

*Not To Be Published:*

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

RICK L. WELLENSTEIN,

Plaintiff,

vs.

MICHAEL J. ASTRUE,  
Commissioner of Social Security,

Defendant.

No. C08-4098-MWB

**MEMORANDUM OPINION AND  
ORDER REGARDING  
MAGISTRATE JUDGE’S REPORT  
AND RECOMMENDATION**

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**TABLE OF CONTENTS**

<b>I. INTRODUCTION</b> .....	2
<b>A. Procedural Background</b> .....	2
<b>B. Factual Background</b> .....	4
1. <i>Introductory facts and Wellenstein’s hearing testimony</i> .....	4
2. <i>Wellenstein’s medical history</i> .....	6
a. <i>Treatment notes</i> .....	6
b. <i>Consulting opinions</i> .....	16
3. <i>Vocational expert’s testimony</i> .....	22
4. <i>The ALJ’s decision</i> .....	23
<b>II. LEGAL STANDARDS</b> .....	25
<b>III. LEGAL ANALYSIS</b> .....	31
<b>A. Credibility Assessment</b> .....	31
<b>B. Dr. Brinck’s and Therapist Sorensen’s Opinions</b> .....	35
<b>C. Full and Fair Development of the Record</b> .....	41
<b>IV. REMAND</b> .....	41

**V. CONCLUSION** . . . . . 43

**I. INTRODUCTION**

**A. Procedural Background**

On November 5, 2004, plaintiff Rick Wellenstein filed applications for Title II<sup>1</sup> disability insurance and Title XVI<sup>2</sup> supplemental security income benefits, alleging a disability onset date of January 1, 2003. Wellenstein claims that he was disabled due to the residual effects of a motorcycle accident, anxiety/depression, and a somatoform disorder. Wellenstein’s applications were denied initially and on reconsideration. An Administrative Law Judge (“ALJ”) held a hearing, as requested, on Wellenstein’s claims on April 3, 2007. The ALJ issued a decision on April 14, 2007, which found that Wellenstein could not return to any of his past relevant work but retains the residual functional capacity to perform other work and is, therefore, not disabled. On September 22, 2008, the Social Security Appeal Council denied Wellenstein’s request to review the ALJ’s decision, and this denial constituted a final decision of the Commissioner of Social Security (“Commissioner”).

On November 14, 2008, Wellenstein filed a complaint in this court seeking review of the Commissioner’s decision (docket no. 1)—the case was referred to Chief United States Magistrate Judge Paul A. Zoss for a report and recommendation, in accordance with Administrative Order #1447.

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<sup>1</sup>Title II of the Social Security Act provides insurance benefits to individuals who establish that they suffer from a physical or mental disability. *See* 42 U.S.C. § 423.

<sup>2</sup>Title XVI of the Social Security Act provides supplemental income to individuals who are disabled while also indigent. *See* 42 U.S.C. § 1382.

Wellenstein filed a brief in support of his claim (docket no. 10), on March 24, 2009. In his brief, Wellenstein claims that the ALJ erred by: 1) failing to give enough weight to the opinions of Ronald Brinck, M.D.; 2) failing to properly consider the opinions of Diane Sorensen, LISW (“Therapist Sorensen”); 3) failing to fully and fairly develop the record concerning Wellenstein’s physical and mental limitations; and 4) failing to make a proper assessment of Wellenstein’s credibility. *See* docket no. 10. Wellenstein argued that the court should reverse the final agency decision and enter judgment under 42 U.S.C. § 405(g) (sentence four) and 42 U.S.C. § 1383(c)(3). If Judge Zoss did not recommend ordering the calculation and award of benefits, Wellenstein asked that he recommend reversing the ALJ’s decision and remanding the case for further proceedings.

On May 21, 2009, the Commissioner filed a responsive brief. The Commissioner claimed that the ALJ properly weighed and considered all of the opinions in the record, properly formulated Wellenstein’s Residual Functional Capacity (“RFC”), and properly considered Wellenstein’s credibility. If Judge Zoss did not affirm the Commissioner’s decision, he asked that he remand the case for further proceedings.

On January 26, 2010, Judge Zoss issued his Report and Recommendation (docket no. 13). Judge Zoss found that the ALJ properly weighed the disputed opinions in the case. However, Judge Zoss found that the ALJ failed to perform a full and complete credibility analysis. As a result, Judge Zoss recommends that this court remand the case for further proceedings, including further development of the record concerning Wellenstein’s work-related mental and physical limitations.

On February 9, 2010, the Commissioner filed his Objections to the United States Magistrate Judge’s Report and Recommendation (docket no. 14). The Commissioner objects to Judge Zoss’s findings that a full credibility analysis was lacking and that, as a result, remand is required.

