

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

LISA J. SCHLABACH,

Plaintiff,

vs.

MICHAEL J. ASTRUE, Commissioner
of Social Security,

Defendant.

No. C07-0094

RULING ON JUDICIAL REVIEW

TABLE OF CONTENTS

I.	INTRODUCTION.	2
II.	PRIOR PROCEEDINGS.	2
III.	PRINCIPLES OF REVIEW.	3
IV.	FACTS.	4
	A. Schlabach's Education and Employment Background.	4
	B. Administrative Hearing Testimony.	4
	1. Schlabach's Testimony.	4
	2. William Schlabach's Testimony.	8
	3. Dr. Ascheman's Testimony.	9
	4. Vocational Expert's Testimony.	10
	C. Schlabach's Medical History.	11
V.	CONCLUSIONS OF LAW.	26
	A. ALJ's Disability Determination.	26
	B. Whether the ALJ Fully and Fairly Developed the Record.	28
	1. The Opinions of Dr. Findlater.	29
	2. The Opinions of Dr. Hall.	36
	3. The Opinions of Toni Neta.	37
	4. Medical Evidence.	38
	C. Reversal or Remand.	39
VI.	CONCLUSION.	40
VII.	ORDER.	40

I. INTRODUCTION

This matter comes before the Court on the Complaint (docket number 3) filed by Plaintiff Lisa J. Schlabach on September 26, 2007, requesting judicial review of the Social Security Commissioner's decision to deny her application for Title II disability insurance benefits. Schlabach asks the Court to reverse the decision of the Social Security Commissioner ("Commissioner") and order the Commissioner to provide her disability insurance benefits. In the alternative, Schlabach requests the Court to remand this matter for further proceedings.

II. PRIOR PROCEEDINGS

On March 17, 2003, Schlabach applied for disability insurance benefits. In her application, Schlabach alleged an inability to work since June 17, 1999, due to depression, anxiety, fibromyalgia, post-traumatic stress disorder, and anxiety attacks. Schlabach's application was denied on May 29, 2003. On October 21, 2003, her application was denied on reconsideration. On December 9, 2003, Schlabach requested an administrative hearing before an Administrative Law Judge ("ALJ"). On March 16, 2005, Schlabach appeared with counsel before ALJ John P. Johnson. Schlabach, her husband, William Schlabach, Dr. Philip Ascherman, Ph.D., an impartial medical expert, and vocational expert Marian Jacobs testified at the hearing. In a decision dated August 4, 2005, the ALJ denied Schlabach's claim. The ALJ determined that Schlabach was not disabled and not entitled to disability insurance benefits because she was functionally capable of performing her past relevant work as a buffet setter, cashier/stocker, and head cashier. Schlabach appealed the ALJ's decision. On July 27, 2007, the Appeals Council denied Schlabach's request for review. Consequently, the ALJ's August 4, 2005 decision was adopted as the Commissioner's final decision.

On September 26, 2007, Schlabach filed this action for judicial review. The Commissioner filed an answer on November 30, 2007. On January 16, 2008, Schlabach 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 she could perform her past relevant work. On

April 11, 2008, the Commissioner filed a responsive brief arguing the ALJ's decision was correct and asking the Court to affirm the ALJ's decision. Schlabach filed a reply brief on April 22, 2008. On October 19, 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

Title 42, United States Code, Section 405(g) provides that the Commissioner's final determination following an administrative hearing not to award disability insurance benefits is subject to judicial review. 42 U.S.C. § 405(g). 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. Schlabach's Education and Employment Background

Schlabach was born in 1963. She is a high school graduate. The record contains a detailed earnings report for Schlabach. She worked at various jobs between 1986 and 1999. At the hearing, Schlabach testified that she mainly worked in retail sales and at convenience stores. He has had experience as a factory worker, general laborer, bookkeeper, motel housekeeper, and teacher's aide. Her highest earnings were \$15,172.33 in 1996, and her lowest earnings were \$900.00 in 1999. Schlabach has had no earnings from 2000 to the present. At the administrative hearing, Schlabach's attorney asked Schlabach why she stopped working in 1999:

Q: What happened in [1999] that you stopped working?

A: I was working in a convenience store at night. We were closing up, and one of the workers under me didn't get an ice door drawer shut. So I walked back in the kitchen, and the floor was wet, and I fell on the floor, and my legs went one way and separated, and my left knee inside I landed on and I hurt it really bad. . . . I waited until morning, and when I told [management] what had happened, and that I would have to have a few days off work, they asked for the store keys back.

Q: So you got fired?

A: Yeah. I guess so.

(Administrative Record at 564-65.)

B. Administrative Hearing Testimony

1. Schlabach's Testimony

At the administrative hearing, Schlabach's attorney first questioned Schlabach about her difficulty with anxiety attacks. When she was working, Schlabach started having anxiety attacks in front of her co-workers and supervisors, so she met with a psychologist and a psychiatrist and was treated with medication. Schlabach testified that she continued

to suffer from anxiety and took Zoloft in the morning, Lexapro at night, and Florazepam three times per day. She also takes Seroquil when she gets too overwhelmed and has a bad anxiety attack. According to Schlabach, her anxiety problems cause her difficulty with thinking and concentrating.

Schlabach and her attorney further discussed her anxiety and other emotional problems. Schlabach testified:

A: When I get a lot of anxiety and depression at the same time I withdraw and I just, I don't do anything because I cannot function to do anything.

Q: And how often does that happen?

A: Oh, it just depends on how my weeks and my days are going. I have anxiety almost every time I leave the house. I kind of got it under control that nobody is going to hurt me, and I shouldn't be scared. . . .

Q: . . . Can you describe [your decreased energy]?

A: Well, it is all the medication I take. The side effects really knock me down a lot.

Q: How would you describe your needs in general from day to day?

A: I'm kind of stressed but able to function.

(Administrative Record at 567-68.)

Schlabach's attorney next asked Schlabach to describe her problems with fibromyalgia. Schlabach testified that she has a constant burning sensation in her arms, neck, back, and legs. According to Schlabach, her pain is a 4 or 5 on a ten-point scale with medicine. She described her fatigue as moderate. Specifically, she testified "[s]ome days I couldn't function, but after a few hours of doing stuff like a load of laundry I get achy. I feel the burning coming on. I can't stand for long periods of time just because the muscles get to burning so bad."¹ When the burning in her muscles gets bad, Schlabach lays down and rests. She testified that she has to lay down one to three times each day.

Schlabach also testified that she has difficulty sleeping at night. According to Schlabach, she takes medicine before going to sleep, and the medication helps her sleep

¹ See Administrative Record at 569-70.

for five to six hours. After five to six hours, her legs start aching and twitching and her arms go numb. As a result, she lays down each day and rests for one to two hours. Schlabach noted that her daughter (3 years old) is in daycare for six hours per day, four days per week. Schlabach explained that she had to put her daughter in daycare “so that I would get rest, and be able to relax, and kind of tend to myself on the days that I need to ice and I need to put heat on, and to give her time away from me.”²

Schlabach’s attorney asked Schlabach to describe her typical day. Schlabach testified that she wakes up early in the morning and usually gets out of bed at 6:30 a.m. She immediately takes medicine and then waits one hour to eat breakfast. After breakfast she takes more medicine. She also gets her three year old daughter up and ready to go to daycare. When Schlabach returns home from taking her daughter to daycare, she generally picks things up around the house, puts dishes away, and does one load of laundry. She testified that she has more strength in the morning and tends to lose her strength as the day goes on. Schlabach also cooks simple meals that don’t take long to make. She is able to drive a car.

The ALJ also questioned Schlabach. The ALJ and Schlabach discussed her functional capabilities:

Q: Now if you were going to go out on the street and walk down the street, how far could you walk?

A: Probably about two blocks.

Q: What type of problems would you have then?

A: My hips and my knees, and my low back are like frozen to where my legs don’t walk like they should walk.

Q: What about your standing? How long can you do that?

A: I do probably stand 30 minutes, and within 10 minutes of standing and trying to do dishes, I get that burning in my neck down my back on my right side, and it is just so overwhelming I just have to stop whatever I’m doing.

² See Administrative Record at 571.

