TO BE PUBLISHED

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

ASEELAH AL-HAMEED, Plaintiff, vs. CAROLYN W. COLVIN, Acting Commissioner of Social Security, Defendant.	No. C13-3009-MWB **REPORT AND RECOMMENDATION**

Plaintiff Aseelah Al-Hameed seeks judicial review of a final decision of the Commissioner of Social Security (the Commissioner) denying her applications for Social Security Disability Insurance benefits (DIB) and Supplemental Security Income benefits (SSI) under Titles II and XVI of the Social Security Act, 42 U.S.C. § 401 *et seq*. (Act). Al-Hameed contends that the administrative record (AR) does not contain substantial evidence to support the Commissioner's decision that she was not disabled. For the reasons that follow, I recommend that the Commissioner's decision be reversed and remanded for further proceedings.

Background

Al-Hameed was born in 1967 and was 42 years old on her alleged onset date of April 20, 2009. AR 8, 52. She has past relevant work as a bakery worker, cashier, housekeeper, salad bar worker and stocker. AR 267. She protectively filed her applications for DIB and SSI on April 1, 2010. AR 8. The applications were denied initially and on reconsideration. *Id*. Al-Hameed then requested a hearing, which was

conducted January 12, 2012, by Administrative Law Judge (ALJ) Jeffrey Marvel. *Id.* Al-Hameed testified during the hearing, as did a vocational expert (VE). AR 36-50. The ALJ issued a decision denying Al-Hameed's application on February 27, 2012. AR 8-17. On January 5, 2013, the Appeals Council denied Al-Hameed's request for review. AR 1-3. As such, the ALJ's decision is the final decision of the Commissioner. AR 1; *see also* 20 C.F.R. §§ 404.981, 416.1481.

On February 13, 2013, Al-Hameed commenced an action in this court seeking review of the ALJ's decision. This matter has been referred to me 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.

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. §§ 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, 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 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).

Summary of ALJ's Decision

The ALJ made the following findings:

(1) The claimant has disability insured status under title II of the Social Security Act through June 30, 2014 (20 CFR 404.130(b)).

(2) The claimant has not engaged in substantial gainful activity since April 20, 2009, the alleged onset date (20 CFR 404.1571 *et seq.,* and 416.971 *et seq.*).

(3) The claimant has the following severe impairments: degenerative disc disease of the lumbar spine; depression; and alcohol dependence and cocaine dependence, both in remission (20 CFR 404.1520(c) and 416.920(c)).

(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 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and 416.926).

(5) After careful consideration of the entire record, the undersigned finds that the claimant has the residual

functional capacity to perform light work as defined in 20 CFR 404.l567(b) and 4l6.967(b) except she: can occasionally balance, stoop, crouch, crawl, kneel and climb; is limited to performing simple, routine, repetitive work, with only occasional contact with the public, co-workers or supervisors; is not able to follow any written instructions; and can tolerate only occasional changes in the work setting.

(6) The claimant is unable to perform any past relevant work (20 CFR 404.1565 and 416.965).

(7) The claimant was born on January 18, 1967, and was 42 years old, which is defined as a younger individual age 18-49, on the alleged disability onset date (20 CFR 404.1563 and 416.963).

(8) The claimant has at least a high school education and is able to communicate in spoken and written English, e.g., testimony and Exhibit 12E (20 CFR 404.1564 and 416.964).

(9) Transferability of job skills is not an issue in this case because the vocational expert stated all of the claimant's past relevant work is unskilled, Exhibit 20E (20 CFR 404.1568 and 416.968).

(10) Considering the claimant's age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy that the claimant can perform (20 CFR 404.1569, 404.1569(a), 416.969 and 416.969(a)).

(11) The claimant has not been under a disability, as defined in the Social Security Act, from April 20, 2009, through the date of this decision (20 CFR 404.1520(g) and 416.920(g)).