Wellenstein also filed his Objections to the Magistrate Judge's Report and Recommendation (docket no. 15) on February 9, 2010. Wellenstein objects to Judge Zoss's finding that the ALJ gave Dr. Brinck's and Therapist Sorensen's opinions proper weight when deciding Wellenstein's RFC. Wellenstein also claims that Judge Zoss failed to consider Wellenstein's argument that the record had not been fully and fairly developed.

### ***B. Factual Background***

In Judge Zoss's Report and Recommendation, he made the following findings of fact:

#### ***1. Introductory facts and Wellenstein's hearing testimony***

Wellenstein was born in 1958. (R. 65) He claims he became disabled on January 1, 2003, when he was 44 years old. He lives in Whiting, Iowa, with his wife of many years. (R. 300-301, 314)

Wellenstein was in a motorcycle accident in 1979. Before the accident, he worked full time at a drain-cleaning company. (R. 316) After the accident, he attempted to return to his job, but he "simply could not do it." (R. 312) Since then, he has not held full-time employment. (*Id.*)

Wellenstein is a high school graduate. (R. 295) He has taken two vocational rehabilitation programs, the first one in plumbing and the second one in drafting, but he was unable to complete either program. (R. 295-96) After failing to complete the second program, he spoke with a representative of the vocational rehabilitation program, who recommended that he find a full-time job. He did not take this advice. When the ALJ asked why, Wellenstein testified,

A full-time job? To find a full-time job, that's not what I was interested in doing anyway. It wasn't my objective. I have a business where I work two hours right now, two to three hours. Why would I work full-time? I mean, there's - I'm not capable of doing it, #1,

and #2, it's not necessary . . . [b]ecause I have a business that I work a minimal amount of hours and I'm able to survive with that.

(R. 298)

Wellenstein has operated a cleaning service for commercial property since at least January 1, 2003. He works at the business about three to four hours each week. He oversees operations and does some of the cleaning, including mopping floors and cleaning bathrooms, although most of the work is subcontracted out. His wife handles the books. (R. 299-300) The business has several large clients, such as Walgreens and FedEx.

Wellenstein testified that although he can run his business, he is not able to work at a full-time job. (R. 312-13) When asked if he could do a full-time "sitting down job," he responded, "I don't think so. I do a minimal amount of work as it is. The work that I do, I am capable of maintaining, with my wife's help, right now. . . . Why would I do a full-time [occupation] when I can get by on two to three hours of work right now?" (R. 311)

Wellenstein testified he has both physical and mental problems that prevent him from working full time. (R. 305-306) His mental problems include severe depression, an anxiety disorder, and a somatoform disorder. (R. 306) He believes his somatoform disorder is "anxiety-based." When he has a somatoform episode, it is similar to going into shock. He goes limp "like a rag doll" and loses his balance, and his speech becomes unintelligible. It causes him to overheat, perspire, and "get prickly all over." (*Id.*) Each episode usually last[s] from four to six hours. When he has an episode, he has to remove himself from his environment because it "renders [him] incapable of even doing anything." (R. 313) He avoided questions about the frequency of these episodes (R. 306-308), but he testified he was having one during the ALJ hearing, though not a severe one. He could tell he was having one because he started to overheat. (R. 307) He testified that if he is pushed while having an

episode, the severity of the episode will increase. (*Id.*) He has never been hospitalized for one of these episodes (R. 308-309), although he has been to the emergency room on three occasions as a result of this problem. (R. 313)

Wellenstein testified his depression can be so severe that it is immobilizing. When suffering from depression, he can function only on “a very, very basic level.” He also has “visual phenomenon with it,” which includes seeing spots, flashes of light, and auras. He also has migraines. (R. 312, 318)

When Wellenstein is not working, he spends much of his time sleeping. (R. 309) He watches birds, although he has stopped feeding them. He listens to music. He occasionally drives a car. (R. 317-18) He participates in church at a “very minimal level,” but has little contact with friends or family. (R. 316-17)

At the time of the ALJ hearing, Wellenstein was taking Lexapro and Wellbutrin for depression and anxiety; Provigil for fatigue; Protonix for inflammation from numerous injuries to his shoulder, hands, wrist, elbow, and back; and medication to prevent the Protonix from damaging his stomach. (R. 311-12)

## **2. *Wellenstein’s medical history***

### **a. *Treatment notes***

Most of the medical evidence of record relates to Wellenstein’s mental health treatment. Wellenstein was seen by Nurse-Practitioner Judy Buss at Siouxland Mental Health on January 4, 2002, for a formal intake evaluation. (R. 215-17) Wellenstein reported to Buss that his doctor had been treating him for seven years with various medications including Zoloft, Wellbutrin, Prozac, and Ritalin. (R. 215) He had been on Prozac for a year, and stated it seemed to be helping him. He had quit his job one month earlier, but stated he did not know why he had quit. He stated he “does better in the summer months,” and “gets overcome by life stresses.” (*Id.*) He “becomes bored easily with details,” and “has a tendency to hyper focus.” (*Id.*) He indicated he did poorly in

school and had been diagnosed with ADD, for which he had been taking Ritalin. (*Id.*) Buss noted Wellenstein's affect was appropriate, and he exhibited no unusual speech patterns, movements or behavior. (R. 216) Buss listed the following diagnostic impressions: "Depressive Disorder NOS," "Seasonal Affective Disorder," "Rule Out OCD," "ADD by History," and "ODD by History." (R. 217) She assessed his current GAF at 60. She recommend[ed] increasing his Prozac dosage to 40 mg daily, and restarting Wellbutrin SR 150 mg twice daily. (*Id.*)

