

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CEDAR RAPIDS DIVISION

JENNIFER ANN DURGIN,

Plaintiff,

vs.

MICHAEL J. ASTRUE,  
Commissioner of Social Security,

Defendant.

No. C07-0063-JSS

ORDER ON JUDICIAL REVIEW

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## ***I. INTRODUCTION***

This matter comes before the Court on the Complaint (docket number 3) filed by Plaintiff Jennifer A. Durgin on July 3, 2007, requesting judicial review of the Social Security Commissioner's decision to deny her application for Title XVI supplemental security income ("SSI") benefits. Durgin asks the Court to reverse the decision of the Social Security Commissioner ("Commissioner") and order the Commissioner to provide SSI benefits. In the alternative, Durgin requests the Court to remand this matter for further proceedings.

## ***II. PRIOR PROCEEDINGS***

Durgin applied for SSI benefits on March 23, 2004.<sup>1</sup> In her application, Durgin alleged an inability to work since January 1, 1999, due to depression, attention deficit hyperactivity disorder ("ADHD"), and learning disabilities. Durgin's application was denied on May 12, 2004. On September 9, 2004, her application was denied on reconsideration. On October 27, 2004, Durgin requested an administrative hearing before an Administrative Law Judge ("ALJ"). On June 20, 2006, Durgin appeared with counsel before ALJ John P. Johnson for an evidentiary hearing. Durgin, Linda Voll, Durgin's case worker, and vocational expert Carma Mitchell testified at the hearing. In a decision dated September 20, 2006, the ALJ denied Durgin's claim. The ALJ determined that Durgin was not disabled and was not entitled to SSI benefits because she was functionally capable of performing work that exists in significant numbers in the national economy. Durgin appealed the ALJ's decision. On May 3, 2007, the Appeals Council denied Durgin's request for review. Consequently, the ALJ's September 20, 2006 decision was adopted as the Commissioner's final decision.

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<sup>1</sup> Durgin first applied for SSI benefits on October 2, 2000. The application was denied on December 21, 2000. The record contains no further information regarding this application.

On July 3, 2007, Durgin filed this action for judicial review. The Commissioner filed an answer on October 3, 2007. On November 19, 2007, Durgin filed a brief arguing there is not substantial evidence in the record to support the ALJ's finding that she is not disabled and that there is other work she can perform. On February 15, 2008, the Commissioner filed a responsive brief arguing the ALJ's decision was correct and asking the Court to affirm the ALJ's decision. Durgin filed a reply brief on February 26, 2008. On September 20, 2007, both parties consented to proceed before the undersigned in this matter pursuant to the provisions set forth in 28 U.S.C. § 636(c).

### **III. PRINCIPLES OF REVIEW**

Pursuant to 42 U.S.C. § 1383(c)(3), the Commissioner's final determination after an administrative hearing not to award SSI benefits is subject to judicial review to the same extent as provided in 42 U.S.C. § 405(g). 42 U.S.C. § 1383(c)(3). 42 U.S.C. § 405(g) provides the Court with the power to: "[E]nter . . . a judgment affirming, modifying, or reversing the decision of the Commissioner . . . with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). "The findings of the Commissioner . . . as to any fact, if supported by substantial evidence, shall be conclusive . . ." *Id.*

The Court must consider "whether the ALJ's decision is supported by substantial evidence on the record as a whole." *Vester v. Barnhart*, 416 F.3d 886, 889 (8th Cir. 2005) (citing *Harris v. Barnhart*, 356 F.3d 926, 928 (8th Cir. 2004)). Evidence is "substantial evidence" if a reasonable person would find it adequate to support the ALJ's determination. *Id.* (citing *Sultan v. Barnhart*, 368 F.3d 857, 862 (8th Cir. 2004)). Furthermore, "[s]ubstantial evidence is 'something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions does not prevent an administrative agency's findings from being supported by substantial evidence.'" *Baldwin v. Barnhart*, 349 F.3d 549, 555 (8th Cir. 2003) (quoting *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989), in turn quoting *Consolo v. Fed. Mar. Comm'n*, 282 U.S. 607, 620 (1966)).

In determining whether the ALJ's decision meets this standard, the Court considers "all of the evidence that was before the ALJ, but it [does] not re-weigh the evidence." *Vester*, 416 F.3d at 889 (citing *Guilliams v. Barnhart*, 393 F.3d 798, 801 (8th Cir. 2005)). The Court not only considers the evidence which supports the ALJ's decision, but also the evidence that detracts from his or her decision. *Guilliams*, 393 F.3d at 801. "[E]ven if inconsistent conclusions may be drawn from the evidence, the agency's decision will be upheld if it is supported by substantial evidence on the record as a whole." *Id.* (citing *Chamberlain v. Shalala*, 47 F.3d 1489, 1493 (8th Cir. 1995)).

#### **IV. FACTS**

##### **A. Durgin's Education and Employment Background**

Durgin was born in 1981. She attended high school and finished the eleventh grade. When she was in school, Durgin was placed in special education classes for academic help, development of independent working abilities, and development of organizational skills. She has not earned a GED.

