caused impairments greater than those reflected in the ALJ's "without DAA" RFC findings. I reject Schnee's argument that the ALJ was required to show that her other impairments improved after Schnee abstained from using drugs. The ALJ properly considered the entire relevant period, both before and after Schnee achieved sobriety, and concluded that DAA was the only impairment that caused Schnee to be unable to work. This is reflected in the contrast between the ALJ's "with DAA" and "without DAA" mental RFC findings. AR 62-63.

The ALJ properly found that before February 17, 2012, Schnee was disabled but DAA was a contributing factor material to disability. Likewise, the ALJ properly found that after February 17, 2012, Schnee was no longer disabled. The ALJ's Step Four analysis is supported by substantial evidence on the record as a whole.

C. Is the Decision Supported by Substantial Evidence?

As noted above, the record contains no opinion from any treating source concerning Schnee's work-related abilities. Nor does the record contain an opinion from an examining source. The only medical opinions concerning Schnee's abilities are those provided by state agency consultants who did not examine Schnee. AR 102-13, 115-27.

While Schnee has not raised this issue, I find that this lack of evidence is a concern because the ALJ found that Schnee was unable, even without DAA, to perform any past relevant work. AR 68. Thus, the ALJ moved to Step Five and, based on the VE's opinion testimony, found that Schnee's RFC without DAA enabled her to perform a wide variety of other, unskilled work at the light and sedentary levels. AR 69-70. Because the ALJ made this finding without the benefit of an opinion from any treating or examining source, I must consider whether the ALJ's decision is consistent with *Nevland v. Apfel*, 204 F.3d 853 (8th Cir. 2000).

In *Nevland*, like here, an ALJ made a Step Five determination that a claimant who could not perform past relevant work could, nonetheless, perform various jobs identified by a VE. *Id.* at 857. Various non-treating and non-examining physicians had reviewed the claimant's records and provided opinions about the claimant's RFC, which the ALJ then used in formulating hypothetical questions to a VE. *Id.* at 858. The Eighth Circuit Court of Appeals began its analysis as follows:

In our circuit it is well settled law that once a claimant demonstrates that he or she is unable to do past relevant work, the burden of proof shifts to the Commissioner to prove, first that the claimant retains the residual functional capacity to do other kinds of work, and, second that other work exists in substantial numbers in the national economy that the claimant is able to do.

McCoy v. Schweiker, 683 F.2d 1138, 1146–47 (8th Cir. 1982)(en banc); *O'Leary v. Schweiker*, 710 F.2d 1334, 1338 (8th Cir. 1983). It is also well settled law that it is the duty of the ALJ to fully and fairly develop the record, even when, as in this case, the claimant is represented by counsel. *Warner v. Heckler*, 722 F.2d 428, 431 (8th Cir. 1983).

Id. at 857. The court then noted that while the record contained many treatment notes, none of the treating physicians provided opinions concerning the claimant's RFC. *Id.* at 858. The court then stated:

In the case at bar, there is no *medical* evidence about how Nevland's impairments affect his ability to function now. The ALJ relied on the opinions of non-treating, non-examining physicians who reviewed the reports of the treating physicians to form an opinion of Nevland's RFC. In our opinion, this does not satisfy the ALJ's duty to fully and fairly develop the record. The opinions of doctors who have not examined the claimant ordinarily do not constitute substantial evidence on the record as a whole. *Jenkins v. Apfel*, 196 F.3d 922, 925 (8th Cir. 1999). Likewise, the testimony of a vocational expert who responds to a hypothetical based on such evidence is not substantial evidence upon which to base a denial of benefits. *Id.* In our opinion, the ALJ should have sought such an opinion from Nevland's treating physicians or, in the alternative, ordered consultative examinations, including psychiatric and/or psychological evaluations to assess Nevland's mental and physical residual functional capacity. As this Court said in *Lund v. Weinberger*, 520 F.2d 782, 785 (8th Cir.1975): “An administrative law judge may not draw upon his own inferences from medical reports. *See Landess v. Weinberger*, 490 F.2d 1187, 1189 (8th Cir.1974); *Willem v. Richardson*, 490 F.2d 1247, 1248–49 n. 3 (8th Cir.1974).”

Id. [emphasis in original].

While *Nevland* establishes a general rule that the denial of benefits at Step Five should be supported by a medical opinion from a treating or examining source, the rule is not without exceptions. As Judge Bennett has explained:

But *Nevland* does not compel remand in every case that lacks a medical opinion from a treating physician. “While the ALJ has an independent duty to develop the record in a social security disability hearing, the ALJ is not required ‘to seek additional clarifying statements from a treating physician unless a crucial issue is undeveloped.’” *Goff v. Barnhart*, 421 F.3d 785,

791 (8th Cir. 2005) (quoting *Stormo*, 377 F.3d at 806) (emphasis added). “[A]n ALJ is permitted to issue a decision without obtaining additional medical evidence so long as other evidence in the record provides a sufficient basis for the ALJ’s decision.” *Naber v. Shalala*, 22 F.3d 186, 189 (8th Cir. 1994); *see also Halverson v. Astrue*, 600 F.3d 922, 933 (8th Cir. 2010) (“The ALJ is required to order medical examinations and tests only if the medical records presented to him do not give sufficient medical evidence to determine whether the claimant is disabled.” (quoting *Barrett v. Shalala*, 38 F.3d 1019, 1023 (8th Cir. 1994))). A claimant’s records need not explicitly discuss work-related limitations, as long as the records describe the claimant’s “functional limitations with sufficient generalized clarity to allow for an understanding of how those limitations function in a work environment.” *Cox v. Astrue*, 495 F.3d 614, 620 n. 6 (8th Cir. 2007).