Wellenstein returned for follow-up on February 14, 2002, with no change in condition. (R. 214) On February 28, 2002, he underwent an intake evaluation by counselor Verna Halligan. (R. 209-13) Wellenstein stated he was working as a janitor at Walgreens, a job he had been doing since 1983. He complained of problems getting to sleep and staying asleep. He was taking Wellbutrin, which he indicated caused problems with his concentration and memory. He was noted to be very talkative, and to intellectualize his problems. He indicated he had problems with relationships, and had lost all of his friends since his motorcycle accident in 1983 [sic]. He "[a]ssumes other people see him as a 'bad' person." (R. 210) The counselor diagnosed Wellenstein with "Mood Disorder NOS," "Rule Out Seasonal Affective Disorder," "Personality change after brain injury," and problems relating to his siblings and friends. She assessed his current GAF at 50. Therapy goals were established including improvement of Wellenstein's relationship skills, "coping with PTSD, decreasing depression and anxiety." (R. 212-13)

Wellenstein saw Wade Kuehl, LMSW for counseling sessions on March 11 and 18, and April 1, 2002. (R. 206-08) He saw Ronald Brinck, M.D. for a "formal intake" and medication review on May 8, 2002. Dr. Brinck diagnosed Wellenstein with dysthymia, "Rule Out Bipolar II Disorder," and a current GAF of 55. He continued Wellenstein on Wellbutrin, and began a trial of Trileptal. (R. 204-05)

Wellenstein cancelled his appointments on June 18 and December 17, 2002. He saw his family doctor on June 17, 2003, for follow-up of “anxiety, depression, and possible ADHD.” (R. 183) He was doing fairly well, and was working five to six hours a week at his janitorial job. The doctor prescribed Lexapro and Ritalin. (*Id.*)

Wellenstein returned to see his family doctor on July 15, 2003. He was doing “fairly well” with his depression. He had been exercising and working on weight loss. He had stopped taking the Lexapro because it made him tired, and he was [re]started on Wellbutrin. (R. 182-83)

Wellenstein saw Dawn Nolan, PA-C at Siouxland Mental Health on December 10, 2003, “for a follow up on his Dysthymia.” (R. 201) He complained of “poor attention span and concentration,” and stated he believed he had ADD/ADHD. He was started on Strattera, and scheduled for follow-up in one month. (*Id.*) When he returned on January 12, 2004, Wellenstein stated the Strattera had “improved his concentration and also his mood, but he had to stop it due to severe GI upset.” (R. 200) He asked to be put back on Wellbutrin, which he had tolerated well. (*Id.*)

Wellenstein saw P.A. Nolan again on April 15, 2004. He stated his depression was well controlled on Wellbutrin, but he continued to complain of decreased energy. Provigil was added to his medication regimen. (R. 199)

Wellenstein returned to see his family doctor on May 18, 2004, asking about getting started on Ritalin again. His depression was under “fair to good control, with possible bipolar symptoms.” (R. 182) He was given prescriptions for Ritalin, Methylphenidate (for ADD), and Adderall. (*Id.*)

Wellenstein saw P.A. Nolan at Siouxland Mental Health on August 12, 2004, and stated he had stopped taking the Provigil two months earlier, and had begun a trial of Adderall through his family doctor. He found the Adderall helpful but could not afford it. He resumed Provigil and Strattera, and continued with Wellbutrin. (R. 198)

Wellenstein saw his family doctor again on October 20, 2004. He continued to do “pretty well with his depression.” (R. 180) He complained of significant fatigue, and arthritis in his back. He was advised to increase his activity level, and develop a regular schedule. He was put back on Adderall, and the doctor suggested he take an aspirin and multivitamin daily. (*Id.*)

At his next appointment with P.A. Nolan, on December 1, 2004, Wellenstein reported doing fairly well. (R. 197)

Throughout his course of treatment at Siouxland Mental Health, Wellenstein continually reported problems with lack of energy, poor concentration, and incidents of obsessive behavior, such as turning his turn signals on repeatedly in the car, and getting ideas in his head that he could not let go. He stated other family members had dealt with similar symptoms. When he saw P.A. Nolan on January 27, 2005, he was agitated and fidgety. He was instructed to get a neurological exam and talk with his family doctor about hot flashes that he was experiencing. Risperdal was added to his medications. (R. 196)