The record contains a detailed earnings report for Durgin. The earnings report provides that Durgin had sporadic employment between 1999 and 2004. Durgin's highest earnings were \$2270.29 in 2003. She earned this amount while working for six different employers. She also had minimal non-covered FICA earnings at Goodwill Industries of Southeast Iowa in 2000, 2001, and 2005.<sup>2</sup>

##### **B. Administrative Hearing Testimony**

###### **1. Durgin's Testimony**

At the administrative hearing, Durgin discussed her work history. She testified that her past jobs had been primarily at fast food restaurants. According to Durgin, the longest

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<sup>2</sup> Durgin's employment at Goodwill Industries was vocational, and the purpose of her employment was to have a successful working experience which would lead to competitive employment.

period of time she held a job was about three months. She described her difficulty at one job as follows:

A: . . . the Supervisor kept on, you know saying that I was hard of hearing, and I couldn't do things right and I wasn't as fast as everybody else was and I didn't learn as fast as everybody else does and I can't do -- I can't multi-task like everybody else can and it was a big problem and she put me down numerous times because of the fact that I wasn't like everybody else and didn't do things like everybody else. And so, I, -- then she kept saying that if I wasn't going to learn it and if I couldn't learn or didn't learn, start learning faster that, I was going to -- she was going to keep taking away my hours and decreasing my pay and do -- I and then eventually not giving me more work and then so, I got down far, so far as, and I didn't want to go back there and work[.] . . .

(Administrative Record at 330) Durgin testified that her work hours at this job were reduced to a couple of hours one day per week. Eventually, Durgin quit this job because it wasn't worth "going there and getting yelled at all the time."<sup>3</sup>

Next, Durgin discussed her medical problems. Durgin's attorney asked her what physical problems she had that would prevent her from working. Durgin replied that her knee gives out sometimes. She further explained that when she was being treated at the Abbe Center for Community Mental Health ("Abbe Center") in Cedar Rapids, Iowa, she was supposed to get a brace to help stabilize her knee, but the brace was never provided to her. She also claimed that she suffered from migraine headaches on a daily basis.

Durgin's attorney also asked Durgin about her mental health difficulties. She testified that she had a hard time concentrating. She further indicated that she had dealt with concentration problems throughout her life. Durgin explained that her concentration

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<sup>3</sup> See Administrative Record at 331.

problems are connected to her diagnosis of ADHD. Durgin's attorney asked Durgin how she is affected by ADHD. She replied:

- A: It's hard for me to stay focused[.] . . .
- Q: Has that been part of the problem you've had in the past, at your jobs that you --
- A: Yeah.
- Q: It's hard to --
- A: Yes, it is.
- Q: Stay doing one thing?
- A: I have a tendency to, I kind of drift off[.] . . .
- Q: So, how would it show up on a day to day? How would it show up now? What kind of things? Would it show up in watching a TV show or --
- A: Yeah. I usually miss bits and pieces and stuff because I just, just kind of zone out and I don't have any -- it's like it, everything completely leaves -- I can't hear nothing. . . .
- Q: What else, I mean are there other things?
- A: Yeah, it's -- it's just that well, basically it's hard for me to keep on task, it's hard for me to do the same thing for a long period of time . . . basically, it's mainly focus. And I also, I have to be explained things over and over.
- Q: Takes a lot of repetition to figure things out? Is that --
- A: Yeah.
- Q: And that's true on the job, is that true in everyday life too?
- A: Yeah. . . .

(Administrative Record at 337-38) Durgin also claimed that she heard voices in her head on a daily basis. When asked which difficulties would interfere with her ability to maintain a regular job, Durgin answered that her depression, anxiety, and hearing voices would cause the most interference.

The ALJ questioned Durgin regarding her daily activities and daily routine. Durgin testified that on most days, she got up around 10:30 a.m. or 11:00 a.m. and went to bed around 2:30 a.m. She further testified that she did not have any problems with bathing,

dressings, or feeding herself. The ALJ and Durgin had the following colloquy regarding her daily routine:

- Q: How would you spend the rest of the morning, once you've gotten up?
- A: I sometimes, I'll draw pictures, sometimes I'll play games, sometimes I'll go to my Mom's, or go over to some friends' house.
- Q: How would you spend the afternoon?
- A: Basically, well, when I come back home I, basically what I do, as I come home, I talk to friends and draw pictures.
- Q: What about in the evening, how do you spend the evening?
- A: About the same. Sometimes I'll watch a show or something, but that's not very often, I don't tend to watch too much TV.
- Q: Do you have any activities or hobbies that you engage in?
- A: Yes, I draw a lot. . . .
- Q: Do you take care of most of the chores around your house yourself?
- A: Not really.

(Administrative Record at 356) According to Durgin, when she does clean her apartment, she has help.

## ***2. Linda Voll's Testimony***

Linda Voll ("Voll") is employed by Hillcrest Family Services. At the time of the hearing, she had worked with Durgin on independent living skills for over two years. Voll testified that she sees Durgin once a week and helps Durgin by making sure that her appointments are written down on a calendar and that she has her medications and is taking them. According to Voll, Durgin has shown little improvement in her independent living skills over the past two and one-half years.

Durgin's attorney asked Voll if she knew why Durgin was absent a lot when she worked for Goodwill in 2005. Voll replied that Durgin had "[a] lot of anxiety. . . . [Durgin d]efinitely [had] lack of motivation. Her depression had set in and she would just

want to sleep all day[.] . . .”<sup>4</sup> When asked about Durgin’s difficulties with socialization, Voll responded:

Q: And as far as you know does she do any socializing at all?

