

TO BE PUBLISHED

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

KENNETH R. BAUERLY,

Plaintiff,

vs.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

No. C13-4048-MWB

**REPORT AND
RECOMMENDATION**

Plaintiff Kenneth Bauerly seeks judicial review of a final decision of the Commissioner of Social Security (the Commissioner) denying his application 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). Bauerly 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 affirmed.

I. BACKGROUND

Bauerly was born in 1969 and previously worked as a garbage collector, lawn service worker, pest control specialist, furniture mover, magazine printing laborer, poultry farm owner/manager, pump assembler and meat packer. AR 38, 314. He protectively filed for DIB and SSI on November 17, 2010, alleging a disability onset date of July 28, 2009. AR 10. Bauerly alleged disability due to anxiety, depression, COPD, bi-polar, schizophrenia, left rotator cuff and broken ankle. AR 256. His claims were

denied initially and on reconsideration. AR 94-127. Bauerly requested a hearing before an Administrative Law Judge (ALJ) and on April 17, 2012, ALJ Christel Ambuehl held a hearing during which Bauerly, his wife, and a vocational expert (VE) testified. AR 34-93.

On May 31, 2012, the ALJ issued a decision finding Bauerly was not disabled since July 28, 2009. AR 10-23. Bauerly sought review of this decision by the Appeals Council, which denied review on March 20, 2013. AR 1-3. The ALJ's decision thus became the final decision of the Commissioner. 20 C.F.R. §§ 404.981, 416.1481.

On May 22, 2013, Bauerly 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 Social Security Act, the Commissioner follows a five-step sequential evaluation process outlined in the regulations. 20 C.F.R. §§ 404.1520, 416.920; *see Kirby v. Astrue*, 500 F.3d 705, 707 (8th Cir. 2007). First, the Commissioner will consider a claimant's work activity.

If the claimant is engaged in substantial gainful activity, then the claimant is not disabled. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i).

Second, if the claimant is not engaged in substantial gainful activity, the Commissioner looks to see “whether the claimant has a severe impairment that significantly limits the claimant’s physical or mental ability to perform basic work activities.” *Dixon v. Barnhart*, 353 F.3d 602, 605 (8th Cir. 2003). “An impairment is not severe if it amounts only to a slight abnormality that would not significantly limit the claimant’s physical or mental ability to do basic work activities.” *Kirby*, 500 F.3d at 707; *see* 20 C.F.R. §§ 404.1520(c), 404.1521(a), 416.920(c), 416.921(a).

The ability to do basic work activities is defined as “the abilities and aptitudes necessary to do most jobs.” 20 C.F.R. §§ 404.1521(b), 416.921(b). These abilities and aptitudes include (1) physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; (2) capacities for seeing, hearing, and speaking; (3) understanding, carrying out, and remembering simple instructions; (4) use of judgment; (5) responding appropriately to supervision, co-workers, and usual work situations; and (6) dealing with changes in a routine work setting. *Id.* §§ 404.1521(b)(1)-(6), 416.921(b)(1)-(6); *see Bowen v. Yuckert*, 482 U.S. 137, 141, 107 S. Ct. 2287, 2291 (1987). “The sequential evaluation process may be terminated at step two only when the claimant’s impairment or combination of impairments would have no more than a minimal impact on her ability to work.” *Page v. Astrue*, 484 F.3d 1040, 1043 (8th Cir. 2007) (internal quotation marks omitted).

Third, if the claimant has a severe impairment, then the Commissioner will consider the medical severity of the impairment. If the impairment meets or equals one of the presumptively disabling impairments listed in the regulations, then the claimant is considered disabled, regardless of age, education, and work experience. 20 C.F.R. §§ 404.1520(a)(4)(iii), 404.1520(d), 416.920(a)(4)(iii), 416.920(d); *see Kelley v. Callahan*, 133 F.3d 583, 588 (8th Cir. 1998).

