

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

CHRISTOPHER CARL BARROWS,

Plaintiff,

vs.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

No. C13-4087-MWB

**REPORT AND
RECOMMENDATION**

Plaintiff Christopher Carl Barrows seeks judicial review of a final decision of the Commissioner of Social Security (the Commissioner) denying his applications for Social Security Disability 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). Barrows contends that the administrative record (AR) does not contain substantial evidence to support the Commissioner's decision that he was not disabled during the relevant period of time. For the reasons that follow, I recommend that the Commissioner's decision be reversed and remanded for further proceedings.

I. BACKGROUND

Barrows was born in 1969 and completed high school. AR 35, 234. He has past relevant work as a welder and laborer. AR 324. He protectively filed for DIB and SSI on March 7, 2011, alleging disability beginning March 14, 2009. AR 12, 234, 236. His claims were denied initially and on reconsideration. *Id.* He requested a hearing before an Administrative Law Judge (ALJ) and on June 12, 2012, ALJ Robert Maxwell held a hearing during which Barrows and a vocational expert (VE) testified. AR 30-75.

On August 6, 2012, the ALJ issued a decision finding Barrows was not disabled since March 14, 2009. AR 12-24. Barrows sought review of this decision by the Appeals Council, which denied review on August 6, 2013. AR 1-3. The ALJ's decision thus became the final decision of the Commissioner. AR 1; *see also* 20 C.F.R. § 416.1481.

On September 11, 2013, Barrows 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.

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. §§ 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 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 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. §§ 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).

III. ALJ'S FINDINGS

The ALJ made the following findings:

- (1) The claimant meets the insured status requirements of the Social Security Act through September 30, 2009.
- (2) The claimant has not engaged in substantial gainful activity since March 14, 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, obesity, major depressive disorder (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 (RFC) to perform light work as defined in 20 CFR 404.1567(b) and 416.967(b) with the following limitations: the claimant can lift and carry up to 20 pounds occasionally and up to 10 pounds frequently; he can occasionally climb ramps and stairs; he can never climb ladders, ropes or scaffolds; he can occasionally balance, crouch, stoop, crawl and kneel; the claimant should avoid concentrated exposure to extreme cold; he should avoid concentrated exposure to hazards such as unprotected heights and dangerous moving machinery; the claimant is limited to work requiring the performance of simple, and some, but not all detailed tasks; his work requirements must be routine in nature, and cannot include frequent 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 July 20, 1969 and was 39 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 English (20 CFR 404.1564 and 416.964).
- (9) 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).
- (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 March 14, 2009, through the date of this decision (20 CFR 404.1520(g) and 416.920(g)).

AR 14-23.

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.” *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.”).

V. *DISCUSSION*

Barrows raises the following arguments in contending that the ALJ’s decision is not supported by substantial evidence:

1. The ALJ Erred By Not Evaluating Obesity And The Effects Of Obesity In Relation To Other Impairments And Residual Functional Capacity.
2. The ALJ Erred By Giving Controlling Weight To Non-examining, Non-Treating Medical Opinions Based On Old Stale Evidence.
3. The ALJ Erred By Giving Little Or No Weight To The Treating Source’s Expert Medical Opinions Without Giving Good Reasons.
4. There Is Not Substantial Evidence In This Record To Support The ALJ’s Denial Of Benefits, And The Record Overwhelmingly Demonstrates That Plaintiff Is Disabled.

Because the second and third arguments are related, I will address them together after addressing the first argument.

A. *Obesity*

Barrows notes that the ALJ found obesity to be a severe impairment, meaning it “significantly limits [his] physical or mental ability to do basic work activities.” Doc. No. 13 at 9 (citing 20 C.F.R. §§ 404.1520(c), 416.920(c)). He argues that the ALJ erred by not expressly evaluating the effects of obesity in formulating his RFC. *Id.* at 9-14. Barrows points out that his Body Mass Index during the relevant period of time was approximately 50, placing him substantially above the level necessary to be considered

“obese.”¹ Doc. No. 13 at 4-5, 11. He then contends that the ALJ’s failure to expressly discuss the effects of obesity violated the Commissioner’s Policy Interpretation Ruling concerning the evaluation of obesity, which includes the following guidance:

8. *How Do We Evaluate Obesity in Assessing Residual Functional Capacity in Adults and Functional Equivalence in Children?*

Obesity can cause limitation of function. The functions likely to be limited depend on many factors, including where the excess weight is carried. An individual may have limitations in any of the exertional functions such as sitting, standing, walking, lifting, carrying, pushing, and pulling. It may also affect ability to do postural functions, such as climbing, balance, stooping, and crouching. The ability to manipulate may be affected by the presence of adipose (fatty) tissue in the hands and fingers. The ability to tolerate extreme heat, humidity, or hazards may also be affected.