AR 10-17. In his Step Two analysis, the ALJ noted that Al-Hameed claims she is unable to work due to back pain and depression. AR 10. He then provided a detailed summary of the medical evidence concerning her physical and mental impairments. AR

10-12. With regard to physical impairments, the ALJ referenced an October 31, 2009, radiology report as finding that Al-Hameed has mild degenerative disc disease. AR 11. He then discussed the results of a consultative examination conducted in August 2010 by Joseph Latella, D.O. *Id.* Dr. Latella found that Al-Hameed had a limited range of motion in the lumbar spine and noted a positive straight leg test on the right side. AR 434-37. Dr. Latella's concluding impressions included asthma, possible multiple sclerosis, back pain due to arthritis, depression and obesity. AR 436. He stated that Al-Hameed was scheduled to have an MRI the following week. *Id.*

The ALJ also noted that James Steele, M.D., had prescribed narcotic pain medication as of November 2010, but records of Al-Hameed's regular medication-management visits with a nurse practitioner during the year 2011 contain no mention of back pain. AR 11. In addition, the ALJ referenced a record from October 25, 2010, in which Al-Hameed is reported to have stated that she had never had an MRI or CAT scan. *Id.*

With regard to mental impairments, the ALJ referenced Al-Hameed's testimony that she suffers from depression and that this causes her to feel untalkative, isolative, sleepy and to have a decreased appetite. *Id.* He noted that she reported to have had no alcohol for the past three years after completing alcohol treatment. *Id.* She also reported that she does not receive mental health counseling but is seen one time each month for a medication check. *Id.* The ALJ also referenced the findings made by Aaron Quinn, Ph. D., a state agency consultant who reviewed available records. *Id.* Dr. Quinn found that Al-Hameed has been treated for depression and anxiety but that her symptoms had stabilized except when exacerbated by psychosocial stressors. AR 430. Dr. Quinn also found that Al-Hameed "would have work-related difficulties with written instructions, stress management, interpersonal functioning, and change." *Id.* However, he also concluded that she is "able to complete at least simple repetitive tasks

on a sustained basis and she would benefit from spoken instructions and not working in crowds of people." *Id.*

Based on the medical evidence, the ALJ concluded that the following impairments were severe: degenerative disc disease of the lumbar spine, depression and alcohol dependence and cocaine dependence (both in remission). AR 10. He also found that two additional impairments – asthma and iron deficiency anemia – were not severe. AR 12. Al-Hameed does not challenge this finding.

Moving to Step Three, the ALJ found that none of Al-Hameed's impairments, individually or in combination, met or equaled one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1. AR 12-13. With regard to her physical impairment of degenerative disc disease, the ALJ found that neither the diagnostic criteria nor the functional manifestations met the requirements of Listing 1.04A-C. AR 13. Al-Hameed does not challenge this finding.

As for her mental impairments, the ALJ found that whether considered individually or in combination, they did not satisfy either Listing 12.04 (affective disorders) or 12.09B (substance abuse). *Id.* He first analyzed the "paragraph B" criteria, noting that to satisfy these criteria the impairments must cause at least two "marked" limitations or one "marked" limitation and "repeated" episodes of decompensation.[1] *Id.* A "marked" limitation is one that is more than moderate but less than extreme. *Id.* The ALJ found

[1] Episodes of decompensation are "exacerbations or temporary increases in symptoms or signs accompanied by a loss of adaptive functioning, as manifested by difficulties in performing activities of daily living, maintaining social relationships, or maintaining concentration, persistence, or pace." 20 CFR Part 404, Subpart P, Appendix 1. Repeated episodes of decompensation, each of extended duration, means three episodes within 1 year, or an average of once every 4 months, each lasting for at least 2 weeks. If the episodes of decompensation are more frequent and of shorter duration or less frequent and of longer duration, the Commissioner must "use judgment to determine if the duration and functional effects of the episodes are of equal severity and may be used to substitute for the listed finding in a determination of equivalence." *Id.*

that Al-Hameed had mild difficulties in activities of daily living, with moderate difficulties in social functioning and with regard to concentration, persistence or pace. *Id.* The ALJ also found that Al-Hameed had experienced no episodes of decompensation which have been of extended duration. *Id.* Therefore, the ALJ found the paragraph B criteria were not satisfied. *Id.* He also stated that he had considered the "paragraph C" criteria and that the evidence failed to establish those criteria, as well. *Id.* Al-Hameed does not challenge any of these findings.