He was seen again on March 14, 2005. He had stopped taking Risperdal after about one week because his symptoms improved. He indicated his “psychotic symptoms only happen[ed] during times of stress,” and he preferred to try to avoid stressors rather than to keep taking Risperdal. He stated he would try the drug again if he was unable to control his stress. (R. 195)

Wellenstein saw P.A. Nolan again on April 18, 2005. Wellenstein talked “at length today about his distress due to his Vocational Rehab evaluation,” stating he “had a lot of difficulty with the testing because he was hallucinating all the while, but his testing showed he was cognitively able to work.” (R. 268) Wellenstein stated the evaluator had been “quite rude about the results,” which caused him stress. He complained of visual hallucinations or “floaters” in the form of “shadows or shapes.” (*Id.*) His medications were

continued without change, and P.A. Nolan noted she “provided supportive psychotherapy.” (*Id.*)

On May 25, 2005, Wellenstein saw Gary Lewis, LISW for a counseling session. Wellenstein was noted to be “[m]ore anxious,” and struggling with “his worries about his yet undiagnosed physical [sic] problem.” (R. 267) Wellenstein expressed concern about “his blackouts where he momentarily lose[s] perspective of time.” (*Id.*) He was scheduled to return in one week. (*Id.*)

Wellenstein saw Lewis on June 1, 2005, stating he wanted “to express his feelings about [a] recent panic episode.” (R. 266) Wellenstein stated he had experienced “sweaty palms, rapid pulse and heart beat ‘for no apparent reason,’” as well as “blurred speech.” (*Id.*) He had gone to the emergency room and been told he was having a panic attack. (*Id.*) Lewis scheduled him for follow-up in one week. (*Id.*) Wellenstein missed his scheduled appointment on June 13, 2005. (R. 265)

On June 21, 2005, Wellenstein saw Dr. Brinck “for a formal intake.” (R. 263) Dr. Brinck diagnosed Wellenstein with Major Depressive Disorder, Generalized Anxiety Disorder, Rule Out OCD, and Rule Out Bipolar Disorder. He assessed Wellenstein’s current GAF at 50. The doctor noted Wellenstein had only had “a limited response to multiple med trials which is not uncommon for this diagnosis,” and Wellenstein’s symptoms had been “quite limiting for many years and [had] prohibited him from employment.” (R. 264) He recommended Wellenstein continue to participate in therapy, and he “encouraged [Wellenstein] to pursue Social Security Disability.” (*Id.*)

Wellenstein saw Lewis on June 27, 2005, and stated he had been to the ER again for “another episode.” (R. 262) According to Wellenstein, doctors had done an “EED and CAT scan,” both of which were normal. He also reported having an MRI that was normal. Dr. Brinck had started him on a trial of Lexapro which Wellenstein said “left him feeling strange, but better than others he [had] tried.” (*Id.*) He

indicated he “needs to learn how to live with it and thinks he can do that.” (*Id.*) The therapist recommended some relaxation exercises. Notes indicate Wellenstein “does not take suggestions well – has some resistance to struggle with.” (*Id.*)

Wellenstein saw another therapist, Terry Hey, on July 14, 2005. Wellenstein appeared anxious and he “complained of losing his sense of time,” but the incidents he described were noted to be unremarkable and somewhat ordinary, such as losing track of what month it is or what time it is. (R. 261) Wellenstein “insisted that it all began with his last ER visit and has been getting worse.” (*Id.*) He was scheduled for follow-up in one week. (*Id.*)

Wellenstein saw Hey on July 21, 2005. The therapist found Wellenstein to be “deluded about his own knowledge/abilities, avoidant, somewhat histrionic,” and egocentric, “hiding an inferiority complex.” (R. 258) He noted Wellenstein “seemed very vested in receiving a diagnosis of somataform [sic] disorder.” (*Id.*) The therapist suggested Wellenstein had “many treatable symptoms and at this point the diagnosis itself wasn’t as relevant as treating the immediate symptoms.” (*Id.*)

Wellenstein also saw P.A. Nolan on July 21, 2005, for medication management. Wellenstein had stopped taking Lexapro after a short time “because it sedated him and he would just sit and stare at the ceiling.” (R. 257) Dr. Brinck had suggested Klonopin, Xanax, or an antipsychotic, but Wellenstein stated he could not afford Klonopin or Xanax, and he “refuse[d] to consider an antipsychotic because of a reaction he had to Risperdal.” (*Id.*) He indicated he had “fired his therapist because she was challenging him to look at things he didn’t want to address.” (*Id.*) P.A. Nolan suggested any good therapist would do the same, and she “encouraged him to reconsider the suggestions for a med change and therapy.” (*Id.*)