- Q: What about climbing stairs? Does that cause you any problems?
- A: Yes. Some days I'm not able to get up the stairs or down the stairs very well.
- Q: Out of an eight hour day how many hours can you be up on your feet either walking, standing, or both?
- A: Maybe four.
- Q: What about bending, stooping, or squatting? Does that cause you any problems?
- A: Yes. It does.
- Q: What type of problems does that cause you?
- A: It gives me pain and a weakness to where I can't get myself back up again.
- Q: Do you have any problems kneeling or crawling?
- A: Yes. It bothers me to kneel because of the pain in my left knee and my hips and my low back. . . .
- Q: Any problems using your hands?
- A: Yes. My hands get stiffness and twitching, and I can't hold a pencil very long, or hold a spoon or spatula very long without it burning in my forearm, and now in my hand.
- Q: How much can you lift at a time?
- A: Less than five pounds. If I try to do more than that, it really pulls on my muscles.
- Q: Are there times when you have to lift your three year old?
- A: I have taught [her] that mommy can't pick her up any more, and that I can't hold her. So I have to sit down and she sits down with me.
- Q: Do you have any problems sitting?
- A: Yes. If I sit too long of a time, my knees and my hips and my low back get real stiff to where I have a hard time walking when I get up.
- Q: How long can you sit at a time?
- A: Probably about 30 minutes and I can start to feel it in my hips and in my knees.
- Q: And if you took that eight hours again, how many hours out of the eight hours do you think you could spend sitting?
- A: Maybe four.
- Q: Do you have any difficulty using your arms to push or pull things, or reach your arms over your head?

A: Yes. I do.
Q: What type of problems do you have with that?
A: I can't stretch my arms up over my head. I can't lift with them because it pulls on my muscles causing that burning sensation of the fibromyalgia.

(Administrative Record at 582-85.)

When asked whether she had difficulty remembering things, Schlabach responded that her mind tends to wander at times and she forgets day-to-day types of things. Schlabach also testified that she does not have difficulty understanding things. When asked whether she has problems getting along with family, neighbors, or acquaintances, Schlabach testified that she doesn't socialize much. The ALJ asked Schlabach what happens when she is in a social situation. Schlabach responded that she starts "to sweat and shake, and that is the anxiety that comes on."³ The ALJ also asked her what types of things cause her stress. Schlabach answered that important things, such as meetings, doctor appointments, trips, and gatherings with people cause her stress.

2. William Schlabach's Testimony

William Schlabach ("William") is Schlabach's husband. They have been married for fifteen years. When asked to describe Schlabach's general mood on most days, William responded "[t]hat depends on every day. There are some days that are good, and there are some days that it is just as good for me and my child to walk back out the door and let her rest and do her own thing."⁴ According to William, Schlabach has difficulties being around groups, so he and his daughter do a lot of activities without her. William also noted that Schlabach can no longer do much around the house. He testified that he mows the yard, washes the dishes, and vacuums and straighten ups the house.⁵ William

³ See Administrative Record at 587.

⁴ *Id.* at 592.

⁵ *Id.* at 594 (William testified that "I do pretty much all the housework and the vacuuming and picking up anything big, or fixing anything.").

also testified that Schlabach needs constant rest and if she over exerts herself, she is unable to do anything for a week or two. William concluded that:

It just seems like over the years it has gotten worse. It has not gotten better. I have seen her try to do things and associate with people. Even our friends, we don't have the friends we did years ago. We don't socialize that much. We do go out every now and then as a family maybe, and go in town, or go into the city 20 miles away to eat supper. I come from a large family that has a lot of big family get-togethers of 40 to 60 people that are around the area. She doesn't really usually make any of them. Every now and then she might go to one a year, and she doesn't go to more because she just doesn't want to deal with the people that I associate with. She has some friends but they are few and far in between.

(Administrative Record at 596.)

3. Dr. Ascheman's Testimony

At the hearing, Dr. Philip Ascheman, Ph.D., a licensed psychologist, provided a psychological diagnosis for Schlabach based on her hearing testimony and a review of her medical records. Dr. Ascheman diagnosed Schlabach with major depressive disorder, recurrent, and anxiety disorder, not otherwise specified which does appear in the records. Dr. Ascheman opined that Schlabach had mild restrictions of activities of daily living, mild to moderate limitations in maintaining social functioning,⁶ and mild difficulties in maintaining concentration, persistence, or pace. Dr. Ascheman further opined that Schlabach would have no limitations in: (1) understanding, carrying out, and remembering simple instructions; (2) use of judgment; (3) responding appropriately to supervision, co-workers, and usual work situations; and (4) changes in routine work settings.

⁶ Specifically, Dr. Ascheman opined that Schlabach would have “essentially no difficulties in interacting with supervisors or . . . co-workers. She may have some intermittent difficulties in high stress situations with large numbers of people in terms of social interaction.” *See* Administrative Record at 599.

4. Vocational Expert's Testimony

At the hearing, the ALJ provided vocational expert Marian Jacobs with a hypothetical for an individual who would be able to: (1) lift no more than 20 pounds, (2) routinely lift 10 pounds, (3) stand and/or walk for six hours out of an eight-hour workday, (4) sit for six hours in an eight-hour workday, and (5) occasionally bend, stoop, squat, kneel, crawl, and climb. The ALJ further noted that:

This individual is not able to do more than simple routine or repetitive work that does not require constant, very close attention to detail. [The individual] can have only occasional contact with the public, however, [the individual] can tolerate brief superficial contacts and interactions. [The individual] does require occasional supervision. [The individual] should not work at more than a regular pace, or more than a moderate level of stress[.] . . .

(Administrative Record at 610.) The vocational expert testified that under such limitations, Schlabach could perform her past relevant work as a buffet setter, cashier/stocker, and head cashier. The vocation expert testified that she could not perform her past work as a file clerk/bookkeeper or sales associate.

The ALJ provided the vocational expert with a second hypothetical with the following limitations:

[This individual] could not lift more than five pounds with standing of 30 minutes at a time. Walking of two blocks at a time, and walking or standing of four hours out of an eight hour day. Sitting for 30 minutes at a time, and sitting of four hours out of an eight hour day, with only occasional bending, stooping, squatting, kneeling, crawling, or climbing. No continuous use of foot controls. No continuous use of hand controls with the right hand. No continuous gross or fine manipulation. Only occasional work with the arms over [his or] her head. This individual is able to do only simple routine repetitive work that does not require close attention to detail. [The individual] can have only occasional contact with the public, co-workers and/or supervisors. However, [this individual] does require occasional supervision. [This

individual] should work at no more than a regular to slow pace, and no more than a mild level of stress.

(Administrative Record at 610-11.) The vocational expert testified that under such limitations, Schlabach could not perform any of her past relevant work because of the combination of standing, sitting, and walking limitations. According to the vocational expert, Schlabach could, however, under such limitations, perform the sedentary unskilled jobs of surveillance system monitor (140 positions in Iowa and 13,000 positions in the nation) and call-out operator (130 positions in Iowa and 11,000 positions in the nation).

Schlabach's attorney also presented the vocational expert with the following hypothetical:

If the person, the hypothetical person, was unable to meet competitive standards with regard to maintaining attendance and being punctual. Was unable to meet competitive standards and completing the normal work week without interruptions, and was unable to meet competitive standards without an unreasonable number breaks. Was seriously limited but not precluded in these additional areas. Sustaining a normal routine without supervision. Two, working in close proximity to others. Three, dealing with normal work stress. Four, dealing with semi-skilled work stress. Would likely miss four days of work a month. Frequently has pain affecting their attention and concentration up to two-thirds of a work day. Cannot tolerate low stress jobs. Needs to take frequent breaks more than normally scheduled breaks as much as 30 minutes at a time, or she would need to lie down. She should have very limited use of her hands, and also when she is seated, would need to elevate her legs at least to hip height. With those limitations would there be any jobs that she could perform?

(Administrative Record at 613.) The vocational expert testified that under such limitations, Schlabach could not perform any type of work.

C. Schlabach's Medical History

On August 14, 1998, Schlabach was examined by Dr. J.B. Worrell, M.D., for complaints of pain in her neck, scapula, and down the right chest wall. Dr. Worrell noted

that Schlabach was “very touchy” and “[s]he jumps all over the place with palpation of the soft tissues.”⁷ Dr. Worrell opined, however, that her spine looked normal and her neck rotations were full. Dr. Worrell further found that her:

complete metabolic panel was again normal, her CBC was normal, . . . rheumatoid arthritis factor was negative, antinuclear antibodies screening was negative, and C-reactive protein was negative.