At Step Four, the ALJ provided a residual functional capacity (RFC) assessment and found that Al-Hameed had the RFC to perform light work[2] with the following limitations: (a) she can only occasionally balance, stoop, crouch, crawl, kneel and climb, (b) she is limited to performing simple, routine, repetitive work, (c) she can have only occasional contact with the public, co-workers or supervisors, (d) she is not able to follow any written instructions and (e) she can tolerate only occasional changes in the work setting. AR 13-15. In explaining this determination, the ALJ first addressed the credibility of Al-Hameed's statements concerning the disabling effects of her impairments. AR 14. He referenced the relevant factors for weighing a claimant's credibility and found it to be significant that Al-Hameed stopped working because her

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[2] "Light work" is defined in the Commissioner's regulations as follows:

> Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

20 C.F.R. §§ 404.1567(b) and 416.967(b).

employer went out of business, not because of her impairments. *Id.* He noted that she nonetheless elected to use her last date of employment as her alleged onset date. *Id.*

The ALJ further explained his credibility finding by stating that the medications Al-Hameed takes are effective, according to the medical records, and do not cause side effects. *Id.* He also found that she suffers from situational stressors that are not related to her impairments, including an abusive boyfriend and a daughter who has medical issues. *Id.* The ALJ noted that while Al-Hameed does not drive, this is due to having a suspended license, not because of her impairments. *Id.* He also referenced her testimony that she walks six blocks each direction to shop at a grocery store and is able to carry home one or two bags of groceries in each hand. *Id.* He noted that Al-Hameed cooks and that she socializes at a community center where she is able to use a computer and watch television. *Id.* Finally, he made reference to evidence that Al-Hameed did not follow through on a referral to have an MRI scan performed on her back. *Id.*

For these reasons, the ALJ found that Al-Hameed's allegations of disability were not fully credible to the extent that they were not consistent with the ALJ's findings as to her RFC. *Id.* He then addressed a third-party statement submitted by Al-Hameed's sister. He noted that it was "somewhat, but not entirely, consistent with" Al-Hameed's statements. *Id.* For example, the third-party statement contradicted Al-Hameed's claims of being untalkative and isolative. AR 15. In any event, the ALJ deemed that the third-party statement was credible only to the extent that it was consistent with his RFC determination. *Id.*

The ALJ next discussed the medical opinion evidence. He discussed "a representative-obtained statement from James Steele, M.D., a treating physician," which the ALJ found "is not supported by the objective evidence or findings on examination, and which impresses as exaggerated." *Id.* He found the opinion to be exaggerated

because, among other things, Dr. Steele stated that Al-Hameed could "never" lift and carry ten pounds. AR 15. The ALJ found this to be inconsistent with Al-Hameed's testimony about carrying grocery bags and her sister's statement that Al-Hameed can lift "only 20 pounds." *Id.* The ALJ also stated that Dr. Steele's opinions were not supported by objective evidence or his findings during examinations and that Dr. Steele had not specified the method by which he arrived at the limitations he assessed. *Id.* For these reasons, the ALJ elected to give Dr. Steele's opinions no weight. *Id.*

The ALJ then discussed a "representative-provided opinion" from B.J. Thomas, a nurse practitioner. *Id.* He criticized Thomas for not referencing alcohol and chemical abuse in her DSM-IV summary, despite noting those diagnoses in her treatment records. *Id.* He also observed that Thomas "supplied a plethora of check mark affirmatives of symptoms that do not appear in her office records." *Id.* He stated that her opinions were subject to being discredited because they include limitations that do not appear in the treatment records and are not supported by objective testing or reasoning. *Id.* He concluded that her opinions were entitled to no weight.