Wellenstein saw Verna Halligan on August 25, 2005. Halligan gave Wellenstein “handouts on stress management

and on refuting irrational ideas.” (R. 256) She attempted to discuss these with Wellenstein, but he stated he was skeptical that it could help him. “States he is ‘dancing with a gorilla’, and states the gorilla is dysphoria, and it ‘does more than just step on my feet’.” (*Id.*) Wellenstein reported he was taking his Lexapro, but only 1/4 pill instead of the 1/2 pill prescribed because he disliked the side effects. (*Id.*)

At his next session, on September 21, 2005, Wellenstein stated his somatoform disorder had “changed his personality” and significantly altered his cognitive abilities. He refused to schedule another session, stating he would call “if he decides therapy will be useful to him.” (R. 254)

Wellenstein saw P.A. Nolan for medication management on November 2, 2005. He reportedly was “doing about the same,” but stated he continued to have “mini strokes that happen during times of increased stress.” (R. 253) Notes indicate Wellenstein “expresses concern over Dr. Brinck’s diagnosis of Undifferentiated Somatoform Disorder, as . . . his attorney said that won’t get him disability.” (*Id.*) His medications were continued without change, and he was directed to follow up in three months. (*Id.*)

Wellenstein returned to see P.A. Nolan on January 31, 2006. He reported good sleep and appetite, and no side effects from his medications which included Lexapro, Provigil, and Wellbutrin. (R. 252)

On March 21, 2006, Wellenstein saw Dr. Brinck. He was noted to be neatly groomed with normal speech, appropriate language, and clear thought content. He also reported having good sleep and appetite, and no side effects from his medications. His behavior was noted to be “psych retardation,” with anxious and depressed mood and affect. The doctor’s diagnoses included Generalized Anxiety Disorder, Somatization Disorder, and Major Depressive Disorder, Rule Out OCD. His current GAF was 40 to 45. (R. 251)

Wellenstein saw Dr. Brinck again on April 4, 2006, “with questions about disability.” (R. 250) He was anhedonic

and reported suicidal thoughts with no plan. Increased Wellbutrin had increased his energy slightly. (*Id.*)

On April 4, 2006, Dr. Brinck completed a Medical Source Statement form regarding Wellenstein. (R. 191-94) He indicated Wellenstein had been seen at the clinic for therapy and medication management since 2002. His diagnoses were Major Depressive Disorder, Generalized Anxiety Disorder, and Somatoform Disorder. Dr. Brinck indicated Wellenstein had improved only partially, and he continued “to struggle with depression, anhedonia, low energy, guilt, trouble thinking and concentrating, anxiety, and panic attacks,” which symptoms “interfered with his ability to work or even perform all activities of daily living.” (R. 192)

Dr. Brinck opined Wellenstein was markedly limited in his ability to maintain regular attendance and punctuality within customary tolerances; to complete a normal work day and work week without interruptions from psychologically-based symptoms; and to perform at a consistent pace without an unreasonable number and length of rest periods. He opined Wellenstein was seriously limited in his ability to sustain an ordinary routine without special supervision; to accept instructions and respond appropriately to criticism from supervisors; to get along with coworkers or peers without unduly distracting them or exhibiting behavioral extremes; and to respond appropriately to changes in a routine work setting. He opined Wellenstein was mildly limited in the ability to remember work-like procedures; to understand, remember, and carry out very short and simple instructions; to maintain attention for extended periods of two-hour segments; to work in coordination with or proximity to others without being unduly distracted by them; and to make simple work-related decisions. He opined Wellenstein would have no limitations in the ability to ask simple questions or request assistance, and to be aware of normal hazards and take appropriate precautions. (R. 191-92)

Dr. Brinck indicated Wellenstein exhibited symptoms including anhedonia or pervasive loss of interest in almost all

activities, appetite disturbance with change in weight, sleep disturbance, psychomotor agitation or retardation, decreased energy, feelings of guilt or worthlessness, difficulty concentrating or thinking, thoughts of suicide, motor tension, autonomic hyperactivity, apprehensive expectation, vigilance and scanning; and recurrent severe panic attacks manifested by a sudden, unpredictable onset of intense apprehension, fear, terror, and a sense of impending doom occurring on the average of at least once a week. He opined Wellenstein's limitations were extreme in the areas of activities of daily living, difficulties in maintaining social functioning, and deficiencies of concentration, persistence, or pace resulting in failure to complete tasks in a timely manner, in work settings or elsewhere. He further indicated Wellenstein experienced "continual" episodes of deterioration or decompensation. (R. 194)

Wellenstein saw P.A. Nolan for medication management on July 5, 2006. He had started taking blood pressure medication and had stopped taking Lexapro because the combination of the medications made him break out in a rash. He reported "his mood and anxiety [were] about the same and he wishe[d] he could take the Lexapro because it did help some." (R. 248) He appeared anxious and depressed. He was advised to see a therapist. (R. 249)