(Administrative Record at 207.) Dr. Worrell determined that Schlabach suffered from myofascial pain syndrome. Dr. Worrell found no evidence of any neurological disease, and concluded that Schlabach’s soft tissue findings suggested fibromyalgia. Dr. Worrell treated her with medication.

On September 21, 1998, Schlabach had a follow-up appointment with Dr. Worrell. Schlabach continued to be symptomatic of fibromyalgia. Dr. Worrell noted, however, that in August 1998, he performed some soft tissue trigger point injections in Schlabach’s paraspinal area and midback which made her feel better. X-rays, also from her visit in August 1998, revealed “some evidence of mild degenerative changes, mid dorsal area, and some old Sharman’s disease at T9 and T10.”⁸ Schlabach’s cervical spine was normal. Dr. Worrell suggested exercise, continued medication, and some more soft tissue injections as treatment.

On December 4, 2002, Shlabach met with Dr. James M. Pape, M.D., complaining of back and lower extremity pain. Schlabach informed Dr. Pape that she had been diagnosed with fibromyalgia and had pain in her lower back and right lower extremity. According to Schlabach, she had no significant comfortable position and any type of activity aggravated her pain. Upon examination, Dr. Pape found:

exquisite tenderness in multiple points to palpation about the supraspinous and paraspinal musculature about the thoracic and lumbar spine. These are essentially trigger points.

⁷ See Administrative Record at 207.

⁸ See Administrative Record at 205.

[Schlabach] has decreased flexibility in forward bending, extending, extension and lateral bending with tight hamstrings noted. She does have good strength in all muscle groups with encouragement, but even just checking deep tendon reflexes, seems to trigger discomfort with [Schlabach] both about the knee and ankle. [She] did become tearful on exam.

(Administrative Record at 259.) Dr. Pape also reviewed an MRI of Schlabach's spine. Dr. Pape noted that she had no significant neural compression and some mild degenerative changes in her spine. Dr. Pape diagnosed Schlabach with a significant component of fibromyalgia. Dr. Pape recommended a conditioning program for back and abdominal strengthening, stretching, and optimization of her medications as treatment.

On December 20, 2002, Schlabach met with Dr. Michael C. March, Ph.D., a psychologist with the Cedar Centre Psychiatric Group, L.L.P. She was referred to Dr. March by her primary physician, Dr. Malcolm Findlater, M.D., for individual counseling to assist her in coping with her chronic health problems, including fibromyalgia. Dr. March's mental status examination revealed that: (1) Schlabach was well oriented; (2) her mood was dysphoric and anxious; (3) she had occasional tearfulness; (4) her attention and concentration were down; (5) her thought processes were within normal limits; (6) she had no signs of psychosis; (7) her insight was fair; and (8) her judgment and mood were reasonably good. Dr. March diagnosed Schlabach with major depressive disorder, recurrent and mild to moderate intensity. Dr. March and Schlabach agreed to a treatment plan to provide individual counseling to assist her with learning additional ways to improve her coping skills.

On December 23, 2002, Schlabach met with Dr. Steve Eyanson, a rheumatologist, for evaluation of diffuse pain on all sides of her body above and below the waist. Dr. Eyanson noted that Schlabach "startles" when she is touched on the skin. Dr. Eyanson provided the following example:

[W]hen I checked the reflex on the right knee, both legs kick out. Likewise, when I touch across the trapezius, both arms are pushed out to the side. When I asked her to touch her toes, [Schlabach] only bends a few inches, but when I have her

in a straight leg raising position, she can have a full range of motion. Her station and gait is otherwise normal. She is tender over every point touch including trigger points.

(Administrative Record at 257.) Dr. Eyanson concluded that Schlabach suffered from significant anxiety disorder and chronic myofascial pain. Dr. Eyanson recommended physical therapy with stretching and aerobic exercise as treatment. Dr. Eyanson also urged Schlabach to work with her psychologist to help improve her anxiety disorder.

On January 20, 2003, Schlabach had a counseling session with Dr. March. Schlabach reported an increase in depressed mood which she attributed to worsening pain. She acknowledged that her pain was the result of overactivity and difficulties with accepting her physical limitations. Dr. March counseled Schlabach on pacing herself and suggested that she use stretching exercises to reduce her overall pain.

On January 23, 2003, Schlabach met with Jill A. Hancock, MS, PT (“Hancock”), a physical therapist, for an initial evaluation. Schlabach’s main complaint was right back pain. She described her pain as a constant ache which burns when it flares up. Schlabach rated her pain as 5/10 on a scale of 1 to 10, with 10 being emergency room pain. Schlabach informed Hancock that her symptoms increased when she washed dishes, vacuumed, folded laundry, or sat down to do bookkeeping. Upon examination, Hancock noted that:

[Schlabach] presents with demonstration of poor scapular mobility on the right side and poor posture consisting of significantly forward shoulders with upper extremity movements. [Schlabach] is inconsistent with her complaints of pain upon upper extremity movements. With strength testing she complains of pain and weakness, however, with functional activities does not appear to have any significant upper extremity weakness. [Schlabach] also demonstrates a flinching response to palpation of the right middle trapezius, some trigger points are noted, however, no significant general muscle tightness is noted. [Schlabach’s] strength testing results are also inconsistent with variable strength demonstrated with testing.

(Administrative Record at 366.) Hancock developed a home exercise program for Schlabach as treatment.

On February 10, 2003, Schlabach had another counseling session with Dr. March. Schlabach reported a reduction in anxiety and dysphoria. Dr. March noted that Dr. Findlater had her taper off Zoloft and start Effexor for her anxiety. Dr. March opined that Schlabach was tolerating the change in medication fairly well.⁹ Dr. March further opined that:

[m]ost importantly, [Schlabach] has been making cognitive and behavioral adjustments in her efforts to pace her activity and rest within the boundaries of her medical condition, resulting in fewer increases in pain due to flare ups of her fibromyalgia. This, of course, also results in reduced anxiety secondary to pain and depression due to decreased activity.

(Administrative Record at 295.) Dr. March recommended continued monthly counseling sessions as treatment.

On April 17, 2003, Dr. March provided Disability Determination Services (“DDS”) with a letter describing his counseling treatment with Schlabach. Dr. March explained that the purpose of the counseling sessions were to assist Schlabach in utilizing cognitive and behavioral skills to reduce her symptoms of anxiety and depression and increase her functioning. Dr. March noted that Schlabach:

has shown the capacity to perform physical work (by her report she is doing about two hours of household remodeling per day at this time, despite the discomfort) provided she paces herself adequately. She participates in physical therapy on a regular basis. She has been active in raising her daughter. While she continues to experience occasional panic attacks, she has been able to manage these somewhat better with relaxation and cognitive reframing. . . . Her depression has been limited

⁹ On February 18, 2003, Schlabach met with Dr. Findlater complaining of increased anxiety. Dr. Findlater changed her dosage of Effexor to correct her increased anxiety. On March 10, 2003, Schlabach had a counseling session with Dr. March. At the counseling session, Schlabach reported that she had been “agitated and distraught since starting Effexor.” Later, Schlabach discontinued using Effexor and returned to Zoloft.

in recent months, responding fairly well to Zoloft and counseling.

[Schlabach] has the capacity to understand and learn instructions, procedures and locations. She can carry out instructions and maintain attention, concentration and pace (though occasional anxiety will likely lead to intermittent problems in these areas, I would not expect this to be a pervasive problem). . . . When she is using coping skills adequately, she can interact appropriately with supervisors, co-workers and the public. I would expect her to use good judgment and to respond appropriately to changes in the workplace.

(Administrative Record at 292-93.)