Finally, the ALJ stated that he afforded "some weight" to the opinions of the state agency consultants, "to the extent their opinions are consistent with the above residual functional capacity assessment." *Id.* He concluded that his RFC determination was supported by the evidence as a whole. *Id.*

Next, the ALJ found that the limitations incorporated into Al-Hameed's RFC will prevent her from performing any of her past relevant work. *Id.* This finding was based on the VE's testimony. *Id.* This required the ALJ to proceed to Step Five and determine whether Al-Hameed is able to perform other jobs that exist in significant numbers in the national economy. AR 16. Based on the VE's answers to hypothetical questions that incorporated Al-Hameed's age, education, work experience and RFC, the ALJ found the answer to be "yes." *Id.* The VE's testimony indicated that

AL-Hameed was capable of performing such positions as folder, pricer and cleaner, and that these positions exist in significant numbers. AR 45-46. As such, the ALJ concluded that Al-Hameed was not disabled within the meaning of the Act. AR 17.

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." *Wester 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.").

Discussion

Al-Hameed raises two issues in contending that the ALJ's decision is not supported by substantial evidence in the record as a whole:

I. The ALJ Failed To Accord Proper Weight To The Medical Opinions.

II. The ALJ Erred By Relying On Responses From The Vocational Expert To An Incomplete Hypothetical Question.

See Doc. No. 10. I will address these issues separately, along with an additional issue that is apparent from my review of the record.

I. Weight Of Medical Opinions

A. Applicable Legal Standards

The Commissioner's regulations give great deference to medical opinions provided by treating physicians:

> Treatment relationship. Generally, we give more weight to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations. If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight. When we do not give the treating source's opinion controlling weight, we apply the factors listed in paragraphs (c)(2)(i) and (c)(2)(ii) of this section, as well as the factors in paragraphs (c)(3) through (c)(6) of this section in determining the weight to give the opinion. We will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion.

20 C.F.R. §§ 404.1527(c)(2) and 416.927(c)(2) [emphasis added]. This means a treating physician's opinion is generally given controlling weight, but is not inherently entitled to it. *Hacker v. Barnhart*, 459 F.3d 934, 937 (8th Cir. 2006). A treating physician's opinion "does not automatically control or obviate the need to evaluate the record as a whole." *Leckenby v. Astrue*, 487 F.3d 626, 632 (8th Cir. 2007). But that opinion will be given controlling weight if it is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other

substantial evidence in the case record. *Hacker*, 459 F.3d at 937. The ALJ must "always give good reasons" for the weight given to a treating physician's evaluation. 20 C.F.R. §§ 404.1527(c)(2) and 416.927(c)(2); *see also Davidson v. Astrue*, 501 F.3d 987, 990 (8th Cir. 2007).

When a treating physician's opinion is entitled to controlling weight, the ALJ must defer to the physician's medical opinions about the nature and severity of an applicant's impairments, including symptoms, diagnosis and prognosis, what an applicant is capable of doing despite the impairment, and the resulting restrictions. 20 C.F.R. §§ 404.1527(a)(2) and 416.927(a)(2); *Ellis v. Barnhart*, 392 F.3d 988, 995 (8th Cir. 2005). However, a treating physician's conclusion that an applicant is "disabled" or "unable to work" addresses an issue that is reserved for the Commissioner and therefore is not a "medical opinion" that must be given controlling weight. *Ellis*, 392 F.3d at 994.

The Commissioner's regulations distinguish opinions provided by licensed physicians and psychologists from those provided by physicians' assistants, nurse practitioners and other sources. 20 C.F.R. §§ 404.1513 and 416.913. The former are "acceptable medical sources" while the latter are not. *Id.* This means that a treating nurse practitioner is not an "acceptable medical source" whose opinions are entitled to controlling weight. 20 C.F.R. §§ 404.1513(d)(1) and 416.913(d)(1); *see also Lacroix v. Barnhart*, 465 F.3d 881, 885–86 (8th Cir. 2006). The opinions of a nurse practitioner may still be considered, but they are not entitled to the deference afforded to medical opinions provided by a treating physician. 20 C.F.R. §§ 404.1513(d)(1) and 416.913(d)(1).

B. Analysis

1. James Steele, M.D.

There is no dispute that Dr. Steele is a treating physician. *See, e.g.,* Doc. No. 12 at 14. He submitted a physical RFC evaluation dated October 13, 2010, in which he indicated that he had been treating Al-Hameed for eighteen months. AR 643-46. Instead of giving Dr. Steele's opinions controlling weight, the ALJ gave them *no* weight. The ALJ's explanation of this determination consisted of three sentences, and seven lines of text. His stated reasons were: (1) the opinions are not supported by the objective evidence, (2) the opinions appear to be exaggerated and (3) Dr. Steele did not specify the method by which he arrived at the limitations he assessed. AR 15.