* * *

An assessment should also be made of the effect obesity has upon the individual's ability to perform routine movement and necessary physical activity within the work environment. Individuals with obesity may have problems with the ability to sustain a function over time. As explained in SSR 96-8p (“Titles II and XVI: Assessing Residual Functional Capacity in Initial Claims”), our RFC assessments must consider an individual's maximum remaining ability to do sustained work activities in an ordinary work setting on a regular and continuing basis. A “regular and continuing basis” means 8 hours a day, for 5 days a week, or an equivalent work schedule.⁵ In cases involving obesity, fatigue may affect the individual's physical and mental ability to sustain work activity. This may be particularly true in cases involving sleep apnea.

¹ Body Mass Index (BMI) “is a number calculated from a person's weight and height” and is considered to be “a fairly reliable indicator of body fatness for most people.” *See* http://www.cdc.gov/healthyweight/assessing/bmi/adult_bmi/index.html?s_cid=tw_ob064 (last visited June 25, 2014). A BMI of 40 or higher is considered “extreme” obesity, “representing the greatest risk for developing obesity-related impairments.” SSR 02-1p(1), 2002 WL 34686281 (Sept. 12, 2002). While the various BMI levels “describe the extent of obesity,” those levels “do not correlate with any specific degree of functional loss.” *Id.*

The combined effects of obesity with other impairments may be greater than might be expected without obesity. For example, someone with obesity and arthritis affecting a weight-bearing joint may have more pain and limitation than might be expected from the arthritis alone.

* * *

As with any other impairment, we will explain how we reached our conclusions on whether obesity caused any physical or mental limitations.

SSR 02-1p(8), 2002 WL 34686281 (Sept. 12, 2002) [footnotes omitted].

The Commissioner does not contend the ALJ explained how he evaluated obesity in determining Barrows's RFC. Instead, she argues that such an explanation was not necessary. Doc. No. 14 at 31. The Commissioner points out that the ALJ specifically referred to obesity in his decision and contends that the ALJ accounted for that impairment in the RFC. *Id.* (citing AR 14, 16, 19). According to the Commissioner, the Eighth Circuit Court of Appeals has held that this is sufficient. *Id.* (citing *Heino v. Astrue*, 578 F.3d 873, 881-82 (8th Cir. 2009) and *Brown ex rel. Williams v. Barnhart*, 388 F.3d 1150, 1153 (8th Cir. 2004)).

While it would have been far better practice for the ALJ to comply with SSR 02-1p by explaining how he reached his conclusions concerning the effects of obesity, this deficiency does not require remand. In *Heino*, the Eighth Circuit made it clear that a detailed explanation is not required so long as the ALJ "references the claimant's obesity" and the record demonstrates that the ALJ considered obesity when evaluating the claim. *Heino*, 578 F.3d at 881-82. Both conditions are present here.

There is no doubt that the ALJ referenced obesity, going so far as to find that it constitutes a severe impairment. AR 14. At Step Three, the ALJ discussed Barrows's height and weight and noted that his BMI falls within the "obese" classification, but pointed out that there is no Listing "specific to the evaluation of obesity impairments." AR 15. Nonetheless, the ALJ stated: "In accordance with SSR 02-1p, the undersigned has considered the claimant's obesity in the following RFC assessment." AR 16.

In analyzing Barrows's RFC, the ALJ discussed the opinion of state agency consultant Marlene Gernes, D.O., stating, *inter alia*, that she had "noted the claimant's obesity and his treatment for back pain." AR 19. Indeed, Dr. Gernes found obesity to be a severe, medically-determinable impairment, pointing out that Barrows's BMI was 49.2. AR 100. She then imposed a series of physical limitations. AR 99-100. In explaining why she concluded Barrows should avoid concentrated exposure to hazards such as machinery and heights, Dr. Gernes wrote: "Due to the morbid obesity preventing claimant from escaping heights, he should avoid concentrated exposure to these hazards." AR 100. She then stated as follows at the conclusion of her opinion:

While the claimant has some limitations with lifting/standing/walking/sitting due to pain and decreased [range of motion] from lumbar [degenerative disc disease] in combination with the morbid obesity, he can still do the remaining functional abilities as outlined in the physical RFC.

AR 101.