On May 26, 2003, Dr. Lon Olsen, Ph.D., reviewed Schlabach's medical records and provided Disability Determination Services ("DDS") with a Psychiatric Review Technique assessment and a mental residual functional capacity ("RFC") assessment for Schlabach. On the Psychiatric Review Technique assessment, Dr. Olsen diagnosed Schlabach with major depressive disorder and anxiety disorder. Dr. Olsen determined that Schlabach had the following limitations: mild restriction of activities of daily living, moderate difficulties in maintaining social functioning, and mild difficulties in maintaining concentration, persistence, or pace. On the mental RFC assessment, Dr. Olsen determined that Schlabach was moderately limited in his ability to: interact appropriately with the general public, accept instructions and respond appropriately to criticism from supervisors, and get along with co-workers or peers without distracting them or exhibiting behavioral extremes. Dr. Olsen concluded that:

[Schlabach] does have an MDI [(medically determinable impairment)], but it would not prevent her from performing work-like activities. She is independent for all self-cares, performs a variety of daily activities, interacts with others on a superficial basis, and engages in purposeful activity when she is motivated to do so. Overall, she attributes most of her limitations to her physical condition, not her mental condition. Due to her interpersonal sensitivity, she would have some difficulty interacting appropriately with the public, responding

to criticism from supervisors, and interacting with co-workers. She would be capable of activities that did not require extensive contact with co-workers or the public, or intense supervisory oversight.

(Administrative Record at 318.)

On May 28, 2003, Dr. Claude H. Koons, M.D., reviewed Schlabach's medical records and provided DDS with a physical RFC assessment. Dr. Koons determined that Schlabach could: (1) occasionally lift and/or carry 25 pounds, (2) frequently lift and/or carry 10 pounds, (3) stand and/or walk with normal breaks for a total of about six hours in an eight-hour workday, (4) sit with normal breaks for a total of about six hours in an eight-hour workday, and (5) push and/or pull without limitations. Dr. Koons further determined that Schlabach could climb, balance, stoop, kneel, crouch, and crawl occasionally. Dr. Koons found no manipulative, visual, communicative, or environmental limitations. Dr. Koons summarized Schlabach's complaints and limitations and noted that she:

alleges pain and stiffness in her neck, right side, shoulder, back, left hip, and left knee. The pain is aggravated by staying in one position for too long a time or moving too much. . . . The pain is present constantly and radiates throughout her body. . . . Exercise and stretching daily are helpful, and heat also helps. She has had to restrict standing too long or sitting too long or lying down too long. . . . Cleaning, vacuuming, laundry, dishes, and lifting her 17 month old child are difficult. Lifting over 10 pounds is difficult. . . . She handles self-care without difficulties. . . . She cooks three times a week and shops for groceries once a week. . . . She has full care of her 17 month old child.

(Administrative Record at 327.) Dr. Koons concluded that Schlabach exhibited many of the typical signs and symptoms of fibromyalgia, but her credibility was eroded somewhat

because activities of daily living indicated that she was “capable of [a] considerable amount of physical activity including the care of a 17 month old child.”¹⁰

On June 21, 2003, Schlabach’s primary care physician since 1995, Dr. Findlater, provided a letter explaining that he had treated her for anxiety, depression, and post-traumatic stress disorder in the past. Dr. Findlater opined that Schlabach “would have difficulty adapting to the rigors of employment related to these illnesses. During the time I have known her she did try to start working again and decompensated as a result of that.”¹¹

On July 10, 2003, Schlabach had a counseling session with Dr. March. Dr. March noted that she exhibited features of social anxiety. Schlabach indicated that she didn’t want to go back to work because she wanted to avoid the potential for interpersonal stress and possibly emotional abuse which she experienced in the past. As treatment, Dr. March recommended that Schlabach keep a journal discussing her fears of having work-related emotional problems. Dr. March indicated that at a future counseling session, he would provide feedback on ways to reduce her anxiety.

On August 1, 2003, Schlabach met with Jill Hancock for a second physical therapy evaluation and treatment plan. Schlabach presented with complaints of left sided lower back pain and radiating pain into her left lower extremity. She also complained of right forearm pain. Schlabach rated her pain on a scale of 1 to 10, with 10 being emergency room pain, as 8/10 generally and 10/10 at its worst. Schlabach informed Hancock that her symptoms increased with bending and reaching. She also indicated that she was unable to decrease her symptoms without the use of medication. Hancock found Schlabach’s strength measures to be “inconsistent with [her] functional level and her pain complaints

¹⁰ See Administrative Record at 327.

¹¹ See Administrative Record at 380.

were also inconsistent with the findings of the evaluation.”¹² Hancock recommended soft tissue massage, mobilization as appropriate, a home exercise program, and therapeutic exercise as treatment. On August 28, 2003, Schlabach was discharged from physical therapy. Hancock noted that Schlabach had improved her lower extremity strength and trunk range of motion. Hancock further noted that her pain level was reduced to 3/10.

In a letter dated September 26, 2003, Dr. Angela Hall, D.C., Schlabach’s chiropractor, provided a summary of Schlabach’s chiropractic treatment. Dr. Hall indicated that Schlabach’s symptoms were fatigue, general malaise, and body aches. Dr. Hall diagnosed her with vertebral subluxation, sciatica, low back pain, neck pain, and shoulder pain. Dr. Hall found her pain, areas of tenderness, and dysfunction consistent with fibromyalgia. Dr. Hall determined that Schlabach was limited to: (1) lifting and carrying no more than 10 pounds, (2) periods of sitting not to exceed 45 minutes without standing and stretching, and (3) periods of standing not to exceed 45 minutes without rest. Dr. Hall also opined that Schlabach should avoid stooping, climbing, kneeling, crawling, and areas that are hot, dusty, hazardous, or improperly filtered from fumes.

On October 28, 2003, Dr. Findlater, Schlabach’s primary care physician, provided a letter summarizing Schlabach’s health issues and limitations. Dr. Findlater diagnosed Schlabach with post-traumatic stress disorder, depression, fibromyalgia, and GERD (Gastroesophageal Reflux Disease). Dr. Findlater noted that Schlabach needed to send her toddler to daycare three days per week in order to rest and had difficulty performing household duties because of easy fatigability and severe muscle pains and weakness with any activity requiring repetitive use of muscles or strength. In summary, Dr. Findlater opined that Schlabach was:

unable to perform work of any type. Specifically, she is unable to lift objects over 5 lbs on a repetitive basis or 40 lbs on a single occasion. She is unable to do repetitive bending, reaching or climbing. She is unable to stand or walk more than 30 minutes on a continuous basis, or over two hours in an

¹² *Id.* at 354.

8 hour work day. She would not be able to work more than 3-4 hours/day at any activity. [Schlabach] can not be expected to work in an organized fashion performing multiple tasks for longer than 30 minutes continuously or 2 hours in an 8 hour work day. If she attempted to perform these activities, it can be expected to see periods of decline that would prevent her from working even these short periods of time more than 2 days/week.

(Administrative Record at 379.)

On November 4, 2003, Schlabach met with Toni Neta (“Neta”), M.A., L.M.S.W., complaining of depression. In her initial assessment, Neta found that Schlabach had the following symptoms: Depressed/sad, poor appetite, but with weight gain, agitation, sense of guilt, worthlessness, hopelessness, helplessness, irritability, crying spells, difficulty coping, and suicidal ideation. Neta diagnosed Schlabach with major depressive disorder. Neta also noted that Schlabach had poor coping and emotion regulation skills. Neta recommended individual therapy as treatment.¹³

On November 11, 2003, Schlabach met with Dr. Ali Safdar, M.D., with complaints of feeling depressed. Schlabach informed Dr. Safdar that she became tearful easily, had a low energy level, felt anxious, and had some fleeting suicidal thoughts. Dr. Safdar diagnosed her with major depressive disorder with anxiety symptoms. Dr. Safdar also noted that she had a history of fibromyalgia, arthritis, stomach problems, and generalized aches and pains. Dr. Safdar recommended medication as treatment.¹⁴

On January 20, 2004, Dr. Findlater filled out a fibromyalgia RFC questionnaire provided by Schlabach’s attorney. Dr. Findlater diagnosed Schlabach with fibromyalgia,

¹³ Schlabach continued to meet with Neta on a monthly basis for individual therapy. *See* Progress Notes, Administrative Record at 443-72.