Fourth, if the claimant's impairment is severe, but it does not meet or equal one of the presumptively disabling impairments, then the Commissioner will assess the claimant's 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 December 31, 2014.
- (2) The claimant has not engaged in substantial gainful activity since July 28, 2009, the alleged onset date (20 CFR 404.1571 *et seq.*, and 416.971 *et seq.*).
- (3) The claimant has the following severe impairments: median and ulnar right claw hand; partial rotator cuff tear with impingement; acromioclavicular joint arthritis status post scope with debridement of a superficial tear; subacromial decompression, distal clavicle excision; advanced tibiotalar degenerative change (Status post left ankle hardware removal, tarsal tunnel release, ankle arthroscopy); bipolar disorder; panic disorder; attention deficit hyperactivity disorder; asthma; obesity (20 CFR 404.1520(c) and 416.920(c)).
- (4) The claimant does not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and 416.926).
- (5) After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to perform less than the full range of sedentary work as defined in 20 CFR 404.1567(a) and 416.967(a) except Claimant can occasionally lift or carry 10 pounds, frequently lift or carry less than

10 pounds, stand or walk (with normal breaks) for a total of 2 hours out of an 8-hour work day, sit (with normal breaks) for a total of 6 hours out of an 8-hour work day. Claimant is limited to occasionally climbing ramps, stairs[,] ladders, ropes and scaffolds. Claimant is limited to no overhead reaching with left upper extremity. Claimant's fingering and handling is limited to occasionally in right upper extremity. Claimant has no limitations on fingering or handling with the left upper extremity. Claimant has no other manipulative, visual or communicative limitations. Claimant is limited to avoiding exposure to fumes, dust, odors, gasses and areas with poor ventilation. Claimant is able to understand, remember and carry out simple and detailed instructions. Claimant cannot perform complex instructions. Claimant is limited to brief and superficial contact with coworkers, supervisors and the general public.

- (6) The claimant is unable to perform any past relevant work (20 CFR 404.1565 and 416.965).
- (7) The claimant was born on February 19, 1969 and was 40 years old, which is defined as a younger individual age 18-44, 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 July 28, 2009, through the date of this decision (20 CFR 404.1520(g) and 416.920(g)).

AR 12-22.

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

Bauerly argues the ALJ’s decision is not supported by substantial evidence for the following reasons:

- I. The ALJ Failed to Properly Evaluate the Medical Opinions of Dr. John Hilsabeck and Dr. Phinit Phisitkul Regarding Mr. Bauerly’s Extremely Limited Ability to Grip and Grasp and to Stand and Walk Prior to Surgery in January 2012.
- II. The ALJ Failed to Identify Inconsistencies in the Record as a Whole Before Discounting Mr. Bauerly’s Subjective Allegations.

III. The ALJ's Decision Is Not Supported by Substantial Vocational Testimony as the Vocational Expert's Testimony is Inconsistent with SSR 96-9P and the Dictionary of Occupational Titles.

I will discuss each of these arguments separately below.

A. *Evaluation of Medical Evidence*

Bauerly contends the ALJ should have given more weight to the opinion of Dr. Hilsabeck, the consultative examiner, regarding his ability to stand and walk. He argues it was error for the ALJ to give more weight to the treatment notes of Bauerly's surgeon, Dr. Phisitkul, because he did not evaluate Bauerly until September 2011, which is more than two years after Bauerly's alleged onset date. Moreover, Bauerly contends the opinions of the two doctors are consistent prior to Bauerly's surgery in January 2012. Finally, Bauerly suggests that even if Dr. Phisitkul's treatment notes support a finding of no disability after the surgery in January 2012, his treatment notes do support a finding of disability from July 28, 2009, to January 2012.