A: No. Pretty much stays at home. Likes to be in her own apartment alone.

Q: And do you know why that is? Does she express any of that to you?

A: She’s informed me that because of the voices, the anxiety and the depression, she just don’t want to go outside.

(Administrative Record at 360) Lastly, Voll testified that she thought Durgin needed a lot more work to achieve successful independent living.

### ***3. Vocational Expert’s Testimony***

At the hearing, the ALJ provided vocational expert Carma Mitchell with a hypothetical for an individual with the following limitations:

[The individual] is able to do only simple, routine, repetitive work that does not require constant close attention to detail or use of independent judgment or decision making, [the individual] does require occasional supervision, and . . . should do no high stress work.

(Administrative Record at 365) The vocational expert testified that under such limitations, Durgin could return to her past work as a cook’s helper or kitchen helper, sales attendant, fast foods worker, or telephone solicitor. The vocational expert also testified that under such limitations, Durgin could perform other work in the national economy such as dining room attendant (890 positions in Iowa and 120,000 positions in the nation), cafeteria attendant (800 positions in Iowa and 117,000 positions in the nation), dietary aide (900 positions in Iowa and 56,850 positions in the nation), and sandwich maker (1,600 positions in Iowa and 127,900 positions in the nation). The ALJ provided the vocational expert with a second hypothetical with the same limitations, except that the

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<sup>4</sup> See Administrative Record at 359.

individual could have only occasional contact with the public and co-workers and would need close supervision by a supervisor. The vocational expert testified that under such limitations, Durgin could return to her past work as a cook helper or kitchen helper and sales attendant, and could perform other work such as a dietary aide or sandwich maker.

Durgin's attorney also questioned the vocational expert. Durgin's attorney asked the vocational expert the following questions:

Q: What if [Durgin] had to work at a slow pace, up to a third of the work day, would that allow for competitive employment?

A: Okay, it's been my experience if that's on-going, slow pace up to a third of the time and somebody else is having to assist them in completing their tasks, generally, no, the person isn't able to maintain full time competitive employment.

Q: And so then -- and the other one is if, I don't know if, you, you specifically answered but if they miss more than two or three days of work a month that would preclude employment?

A: It's typically been my experience, yes. That an employer will only tolerate one to two days of absences for the month anything over that on a regular basis typically isn't tolerated.

(Administrative Record at 369) Lastly, when asked whether an individual could find full-time competitive employment, if he or she could only handle stress levels of one or two on a ten-point scale, the vocational expert answered that such an individual could not find full-time competitive employment.

### ***C. Durgin's Medical History***

On March 16, 2000, Durgin was evaluated by Dr. Larry L. Richards, D.O., for depression. Upon examination, Dr. Richards found that Durgin was oriented to time, place, and person. She had no hallucinations, delusions, or phobias. She had some memory problems and was unable to repeat any of three items after five minutes. Dr. Richards determined, however, that her concentration was good and her intellectual

function was in the average range. Dr. Richards diagnosed Durgin with adjustment disorder and a depressed mood. Dr. Richards encouraged Durgin to continue counseling at school and prescribed Celexa as treatment.

On July 24, 2000, Durgin visited Dr. Richards for a follow-up appointment. She informed Dr. Richards that she had stopped taking Celexa because it caused her to feel sedated and she felt that she no longer had any problems with depression. Dr. Richard affirmed his diagnosis of adjustment disorder with depressed mood. Dr. Richards indicated that Durgin could continue with no medication and stated that she could schedule a return visit as needed.

On November 15, 2000, Disability Determination Services (“DDS”) referred Durgin to Jacque Fielder (“Fielder”), a licensed psychologist, for a psychological evaluation. In his Psychological Report, Fielder describes Durgin’s reasons for seeking disability insurance benefits:

[Durgin] states the reasons for her disability application involve: “The place where I’m living asked me to get on it.” When asked for elaboration on this, she states that she is in the SAL program living at Viking Court and has been there since May or June of this year. She states she dropped out of school about 2 months ago. She was a senior at Jefferson High School and was in the special education department. . . . She states this was related to her having a learning disability. She also states she had depression and acknowledges that she took medication for it but only a little while. She states she stopped taking the medication because she did not feel it did anything for her. She currently admits she doesn’t feel depressed.

(Administrative Record at 219-20) Durgin described her typical day as: (1) Getting up around 9:30 a.m., (2) getting ready for work, (3) leaving her apartment at 10:20 a.m. in order to catch the bus to Goodwill Industries, (4) working at Goodwill from 11:00 a.m. to 4:00 p.m., (5) getting home between 4:30 p.m. and 5:00 p.m., (6) fixing herself something for dinner, and (7) retiring to her room after dinner to watch movies, play computer games,

or draw until 9:30 p.m. or 10:00 p.m. when she goes to sleep.<sup>5</sup> Fielder noted that Durgin helped clean her apartment, did dishes, and did her own laundry when she could afford it. Fielder also noted that Durgin did not have a driver's license, but was able to get around the community by using public transportation. Fielder further provided that Durgin's counselor helped Durgin with grocery shopping, making doctor appointments, and other important activities in her life. During the evaluation, Fielder also administered the Wechsler Adult Intelligence Scale -Third Edition and Structured Mental Status Assessment tests. The results of these tests showed that Durgin was functioning in the low average range of intellectual abilities. Fielder summarized his findings as follows:

Based upon the information currently available, it is felt that this young adult could remember and understand up to moderately complex instructions, procedures, and locations. Provided the alleged learning disability is not an interfering factor, there was nothing to suggest that she could not carry out reasonably complex instructions. She appears capable of maintaining a normal degree of attention, concentration, and pace. Although she seemed somewhat shy and a little hesitant, it is felt that in an appropriate work environment and some support, she could respond appropriately with supervisors, co-workers, and the public. Judgment appears to be intact, and it is felt that she could respond appropriately to changes in the work place if she chose to do so. It is also felt that this individual could handle benefits appropriately in her own behalf if awarded.