¹⁴ The record contains progress notes of visits Schlabach had with Dr. Safdar in December 2003, February 2004, March 2004, May 2004, and September 2004. The progress notes generally state that Schlabach was “doing and feeling better,” “doing and feeling fairly well,” and “doing and feeling fair.” *See* Administrative Record at 475-79. Dr. Safdar treated Schlabach with medication.

irritable bowel syndrome, post-traumatic stress disorder, GERD, and an anxiety disorder. Dr. Findlater opined that the best possible result for Schlabach would be the stabilization of her symptoms so that she could carry out her activities of daily living.

Dr. Findlater identified Schlabach's symptoms as follows: multiple tender points, chronic fatigue, numbness and tingling, morning stiffness, muscle weakness, irritable bowel syndrome, frequent and severe headaches, temporomandibular joint dysfunction, anxiety, panic attacks, depression, and chronic fatigue syndrome. Dr. Findlater also identified the following areas where Schlabach experienced pain: bilateral lumbosacral spine, thoracic spine, shoulders, arms, left hand and fingers, and right leg. Dr. Findlater described Schlabach's pain as "[p]resent daily [and] at times [she] is unable to function well enough to carry out [her] ADL's [(activities of daily living)]."¹⁵ Dr. Findlater opined that Schlabach's pain was precipitated by changing weather, cold, static position, fatigue, stress, and movement/overuse. Dr. Findlater further opined that during a typical workday, Schlabach would frequently experience pain or other symptoms severe enough to interfere with her attention and concentration to perform simple tasks.¹⁶ Dr. Findlater also determined that Schlabach was incapable of even "low stress" jobs.

Additionally, Dr. Findlater noted that Schlabach could walk two blocks without rest or severe pain. Dr. Findlater indicated that she could sit at one time for forty-five minutes, and could stand at one time for thirty minutes. Dr. Findlater determined that Schlabach could stand/walk for about four hours in an eight-hour workday and could sit about two hours in an eight-hour workday. Dr. Findlater noted that Schlabach would need a job that allowed periods of walking around every forty-five minutes in an eight-hour workday, and permitted shifting positions at will from sitting, standing, or walking, and allowed her to take unscheduled breaks during an eight-hour workday. The unscheduled breaks would require Schlabach to lie down for about thirty minutes before returning to

¹⁵ See Administrative Record at 393.

¹⁶ According to the questionnaire, "frequently" means 34% - 66% of an eight-hour workday.

work. Dr. Findlater limited Schlabach to lifting less than 10 pounds occasionally, 10 pounds occasionally, 20 pounds occasionally, and never lifting 50 pounds. Dr. Findlater further limited Schlabach to never twisting, stooping, crouching, and climbing ladders and occasionally climbing stairs. Dr. Findlater indicated that Schlabach could occasionally look down, and rarely turn her head to the left or right, look up, or hold her head in a static position. Dr. Findlater also opined that Schlabach would have significant limitations in doing repetitive reaching, handling, and fingering. Lastly, Dr. Findlater determined that Schlabach would be absent four or more days per month due to her impairments.

On February 2, 2004, Neta filled out a mental impairment questionnaire provided by Schlabach's attorney. Neta diagnosed Schlabach with major depressive disorder and a history of post-traumatic stress disorder. Neta indicated that Schlabach was being treated with medication and individual therapy sessions. After five therapy sessions, Neta found Schlabach to be less depressed, but not yet stable. Specifically, Neta opined that Schlabach's "mood continues [to be] depressed, though improved. She is tearful off and on during sessions. She reports that she has difficulty taking care of things at home. [She] doesn't socialize much. [She] gets easily overwhelmed."¹⁷ Neta indicated that she expected Schlabach to improve.

Next, Neta identified the following signs and symptoms of Schlabach's mental impairments: decreased energy, feelings of guilt or worthlessness, mood disturbance, difficulty thinking or concentrating, persistent disturbances of mood or affect, and emotional withdrawal or isolation. Neta also noted that Schlabach occasionally has thoughts of suicide, impairment in impulse control, recurrent and intrusive recollections of a traumatic experience, which are a source of marked distress, intense and unstable interpersonal relationships and impulsive and damaging behavior, and sleep disturbance.

Neta found that Schlabach was limited but satisfactory in her ability to remember work-like procedures, understand and remember very short and simple instructions, carry

¹⁷ See Administrative Record at 397.

out very short and simple instructions, maintain attention for a two hour segment, make simple work-related decisions, ask simple questions or request assistance, accept instructions and respond appropriately to criticism from supervisors, get along with co-workers or peers without unduly distracting them or exhibiting behavioral extremes, respond appropriately to changes in a routine work setting, understand and remember detailed instructions, carry out detailed instructions, set realistic goals or make plans independently of others, interact appropriately with the general public, travel in an unfamiliar place, use public transportation, and be aware of normal hazards and take appropriate precautions. Neta further found that she was seriously limited, but not precluded from sustaining an ordinary routine without special supervision, working in coordination with or proximity to others without being unduly distracted, dealing with normal work stress, and dealing with stress of semi-skilled or skilled work. Lastly, Neta determined that Schlabach was unable to meet the competitive standards for maintaining regular attendance and being punctual within customary usually strict tolerances, completing a normal workday and workweek without interruptions from psychologically based symptoms, and performing at a consistent pace without an unreasonable number and length of rest periods. Neta also found that Schlabach had mild difficulties in maintaining social functioning, moderate deficiencies of concentration, persistence, or pace, and marked restriction of activities of daily living.

On February 9, 2004, Schlabach met with Dr. Brent A. Overton, M.D., complaining of left knee pain. Upon examination, Dr. Overton found tenderness throughout her knee and a range of motion of 0 to 120 degrees. Dr. Overton found x-rays of Schlabach's knee to be unremarkable. Dr. Overton diagnosed her with left knee pain, probable patellar chondromalacia. Dr. Overton recommended a stretching and strengthening program as treatment.

On February 28, 2005, Neta filled out a second mental impairment questionnaire provided by Schlabach's attorney. Neta reported that she had been meeting with Schlabach monthly since November 2003. Neta diagnosed Schlabach with major depressive disorder.

Neta provided that Schlabach was being treated with insight-oriented psychotherapy. Neta found that she remained depressed, but less chronically suicidal. Neta noted the following “clinical” findings for Schlabach: depression, anxiety, occasional suicidal ideation, social isolation, difficulties with housework due to pain, and getting overwhelmed very easily. Neta indicated that Schlabach “has made some improvements but there are underlying issues [related] to early childhood that haven’t been addressed yet. These [continue] to affect her depression and relationships.”¹⁸

Next, Neta identified the following signs and symptoms of Schlabach’s mental impairments: appetite disturbance with weight change, decreased energy, feelings of guilt and worthlessness, generalized persistent anxiety, mood disturbance, recurrent and intrusive recollections of a traumatic experience, which are a source of marked distress, persistent disturbances of mood or affect, apprehensive expectation, emotional lability, and sleep disturbance. Neta also noted that Schlabach occasionally has thoughts of suicide, impairment in impulse control, difficulty thinking and concentrating, and emotional withdrawal or isolation.

Neta found that Schlabach was limited but satisfactory in her ability to remember work-like procedures, understand and remember very short and simple instructions, carry out very short and simple instructions, sustain an ordinary routine without special supervision, make simple work-related decisions, ask simple questions or request assistance, get along with co-workers or peers without unduly distracting them or exhibiting behavioral extremes, be aware of normal hazards and take appropriate precautions, understand and remember detailed instructions, set realistic goals or make plans independently of others, interact appropriately with the general public, maintain socially appropriate behavior, and travel in unfamiliar places. Neta further found that she was seriously limited, but not precluded from accepting instructions and responding to criticism from supervisors, responding appropriately to changes in a routine work setting,

¹⁸ See Administrative Record at 537.

and carrying out detailed instructions. Neta also determined that Schlabach was unable to meet the competitive standards for maintaining attention for a two hour segment, maintaining regular attendance and being punctual within customary usually strict tolerances, working in coordination with or proximity to others without being unduly distracted, completing a normal workday and workweek without interruptions from psychologically based symptoms, performing at a consistent pace without an unreasonable number and length of rest periods, dealing with normal work stress, dealing with stress of semi-skilled and skilled work, and using public transportation. In summary, Neta noted that Schlabach “has satisfactory social skills, but she would have difficulty maintaining them under stress.”¹⁹ Neta also found that Schlabach had moderate difficulties in maintaining social functioning and marked deficiencies of concentration, persistence, or pace and restriction of activities of daily living. Lastly, Neta opined that Schlabach would miss more than four days per month of work because of her impairments.