The Commissioner argues the ALJ properly gave Dr. Hilsabeck's opinion less weight because it was inconsistent with the treating physician opinions and Bauerly's lack of regular treatment. She points out that Dr. Phisitkul did not provide a medical opinion with regard to Bauerly's limitations, but simply released him to weight-bearing while he was still in a cast following his ankle surgery in January 2012.

The claimant's RFC is a medical question and the ALJ's assessment must be supported by "some medical evidence" of the claimant's ability to function in the workplace. *Lauer v. Apfel*, 245 F.3d 700, 704 (8th Cir. 2001). "It is the ALJ's responsibility to determine [the] claimant's RFC based on all the relevant evidence, including medical records, observations of treating physicians and others, and claimant's own description of her limitations." *Jones v. Astrue*, 619 F.3d 963, 971 (8th Cir. 2010) (citing *Page*, 484 F.3d at 1043). "It is the ALJ's function to resolve conflicts among the

opinions of various treating and examining physicians. The 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.” *Pearsall v. Massanari*, 274 F.3d 1211, 1219 (8th Cir. 2001).

Dr. Hilsabeck is a consultative examiner, not a treating physician, so his opinion generally does not constitute substantial evidence. *See Kelley v. Callahan*, 133 F.3d 583, 589 (8th Cir. 1998) (“The opinion of a consulting physician who examines a claimant once or not at all does not generally constitute substantial evidence.”). Dr. Hilsabeck performed a consultative examination in January 2011. AR 375-76. His opinion was based on Bauerly’s subjective statements and range of motion testing. *Id.* He made several findings with regard to limitations of the right upper extremity, and Bauerly makes no argument as to how the ALJ allegedly erred in this part of her opinion.¹ Bauerly’s argument focuses on Dr. Hilsabeck’s finding that Bauerly had difficulty standing in one place or walking for any length of time due to his ankle and contends this opinion should have been given more weight. *Id.* Dr. Phisitkul is a treating physician who performed surgery on Bauerly’s ankle in January 2012. He found Bauerly was able to bear full weight on his left ankle by April 2012. AR 19, 584. Bauerly reported soreness if he stood on it for a long period of time, but this could be treated with Tylenol. The ALJ concluded that because Dr. Phisitkul’s surgery and treatment notes were more recent than Dr. Hilsabeck’s report, they were entitled to more weight than Dr. Hilsabeck’s opinion regarding Bauerly’s ankle impairment. *Id.*

Bauerly argues that while Dr. Phisitkul’s assessment in April 2012 is more recent and does not demonstrate a disabling condition, his assessment prior to the surgery should

¹ Although Bauerly argued in his point heading that the ALJ failed to properly evaluate Dr. Hilsabeck’s opinion on Bauerly’s limited ability to grip and grasp, he failed to argue *how* the ALJ erred in this respect in his argument. In any event, I find the ALJ’s evaluation of this part of Dr. Hilsabeck’s opinion is supported by substantial evidence since she included a limitation of occasional fingering and handling with the right upper extremity in the RFC, which is consistent with other medical opinions in the record. AR 16, 19.

have been considered in evaluating whether Bauerly was disabled from July 28, 2009, to his surgery in January 2012. He points out the Commissioner may award Social Security disability benefits either on a continuing basis, or for a “closed period.” *See Harris v. Sec’y of Dept. of Health and Human Servs.*, 959 F.2d 723, 724 (8th Cir. 1992) (noting that disability is not an “all-or-nothing” proposition and disability benefits may be rewarded on either a continuing basis or “closed period” under 20 C.F.R. § 404.316). However, even within a closed period, a claimant must still meet the definition of disability which is an “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 which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A).