Wellenstein saw Diane Sorensen, LISW, for an intake assessment on July 11, 2006. (R. 244-46) Her treatment plan for Wellenstein was to "attempt cognitive redirection to influence symptoms." (R. 246) His first counseling session with Sorensen was on July 18, 2006. When asked what he was "moving toward," Wellenstein responded that "it dealt with an end to the disability process." (R. 243) He returned for follow-up on July 25, 2006. He completed a Burns Anxiety Inventory "which generated a score of 67, extremely anxious." (R. 242) Sorensen showed him a technique to help reframe his thoughts to be rational, but Wellenstein "appeared not particularly interested." Sorensen noted, "We are rather

at a stalemate, as [Wellenstein] has been with therapists previously.” (*Id.*)

Dr. Brinck saw Wellenstein on August 9, 2006. The doctor increased Wellenstein’s Wellbutrin dosage. (R. 241) Wellenstein then saw [Sorensen] for a therapy session. Sorensen suggested his “thoughts and feelings [could] manifest as symptoms,” and she recommended a method to change his thinking. (R. 239) At their next session on August 16, 2006, Wellenstein described feeling “self-hypnotized,” and stated he felt “incapable of physical activity because of physical/health restrictions, even fishing.” (R. 238) Sorensen assigned homework, directing Wellenstein to try one new challenge. (*Id.*)

Wellenstein saw Sorensen on August 30 and September 27, 2006, and February 7, 2007. No real progress was noted. Wellenstein continued to relate a litany of physical problems that he correlated with his stress and anxiety. (R. 25-26, 234, 237)

On September 28, 2006, Dr. Brinck wrote a letter stating that “[d]espite numerous medication trials and ongoing psychotherapy, [Wellenstein] continues to have residual symptoms that clearly interfere with his ability to work.” (R. 190) He indicated he had “strongly encouraged” Wellenstein to apply for disability benefits, and the doctor opined Wellenstein would be unable to “obtain or maintain gainful employment for the foreseeable future.” (*Id.*)

On March 26, 2007, Diane Sorensen, LISW from Siouxland Mental Health completed a Medical Source Statement checklist regarding Wellenstein. She indicated Wellenstein would be seriously limited in his ability to maintain attention for extended periods of two-hour segments, maintain regular attendance and be punctual within customary tolerances, accept instructions and respond appropriately to criticism from supervisors, get along with co-workers or peers without unduly distracting them or exhibiting behavioral extremes, and respond appropriately to changes in a routine work setting. She indicated he would be seriously or markedly

limited in his ability to complete a normal workday and workweek without interruptions from psychologically-based symptoms, and perform at a consistent pace without an unreasonable number and length of rest periods. (R. 219-20) Ms. Sorensen listed Wellenstein's impairments as an Affective Disorder, with symptoms of anhedonia, decreased energy, difficulty concentrating or thinking, and thoughts of suicide; a possible Anxiety-Related Disorder characterized by recurrent severe panic attacks; and a Somatoform Disorder, characterized by persistent nonorganic disturbances of the use of his limbs and diminished or heightened sensation, and unrealistic interpretation of physical signs or sensations associated with the preoccupation or belief that he has a serious disease or injury. (R. 222) Sorensen opined Wellenstein has a marked restriction of the activities of daily living, and marked deficiencies of concentration, persistence or pace that would result in failure to complete tasks in a timely manner. (R. 223)

***b. Consulting opinions***

On December 8, 2004, Wellenstein underwent a physical examination by RoseMary Mason, M.D. at the request of Disability Determination Services. (R. 184-88) Wellenstein stated he and his wife worked at Walgreens four hours per week, polishing the floors with a high speed burnisher. His wife did "all of the bending and lifting" while he "walk[ed] behind the self-assisted machine that more or less pull[ed] itself." (R. 184) He previously worked as a parking ramp attendant for ten hours per week, but he could not maintain the job because of physical pain, depression, and nervous anxiety. He reported taking Wellbutrin XL for depression, Provigil for fatigue, Strattera for obsessive compulsive and attention deficit disorder and to aid concentration, Ibuprofen for arthritic pain, and Glucosamine Chondroitin for arthritis. (R. 185)

Examination showed Wellenstein had normal ranges of motion in his shoulders, elbows, and wrists, and a normal gait. He had good grip strength and upper extremity muscle

strength, slightly reduced flexion of his knees bilaterally, and mildly reduced ranges of motion of his hips bilaterally. He exhibited pain in his lumbar spine on leaning to the right; moderate to severe limitations in flexing and rotating his neck; good lower extremity muscle strength on the right; and fair lower extremity muscle strength on the left, with the notation that he has a dropped foot on the left. (R. 187-88) After examination, the doctor diagnosed Wellenstein with “Osteoarthritis in the back, left shoulder, right elbow and right foot from a previous motorcycle accident,” and “Obsessive compulsive disorder and attention deficit disorder with difficulty concentrating and depression.” (R. 186)