(Administrative Record at 223-24)

On December 20, 2000, Dr. David G. Beeman, Ph.D., reviewed Durgin's medical records and provided DDS with mental residual functional capacity ("RFC") and Psychiatric Review Technique assessments for Durgin. On the Psychiatric Review Technique assessment, Dr. Beeman diagnosed Durgin with a learning disability. Dr. Beeman determined that Durgin had the following limitations: Moderate restriction of

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<sup>5</sup> Fielder noted, however, that Durgin sometimes had difficulty getting to sleep at night.

activities of daily living, mild difficulties in maintaining social functioning, and mild difficulties in maintaining concentration, persistence, or pace. On the mental RFC assessment, Dr. Beeman determined that Durgin was moderately limited in her ability to: Understand and remember detailed instructions; perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances; sustain an ordinary routine without special supervision; and maintain appropriate social behavior and adhere to basic standards of neatness and cleanliness. Dr. Beeman concluded that Durgin “retains the ability to complete a wide range of at least moderately complex work functions when motivated to do so.”<sup>6</sup>

On April 14, 2004, DDS referred Durgin to Fielder for a second psychological evaluation. Fielder administered the Structured Mental Status Assessment test. According to Fielder, the results of the test showed Durgin’s general psychomotor behavior to be unremarkable. She showed no indication of delusional thinking. Her thought processes were reasonably tight and logical, with no significant abnormalities of thought processing. Her affect was flat. Her facial expressions were sad. Both her short-term recall and general memory were intact. Her judgment was fair. Fielder noted that Durgin “seemed to have some mild difficulties with her ability to attend, concentrate, and particularly with pace.”<sup>7</sup> Fielder diagnosed Durgin with major depression, recurrent. Fielder concluded that:

Based on the information currently available, it is this examiner’s opinion that . . . Durgin appears to have some moderate degree of difficulty in remembering and understanding other than fairly simple and routine instructions, procedures, and locations. She appears capable of carrying out simple to mildly complex instructions without a lot of supervision. She is quite slow in her pace which may cause her difficulties in a work environment, but her ability to attend and

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<sup>6</sup> See Administrative Record at 230.

<sup>7</sup> See Administrative Record at 252.

concentrate is seen as adequate. It is felt that she could interact appropriately with supportive and understanding supervisors and co-workers. She may have more difficulty interacting with the public. Work based judgment is seen as somewhat limited but not significant enough to prevent her from being employed. It is thought she would need some supervision and support in responding appropriately to changes in the work place until she [was] familiar with them.

(Administrative Record at 253)

On May 5, 2004, Dr. Herbert L. Notch, Ph.D., reviewed Durgin's medical records and provided DDS with mental RFC and Psychiatric Review Technique assessments for Durgin. On the Psychiatric Review Technique assessment, Dr. Notch diagnosed Durgin with depression recurrent. Dr. Notch determined that Durgin had the following limitations: Moderate restriction of activities of daily living, moderate difficulties in maintaining social functioning, and moderate difficulties in maintaining concentration, persistence, or pace. On the mental RFC assessment, Dr. Notch determined that Durgin was moderately limited in her ability to: Carry out detailed instructions; maintain attention and concentration for extended periods; complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods; get along with co-workers or peers without distracting them or exhibiting behavioral extremes; respond appropriately to changes in the work setting; and set realistic goals or make plans independently of others. Dr. Notch concluded that Durgin "is . . . able to do simple one or two step work-like activities on a consistent basis without significant interference from her mental impairments."<sup>8</sup>

On June 30, 2004, Durgin presented at Mercy Medical Center in Cedar Rapids, Iowa, complaining of depression and suicidal thoughts. She was admitted to the locked psychiatric unit and diagnosed with recurrent depressive disorder. Dr. Ali Safdar prescribed antidepressant medication as treatment. Durgin was discharged from the

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<sup>8</sup> See Administrative Record at 261.

psychiatric unit on July 12, 2004. Dr. Safdar noted that Durgin was treated with medications and supportive therapy. Dr. Safdar also noted that her condition improved and she started eating, sleeping, and feeling better. Dr. Safdar determined that Durgin needed “structured placement” and placed her in the Abbe Center for support.

On July 19, 2004, Durgin met with Dr. Jeffrey D. Wilharm, M.D., a staff psychiatrist at the Abbe Center. Dr. Wilharm noted the following symptomatology for Durgin: Depressed/sad, discouraged, sleep difficulty, loss of energy, loss of concentration, worthlessness, hopelessness, loss of interest, loss of motivation, crying spells, difficulty coping, irritability, tiredness/fatigue, tense/nervous, poor sleep, short attention span, distractable, forgetful, impulsive, poorly organized, fidgety/restless, working below capacity, inability to complete tasks, procrastination, poor concentration, easily frustrated, and possible auditory hallucinations. Dr. Wilharm diagnosed Durgin with depressive disorder and likely ADHD. Dr. Wilharm continued Zoloft as medication for Durgin and suggested behavior modification as treatment.