The ALJ afforded great weight to Dr. Gernes's opinion and provided several reasons for doing so, including the fact that her opinion "is uncontroverted by that of a treating or examination [sic] physician." AR 19-20. Indeed, the ALJ's ultimate physical RFC findings mirrored those of Dr. Gernes. AR 16-17, 98-100. Thus, the ALJ gave great weight to a medical opinion that expressly considered and discussed the effects of obesity.

While the ALJ could have, and arguably should have, provided a more-detailed explanation of how he reached his conclusions about the effects of obesity, he complied with *Heino* by (a) expressly referencing obesity and (b) making it clear that he considered obesity in evaluating this claim. As such, remand is not required on grounds that the ALJ failed to consider and evaluate the effects of obesity. However, whether substantial evidence in the record as a whole supports the ALJ's decision is a separate matter, which will be addressed *infra*.

B. Medical Opinions

Barrows next argues that the ALJ erred in weighing the various medical opinions of record, both by (a) giving too much weight to the opinions of non-treating, non-examining physicians and (b) discounting the opinion of Barrows's treating nurse practitioner. Barrows contends that the opinion evidence of record, when weighed properly, does not constitute substantial evidence that he is not disabled. The Commissioner disagrees, arguing that the ALJ properly considered and weighed the medical opinions and provided good reasons for his conclusions.

1. Applicable Standards

“In deciding whether a claimant is disabled, the ALJ considers medical opinions along with ‘the rest of the relevant evidence’ in the record.” *Wagner v. Astrue*, 499 F.3d 842, 848 (8th Cir. 2007) (quoting 20 C.F.R. § 404.1527(b)). “Medical opinions” are defined as “statements from physicians and psychologists or other acceptable medical sources that reflect judgments about the nature and severity of your impairment(s), including your symptoms, diagnosis and prognosis, what you can still do despite impairment(s), and your physical or mental restrictions.” 20 C.F.R. §§ 404.1527(a)(2), 416.927(a)(2). Other relevant evidence includes medical records, observations of treating physicians and others, and an individual's own description of his limitations. *McKinney v. Apfel*, 228 F.3d 860, 863 (8th Cir. 2000).

Acceptable Medical Source Opinions. Medical opinions can come from a treating source, an examining source or a non-treating, non-examining source (typically a state agency medical consultant who issues an opinion based on a review of medical records). Medical opinions from treating physicians are entitled to substantial weight. *Singh v. Apfel*, 222 F.3d 448, 452 (8th Cir. 2000). 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). Nonetheless, if the ALJ finds that a treating physician's medical opinion as to the nature and severity of the claimant's impairment is

“well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the claimant’s] record, [the ALJ] will give it controlling weight.” 20 C.F.R. §§ 404.1527(c)(2), 416.927(c)(2). “When an ALJ discounts a treating physician’s opinion, he should give good reasons for doing so.” *Brown v. Astrue*, 611 F.3d 941, 951-52 (8th Cir. 2010). Note, however, that 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 v. Barnhart*, 392 F.3d 988, 994 (8th Cir. 2005).

At the other end of the medical-opinion spectrum are opinions from non-treating, non-examining sources: “The opinions of non-treating practitioners who have attempted to evaluate the claimant without examination do not normally constitute substantial evidence on the record as a whole.” *Shontos v. Barnhart*, 328 F.3d 418, 427 (8th Cir. 2003). This does not mean, however, that such opinions are to be disregarded. Indeed, “an ALJ may credit other medical evaluations over that of the treating physician when such other assessments are supported by better or more thorough medical evidence.” *Prosch v. Apfel*, 201 F.3d 1010, 1014 (8th Cir. 2000) (internal quotations and citations omitted). Unless a treating source’s opinion is given controlling weight, the ALJ “must explain in the decision the weight given to the opinions of a State agency medical or psychological consultant.” 20 C.F.R. §§ 404.1527(e)(2)(ii), 416.927(e)(2)(ii).

In the middle of the spectrum are opinions from consultative examiners who are not treating sources but who examined the claimant for purposes of forming a medical opinion. Normally, the opinion of a one-time consultative examiner will not constitute substantial evidence, especially when contradicted by a treating physician’s opinion. *Cantrell v. Apfel*, 231 F.3d 1104, 1107 (8th Cir. 2000).

Ultimately, it is the ALJ’s duty to assess all medical opinions and determine the weight to be given these opinions. *See Finch*, 547 F.3d at 936 (“The ALJ is charged with the responsibility of resolving conflicts among medical opinions.”); *Estes v.*

Barnhart, 275 F.3d 722, 725 (8th Cir. 2002) (“It is the ALJ’s function to resolve conflicts among ‘the various treating and examining physicians.’”) (citing *Bentley v. Shalala*, 52 F.3d 784, 785-87 (8th Cir. 1995)).