The ALJ offered no analysis of his first reason. He did not, for example, attempt to describe how the limitations found by Dr. Steele are inconsistent with the objective evidence. Nor did he provide examples. I cannot identify inconsistencies between Dr. Steele's opinions and the records concerning his own treatment of Al-Hameed. Those records show that he saw Al-Hameed on November 5, 2009, to follow up on an emergency room visit for back pain. AR 367. He saw her again on December 22, 2009, for back pain and began prescribing medications to attempt to alleviate the pain, including narcotic pain medications. AR 364. In February 2010, he noted that she had worsening low back pain with sciatic pain. AR 463. On February 26, 2010, he reported that Al-Hameed "has a diagnosis of arthritis in her back." AR 363, 470. On March 2, 2010, he found that her back pain was not improving and he referred her for an MRI and a back surgeon consult (which, apparently, did not happen for some reason). AR 469. On May 4, 2010, Al-Hameed saw Dr. Steele after again visiting the emergency room for back pain. AR 537. He prescribed Tramadol and wrote that he would "start the process of referral to UIHC for the worsening low back pain." *Id.* On July 16, 2010, Dr. Steele wrote that Al-Hameed was waiting for an appointment at

UIHC Department of Orthopedic Surgery. AR 465. He diagnosed her as having "acute exacerbation of chronic thoracic lumbar pain." *Id.*

It would have been helpful if the ALJ would have explained his statement that Dr. Steele's opinions are not supported by the objective evidence. He did not do so. Based on my review of the evidence, I cannot state that the opinions are inconsistent with Dr. Steele's own treatment notes. Nor have I located other "objective evidence" that would justify the complete discrediting of Dr. Steele's opinions. The ALJ's first stated reason for giving no weight to those opinions is not a "good" reason.

With regard to his second reason, the ALJ provided one example of an "exaggerated" opinion. He criticized Dr. Steele for stating that Al-Hameed could "never" lift ten pounds despite evidence suggesting that she sometimes does so. AR 15. Al-Hameed accurately demolishes this alleged "exaggeration" in her brief:

> The example that the ALJ uses is that Dr. Steele indicates that Ms. Al-Hameed could "never" lift and carry 10 pounds - when her testimony about grocery shopping and her sister's suggestion that she can [lift] "only 20 pounds" is that Ms. Al-Hameed "has greater capabilities." [AR] 15. But, the ALJ misinterprets Dr. Steele's answer to the questionnaire. The question asks: "How many pounds can your patient lift and carry in a competitive work situation." [AR] 646, ¶ I. That paragraph of the questionnaire goes back to ¶ 4 which instructs the person answering the questionnaire to give responses "As a result of your patient's impairments, estimate your patient's functional limitations if your patient were placed in a competitive work situation.["] [AR] 644. Although work is not defined in the questionnaire it is defined by the Social Security Administration as substantial gainful activity performed on a full-time basis, for pay or profit whether or not a profit is realized. . . . There is no basis for the ALJ to discount the treating physician's opinion on the basis that Ms. Al-Hameed goes grocery shopping. There is no indication in the Function Report that suggests that Ms. Al-Hameed is lifting more than 10 pounds. Likewise - there is no indication in the Function Reports that Ms. Al-Hameed is grocery shopping 40 hours per week. Her sister reports that she shops once a month for about one and one-half hours. [AR] 229.

Doc. No. 10 at 11-12 [citation omitted]. I agree with this analysis. Indeed, a closer analysis of Dr. Steele's responses to the questionnaire indicates that he acknowledged Al-Hameed's ability to lift and carry less than ten pounds "occasionally," meaning up to 2 hours and 40 minutes each workday (one-third of an eight-hour workday). AR 646. However, he did not believe she would be capable of lifting ten pounds or more with that level of regularity each workday. *Id.* Contrasting that opinion with a one-time-per-month grocery shopping excursion is absurd. This does not necessarily mean Dr. Steele's opinions are correct, but it does mean the example the ALJ provided to illustrate that it is "exaggerated" is flawed.[3] The ALJ's second reason for giving no weight to Dr. Steele's opinion is not a "good" reason.