On December 19, 2004, Jan Hunter, D.O. reviewed the record and completed a Physical Residual Functional Capacity Assessment form (R. 169-76) He opined Wellenstein would be able to lift up to twenty pounds occasionally and ten pounds frequently, and sit, stand and/or walk for about six hours in an eight-hour workday. He found Wellenstein to have no limitations in his ability to push/pull, and indicated he could perform all postural activities occasionally. (*Id.*) Dr. Hunter found Wellenstein’s allegations of significant, ongoing pain not to be entirely credible, noting Wellenstein had failed to seek treatment for his alleged pain syndrome and he took only over-the-counter medications for pain. (R. 178) He further noted Wellenstein’s “physical examination findings were minimal and gait was normal.” (*Id.*)

On February 8, 2005, John A. May, M.D. reviewed the record and concurred in Dr. Hunter’s assessment. (R. 176; *see* R. 177)

Regarding Wellenstein’s mental health, John F. Tedesco, Ph.D. reviewed the record on December 29, 2004, and completed a Mental Residual Functional Capacity Assessment form (R. 150-54), and a Psychiatric Review Technique form (R. 155-68) He found Wellenstein suffers from ADHD, depression/dysthymia, and obsessive-compulsive disorder, that likely would cause him mild limitation in his activities of daily living, and moderate difficulties in

maintaining social functioning and maintaining concentration, persistence, or pace. He found Wellenstein had experienced no extended episodes of decompensation. (R. 155-66)

Dr. Tedesco opined Wellenstein would be moderately limited in the ability to understand, remember, and carry out detailed instructions; maintain attention and concentration for extended periods; work in coordination with or proximity to others without being distracted by them; complete a normal workday and workweek without interruptions from psychologically-based symptoms; perform at a consistent pace without an unreasonable number and length of rest periods; interact appropriately with the general public; accept instructions and respond appropriately to criticism from supervisors; and respond appropriately to changes in the work setting. He otherwise found Wellenstein to have no work-related limitations in terms of his mental functional capacity. (R. 150-53) Dr. Tedesco found the record did not support the existence of marked functional impairments, noting that although Wellenstein indicated he had suffered from depression throughout his life, he nevertheless had been able to work at substantial gainful activity levels. (R. 152) He also noted none of Wellenstein's treating sources had made note of marked functional impairments or serious symptomatology, and Wellenstein had never required hospitalization for his symptoms. (*Id.*)

On March 8, 2005, Wellenstein underwent a neuropsychological assessment by John E. Meyers, PsyD. (R. 282-89) Dr. Meyers administered a battery of tests to Wellenstein, the results of which Dr. Meyers indicated were "an adequate representation of his current cognitive functioning level on the tasks given." (R. 283) In addition, Wellenstein completed two self-report questionnaires of his psychological functioning, one addressing his general functioning over time (the MMPI-2), and the other addressing his psychological functioning during the preceding seven days (the SCL90-R). Considering Wellenstein's test results and the

results of these self-report questionnaires, Dr. Meyer[s] reached the following conclusions:

[Wellenstein's] Attention and Working Memory was average. Tasks of Processing Speed and Mental Flexibility were average. Verbal Reasoning skills were average. His Visual Reasoning skills were low average. His Verbal Memory skills were average. His Non-Dominant Hand Motor and Sensory skills were average.

Everyday functional memory skills are dependent on a multitude of cognitive functions not limited to simple new learning. Given the current scores, his functional memory was average. Functional activities including daily living activities, self care and daily decision making including cooking, home care and basic activities of daily living function was average. Appropriate social activities and interaction is a complex set of behaviors that can be influenced by psychological and cognitive factors. His social awareness was average.

The psychological profile suggests chronic marginal schizoid adjustment. He may be angry and resentful but has difficulty modulating his emotions. His behavior may be unpredictable and frequent social and legal difficulties are possible. He may have a thought disorder as well . . . including bizarre thinking and difficulty organizing his thinking.

Remembering locations and work-like procedures was average. Understanding and remembering very short and simple instructions was average. Understanding and remembering detailed instructions was a little below average, but still within normal limits. Carrying-out detailed instructions was average. Maintaining attention and concentration for extended periods of time was average. Performing activities within a schedule

and maintaining regular attendance and punctuality within customary tolerances was a little below average, but still within normal limits. Sustaining an ordinary routine without special supervision was average. Working on coordination with or in proximity to others without being distracted was average. Making simple work-related decisions was average[.] Ability to complete a workweek without undue interruptions from psychologically based symptoms was average. Performing at a consistent pace without an unreasonable number and length of rest periods due to psychological/cognitive difficulties was average. Interacting appropriately with the general public was a little below average, but still within normal limits. Asking simple questions or requesting assistance was average. Accepting instructions and responding appropriately to criticism from supervisors was average. Getting along with coworkers and peers without distracting them or exhibiting behavioral extremes was average. Maintaining socially appropriate behavior and adhering to basic standards of behavior was average. Responding appropriately to changes in the work setting was average. Ability to manage own schedule was a little below average, but still within normal limits. The ability to manage one's own finances involves a multitude of cognitive tasks. His ability to manage his own finances was average.