Other Opinion Evidence. Opinion evidence may also come from health care providers who do not fall within the Commissioner’s definition of an “acceptable medical source,” such as nurse practitioners and physician assistants.² Social Security Ruling 06-03p nonetheless requires the ALJ to give consideration to such opinions. That ruling includes the following statements:

The distinction between “acceptable medical sources” and other health care providers who are not “acceptable medical sources” is necessary for three reasons. First, we need evidence from “acceptable medical sources” to establish the existence of a medically determinable impairment. *See* 20 CFR 404.1513(a) and 416.913(a). Second, only “acceptable medical sources” can give us medical opinions. *See* 20 CFR 404.1527(a)(2) and 416.927(a)(2). Third, only “acceptable medical sources” can be considered treating sources, as defined in 20 CFR 404.1502 and 416.902, whose medical opinions may be entitled to controlling weight. *See* 20 CFR 404.1527(d) and 416.927(d).

* * *

In addition to evidence from “acceptable medical sources,” we may use evidence from “other sources,” as defined in 20 CFR 404.1513(d) and 416.913(d), to show the severity of the individual's impairment(s) and how it affects the individual's ability to function. These sources include, but are not limited to:

- Medical sources who are not “acceptable medical sources,” such as nurse practitioners, physician assistants, licensed clinical social workers, naturopaths, chiropractors, audiologists, and therapists;

² That definition identifies various “acceptable medical sources” who can “provide evidence to establish an impairment.” *See* 20 C.F.R. §§ 404.1513(a) and 416.913(a). Nurse practitioners and physician assistants are not included. *Id.*

* * *

Although the factors in 20 CFR 404.1527(d) and 416.927(d) explicitly apply only to the evaluation of medical opinions from “acceptable medical sources,” these same factors can be applied to opinion evidence from “other sources.” These factors represent basic principles that apply to the consideration of all opinions from medical sources who are not “acceptable medical sources” as well as from “other sources,” such as teachers and school counselors, who have seen the individual in their professional capacity.

* * *

Opinions from “other medical sources” may reflect the source's judgment about some of the same issues addressed in medical opinions from “acceptable medical sources,” including symptoms, diagnosis and prognosis, what the individual can still do despite the impairment(s), and physical and mental restrictions.

* * *

The fact that a medical opinion is from an “acceptable medical source” is a factor that may justify giving that opinion greater weight than an opinion from a medical source who is not an “acceptable medical source” because, as we previously indicated in the preamble to our regulations at 65 FR 34955, dated June 1, 2000, “acceptable medical sources” “are the most qualified health care professionals.” However, depending on the particular facts in a case, and after applying the factors for weighing opinion evidence, an opinion from a medical source who is not an “acceptable medical source” may outweigh the opinion of an “acceptable medical source,” including the medical opinion of a treating source. For example, it may be appropriate to give more weight to the opinion of a medical source who is not an “acceptable medical source” if he or she has seen the individual more often than the treating source and has provided better supporting evidence and a better explanation for his or her opinion.

See SSR 06-03p, 2006 WL 2329939 (Aug. 9, 2006). Among other things, this ruling means a nurse practitioner’s opinion is not a “medical opinion,” is not entitled to controlling weight and cannot establish *the existence of* a medically-determinable impairment. However, that opinion *can* be used as evidence of the severity of an

impairment and how the impairment affects the individual's ability to function. An ALJ must evaluate the opinion with reference to the same factors that apply to other medical sources, including:

- How long the source has known and how frequently the source has seen the individual;
- How consistent the opinion is with other evidence;
- The degree to which the source presents relevant evidence to support an opinion;
- How well the source explains the opinion;
- Whether the source has a specialty or area of expertise related to the individual's impairment(s), and
- Any other factors that tend to support or refute the opinion.

See 20 C.F.R. §§ 404.1527(c), 416.927(c). “In determining what weight to give ‘other medical evidence,’ the ALJ has more discretion and is permitted to consider any inconsistencies found within the record.” *Raney v. Barnhart*, 396 F.3d 1007, 1010 (8th Cir. 2005).

The ALJ's Duty. Obviously, medical opinions and other forms of medical evidence do not magically appear on the ALJ's desk in advance of a hearing. Instead, the ALJ has a duty to fully and fairly develop the record, even when the claimant is represented by counsel. *Nevland v. Apfel*, 204 F.3d 853, 857 (8th Cir. 2000) (citing *Warner v. Heckler*, 722 F.2d 428, 431 (8th Cir. 1983)). This duty includes “arranging for a consultative examination(s) if necessary, and making every reasonable effort to help [the claimant] get medical reports from [his or her] own medical sources.” 20 C.F.R. §§ 404.1545(a)(3), 416.945(a)(3). “Because the social security disability hearing is non-adversarial ... the ALJ's duty to develop the record exists independent of the claimant's burden in the case.” *Stormo*, 377 F.3d at 806 (citing *Snead v. Barnhart*, 360 F.3d 834, 838 (8th Cir. 2004)).