The Commissioner points out that Bauerly did not seek treatment for his left ankle until August 2011, at which time he complained that the pain had been worsening for the past three months. AR 539. At this examination, Bauerly indicated that he saw a doctor in January 2011 and had an x-ray of his ankle. Records from February 2011² indicate there was “[r]elatively advanced tibiotalar degenerative change,” “bony irregularity in the lateral talar dome” and the “[p]ossibility of osteochondral abnormality in this area” could not be excluded. AR 379. No definite acute fracture was evident. *Id.* Even if I gave Bauerly the benefit of the doubt and found that his ankle injury prevented him from engaging in substantial gainful activity as of February 2011, he still would not meet the 12-month durational requirement for disability because he had successful surgery on his ankle in January 2012. AR 574-75. There is no medical evidence that Bauerly’s ankle problem was severe enough to affect his ability to work prior to February 2011. The injury associated with his alleged onset date involved his left shoulder. Bauerly initially fractured his ankle in August 2000 after falling off a roof, but he had surgery and was

² Only the diagnostic imaging results dated February 2011 are in the record. There are no corresponding treatment records from January or February 2011 addressing Bauerly’s ankle pain, other than Dr. Hilsabeck’s consultative examination.

apparently able to continue working on it until it started bothering him again sometime in early 2011. AR 314, 428. Moreover, Bauerly's ankle impairment cannot be considered disabling for a "closed period" because it was amenable to treatment through surgery. *See Brown v. Barnhart*, 390 F.3d 535, 540 (8th Cir. 2004) ("If an impairment can be controlled by treatment or medication, it cannot be considered disabling."). For these reasons, I find the ALJ did not err by failing to find a "closed period" of disability from July 28, 2009, to January 2012.

I find the ALJ's evaluation of the medical evidence associated with Bauerly's advanced tibiotalar degenerative change (status post left ankle hardware removal, tarsal tunnel release, ankle arthroscopy) is supported by substantial evidence in the record as a whole. Dr. Phisitkul's treatment notes indicate Bauerly was fully weight-bearing in a boot three months after surgery. AR 584. Bauerly reported soreness upon standing for a long period of time and took Tylenol for pain control. He was otherwise happy with the results and had no complaints as of April 19, 2012. AR 582. The ALJ's limitation of standing or walking for a total of two hours out of an eight-hour work day in the RFC adequately addresses the symptoms Bauerly continues to experience with his ankle. AR 16. It was appropriate for the ALJ to give Dr. Phisitkul's post-operative treatment notes greater weight than the opinion of the consultative examiner who examined Bauerly once in January 2011 when his ankle pain was beginning to develop.

B. Claimant's Credibility

Bauerly alleges the ALJ failed to identify any inconsistencies in the record before discrediting his subjective allegations. He contends his allegations are consistent with the objective medical evidence, his daily activities and his wife's statements. The Commissioner contends the ALJ provided good reasons for discrediting Bauerly, which include inconsistencies between Bauerly's allegations and his work history, the objective medical evidence and the successfulness of treatment.

The standard for evaluating the credibility of a claimant's subjective complaints is set forth in *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984). The ALJ must consider the claimant's daily activities; duration, frequency and intensity of pain; dosage and effectiveness of medication; precipitating and aggravating factors; and functional restrictions. *Polaski*, 739 F.2d at 1322. The claimant's work history and the absence of objective medical evidence to support the claimant's complaints are also relevant. *Wheeler v. Apfel*, 224 F.3d 891, 895 (8th Cir. 2000). The ALJ does not need to explicitly discuss each factor as long as he or she acknowledges and considers the factors before discrediting the claimant's subjective complaints. *Goff*, 421 F.3d at 791. "An ALJ who rejects [subjective] complaints must make an express credibility determination explaining the reasons for discrediting the complaints." *Singh v. Apfel*, 222 F.3d 448, 452 (8th Cir. 2000). The court must "defer to the ALJ's determinations regarding the credibility of testimony, so long as they are supported by good reasons and substantial evidence." *Guilliams v. Barnart*, 393 F.3d 798, 801 (8th Cir. 2005).