For his third and final reason, the ALJ stated that Dr. Steele did not specify the method by which he arrived at his opinions. Technically, this could be true. In answering the various questions contained on the Physical Residual Functional Capacity Questionnaire, Dr. Steele did not state – for each individual answer – the basis for the answer. AR 643-46. Nor did the questionnaire ask for such information in response to each question. *Id.* The questionnaire *did* ask Dr. Steele to "[i]dentify the clinical findings and objective signs" concerning Al-Hameed's impairments. AR 643. He wrote as follows:

> Lumbar spine tenderness + paraspinous muscle tenderness
>
> Antalgic gait, difficultly getting up from a chair

[3] Other aspects of Dr. Steele's opinions are inconsistent with a conclusion that he set out to "exaggerate" the effects of Al-Hameed's impairments. When asked about the degree to which Al-Hameed could tolerate work stress, he found that she is capable of low stress jobs, not that she is incapable of even a low stress job. AR 644. He also found that it would be unnecessary for Al-Hameed to take unscheduled breaks, that she can sit for more than two hours at a time and that she would have no significant limitations with respect to repetitive reaching, handling or fingering. AR 645-46. Dr. Steele also indicated that back pain would likely cause Al-Hameed to miss work about twice per month, foregoing the opportunity to circle several options predicting a larger number of monthly absences. AR 647.

Id. On the same page, in response to other questions concerning his opinions, he stated that he had seen Al-Hameed during ten office visits over a period of eighteen months (April 2009 to October 2010) and described Al-Hameed's symptoms as being low back pain, muscle stiffness and bilateral sciatic pain. *Id.* Dr. Steele then proceeded to answer the questionnaire's various inquiries concerning the functional effects of those symptoms. AR 643-46.

Under these circumstances, it is rather clear that Dr. Steele's opinions concerning Al-Hameed's capabilities were based on his repeated examinations of her over the previous eighteen months. I have no idea what additional specification of "methods" the ALJ would have considered acceptable. To determine how much weight Al-Hameed could lift and carry, and with what level of frequency during a workday, should Dr. Steele have conducted experiments? Is there some kind of laboratory testing that he should have ordered to arrive at his conclusions? The same questions apply to his opinions concerning her other functional capabilities (length of time she is able to sit, stand and walk, etc.).

The ALJ, in being critical of Dr. Steele for not explaining his conclusions, did not explain his own conclusion. The ALJ did not specify the additional information Dr. Steele allegedly should have provided. Absent a better explanation from the ALJ as to what additional information Dr. Steele should have provided, I find that the ALJ's third reason for giving no weight to Dr. Steele's opinion is not a "good" reason.

To conclude, I do not mean to suggest that the ALJ was required to give controlling weight, or even a little weight, to Dr. Steele's opinions. Perhaps there really are good reasons for giving no weight to those opinions. Unfortunately, those reasons do not manifest themselves in the ALJ's decision. If an ALJ is going to give absolutely no weight to the medical opinions provided by a treating physician, he or she must provide an explanation that contains far more detail and precision than the one

provided in this case. A few short, conclusory statements do not suffice – especially when those statements are of dubious accuracy. Because the ALJ did not provide good reasons for affording absolutely no weight to Dr. Steele's opinions, I must recommend that the Commissioner's decision be reversed and remanded for further proceedings. On remand, the ALJ must re-weigh Dr. Steele's opinions. If he finds that they are not entitled to controlling weight, he shall explain that finding in detail and shall then provide good reasons for the weight to which he determines they are entitled. Finally, if the ALJ decides that it is appropriate to afford something other than no weight to Dr. Steele's opinions, he shall re-evaluate Al-Hameed's physical RFC to reflect the weight given to those opinions.