This duty assumes particular importance if the sequential evaluation process for determining disability reaches Step Five. As noted above, the ALJ reaches Step Five

only upon concluding, at Step Four, that the claimant's RFC rules out all past relevant work. In that situation, the Commissioner bears the burden of producing evidence "first that the claimant retains the RFC 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 perform." *Eichelberger*, 390 F.3d at 591; *see also Nevland*, 204 F.3d at 857. The burden of persuasion, however, remains with the claimant. *Harris v. Barnhart*, 356 F.3d 926, 931 n.2 (8th Cir. 2004) ("The Commissioner recently promulgated a new rule designed to clarify that although a burden of production shifts to the Commissioner at step five, the ultimate burden of persuasion remains with the claimant.").

The Commissioner "ordinarily" cannot meet her burden of production at Step Five without an opinion from at least one doctor who actually examined the claimant. *Nevland*, 204 F.3d at 858. Of course, "ordinarily" does not mean "never." Thus, *Nevland* "does not compel remand in every case in which the administrative record lacks a treating doctor's opinion." *Hattig v. Colvin*, No. C 12-4092 MWB, 2013 WL 6511866, at * 10 (N.D. Iowa Dec. 12, 2013). If other medical evidence in the record clearly establishes a claimant's RFC to do other work, and to function in the workplace, the absence of an opinion from examining physicians may not require remand. *Id.* at *11 (citing *Nevland*, 204 F.3d at 858).

2. *Analysis*

Barrows starts with an attack on the ALJ's decision to afford great weight to the opinions of two state agency consultants, Dr. Lark and Dr. Gernes. He contends that the ALJ "relied entirely on the opinion evidence of Dr. Gernes and Dr. Lark, two non-treating and non-examining sources from the state agency." Doc. No. 13 at 15. He then argues that the ALJ should have given greater weight to an opinion provided by his primary treating source, Sharon Eckhart, who is a board certified advanced registered nurse practitioner. *Id.* at 23-25.

Russell Lark, Ph.D., reviewed records and prepared a psychiatric review technique assessment and mental RFC assessment, both of which were dated June 13, 2011. AR 96-97, 101-03. As discussed earlier, Marlene Gernes, D.O., reviewed records and prepared a physical RFC assessment, which was dated May 23, 2011. AR 98-101. Nurse Eckhart submitted a letter dated March 22, 2011, that enclosed progress notes and a psychiatric evaluation dated June 22, 2010. AR 362-71. She also provided a treating medical source statement dated May 25, 2012. AR 575-76. I will undertake separate discussions of the various mental RFC and physical RFC opinions.

a. Mental RFC Opinions

In arguing that the ALJ erred by giving great weight to Dr. Lark's mental RFC opinion, Barrows seems to have overlooked the opinion provided by William E. Morton, Psy.D., a licensed clinic psychologist who conducted an examination of Barrows on May 31, 2011. AR 436-38. The ALJ provided a lengthy summary of Dr. Morton's opinion and afforded it significant weight, finding that it was consistent with Barrows's treatment records. AR 21.

Barrows does not mention Dr. Morton's opinion. Indeed, in claiming the ALJ "relied entirely on the opinion evidence of Dr. Gernes and Dr. Lark," Doc. No. 13 at 15, Barrows acts as if Dr. Morton's opinion does not exist. This is unusual because, as the ALJ noted, Dr. Lark specifically referenced Dr. Morton's opinion in the course of his own analysis. AR 21, 101-03.

Dr. Morton diagnosed major depressive disorder, moderate, and adjustment disorder with anxiety. AR 438. He found only mild limitations in understanding, remembering, and carrying out instructions. *Id.* He further found only minimal limitations with regard to interacting with others and maintaining attention, concentration and pace. *Id.* He noted moderate limitations concerning the ability to use good judgment and to respond appropriately to workplace changes. *Id.* He assigned a Global

Assessment of Functioning (GAF) score of 55 to 60, suggesting moderate limitations,³ and concluded that Barrows “is able to adequately self-care and attend to the activities of daily living.” *Id.*

Dr. Lark, upon reviewing medical records and Dr. Morton’s report, concluded that Dr. Morton’s opinion was consistent with the medical evidence. AR 102-03. The ALJ likewise concluded that Dr. Lark’s and Dr. Morton’s opinions were consistent with Barrows’s treatment notes and other medical evidence of record. AR 20-21. The ALJ pointed out that Nurse Eckhart’s treatment notes do not suggest severe limitations and, indeed, reflect GAF scores in the range of 65 to 70.⁴ AR 20.