On May 27, 2005, Durgin self-referred to the Abbe Center for therapy. She met with Carla Levi, LMSW (Licensed Master Social Worker) (“Levi”) and Gary Siguenza, LISW (Licensed Independent Social Worker) (“Siguenza”). Durgin reported that she would like to “deal with herself better” and would like to decrease her depression symptoms. Levi and Siguenza described Durgin’s symptomatology as follows:

[Durgin] expresses that her symptoms have decreased since she has been on her medications, but that she still feels sad and discouraged at times. Her appetite fluctuates and she still has some problems sleeping. Her energy level is what she calls at medium level. She does have a sense of guilt and feelings of worthlessness, hopelessness, and helplessness. She also has lost interest in leisure activities and motivation to do them. She has frequent crying spells and feels she has difficulty coping with life in general. She does not have any suicidal ideation today, but two nights ago she reports wishing that she was dead and did not see any purpose in continuing to live her life. She does deny any plans to act on those thoughts. She has some

anxiety symptoms of having headaches and feeling tired and fatigued. . . . She today has symptoms of having a short attention span and being easily distracted. She is forgetful, impulsive, and poorly organized. . . . She fails to complete her tasks, jumping from task to task, and procrastinates. She has poor ability to concentrate and she self-soothes herself by eating. . . . She does report having auditory hallucinations of hearing voices daily.

(Administrative Record at 311) Levi and Siguenza diagnosed Durgin with depressive disorder and ADHD. Levi and Siguenza recommended that Durgin continue her medications and begin short-term therapy after determining her therapy goals.

On June 2, 2005, Durgin had a follow-up therapy appointment with Levi and Siguenza. At the appointment, Durgin and the therapists discussed her self-esteem issues. Levi and Siguenza noted that Durgin felt “very sad and state[d] that sometimes she does not know why she keeps living on the earth because she does not really see any purpose to it.”<sup>9</sup> Levi and Siguenza encouraged Durgin to use positive affirmations to counter her negative thoughts and feelings. Durgin was also encouraged to keep a journal of her food intake, work on portion control, and exercise at the YMCA in order to start losing weight and increase her self-esteem.

On December 20, 2005, Durgin met with Dr. Wilharm. Dr. Wilharm noted that:

[Durgin] may lose her job at Goodwill Industries. Her attendance record is poor. She had head lice for 2 weeks. This has not been a great month for her. Mood, interest, and motivation are all decreased. She attends Systems Training for Emotional Predictability and Problem Solving [STEPPS] group.

(Administrative Record at 299) Dr. Wilharm also noted that Durgin was experiencing auditory hallucinations and some paranoia. Dr. Wilharm increased Durgin’s dosage of Zoloft and otherwise kept her medications the same for treatment.

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<sup>9</sup> See Administrative Record at 309.

On January 16, 2006, Durgin was admitted to Mercy Medical Center for suicidal ideation. Dr. Wilharm found that Durgin

is having increased auditory hallucinations. She is only taking her medications 1-2 times per week now. She has a lot of low self-esteem issues. She has issues of where she states that her whole body disagrees with her, meaning that her voices are telling her to harm herself, that she is insane, that she is fat, that she is crazy. This really makes her feel terrible. Her motivation, interest, energy, and concentration are all low. She has also been getting to the point where the voices want her to kill herself, and at this point, it would be simpler just to do so.

(Administrative Record at 294) Upon admitting her, Dr. Wilharm determined that Durgin would be maintained on appropriate precautions and provided with therapy. Dr. Wilharm also adjusted her medications. Durgin was discharged from the hospital on January 20, 2006. Dr. Wilharm noted that Durgin reached an appropriate stabilization of mental status and safety levels prior to discharge.

Durgin saw Dr. Wilharm on April 18, 2006. Dr. Wilharm noted that Durgin was not working, but her medications, mood, sleep, and appetite were all okay. Dr. Wilharm found Durgin to be stable. Dr. Wilharm also noted no suicidal ideation. Dr. Wilharm continued her medications (Wellbutrin, Trazodone, Seroquel) as treatment.

## **V. CONCLUSIONS OF LAW**

### **A. ALJ's Disability Determination**

The ALJ determined that Durgin is not disabled. In making this determination, the ALJ was required to complete the five-step sequential test provided in the social security regulations. *See* 20 C.F.R. § 404.1520(a)-(f); *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987); *Page v. Astrue*, 484 F.3d 1040, 1042 (8th Cir. 2007); *Anderson v. Barnhart*, 344 F.3d 809, 812 (8th Cir. 2003). The five steps an ALJ must consider are:

- (1) whether the claimant is gainfully employed,
- (2) whether the claimant has a severe impairment,
- (3) whether the impairment meets the criteria of any Social Security Income listings,
- (4) whether the impairment prevents the claimant from

performing past relevant work, and (5) whether the impairment necessarily prevents the claimant from doing any other work.