On March 4, 2005, Dr. Findlater filled out a second fibromyalgia RFC questionnaire provided by Schlabach’s attorney. Dr. Findlater diagnosed Schlabach with fibromyalgia, left leg weakness, depression, and anxiety. Dr. Findlater opined that Schlabach’s prognosis was fair.

Dr. Findlater identified Schlabach’s symptoms as follows: multiple tender points, chronic fatigue, nonrestorative sleep, morning stiffness, muscle weakness, irritable bowel syndrome, subjective swelling, vestibular dysfunction, breathlessness, anxiety, and panic attacks. Dr. Findlater opined that emotional factors contributed to the severity of Schlabach’s symptoms and functional limitations. Dr. Findlater found that Schlabach had bilateral pain in her lumbosacral spine, cervical spine, thoracic spine, chest, shoulders, arms, hands, fingers, hips, legs, knees, ankles, and feet. Dr. Findlater noted that the severity of her pain was variable, but she had daily pain and achiness. Dr. Findlater opined that Schlabach’s pain was precipitated by changing weather, cold, fatigue, stress,

¹⁹ See Administrative Record at 540.

and movement/overuse. Dr. Findlater further opined that during a typical workday, Schlabach would frequently experience pain or other symptoms severe enough to interfere with her attention and concentration to perform simple tasks. Dr. Findlater also determined that Schlabach was incapable of even “low stress” jobs.

Additionally, Dr. Findlater noted that Schlabach could walk two blocks without rest or severe pain. Dr. Findlater indicated that she could sit at one time for thirty minutes, and could stand at one time for one hour. Dr. Findlater determined that Schlabach could stand/walk and sit about two hours in an eight-hour workday. Dr. Findlater noted that Schlabach would need a job that allowed periods of walking around every thirty minutes in an eight-hour workday, and permitted shifting positions at will from sitting, standing, or walking, and allowed her to take unscheduled breaks during an eight-hour workday. The unscheduled breaks would require Schlabach to lie down for about twenty to thirty minutes two to three times in an eight-hour workday. Dr. Findlater also indicated that Schlabach would need to have her legs elevated 25% of the time during an eight-hour workday. Dr. Findlater limited Schlabach to lifting less than 10 pounds occasionally, 10 pounds occasionally, 20 pounds rarely, and never lifting 50 pounds. Dr. Findlater further limited Schlabach to occasionally twisting, rarely crouching and climbing stairs, and never crouching, squatting, or climbing ladders. Dr. Findlater indicated that Schlabach could occasionally look down, turn her head to the left or right, and look up. Dr. Findlater also opined that Schlabach would have significant limitations in doing repetitive reaching, handling, and fingering. Lastly, Dr. Findlater determined that Schlabach would be absent four or more days per month due to her impairments.

V. CONCLUSIONS OF LAW

A. ALJ's Disability Determination

The ALJ determined that Schlabach 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,

140-42 (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 Schlabach had not engaged in substantial gainful activity since his alleged disability onset date, June 17, 1999. At the second step, the ALJ concluded that:

The medical evidence establishes that [Schlabach] has allegations of medically determinable impairment[s] resulting in complaints of multiple aches and pains with a history of fibromyalgia, right shoulder strain, degenerative disc disease of the thoracic spine, degenerative changes of the lumbar spine, myofascial pain of the cervical and thoracic spine, left knee patellar chondromalacia, history of irritable bowel syndrome, gastroesophageal reflux disease and collagenous colitis, recurrent major depressive disorder, and anxiety disorder[.]

At the third step, the ALJ found that Schlabach did not have an impairment or combination of impairments that “meet[s] or equal[s] the criteria of any of the impairments listed in [20 C.F.R. § 404,] Appendix 1, Subpart P, Regulations No. 4 [(the Listing of Impairments)].”

At the fourth step, the ALJ determined Schlabach’s RFC as follows:

[Schlabach] retains the ability to lift and/or carry 20 pounds occasionally, 10 pounds frequently, stand and/or walk for 6 hours of an 8 hour workday and sit for 2 hours of an 8 hour workday. Such work should involve only occasional bending, stooping, or brief superficial contact with the public and supervisors, non-complex tasks performed at no more than a regular pace, a moderate level of stress, and no constant very close attention to detail.

Using this RFC, the ALJ determined that Schlabach could perform her past relevant work as a buffet setter, cashier/stocker, and head cashier. Therefore, the ALJ concluded that because Schlabach was capable of performing her past relevant work, she was “not disabled.”

B. Whether the ALJ Fully and Fairly Developed the Record

Schlabach contends that the ALJ erred in four respects. First, Schlabach argues that the ALJ failed to give good reasons for discounting the opinions of her treating doctor, Dr. Findlater. Second, Schlabach argues that the ALJ erred in giving the opinions of Dr. Hall no weight. Third, Schlabach argues that the ALJ failed to properly evaluate the opinions of her therapist, Toni Neta. Fourth, Schlabach argues that the ALJ’s decision is not supported by substantial medical evidence.

1. The Opinions of Dr. Findlater

Schlabach contends that the ALJ failed to give “good” reasons for discounting the opinions of her treating physician, Dr. Findlater. In addition to this contention, Schlabach offers three additional arguments to support her position. First, Schlabach argues that the ALJ improperly found that Dr. Findlater’s opinions were inconsistent with her activities of daily living. Next, Schlabach argues that Dr. Findlater provided three consistent evaluations of her functional capabilities in 2003, 2004, and 2005 which the ALJ ignored when determining her RFC. Lastly, Schlabach argues that the ALJ’s findings with regard to her diagnosis of fibromyalgia are contrary to the medical opinion evidence of Dr. Findlater and other treating and non-treating physicians in the record.

An ALJ is required to “assess the record as a whole to determine whether treating physicians’ opinions are inconsistent with substantial evidence on the record.” *Travis v. Astrue*, 477 F.3d 1037, 1041 (8th Cir. 2007) (citing 20 C.F.R. § 404.1527(d)(2)). The opinion of a treating physician:

should not ordinarily be disregarded and is entitled to substantial weight. A treating physician’s opinion regarding an applicant’s impairment will be granted controlling weight, provided the opinion is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the record.

Singh v. Apfel, 222 F.3d 448, 452 (8th Cir. 2000) (citations omitted). The regulations provide that the longer the treating relationship between a physician and a patient, the more weight should be given to that treating physician’s medical opinions. *See* 20 C.F.R. § 404.1527(d)(2)(I). Furthermore, an ALJ is “encouraged to give more weight to the opinion of a specialist about medical issues related to his or her area of specialty than to the opinion of a source who is not a specialist.” *Singh*, 222 F.3d at 452. The regulations require an ALJ to give “good reasons” for giving weight to statements provided by a treating physician. *See* 20 C.F.R. § 404.1527(d)(2). The regulations also require an ALJ to give “good reasons” for rejecting statements provided by a treating physician. *Id.* “Although a treating physician’s opinion is entitled to great weight, it does not

automatically control or obviate the need to evaluate the record as a whole.” *Hogan v. Apfel*, 239 F.3d 958, 961 (8th Cir. 2001) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1013 (8th Cir. 2000)). “The ALJ may discount or disregard such an opinion if other medical assessments are supported by superior medical evidence, or if the treating physician has offered inconsistent opinions.” *Id.*; see also *Edwards v. Barnhart*, 314 F.3d 964, 967 (8th Cir. 2003) (If the doctor’s opinion is “inconsistent with or contrary to the medical evidence as a whole, the ALJ can accord it less weight.”); *Strongson*, 361 F.3d at 1070 (an ALJ does not need to give controlling weight to a physician’s RFC assessment if it is inconsistent with other substantial evidence in the record); *Cabrnoch v. Bowen*, 881 F.2d 561, 564 (8th Cir. 1989) (the resolution of conflicts of opinion among various treating and examining physicians is the proper function of an ALJ).

The ALJ also 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)).

In finding that “significant weight” should not be accorded to Dr. Findlater’s opinions, the ALJ determined that:

the clinical findings reported in the treatment records from Dr. Findlater, as well as clinical findings and laboratory studies from other sources, do not support the degree of limitations opined, and the degree of limitations opined are not consistent with other evidence of abilities, for example her activities of daily living.