Based on my review of the record, I find that the ALJ provided good reasons, supported by substantial evidence, for affording significant weight to Dr. Lark’s and Dr. Morton’s opinions concerning Barrows’s mental RFC. As for Nurse Eckhart, the ALJ correctly noted that she is not an acceptable medical source and, therefore, is not qualified to provide a medical opinion. AR 20. The ALJ then gave consideration to her opinion, as required by SSR 06-03p. He did not discount her opinion simply because she is not an acceptable medical source. Instead, he compared her opinion to her treatment notes, and other medical evidence, and found that the significant mental impairments suggested by her opinion were not supported by the other evidence. AR 20. For example, Nurse Eckhart regularly assigned GAF scores in the 60’s and acknowledged that Barrows’s

³ A GAF score represents a clinician’s judgment of an individual’s overall ability to function in social, school, or occupational settings, not including impairments due to physical or environmental limitations. *See* American Psychiatric Ass’n, *Diagnostic & Statistical Manual of Mental Disorders* 34 (4th ed.) (DSM-IV). A GAF score of 51-60 indicates the individual has moderate symptoms (*e.g.*, flat affect and circumstantial speech, occasional panic attacks) or moderate difficulty in social, occupational, or school functioning (*e.g.*, few friends, conflicts with peers or co-workers). *Id.*

⁴ A GAF score of 61-70 indicates the individual has some mild symptoms (*e.g.*, depressed mood and mild insomnia) or some difficulty in social, occupational, or school functioning (*e.g.*, occasional truancy, or theft within the household), but is generally functioning pretty well and has some meaningful interpersonal relationships. *Id.*

average GAF score during the period of her treatment was 65. AR 20, 446-50, 575. Of course, GAF scores are not conclusive. Indeed, the Social Security Administration has declined to endorse the GAF scale for “use in the Social Security and SSI disability programs,” and has indicated that GAF scores have no “direct correlation to the severity requirements in our mental disorders listings.” See Revised Medical Criteria for Evaluating Mental Disorders and Traumatic Brain Injury, 65 Fed Reg. 50,746, 50,764-65, 2000 WL 1173632 (Aug. 21, 2000). Nonetheless, GAF scores are relevant and should be considered. See, e.g., *Halverson v. Astrue*, 600 F.3d 922, 930-31 (8th Cir. 2010); *England v. Astrue*, 490 F.3d 1017, 1023 n.8 (8th Cir. 2007).

Here, the GAF scores at issue are of particular relevance because they were assigned by Nurse Eckhart herself. While routinely assigning scores that indicated only “mild” symptoms while treating Barrows, the opinion she wrote for the purpose of his disability claim suggests a greater level of impairment. AR 575-76. This does not seem to be a mere timing issue, as might happen if Barrows’s condition deteriorated sharply after Nurse Eckhart assigned higher GAF scores. She assigned a GAF score of 65 on March 9, 2012, and indicated that Barrows’s overall condition was “stable.” AR 446.⁵ She wrote her treating source statement about two months later. AR 575-76. No treatment notes during the intervening period suggest that Barrows’s mental impairments suddenly became more severe. Nor does the record contain any other explanation for the apparent discrepancy between Nurse Eckhart’s opinion and the GAF scores she contemporaneously assigned. As such, I find that the ALJ provided good reasons, supported by substantial evidence, for discrediting Nurse Eckhart’s opinion.

Barrows also argues that Nurse Eckhart’s opinion should have prevailed because it is more-recent, while the competing opinions were based on “old stale” evidence. Doc.

⁵ Nurse Eckhart’s notes from March 9, 2012, include other comments suggestive of only mild impairment. She wrote that Barrows “[s]tates his mood and concentration is improved and he is able to get things done.” AR 446. She also stated that he “has heard from vocational rehab and is hopeful that can help him in some way at least find part time work.” *Id.* While noting him to be “anxious,” she also stated: “Remote and recent memory is intact.” *Id.*

No. 13 at 14-16. He notes that additional medical records were obtained after Dr. Lark (and, while unmentioned, Dr. Morton) submitted their opinions. The vast majority of the “new” records he cites relate to physical health issues, such as back pain and a kidney stone issue. *See, e.g.*, AR 460-556. Of the few that address mental health concerns, Barrows does not explain how the information contained in those records contradicts the opinions of Dr. Lark and Dr. Morton. Having conducted my own review of those records, I find nothing that casts doubt on those opinions.⁶