*Goff v. Barnhart*, 421 F.3d 785, 790 (8th Cir. 2005) (citing *Eichelberger v. Barnhart*, 390 F.3d 584, 590 (8th Cir. 2004)); *see also* 20 C.F.R. § 404.1520(a)-(f). “If a claimant fails to meet the criteria at any step in the evaluation of disability, the process ends and the claimant is determined to be not disabled.” *Eichelberger*, 390 F.3d at 590-91 (citing *Ramirez v. Barnhart*, 292 F.3d 576, 580 (8th Cir. 2002)).

“To establish a disability claim, the claimant bears the initial burden of proof to show that he [or she] is unable to perform his [or her] past relevant work.” *Frankl v. Shalala*, 47 F.3d 935, 937 (8th Cir. 1995) (citing *Reed v. Sullivan*, 988 F.2d 812, 815 (8th Cir. 1993)). If the claimant meets this burden, the burden of proof then shifts to the Commissioner to demonstrate that the claimant retains the residual functional capacity to perform a significant number of other jobs in the national economy that are consistent with claimant’s impairments and vocational factors such as age, education, and work experience. *Id.* The RFC is the most an individual can do despite the combined effect of all of his or her credible limitations. 20 C.F.R. § 416.945. “It is the ALJ’s responsibility to determine a claimant’s RFC based on all relevant evidence, including medical records, observations of treating physicians and others, and claimant’s own descriptions of his [or her] limitations.” *Tellez v. Barnhart*, 403 F.3d 953, 957 (8th Cir. 2005) (quoting *Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001)).

The ALJ applied the first step of the analysis and determined that Durgin had not engaged in substantial gainful activity since her alleged onset date, January 1, 1999. At the second step, the ALJ concluded that Durgin had the following impairments “learning disorder and major depressive disorder.” At the third step, the ALJ found that Durgin did not have “an impairment or combination of impairments that meets or medically equals one of the listed impairments in [20 C.F.R. § 404, Appendix 1, Subpart P, Regulations No. 4 (the Listing of Impairments)].” At the fourth step, the ALJ determined Durgin’s RFC as follows:

[Durgin] has the residual functional capacity to perform activities at all exertional levels. She is limited to simple, routine repetitive tasks, not requiring attention to detail, individual judgment or decision making. She can handle occasional contact with the public or coworkers. She can deal with close supervision, on site but not looking over her shoulder. She must avoid high stress jobs.

The ALJ determined that Durgin had no past relevant work. At the fifth step, the ALJ determined that Durgin, based on her age, education, and RFC, could work at jobs that exist in significant numbers in the national economy. Therefore, the ALJ concluded Durgin was “not disabled.”

***B. Whether the ALJ Fully and Fairly Developed the Record***

Durgin contends that the ALJ erred in four respects. First, Durgin argues that the ALJ failed to fully consider all of her pertinent medical records, including the opinions of Fielder and Dr. Notch. Next, Durgin argues that the ALJ failed to consider evidence regarding her need for frequent absences from work and failed to make any findings as to whether such absences were related to any of her medically determinable impairments. Durgin also argues that the ALJ failed to consider evidence from a vocational counselor at Goodwill Industries who determined that she needed further vocational training before she could perform competitive employment. Lastly, Durgin argues that the ALJ failed to properly consider the witness testimony of Linda Voll.

***1. Medical Evidence and Opinions***

Durgin argues that the ALJ’s determination of her RFC lacked consideration of Fielder’s opinion that she “is quite slow in her pace which may cause her difficulties in a work environment.”<sup>10</sup> Similarly, Durgin argues that the ALJ also failed to consider Dr. Notch’s opinions that she had: (1) Moderate difficulties in maintaining concentration, persistence, or pace; (2) moderate limitations in her ability to maintain attention and concentration for extended periods; (3) moderate limitations in her ability to complete a

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<sup>10</sup> See Administrative Record at 253.

normal workday and workweek without interruptions from psychologically based symptoms; and (4) moderate limitations in her ability to perform at a consistent pace without an unreasonable number and length of rest periods.<sup>11</sup>

An ALJ has the responsibility of assessing a claimant's RFC, and his or her assessment must be based on all of the relevant evidence. *Guilliams*, 393 F.3d at 803; *see also Roberts v. Apfel*, 222 F.3d 466, 469 (8th Cir. 2000) (same). Relevant evidence for determining a claimant's RFC includes "'medical records, observations of treating physicians and others, and an individual's own description of his [or her] limitations.'" *Lacroix v. Barnhart*, 465 F.3d 881, 887 (8th Cir. 2006) (quoting *Strongson v. Barnhart*, 361 F.3d 1066, 1070 (8th Cir. 2004)). However, "RFC is a medical question, and an ALJ's finding must be supported by some medical evidence." *Guilliams*, 393 F.3d at 803 (citing *Masterson v. Barnhart*, 363 F.3d 731, 738 (8th Cir. 2004)). In considering medical evidence, an ALJ may "'reject the conclusions of any medical expert, whether hired by the claimant or the government, if they are inconsistent with the record as a whole.'" *Wagner v. Astrue*, 499 F.3d 842, 848 (8th Cir. 2007) (quoting *Pearsall*, 274 F.3d at 1219).