The ultimate question, then, is whether a critical issue was underdeveloped here such that the ALJ’s decision was not supported by substantial evidence. “There is no bright line rule indicating when the Commissioner has or has not adequately developed the record; rather, such an assessment is made on a case-by-case basis.” *Mouser v. Astrue*, 545 F.3d 634, 639 (8th Cir. 2008) (citation omitted). “[S]ome medical evidence must support the determination of the claimant’s RFC, and the ALJ should obtain medical evidence that addresses the claimant’s ability to function in the workplace [.]” *Lauer v. Apfel*, 245 F.3d 700, 703–04 (8th Cir. 2001) (quoting *Dykes v. Apfel*, 223 F.3d 865, 867 (8th Cir. 2000) (per curiam); *Nevland*, 204 F.3d at 858) (internal citations and quotation marks omitted). But “the ALJ [is] not limited to considering medical evidence....” *Id.* at 704. Rather, the ALJ must “assess[] a claimant’s residual functional capacity based on all relevant evidence.” *Guilliams v. Barnhart*, 393 F.3d 798, 803 (8th Cir. 2005) (quoting *Roberts v. Apfel*, 222 F.3d 466, 469 (8th Cir. 2000)). Relevant evidence includes “medical records, observations of treating physicians and others, and an individual’s own description of his limitations.” *Lacroix v. Barnhart*, 465 F.3d 881, 887 (8th Cir. 2006) (quoting *Strongson v. Barnhart*, 361 F.3d 1066, 1070 (8th Cir. 2004) (internal quotation and citation omitted)).

Walker v. Colvin, No. C13–3021–MWB, 2014 WL 2884028, at *1-2 (N.D. Iowa June 25, 2014); *see also Figgins v. Colvin*, C13-3022-MWB, 2014 WL 1686821, at *9-10 (N.D. Iowa Apr. 29, 2014) (affirming denial of benefits despite lack of medical opinion evidence).

Having carefully reviewed the entire record, I find that *Nevland* does not compel remand, as no critical issue remains undeveloped. Two state agency consultants determined, based on their reviews of Schnee's records, that she was not disabled. AR 102-13, 115-27. When the assessments of state agency medical consultants are consistent with other medical evidence in the record, they can provide substantial evidence supporting the ALJ's decision. *Stormo*, 377 F.3d at 807-08. Other evidence in the record supports the ALJ's finding that Schnee can perform unskilled light and sedentary work within the limitations set forth in the ALJ's "without DAA" RFC findings. With regard to Schnee's mental RFC, an examination in April 2012, after about two months of sobriety, indicated that Schnee's judgment and insight were intact, her recent and remote memory was intact and her mood and affect were not depressed, anxious, or agitated. AR 1509. The same findings resulted from an examination in October 2012, after six months of sobriety.⁴ AR 1475-76. This evidence, when combined with the opinions of the state agency consultants, provided sufficient basis for the ALJ to make findings as to Schnee's mental RFC.

As for Schnee's physical RFC, the ALJ cited and discussed numerous contemporaneous treatment records addressing the effect of Schnee's physical impairments. AR 64-67. Those records, along with the opinions of the state agency consultants, support the ALJ's finding that the physical impairments are not disabling. Moreover, as noted above, Schnee's own statement concerning her abilities as of December 2012 provide additional support for the ALJ's physical RFC findings. AR 309.

Thus, while the record contains no medical opinion evidence from a treating or examining source, I conclude that *Nevland* does not compel remand because other

⁴ By contrast, Schnee was hospitalized after a brief substance-abuse relapse in March 2012. AR 1433-35. At that time, a mental status examination indicated that she was "slightly disheveled" and demonstrated "some irritability." AR 1433. This is consistent with the ALJ's finding that Schnee's mental RFC deteriorated during periods of substance abuse.

evidence in the record provides a sufficient basis for the ALJ's decision. The ALJ's findings as to Schnee's "without DAA" RFC are supported by substantial evidence on the record as a whole. As such, the VE's opinion testimony, which was provided in response to hypothetical questions based on Schnee's RFC, AR 48-53, constitutes substantial evidence that Schnee is able to perform other work that is available in the national economy. *Hulsey v. Astrue*, 622 F.3d 917, 922 (8th Cir. 2010) ("A vocational expert's testimony constitutes substantial evidence when it is based on a hypothetical that accounts for all of the claimant's proven impairments.").

VI. CONCLUSION

After a thorough review of the entire record and in accordance with the standard of review I must follow, I RESPECTFULLY RECOMMEND that the Commissioner's determination that Schnee was not disabled be **affirmed** and that judgment be entered against Schnee and in favor of the Commissioner.

Objections to this 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 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 25th day of June, 2015.



**LEONARD T. STRAND
UNITED STATES MAGISTRATE JUDGE**