The mere passage of time between the Lark and Morton opinions and the ALJ’s hearing did not make it improper for the ALJ to assign significant weight to those opinions. *See, e.g., Chandler v. Comm’r of Soc. Sec.*, 667 F.3d 356, 361 (3d Cir. 2011) (“[B]ecause state agency review precedes ALJ review, there is always some time lapse between the consultant’s report and the ALJ hearing and decision. The Social Security regulations impose no limit on how much time may pass between a report and the ALJ’s decision in reliance on it.”). Simply pointing to new evidence, without attempting to explain how that evidence might undermine the “stale old” opinions, is hardly persuasive.

The ALJ provided good reasons, supported by substantial evidence, for the weights he assigned to the various opinions concerning Barrows’s mental RFC. As such, and after careful review of the entire record, I find that ALJ’s determination of Barrows’s mental RFC is supported by substantial evidence in the record as a whole.

b. Physical RFC Opinions

The only medical opinions concerning Barrows’s physical RFC are those submitted by the state agency consultants who reviewed records but never treated or examined Barrows. They include Dr. Gernes, whose opinion has already been discussed,

⁶ The “new” records relating to mental impairments include Nurse Eckhart’s treatment notes, which I have already discussed, and treatment notes indicating that Barrows was seen for depression on a few occasions in 2009 and 2010 at a Mayo Clinic affiliate in Mankato, Minnesota. AR 446-51, 563, 565-68, 571-74.

and John May, M.D., who reviewed the file and affirmed Dr. Gernes's opinion as written on September 14, 2011. AR 440. The ALJ's reliance on opinions issued by non-treating and non-examining sources raises a serious issue as to whether the ALJ fully and fairly developed the record concerning Barrows's physical RFC. I find that he did not.

In *Nevland*, as 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. 204 F.3d at 857. As in this case, 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]. *Nevland* remains good law, despite the Commissioner's occasional arguments to the contrary. *See, e.g., Hattig*, 2013 WL 6511866, at * 9. Thus, it has been the law in this Circuit for at least fourteen years that the Commissioner “ordinarily” cannot meet her burden of production at Step Five without an opinion from at least one doctor who actually examined the claimant. *Nevland*, 204 F.3d at 858.

It is possible, however, that other medical evidence of record in a particular case might fill the gap by clearly establishing a claimant's RFC to do other work, and to function in the workplace. *Hattig*, 2013 WL 6511866, at * 11 (citing *Nevland*, 204 F.3d at 858). In that situation, remand is not necessary even though the record contains no medical opinion evidence from a treating or examining source. *See Figgins v. Colvin*, No. C13-3022-MWB, 2014 WL 1686821, at * 9-10 (N.D. Iowa Apr. 29, 2014) (remand not necessary because the record contained numerous records addressing the claimant's ability to function in the workplace); *Agan v. Astrue*, 922 F. Supp. 2d 730, 755-56 (N.D. Iowa 2013) (further development of the record not necessary when records showed that surgical treatment resolved the claimant's back pain and he was working full-time without limitations). The question, then, is whether the record contains sufficient evidence concerning Barrows's physical RFC to support the ALJ's findings despite the lack of a medical opinion from any doctor who treated or examined Barrows.

Here, some guidance from the Commissioner might have been helpful but, unfortunately, was not forthcoming. Barrows cited *Nevland* in support of the proposition that the ALJ “should have sought opinion of the treating doctor or ordered a consultative

examination.” Doc. No. 13 at 13. This court has repeatedly reversed and remanded cases because the Commissioner’s ALJs frequently make Step Five determinations without complying with *Nevland*.⁷ Given Barrows’s express reliance on *Nevland*, and the familiar pattern of claims being sent back to the Commissioner based on that case, one would think the Commissioner would have addressed the *Nevland* situation in her brief and explained what evidence, if any, fills the gap. She didn’t. Unbelievably, the word “Nevland” does not appear in the Commissioner’s brief.

Without guidance from the Commissioner, I have carefully reviewed the record and find nothing that even arguably could make up for the lack of medical evidence from any treating or examining source to support the ALJ’s decision. The ALJ found that Barrows has the severe physical impairments of degenerative disc disease of the lumbar spine and obesity. AR 14. Indeed, and as discussed earlier, Barrows falls within the category of “extreme” obesity. Yet no doctor who ever treated or examined Barrows provided an opinion as to the effects of these impairments on Barrows’s ability to function in the workplace. For example, what impact do these severe impairments have on his ability to sit, stand, walk, bend, stoop, climb, lift and carry?