2. B.J. Thomas

Thomas, a nurse practitioner, provided opinions in the form of a Mental Functional Capacity Questionnaire dated August 11, 2010. AR 635-41. Because Thomas is not a physician, his opinions are not medical opinions from an acceptable medical source and, therefore, are not entitled to controlling weight. 20 C.F.R. §§ 404.1513(d)(1) and 416.913(d)(1); *see also Lacroix,* 465 F.3d 881 at 885–86. Here, the ALJ found that Thomas' opinions were entitled to no weight. AR 15.

The ALJ provided two reasons for this finding. First, in listing Al-Hameed's various diagnoses Thomas did not list alcohol and cocaine abuse, despite the fact that these diagnoses appear in all of Thomas' treatment notes. *Id.* The ALJ found that this constituted the "selective exclusion of 'unhelpful' diagnoses." *Id.* Second, the ALJ criticized Thomas for supplying "a plethora of check mark affirmations of symptoms that do not appear in her[4] office records." *Id.*

[4] The ALJ referred to Thomas as being female. Al-Hameed, however, refers to Thomas as being male. Because Al-Hameed visited Thomas on multiple occasions, I assume she is correct.

Al-Hameed addresses both of these criticisms in her brief. With regard to "selective exclusion," Al-Hameed points out that Thomas never treated her for alcohol or cocaine abuse and, indeed, that she was not abusing those substances during the period of time she was being seen by Thomas. AR 390. Al-Hameed further notes that Thomas nonetheless documented her history of alcohol and cocaine abuse in his notes for each visit. Al-Hameed suggests this shows there was no effort on Thomas' part to hide or minimize these issues.

As for the "check marks," Al-Hameed provided a table matching many of the questionnaire check marks to notations in Thomas' treatment records. Doc. No. 10 at 15-16. While the table is helpful, it does show that even Al-Hameed herself is only able to match 10 of the 16 check marks in the questionnaire to Thomas' treatment records. *Id.* In other words, more than one-third of the symptoms Thomas referenced in the questionnaire have no support in Thomas' treatment notes.

While I might have afforded different weight to Thomas' opinions, I cannot find that the reasons provided by the ALJ for giving them no weight were so obviously wrong, or unsupported by the record, as to require reversal. There is no presumption that those opinions are entitled to controlling weight, or any other level of weight. The ALJ was free to find it suspicious that Thomas, after listing alcohol and cocaine abuse as diagnoses in his treatment notes, excluded those diagnoses from his mental RFC evaluation. And, as noted above, the ALJ correctly found that Thomas' RFC evaluation indicated the presence of symptoms that are not referenced by the treatment notes.

As I will discuss in Section II, *infra*, the ALJ will be required on remand to obtain additional medical evidence concerning Al-Hameed's mental RFC. Based on that evidence, the ALJ is free to re-weigh Thomas' opinions if he deems it appropriate, but he

is not required to do so. Either way, however, it will be necessary to re-evaluate Al-Hameed's mental RFC based on the new evidence.

II. The Lack Of Medical Evidence Concerning Al-Hameed's Mental RFC

In reviewing the entire record, I note that it contains no medical opinions from any treating or examining source concerning Al-Hameed's mental RFC during the period of her alleged disability. Al-Hameed claims a disability onset date of April 20, 2009, and the record reflects that she received therapy and treatment for her mental impairments on many occasions after that date. AR 383-413. While a treating nurse practitioner provided a mental RFC evaluation dated August 11, 2010, AR 635-41, a nurse practitioner is not an acceptable medical source. 20 C.F.R. §§ 404.1513(d)(1) and 416.913(d)(1). I have not been able to locate (and neither party has identified) a treating or examining source's medical opinion about the nature and severity of Al-Hameed's mental impairments during the relevant period of time, including her symptoms, diagnosis and prognosis, what she is capable of doing despite the impairments, and the resulting restrictions.

The only acceptable medical sources who gave opinions concerning Al-Hameed's mental RFC are Aaron Quinn, Ph.D., and Dee Wright, Ph.D., state agency consultants who reviewed records but did not examine Al-Hameed. AR 414-31, 507-20. As noted earlier, this is a situation in which the claimant cannot perform past relevant work but, at Step Five, the Commissioner has found that she has the RFC to perform various other jobs that exist in the national economy. Given the lack of evidence from any treating or examining source supporting this finding, it is not supported by substantial evidence in the record.