Moreover, the ALJ has a duty to develop the record fully and fairly. *Cox v. Astrue*, 495 F.3d 614, 618 (8th Cir. 2007); *Sneed v. Barnhart*, 360 F.3d 834, 838 (8th Cir. 2004); *Wilcutts v. Apfel*, 143 F.3d 1134, 1137 (8th Cir. 1998). Because an administrative hearing is a non-adversarial proceeding, the ALJ must develop the record fully and fairly in order that "'deserving claimants who apply for benefits receive justice.'" *Wilcutts*, 143 F.3d at 1138 (quoting *Battles v. Shalala*, 36 F.3d 43, 44 (8th Cir. 1994)).

The record demonstrates that the ALJ considered both the opinions of Fielder and Dr. Notch and gave Fielder's opinion "considerable" weight. Furthermore, at step three of the sequential test, the ALJ noted that Durgin had "moderate difficulties in maintaining

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<sup>11</sup> *Id.* at 256-73.

concentration, persistence, or pace.”<sup>12</sup> The ALJ’s RFC determination, however, lacked any discussion of Fielder’s and Dr. Notch’s opinions, or his own findings of Durgin’s limitations with regard to concentration, persistence, or pace. Therefore, the Court finds that the ALJ’s RFC assessment was not based on all of the relevant medical evidence. *See Guilliams*, 393 F.3d at 803; *Roberts*, 222 F.3d at 469. Accordingly, the Court determines that remand is appropriate. On remand, the ALJ must fully and fairly develop the record with regard to the opinions of Fielder and Dr. Notch. Specifically, the ALJ shall explain his reasons for accepting or rejecting Fielder’s and Dr. Notch’s opinions on Durgin’s limitations as to concentration, persistence, and pace. The ALJ should also explain the effect those limitations may or may not have on Durgin’s RFC.

## ***2. Frequent Absences***

Durgin argues that “[t]he ALJ failed to make any findings regarding [her] need for absences and failed to make any findings as whether [her] absences were related to one of her medically determinable impairments.”<sup>13</sup> Durgin supports her argument by referring to her experience of working in the vocational program at Goodwill Industries. When she started at Goodwill, Durgin worked three days per week for four hours at a time. Because of attendance problems, she was reduced to working two days per week. Due to further attendance problems, she was reduced to working one day per week<sup>14</sup>.

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<sup>12</sup> *See* Administrative Record at 24.

<sup>13</sup> *See* Durgin’s Brief at 21.

<sup>14</sup> *See* Administrative Record at 197 (Durgin’s 2005 Goodwill Industries Final Report provided: “[Durgin’s] attendance was very poor during the 11 months that she was receiving services. An attendance contract was put into place in June, and a second one [was] put into place in October. [Durgin] started out working three days per week in March 2005 and was down to one day per week by November 2005. It was difficult for Goodwill staff to support [Durgin in her desire to obtain community employment] due to her poor attendance.”).

Durgin failed to note, however, that she voluntarily exited the Goodwill work program because she did not want to work.<sup>15</sup> Furthermore, Durgin's Goodwill Industries Final Report provides that she had "a very negative attitude and motivation to work."<sup>16</sup> Moreover, Durgin offers no evidence that her absences were the result of any medical impairments. Social Security benefits are not awarded for individuals who are unemployed because they do not wish to work. *See* 20 C.F.R. § 404.1566(c)(8). Because there is no medical evidence to support Durgin's "need" for frequent absences, and it appears from the record that her absences are the result of not wanting to work, the Court determines that the ALJ did not fail in his duty to develop the record fully and fairly by not considering Durgin's "need" for frequent absences. *See Cox*, 495 F.3d at 618.

### ***3. Durgin's Need for further Vocational Training***

Durgin argues that the ALJ failed to consider evidence from a vocational counselor at Goodwill, Sarah Gray ("Gray"), suggesting that Durgin needed further vocational training before she could perform competitive employment. Specifically, Durgin refers to a Goodwill Industries Work Evaluation Report, dated August 16, 2000. In the report, Gray opined:

I feel [Durgin] would benefit from continued training by completing a Work Adjustment Training Period at a training facility like Goodwill Industries. During this Work Adjustment Training Period[, Durgin] could focus on the above-related behaviors that she needs to continue to improve upon before she is ready for community employment.

[Durgin] has some good work skills that are needed for a community job but she still has areas that need improvement before [she] is ready for community placement. When [she] is ready for community employment she would need the assistance of an Adult Service provider such as Goodwill Industries, who

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<sup>15</sup> *See* Administrative Record at 197 ("[Durgin] has voluntarily exited programming due to not wanting to work.").

<sup>16</sup> *Id.*

could assist her in job seeking skills, filling out applications, interviewing, and talking with potential employers about any necessary job accommodations. [Durgin] would also need job coaching and follow along support.

(Administrative Record at 107) Durgin cites *Simons v. Sullivan*, 915 F.2d 1223 (8th Cir. 1990) and *Atkinson v. Bowen*, 864 F.2d 67 (8th Cir. 1988) for the proposition that “the Eighth Circuit has reversed the denial of benefits where a claimant needs rehabilitative and vocational counseling before she, in fact, would be able to obtain gainful employment.”<sup>17</sup>

The Commissioner agrees that the facts in this case are “somewhat” similar to the facts in *Simons* and *Atkinson*. Similar to this case, in *Simons* and *Atkinson*, there was vocational evidence that both claimants needed additional vocational training before they would be able to perform competitive employment. See *Simons*, 915 F.2d at 1225; *Atkinson*, 864 F.2d at 70-71. Both cases also held, however, that a claimant is not entitled to benefits if he or she refuses vocational rehabilitation services or fails to make a good faith attempt to seek rehabilitation. See *Simons*, 915 F.2d at 1225, n. 3 (“As in *Atkinson*, this award should be made contingent on the claimant’s good faith attempt to seek rehabilitation.”); *Atkinson*, 864 F.2d at 71 (benefits may be terminated if the claimant “refuses rehabilitation services or fails to make a good faith attempt to seek rehabilitation.”).