(Administrative Record at 26.) The ALJ does not address or explain his reasons for finding Dr. Findlater’s opinions to not be accorded “significant” weight. The ALJ simply makes a conclusory observation that Dr. Findlater’s opinions are not supported by his treatment records or the “clinical findings and laboratory studies from other sources.” The ALJ does not address, however, Dr. Findlater’s treatment records, any medical evidence

in the record, or the “clinical findings and laboratory studies from other sources” that he relied on in determining that Dr. Findlater’s opinions should not be accorded “significant” weight. The ALJ also asserts that Dr. Findlater’s opinions are not consistent with Schlabach’s activities of daily living. Again, the ALJ offers no examples in his decision of Schlabach’s activities that are inconsistent with Dr. Findlater’s opinions.

An ALJ has a duty to develop the record fully and fairly. *Cox*, 495 F.3d at 618. The regulations require an ALJ to give “good reasons” for rejecting statements provided by a treating physician. *See* 20 C.F.R. § 404.1527(d)(2). The Court finds that the ALJ has failed to meet these requirements. The ALJ did not provide any reasons other than conclusory statements, let alone “good reasons,” for not granting “significant” weight to Dr. Findlater’s opinions. Therefore, the Court finds that this matter should be remanded so that the ALJ may fully and fairly develop the record with regard to Dr. Findlater’s opinions. On remand, the ALJ shall provide clear reasons for accepting or rejecting Dr. Findlater’s opinions and support his reasons with evidence from the record, including any inconsistencies between Dr. Findlater’s opinions and Schlabach’s activities of daily living.

Schlabach also argues that the ALJ failed to consider Dr. Findlater’s opinions regarding her functional limitations and the effect those findings would have on her RFC. 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)). Again, the Court

bears in mind that the ALJ also has a duty to develop the record fully and fairly. *Cox v. Astrue*, 495 F.3d at 618.

On October 28, 2003, Dr. Findlater opined that Schlabach had the following functional limitations:

[Schlabach] is unable to lift objects over 5 lbs on a repetitive basis or 40 lbs on a single occasion. She is unable to do repetitive bending, reaching or climbing. She is unable to stand or walk more than 30 minutes on a continuous basis, or over two hours in an 8 hour work day. She would not be able to work more than 3-4 hours/day at any activity. [Schlabach] can not be expected to work in an organized fashion performing multiple tasks for longer than 30 minutes continuously or 2 hours in an 8 hour work day. If she attempted to perform these activities, it can be expected to see periods of decline that would prevent her from working even these short periods of time more than 2 days/week.

(Administrative Record at 379.) On January 20, 2004, Dr. Findlater opined that Schlabach: (1) could sit at one time for forty-five minutes and stand at one time for thirty minutes; (2) could stand/walk for about four hours in an eight-hour workday and sit about two hours in an eight-hour workday; (3) would need a job that allowed periods of walking around every forty-five minutes in an eight-hour workday and permitted shifting positions at will from sitting, standing, or walking, and allowed her to take unscheduled breaks during an eight-hour workday; (4) would be limited to lifting less than 10 pounds occasionally, 10 pounds occasionally, 20 pounds occasionally, and never lifting 50 pounds; (5) would be limited to never twisting, stooping, crouching, or climbing ladders and occasionally climbing stairs; and (6) would have significant limitations in doing repetitive reaching, handling, and fingering.²⁰ On March 4, 2005, Dr. Findlater opined that Schlabach: (1) could walk two blocks without rest or severe pain; (2) could sit at one time for thirty minutes and stand at one time for one hour; (3) could stand/walk and sit about two hours in an eight-hour workday; (4) would need a job that allowed periods of walking

²⁰ See Administrative Record at 394-96.

around every thirty minutes in an eight-hour workday, permitted shifting positions at will from sitting, standing, or walking, and allowed her to take unscheduled breaks during an eight-hour workday; (5) would be limited to lifting less than 10 pounds occasionally, 10 pounds occasionally, 20 pounds rarely, and never lifting 50 pounds; (5) would be limited to occasionally twisting, rarely crouching and climbing stairs, and never crouching, squatting, or climbing ladders; and (6) would have significant limitations in doing repetitive reaching, handling, and fingering.²¹

The ALJ's decision lacks any discussion of Dr. Findlater's opinions from 2003, 2004, or 2005 regarding Schlabach's functional limitations. 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 Dr. Findlater regarding Schlabach's functional limitations. Specifically, the ALJ shall explain his reasons for accepting or rejecting those opinions.

Schlabach also calls into question the ALJ's conclusion that her diagnosis of fibromyalgia is "questionable." In his decision, the ALJ found:

the diagnosis of fibromyalgia itself is questionable because, according to Dr. Findlater's first Fibromyalgia Residual Functional Capacity Questionnaire dated January 20, 2004, it was not evaluated under the American College of Rheumatology criteria . . . although in his second such form, he indicated it was[.] . . . Overall, the criteria with regard to the number of tender points and other symptomatology is not evident from the file before the undersigned. . . . Notwithstanding the lack of a proper diagnosis, the undersigned, giving [Schlabach] the benefit of the doubt, finds that the most favorable assessment is that she alleges a medically determinable impairment resulting in complaints of multiple aches and pain with a history of fibromyalgia.

²¹ *Id.* at 545-47.

(Administrative Record at 24.) According to the Eighth Circuit Court of Appeals, fibromyalgia:

is pain in the fibrous connective tissue components of muscles, tendons, ligaments, and other white connective tissues, [which] can be disabling. It often leads to a distinct sleep derangement which often contributes to a general cycle of daytime fatigue and pain.

Kelley v. Callahan, 133 F.3d 583, 589 (8th Cir. 1998) (citing *Cline v. Sullivan*, 939 F.2d 560, 563-67 (8th Cir. 1991)); see also *Brosnahan v. Barnhart*, 336 F.3d 671, 672, n.1 (8th Cir. 2003) (“[F]ibromyalgia is diagnosed based on widespread pain with tenderness in at least eleven of eighteen sites known as trigger points.”).

The record reflects that in addition to Dr. Findlater, other treating and non-treating sources diagnosed Schlabach with fibromyalgia. Specifically, Dr. Worrell noted that Schlabach was “very touchy” and jumped all over the place with palpation of her soft tissues.²² Dr. Worrell determined that Schlabach suffered from myofascial pain syndrome and concluded that the soft tissue findings suggested fibromyalgia. Dr. Eyanson noted that Schlabach was “tender over every point touch including trigger points.”²³ Dr. Eyanson diagnosed Schlabach with chronic myofascial pain. Dr. Pape found “exquisite tenderness in multiple points to palpation about the supraspinous and paraspinal musculature about the thoracic and lumbar spine. These are essentially trigger points.”²⁴ Dr. Pape diagnosed Schlabach with a “significant” component of fibromyalgia. Dr. Overton noted that Schlabach “does have fibromyalgia.”²⁵ Dr. Koons, a non-examining consultative physician, found that Schlabach had “been diagnosed with fibromyalgia and exhibits many

²² See Administrative Record at 207.

²³ *Id.* at 257.

²⁴ *Id.* at 259.

²⁵ See Administrative Record at 437.

of the typical signs and symptoms of the disorder.”²⁶ After reviewing the entire record, the Court finds ample evidence to suggest that Schlabach has widespread pain and trigger point tenderness consistent with a diagnosis of fibromyalgia. *See Brosnahan*, 336 F.3d at 672, n. 1. The ALJ should seek clarification or additional information from Schlabach’s treating physicians to determine whether her symptoms meet the criteria for a diagnosis of fibromyalgia.