This outcome is dictated by *Nevland v. Apfel*, 204 F.3d 853 (8th Cir. 2000). There, like here, the Commissioner 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. And, like here, non-treating and non-examining physicians reviewed the claimant's records and gave 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].

This case presents the same situation with regard to Al-Hameed's mental RFC. The ALJ found that she has severe mental impairments. AR 10. Because Al-Hameed cannot perform her past relevant work, the Commissioner bears the burden of proving that despite her impairments, she has the RFC to do some kind of work that exists in the national economy. *Nevland*, 204 F.3d at 857. However, the ALJ determined Al-Hameed's mental RFC without the benefit of a medical opinion from any doctor who ever examined Al-Hameed. Instead, the ALJ relied on the opinions of non-examining state agency consultants in evaluating Al-Hameed's RFC and in formulating a hypothetical question to the VE.[5] AR 16, 45-46. Pursuant to *Nevland*, substantial evidence does not support the ALJ's determination of Al-Hameed's mental RFC.

Al-Hameed did not raise this argument. Nonetheless, under *Nevland* I cannot find that substantial evidence supports the ALJ's Step Five determination that Al-Hameed is able to perform positions that exist in the national economy and, therefore, is not disabled. On remand, the ALJ must fully and fairly develop the record by obtaining a medical opinion, either from a treating physician or via a consultative examination, as to Al-Hameed's mental RFC in light of her severe mental impairments.

[5] Strangely, after deciding to give *no* weight to the opinions of nurse practitioner Thomas, the ALJ stated that he was only giving *some* weight to the opinions of the non-examining state agency consultants. AR 15. Because the ALJ either completely or substantially discounted all opinion evidence in the record concerning Al-Hameed's mental RFC, it is not clear how he arrived at his own finding concerning that RFC.

III. Reliance On The Vocational Expert's Testimony

Al-Hameed next argues that the ALJ erred in relying on the VE's testimony because the ALJ improperly formulated hypothetical questions that did not encompass all of Al-Hameed's impairments. Al-Hameed correctly notes that when a hypothetical question fails to include all relevant impairments, the VE's answer to that question does not constitute substantial evidence. *Pickney v. Chater*, 96 F.3d 294, 296 (8th Cir. 1996). She also notes that when limitations supported by the opinions of Dr. Steele and B.J. Thomas were added to the ALJ's hypothetical questions, the VE testified that no jobs would be available in the competitive market.

I have already concluded that I must recommend remand because (a) the ALJ did not provide good reasons for his decision to give absolutely no weight to Dr. Steele's opinions and (b) the ALJ failed to fully and fairly develop the record by obtaining a medical opinion, either from a treating physician or via a consultative examination, as to Al-Hameed's mental RFC. Taking these steps on remand will require the ALJ to re-evaluate Al-Hameed's RFC. If that process results in changes to the ALJ's findings concerning her RFC, then the ALJ will have to determine whether it is necessary to obtain additional VE testimony based on the reformulated RFC.

Conclusion and Recommendation

For the reasons discussed above, I RESPECTFULLY RECOMMEND that the Commissioner's decision be **reversed** and this case be **remanded** for further proceedings consistent with this report. Judgment should be entered in favor of Al-Hameed and against the Commissioner. On remand:

1. The ALJ must re-weigh Dr. Steele's opinions. If the ALJ finds that they are not entitled to controlling weight, he shall explain that finding in detail and shall then provide good reasons for the weight to which he determines they are entitled.

2. The ALJ must fully and fairly develop the medical evidence concerning Al-Hameed's mental RFC. At minimum, this will require that the ALJ obtain a medical opinion concerning Al-Hameed's mental RFC from either a treating source or, at least, a consultative examining physician.

3. The ALJ must undertake a new analysis at Steps Four and Five to re-evaluate Al-Hameed's RFC and determine whether she is able to perform work that exists in the national economy. This may require the ALJ to obtain additional VE testimony.

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 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 4th day of November, 2013.

LEONARD T. STRAND
UNITED STATES MAGISTRATE JUDGE