This situation is nothing like that in *Agan*, where other medical evidence demonstrated that the claimant’s sole impairment, back pain, had been surgically resolved. 922 F. Supp. 2d at 755-56. Here, to the extent Barrows’s treatment records do indicate any level of functioning, they suggest that his degenerative disc disease imposes significant limitations despite treatment. Barrows’s back pain is treated with

⁷ See, e.g., *Kruger v. Colvin*, No. C13-3036-MWB, 2014 WL 1584411, at *9-10 (N.D. Iowa Apr. 21, 2014), *adopted by* 2014 WL 2884038 (N.D. Iowa June 25, 2014); *King v. Colvin*, No. C13-3039-LTS, 2014 WL 1344194, at *8-9 (N.D. Iowa Apr. 4, 2014); *Walker v. Colvin*, No. C13-3021-MWB, 2014 WL 1348016, at *10 (N.D. Iowa Apr. 3, 2014), *adopted by* 2014 WL 2884028 (N.D. Iowa June 25, 2014); *Niebaum v. Colvin*, No. C13-4062-MWB, 2014 WL 819407, at *9 (N.D. Iowa Mar. 4, 2014), *adopted by* 2014 WL 2815355 (N.D. Iowa June 23, 2014); *Al-Hameed v. Colvin*, No. C13-3009-MWB, 2013 WL 5969860, at *13-14 (N.D. Iowa Nov. 4, 2013), *adopted by* 2013 WL 6858427 (N.D. Iowa Dec. 30, 2013); *Loftis v. Colvin*, 977 F. Supp. 2d 909, 919-20 (N.D. Iowa 2013).

pain medication and epidural steroid injections, which provide little or short-lived relief. AR 337-38, 482, 560. He has indicated the pain is constant and worse with walking and standing. AR 337-38, 393, 426, 430, 533, 557. An assessment by a physical therapist on April 29, 2011, indicated he had decreased strength, range of motion and impaired transfers and gait due to his back pain. AR 393. However, other providers found he had no weakness in the lower extremities, but did acknowledge limited range of motion. AR 338, 390. This evidence should have alerted the ALJ to the need for a medical opinion from a treating or examining source to resolve any discrepancies and determine Barrows's physical work-related limitations associated with his degenerative disc disease.

Moreover, the Social Security Administration has recognized that obesity can cause unique work-related limitations. SSR 02-1p(8), 2002 WL 34686281, at *6 (Sept. 12, 2002). These limitations arise not only from obesity itself, but also from the effect of obesity on other impairments: "The combined effects of obesity with other impairments may be greater than might be expected without obesity. For example, someone with obesity and arthritis affecting a weight-bearing joint may have more pain and limitation than might be expected from the arthritis alone." *Id.*

Here, Barrows is extremely obese and suffers from degenerative disc disease. No medical evidence fills the gap created by the ALJ's failure to obtain an opinion from a treating or examining source as to how those impairments, alone and in combination with each other, affect Barrows's ability to function in the workplace. If anything, the medical evidence suggests Barrows experiences greater physical limitations than provided in the RFC. Substantial evidence, therefore, does not support the ALJ's conclusion that Barrows retains the ability to do other work available in the national economy. Pursuant to *Nevland*, remand is necessary to correct this error.⁸

⁸ I reject Barrows's final argument, which is that he is entitled to an immediate award of benefits rather than remand for further proceedings. The court may enter an immediate finding of disability only if the record "overwhelmingly supports" such a finding, otherwise, the case is remanded for further administrative proceedings. *Buckner v. Apfel*, 213 F.3d 1006, 1011 (8th Cir. 2000). Here, the evidentiary hole created by the ALJ's failure to obtain an opinion from a

VI. CONCLUSION AND RECOMMENDATION

For the reasons set forth herein, I RESPECTFULLY RECOMMEND that the Commissioner's determination that Barrows was not disabled be **reversed and remanded** for further proceedings and that judgment be entered against the Commissioner and in favor of Barrows. On remand, the ALJ must fully and fairly develop the record concerning Barrows's physical impairments. This includes obtaining an opinion from a treating or examining acceptable medical source as to his physical RFC. The ALJ must then re-analyze Barrows's claim based on the fully-developed record.

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 1st day of July, 2014.



LEONARD T. STRAND
UNITED STATES MAGISTRATE JUDGE

treating or examining source as to Barrows's physical RFC requires remand for further development of the record. Barrows has not shown that the current record "overwhelmingly supports" a finding of disability.