It is appropriate for an ALJ to “seek additional clarifying statements from a treating physician” when a crucial issue is undeveloped. *Stormo v. Barnhart*, 377 F.3d 801, 806 (8th Cir. 2004) (citation omitted). An ALJ should only contact a treating physician “if the doctor’s records are ‘inadequate for us to determine whether the claimant is disabled’ such as ‘when the report does not contain all the necessary information, or does not appear to be based on medically acceptable clinical and laboratory diagnostic techniques.’” *Goff*, 421 F.3d at 791 (citing 20 C.F.R. §§ 404.1512(e) and 416.912(e)). An ALJ may also order medical examinations and tests when the medical records presented to him or her constitute insufficient medical evidence to determine whether the claimant is disabled. *Barrett v. Shalala*, 38 F.3d 1019, 1023 (8th Cir. 1994) (citation omitted); *see also* 20 C.F.R. § 404.1519a(a)(1) (“The decision to purchase a consultative examination . . . will be made after we have given full consideration to whether the additional information needed is readily available from the records of your medical sources.”). Additionally, 20 C.F.R. § 404.1519a(b) provides that “[a] consultative examination may be purchased when the evidence as a whole, both medical and nonmedical, is not sufficient to support a decision on . . . [the] claim.” *Id.* For example, a consultative examination should be purchased when “[t]he additional evidence needed is not contained in the records of your medical sources.” 20 C.F.R. § 404.1519a(b)(1).

After reviewing the record, the Court concludes that “a crucial issue is undeveloped.” *See Stormo*, 377 F.3d at 806. The Court finds that the ALJ failed to fully

²⁶ *Id.* at 327.

and fairly develop the record with regard to Schlabach's diagnosis of fibromyalgia. *See Cox*, 495 F.3d at 618. On remand, the ALJ should recontact Dr. Findlater and any other treating physicians he deems necessary to seek clarification of the reasons and medical evidence which support their determinations that Schlabach suffers from fibromyalgia. Additionally, if after recontacting the physicians, further examination is necessary to provide a complete record on the issue of Schlabach's fibromyalgia, then a consultative examination should be purchased. *See Barrett*, 38 F.3d at 1023; 20 C.F.R. § 404.1519a.

2. The Opinions of Dr. Hall

Schlabach argues that the ALJ improperly disregarded the opinions of Dr. Hall because she is a chiropractor or "other medical source." Social Security Ruling 06-03p was issued on August 9, 2006 by the Social Security Administration ("SSA"). The purpose of the ruling was to clarify how the SSA considers opinions from sources not classified as "acceptable medical sources." *See Sloan v. Astrue*, 499 F.3d 883, 888 (8th Cir. 2007) (discussing SSR 06-03p). SSR 06-03p provides that when considering the opinion of a medical source that is a "not acceptable medical source," such as a chiropractor, "it would be appropriate to consider such factors as the nature and extent of the relationship between the source and the individual, the source's qualifications, the source's area of specialty or expertise, the degree to which the source presents relevant evidence to support his or her opinion, whether the opinion is consistent with other evidence, and any other factors that tend to support or refute the opinion." SSR 06-03p. Furthermore, in discussing SSR 06-03p, the Eighth Circuit Court of Appeals, in *Sloan*, pointed out:

Information from these 'other sources' cannot establish the existence of a medically determinable impairment, according to SSR 06-3p. Instead, there must be evidence from an 'acceptable medical source' for this purpose. However, information from such 'other sources' may be based on special knowledge of the individual and may provide insight into the severity of the impairment(s) and how it affects the individual's ability to function.

Sloan, 499 F.3d at 888 (quoting SSR 06-03p).

In his decision, the ALJ accorded Dr. Hall's opinions no weight because a chiropractor is "not a recognized medical source." The ALJ also noted that some of the limitations provided by Dr. Hall were outside her expertise. Schlabach concedes that Dr. Hall's opinions regarding environmental limitations are outside her expertise, but maintains that her opinions regarding her physical limitations should have been considered by the ALJ.

In a letter dated September 26, 2003, Dr. Hall indicated that Schlabach had symptoms of fatigue, general malaise, and body aches. Dr. Hall diagnosed Schlabach with vertebral subluxation, sciatica, low back pain, neck pain, and shoulder pain. Dr. Hall found Schlabach's pain, areas of tenderness, and dysfunction consistent with fibromyalgia. Dr. Hall determined that Schlabach was limited to: (1) lifting and carrying no more than 10 pounds, (2) periods of sitting not to exceed 45 minutes without standing and stretching, and (3) periods of standing not to exceed 45 minutes without rest. Dr. Hall also opined that Schlabach should avoid stooping, climbing, kneeling, crawling. The Court finds that Dr. Hall's opinions may provide insight into the severity of Schlabach's impairments and how such impairments affect her ability to function. *See* SSR 06-03p. Accordingly, by not considering Dr. Hall's opinions and not explaining his reasons for granting no weight to her opinions, the Court finds that the ALJ failed to fully and fairly develop the record. *See Cox*, 495 F.3d at 618. On remand the ALJ should consider and discuss Dr. Hall's opinions in accordance with the considerations provided in SSR 06-03p and explain his reasons for accepting or rejecting her opinions.

3. The Opinions of Toni Neta

Similar to the opinions of Dr. Hall, Schlabach also argues that the ALJ improperly disregarded the opinions of Neta because she is a social worker or "other medical source." In his decision, the ALJ determined that:

[Schlabach's] counselor completed a checklist indicating [Schlabach] would not be able to meet competitive standards in several areas of work activity. . . . First, there is no

evidence that a social worker has any expertise to determine competitive standards, much less the ability to or not to meet those standards. . . . The records from her sessions . . . do not contain findings supportive of the degree of limitation indicated in either at that level or “seriously limited, but not precluded.” Likewise, there are no supportive clinical findings to support the counselor’s second opinion[.] . . . Thus, no weight is accorded these opinions.

(Administrative Record at 26-27.) At various points in the ALJ’s decision, the ALJ presents some evidence from Neta and other psychological counselors who worked with Schlabach, but at no point does the ALJ compare Neta’s opinions with other psychological opinions or explain his reasons for finding that her opinions are not supportive the limitations she imposes on Schlabach. Furthermore, even though Neta is not an “acceptable medical source,” the SSA has directed that:

medical sources who are not ‘acceptable medical sources,’ such as . . . licensed clinical social workers, have increasingly assumed a greater percentage of the treatment and evaluation functions previously handled primarily by physicians and psychologists. Opinions from these medical sources, who are not technically deemed ‘acceptable medical sources’ under our rules, are important and should be evaluated on key issues such as impairment severity and functional effects along with the other relevant evidence in the file.

SSR 06-03p. The Court finds that the ALJ failed to failed to fully and fairly develop the record with regard to Neta’s opinions. *See Cox*, 495 F.3d at 618. On remand the ALJ should consider and discuss Neta’s opinions in accordance with the considerations provided in SSR 06-03p and explain his reasons for accepting or rejecting her opinions.

4. Medical Evidence

In her fourth argument, Schlabach asserts that “[t]he ALJ’s decision is not supported by substantial medical evidence as it is contrary to the opinions of the treating physician, [her] chiropractor, and [her] therapist, and is not supported by the opinion of

any examining source.”²⁷ Schlabach’s contention is that the ALJ failed to properly consider the opinions of Dr. Findlater (Schlabach’s primary treating physician), Dr. Hall (Schlabach’s chiropractor), and Neta (Schlabach’s therapist). In sections *V.B.1, 2, and 3*, the Court remanded this case to the ALJ for further consideration of the opinions of Dr. Findlater, Dr. Hall, and Neta. Thus, having already considered these issues in the previous sections of this ruling, the Court is confident that Schlabach’s concerns will be addressed on remand.

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 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

²⁷ *See Schlabach’s Brief at 24.*

the opinions of Dr. Findlater, Dr. Hall, and Toni Neta. 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 Dr. Findlater and provide clear reasons for accepting or rejecting Dr. Findlater's opinions and support his reasons with evidence from the record, including any inconsistencies between Dr. Findlater's opinions and Schlabach's activities of daily living. The ALJ should also address his reasons for accepting or rejecting Dr. Findlater's opinions regarding Schlabach's functional limitations. Additionally, the ALJ must fully develop the record on the issue of Schlabach's fibromyalgia diagnosis and recontact Dr. Findlater or any other treating physician to seek clarification of the reasons and medical evidence which support their determinations that Schlabach suffers from fibromyalgia. The ALJ must also develop the record fully and fairly with regard to the opinions of Dr. Hall and Toni Neta and fully explain his reasons for accepting or rejecting their opinions.

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 4th day of August, 2008.



JON STUART SCOLES
United States Magistrate Judge
NORTHERN DISTRICT OF IOWA