The ALJ summarized Bauerly's subjective allegations contained in his testimony at the administrative hearing, his function reports and a pain questionnaire. AR 17. She found that his allegations were not credible to the extent they were inconsistent with the RFC she provided and inconsistent with the medial evidence and other evidence in the record. She partly discredited Bauerly's allegation that he could not do much of anything with his right arm after he fell through a plate glass window in 1990 based on evidence in the record demonstrating his surgeries, follow up treatment and physical therapy for this injury were successful. AR 18. She also reasoned that his treatment plan allowed him to resume work and he had worked a number of years following this injury. *Id.* He was also able to use his right hand to eat and write, which the ALJ found inconsistent with his allegation that he had "no power or dexterity in his right arm." AR 17-18. The ALJ credited his allegations to the extent he had weakness in his right arm and provided a limitation of occasional fingering and handling with his right upper extremity in the RFC. AR 16.

In evaluating allegations associated with Bauerly's left upper extremity, the ALJ noted that in July 2009, he fell down stairs while at work and suffered a left shoulder rotator cuff tear with acromioclavicular joint arthritis and secondary impingement for which he had surgery. AR 18. She observed that post-surgical treatment notes indicated he was asymptomatic and had full range of motion in his left shoulder by April 2010. She gave great weight to the opinions of Dr. Wilkerson and Dr. Stoken concerning Bauerly's left upper extremity impairment. Dr. Wilkerson found Bauerly had a 10 percent upper extremity impairment which converted to an overall 6 percent permanent body impairment. AR 19, 406. Dr. Stoken found his upper extremity impairment was 13 percent which converted to an 8 percent overall body impairment. AR 19, 412. Dr. Stoken also noted Bauerly would need to use common sense when working at or above shoulder level and lifting more than 30 pounds on a frequent basis. *Id.* The ALJ credited Bauerly's allegations to the extent that he could perform no overhead reaching with his left upper extremity. AR 16.

As for Bauerly's left ankle, the ALJ discredited Bauerly's allegations that he could barely walk and could only walk one block or walk or stand five to ten minutes before needing a rest. AR 17. This was based on Dr. Phisitkul's treatment notes, which indicated he was able to bear full weight on his left ankle and only experienced soreness after standing on it for a long time. AR 19. She also discredited Bauerly's allegation that he experienced "unmanageable pain" in his left ankle as the treatment notes indicated he was able to treat his soreness with Tylenol. AR 17, 19. To accommodate the soreness with long periods of standing, the ALJ included a limitation of standing or walking for a total of two hours out of an eight-hour work day and sitting for six hours out of an eight-hour work day. AR 16.

With regard to Bauerly's mental impairments, the ALJ did not fully credit Bauerly's allegations that they prevented him from performing all work. She noted that his mood was stabilized in January 2010, and although he had had periodic setbacks since then as adjustments were made to his medications, these were largely situational in nature,

such as the death of Bauerly's mother. AR 19. The ALJ also noted his GAF scores ranged from 50 to 60, which suggest moderate symptoms. She also considered his daily activities, which included household chores, making meals, grocery shopping, driving six to seven days a week, fishing and going out in public on his own. *Id.* She found all these activities to be inconsistent with Bauerly's assertions of isolation and paralyzing fear of going out and being around people. *Id.* However, the ALJ did provide limitations in the RFC that Bauerly was able to understand, remember and carry out simple and detailed instructions, but not complex instructions, and he was limited to brief and superficial contact with coworkers, supervisors and the general public. AR 16.

Finally, in considering Ms. Bauerly's third party function report and testimony, the ALJ noted it was consistent with Bauerly's own statements. She stated that she gave Ms. Bauerly's statements weight to the extent they were consistent with the RFC, but ultimately gave greater weight to Bauerly's treatment records which reflected his progress towards mood stabilization. AR 20.