Here, Durgin voluntarily quit working at the Goodwill work program in 2000. Additionally, there is no evidence in the record that Durgin sought vocational rehabilitation services after quitting the program in 2000. Durgin worked at the Goodwill program again in 2005. On February 21, 2006, she exited the program “due to not wanting to work.”<sup>18</sup> Again, there is no evidence in the record which suggests she ever sought vocational rehabilitation services after she exited the program in 2006. When a claimant refuses vocational rehabilitation services or fails to make a good faith effort to seek rehabilitation,

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<sup>17</sup> See Durgin’s Brief at 23.

<sup>18</sup> See Administrative Record at 197.

the claimant is not entitled to Social Security benefits. *See Simons*, 915 F.2d at 1225, n.3; *Atkinson*, 864 F.2d at 71. Because the record lacks any evidence of Durgin seeking vocational rehabilitation, the Court determines that the ALJ did not fail in his duty to develop the record fully and fairly by not discussing Gray’s 2000 Goodwill Industries Work Evaluation Report in his decision. *See Cox*, 495 F.3d at 618.

#### **4. Credibility Determination**

Durgin argues that the ALJ failed to properly consider the witness testimony of Linda Voll, a social worker who works with Durgin on a regular basis. Voll testified at the administrative hearing held on June 20, 2006. According to Voll, Durgin had “[a] lot of anxiety. . . . [Durgin d]efinitely [had] lack of motivation. Her depression had set in and she would just want to sleep all day[.] . . .”<sup>19</sup> She also opined that Durgin needed a lot more work to achieve successful independent living. In his decision, the ALJ briefly addresses Voll’s testimony, but provides no credibility determination for her testimony. Assessment of the credibility of witness testimony lies within the province of the ALJ. *Siemers v. Shalala*, 47 F.3d 299, 302 (8th Cir. 1995). Deference is given to an ALJ’s witness credibility determination, if his or her determination is supported by good reasons and substantial evidence. *Vester*, 416 F.3d at 889 (citation omitted). The Court finds that by failing to make a credibility determination, the ALJ did not fully and fairly develop the record with regard to Voll’s testimony. *See Cox*, 495 F.3d at 618. Therefore, the court determines that remand is appropriate. On remand, the ALJ shall fully consider Voll’s testimony and include a credibility determination in his decision.

#### **C. Reversal or Remand**

The scope of review of the Commissioner’s final decision is set forth in 42 U.S.C. § 405(g) which provides in pertinent part:

The court shall have the power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or

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<sup>19</sup> *See Administrative Record* at 359.

reversing the decision of the Secretary, with or without remanding the cause for a rehearing.

42 U.S.C. § 405(g). The Eighth Circuit Court of Appeals has stated that:

Where the total record is overwhelmingly in support of a finding of disability and the claimant has demonstrated his [or her] disability by medical evidence on the record as a whole, we find no need to remand.

*Gavin v. Heckler*, 811 F.2d 1195, 1201 (8th Cir. 1987); *see also Beeler v. Brown*, 833 F.2d 124, 127 (8th Cir. 1987) (finding reversal of denial of benefits was proper where “the total record overwhelmingly supports a finding of disability”); *Stephens v. Sec’y of Health, Educ., & Welfare*, 603 F.2d 36, 42 (8th Cir. 1979) (explaining that reversal of denial of benefits is justified where no substantial evidence exists to support a finding that the claimant is not disabled). In the present case, the Court concludes that the medical records as a whole do not “overwhelmingly support a finding of disability.” *Beeler*, 833 F.2d at 127. Instead, the ALJ simply failed to fully and fairly develop the record with regard to Fielder’s and Dr. Notch’s medical opinions and Voll’s witness testimony. Accordingly, the Court finds that remand is appropriate.

## **VI. CONCLUSION**

The Court concludes that this matter should be remanded to the Commissioner for further proceedings. On remand, the ALJ should develop the record fully and fairly with regard to the opinions of Fielder and Dr. Notch. Specifically, the ALJ shall explain his reasons for accepting or rejecting Fielder’s and Dr. Notch’s opinions on Durgin’s limitations as to concentration, persistence, and pace. The ALJ should also explain the effect those limitations may or may not have on Durgin’s RFC. Finally, the ALJ shall also fully consider Voll’s witness testimony and make a credibility determination as to her testimony.

**VII. ORDER**

For the foregoing reasons, it is hereby **ORDERED**:

This matter is **REVERSED** and **REMANDED** to the Commissioner of Social Security pursuant to sentence four of 42 U.S.C. § 405(g), for further proceedings as discussed herein.

DATED this 8<sup>th</sup> day of May, 2008.



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**JON STUART SCOLES**  
United States Magistrate Judge  
NORTHERN DISTRICT OF IOWA