I find that the ALJ identified appropriate inconsistencies between Bauerly's subjective allegations and other evidence in the record and credited his allegations to the extent they were consistent with the medical and other evidence in the record. Because the ALJ did not base her credibility determination solely on a finding that Bauerly's allegations were not supported by the objective medical evidence, but identified other legitimate inconsistencies, I find the ALJ provided good reasons supported by substantial evidence in the record as a whole for discrediting Bauerly's allegations of disabling impairments.

C. VE Testimony

Bauerly argues the ALJ failed to meet her burden at Step Five of proving there is other work in the national economy Bauerly can perform because there is a discrepancy between the VE's testimony and the Dictionary of Occupational Titles (DOT). The

discrepancy is that the DOT does not specify whether the jobs require use of one or both hands and the VE did not resolve this. Bauerly's RFC provides that he is limited to no overhead reaching with his left upper extremity and fingering and handling is limited to occasionally with his right upper extremity. AR 16. He has no fingering or handling limitations with his left upper extremity. *Id.* Bauerly contends the VE failed to adequately address this conflict and that his testimony is inconsistent with Social Security Ruling (SSR) 96-9p, which provides that most unskilled sedentary jobs require good use of both hands and fingers.

In response, the Commissioner argues an individual limited to sedentary work with a manipulative limitation does not necessarily make him or her disabled according to SSR 96-9p. The Commissioner contends the ruling indicates a manipulative limitation simply results in an erosion of the sedentary occupational base. She argues the VE's testimony provided a proper basis for the ALJ to conclude that Bauerly could perform other work available in the national economy.

The Commissioner has the burden at step five to prove "the claimant is able to perform other work in the national economy in view of her age, education, and work experience." *Harris v. Barnhart*, 356 F.3d 926, 929 (8th Cir. 2004). The Commissioner may use a VE's response to a properly formulated hypothetical question to show that jobs exist in significant numbers for a person with the claimant's RFC. *See* 20 C.F.R. §§ 404.1566(e), 416.966(e); *Guilliams*, 393 F.3d at 804.

The ALJ provided the following hypothetical to the VE:

I'd like you to assume a hypothetical individual of the claimant's age and education with the past jobs that you described. Further assume that the individual's limited to the following: the individual can occasionally lift and/or carry 20 pounds, frequently lift and/or carry 10 pounds, stand and/or walk with normal breaks for total of about six hours in an eight hour work day, sit with normal breaks for a total of about six hours in an eight hour work day. The individual can occasionally climb ramps and stairs and occasionally climb ladders, ropes or scaffolds. The individual should have

no overhead reaching with his left arm. There are no limitations on reaching with right arm. The individual's fingering and handling on the right would be limited to occasionally. The left has no limitation. There is no visual or communicative limitations. The individual should avoid exposure to fumes, odors, dust, gases, and poor ventilation. And the mental limitations: the individual can understand, remember, and carry out simple and detailed instructions. He cannot do complex instructions. The individual would be limited to brief an[d] superficial contact with coworkers, supervisors, and the general public.

AR 87. The VE testified Bauerly could not perform any of his past work with these limitations, but he could perform work as a garment sorter, motel or hotel housekeeper and shipping and receiving clerk. AR 88. The ALJ asked if his testimony was consistent with the DOT and the VE said yes, with one exception. He noted the DOT did not specify whether the handling and fingering required in these jobs was with one or both hands. However, the VE stated that as long as the person could do the work with one hand, he or she should be able to do that job. *Id.* The ALJ then modified the hypothetical to include limitations of lifting 10 pounds occasionally and less than 10 pounds frequently and standing and walking two hours out of an eight-hour work day. AR 89. This is the RFC that the ALJ ultimately adopted. AR 16. The VE testified that there were sedentary unskilled jobs Bauerly could perform such as surveillance system monitor, government clerk and credit clerk. AR 89. The VE confirmed that other than the hand issue he had addressed earlier, his testimony was consistent with the DOT. *Id.*

Bauerly points out that the DOT descriptions for the jobs identified by the VE³ all require a similar level of manual and finger dexterity, which is Level 3 (medium degree of aptitude ability) or Level 4 (low degree of aptitude ability). Doc. No. 9-1 at 3, 8, 12

³ Bauerly points out that the VE's DOT numbers do not match up with some of the jobs he identified. For instance, the job of credit clerk is not assigned to DOT 237.367-014, but DOT 205.367-022. DOT 237.367-014 describes the job of call-out operator. Also, the DOT number the VE provided for "Government Clerk" is described as "Election Clerk" in the DOT. I find these inaccuracies are not so significant as to affect the VE's testimony or the ALJ's decision.

and 16. However, Bauerly fails to point out the frequency of handling and fingering required in these jobs, which is also noted in the DOT descriptions. For credit clerk, handling and fingering is described as frequent, existing from one-third to two-thirds of the time. Doc. No. 9-1 at 4. For government clerk, handling and fingering is described as occasionally, existing up to one-third of the time. Doc. No. 9-1 at 8. For surveillance system monitor, fingering and handling is not present and does exist in that job. Doc. No. 9-1 at 16. While Bauerly is correct that the DOT does not specify whether handling and fingering in these jobs requires use of both hands or can be done with one, I find this to be immaterial. Even if these three jobs did require use of both hands for handling and fingering, only one of the jobs (credit clerk) would be eliminated by Bauerly's limitation of occasional handling and fingering with his right hand as described in the RFC. He could still perform the work of government clerk, which requires occasional handling and fingering, and surveillance system monitor, which requires no handling and fingering.

As for SSR 96-9p, this ruling states:

Manipulative limitations: Most unskilled sedentary jobs require good use of both hands and the fingers; i.e., bilateral manual dexterity. Fine movements of small objects require use of the fingers; e.g., to pick or pinch. Most unskilled sedentary jobs require good use of the hands and fingers for repetitive hand-finger actions.

Any *significant* manipulative limitation of an individual's ability to handle and work with small objects with both hands will result in a significant erosion of the unskilled sedentary occupational base. . . . When the limitation is less significant, especially if the limitation is in the non-dominant hand, it may be useful to consult a vocational resource.

SSR 96-9p, 1996 WL 374185 (July 2, 1996) (emphasis in original). I agree with the Commissioner that this ruling does not suggest that a significant manipulative limitation in addition to unskilled sedentary work leads to a finding of disability as Bauerly

contends. The ruling plainly states a significant manipulative limitation will result in a significant erosion of the unskilled sedentary occupational base.

The ALJ properly obtained VE testimony to consider whether Bauerly could perform any work in the national economy with the limitations provided in the RFC. The VE recognized that the DOT did not clarify whether the jobs he identified required handling and fingering with one or both hands. AR 88. However, he testified that as long as the person could do the work with one hand, he or she should be able to perform the job. *Id.* While it would have been ideal for the ALJ to clarify whether the handling and fingering requirements for work as a surveillance system monitor, government clerk and credit clerk could be done with one hand, I find that this was not necessary, especially given that the DOT descriptions would potentially preclude only one of the jobs the VE identified if the handling and fingering requirements involved the use of both hands. For these reasons, I find the ALJ appropriately relied on the VE testimony in finding that Bauerly could perform other work available in the national economy.

VI. CONCLUSION AND RECOMMENDATION

For the reasons set forth herein, I RESPECTFULLY RECOMMEND that the Commissioner's determination that Bauerly was not disabled be **affirmed** and judgment be entered against Bauerly and in favor of the Commissioner.

Objections to this Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b) must be filed within fourteen (14) days of the service of a copy of this Report and Recommendation. Objections must specify the parts of the Report and Recommendation to which objections are made, as well as the parts of the record forming the basis for the objections. *See* Fed. R. Civ. P. 72. Failure to object 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 11th day of March, 2014.



LEONARD T. STRAND
UNITED STATES MAGISTRATE JUDGE