Vocational Summary: Individuals who score at this level of overall performance on the neuropsychological battery are generally able to perform office type work, including clerical, sales, managerial, skilled work or semi-skilled or unskilled vocations are also within this vocational range. At this level of performance, any area of vocational interest could be achieved. Selection of a vocation is therefore a personal preference depending on interests and any physical limitations.

Academic pursuits, vocational technical training or on-the-job training will probably be successful.

The speed of processing information (visual or verbal) was adequate; this suggests he would be expected to be able to maintain adequate speed and pace of response. Unless physical limitations are present, he would be able to meet general industrial demands. If additional formal classroom training is needed, no particular difficulty would be expected in his ability to maintain cognitive pace and duration of concentration. Language skills were generally intact. He would be generally able to follow normal conversations, instructions and language based procedures. Given the neuropsychological profile, he appears to be about average in his processing of visual information. He is able to use visual cues from the environment to alter his behavior. Vocations that are visual in nature could be considered for vocational planning. His ability to process auditory information was good. This suggests at least adequate ability to process multiple auditory inputs. No particular difficulty would be expected with group conversations or in other social interactions. He shows adequate general learning ability. He would be able to learn verbal procedures in a generally normal fashion. Vocations that require verbal training could be considered when making vocational choices. Given the profile of results his ability to manage his own schedule, and perform everyday functional memory type tasks was adequate (i.e. remembering appointments and tasks that need to be done). This suggests that in a vocational setting, he would be expected to be able to recall procedures, and to perform future events adequately. The use of a calendar or memory book may be helpful. Dominant hand skills that require sensory and motor persistence were within functional limits. This indicates no general difficulty

for tasks that require fine motor control and sensory feedback. Non-dominant hand skills that require sensory and motor persistence were within normal limits. This indicates no general difficulty for tasks that require fine motor control and sensory feedback.

Based on the profile of neuropsychological data this patient shows a pattern of scores that generally falls within normal limits. There is no indication of cognitive impairment. The pattern of scores is most consistent with individuals that have delusional characteristics which may be the basis of his unusual cognitive complaints and unusual behavioral presentation[.] The presence of thought disorder characteristics [is] indicated by both the psychological and cognitive portion of the evaluation. He may wish to consult with his treating physician to help organize his thinking.

(R. 287-88)

On April 1, 2005, Myrna C. Tashner, Ed.D. reviewed the record and concurred in Dr. Tedesco's findings. (R. 153, 154) It is not apparent from the record whether this evaluator had the results of the neuropsychological assessment available to her.

**3. *Vocational expert's testimony***

The ALJ asked the VE to consider a younger worker with a high school education and past work as a commercial or institutional cleaner, who is subject to the following limitations:

First question I have is for light, unskilled work, if he could occasionally lift or carry 20 pounds[,] frequently[] 10 pounds, could stand, or walk, or sit for six hours in an eight hour day and could occasionally do postural activities. Then, from a mental standpoint, needs to have routine, repetitive work that does not require him to set goals, deal with job changes, or have extended concentration. And this is work that could be

done under ordinary supervision, but I would say that the social interaction should be only brief or superficial with coworkers and the general public, and would not exceed frequent or constant during the workday. With that functional capacity, could he do this past work or could you identify any other type of work?

(R. 326-27) The VE indicated the hypothetical individual could perform a large number of different jobs. (R. 327-29)

The ALJ next asked the VE to consider a second hypothetical question[]:

Now, secondly, we have a check-list from Dr. Brin[c]k in which he indicates that the Claimant has continual episodes of de-compensation and extreme restrictions in [activities of daily living], social [interaction], and concentration. Would that at the extreme level, obviously, preclude all employment?

(R. 329) The VE responded that it would. (R. 330) The ALJ then asked whether, if Wellenstein's testimony was credible, he could perform any type of work. The VE responded, "No." (*Id.*)

#### **4. *The ALJ's decision***

The ALJ determined that Wellenstein has the following severe impairments: attention deficit hyperactivity disorder, depression, obsessive compulsive disorder, somatoform disorder, and chronic pain from a motorcycle accident in 1979. (R. 18.) However, Wellenstein does not have an impairment or combination of impairments that meets the Listings. (*Id.*)

The ALJ found Wellenstein is self-employed and runs his own business. His activities include preparing simple meals, doing laundry, grocery shopping, driving a car, playing with his computer, talking with friends on the telephone, and attending church activities at least three times per week. (R. 19)

The ALJ found Wellenstein has the following residual functional capacity:

After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to lift 20 pounds occasionally and 10 pounds frequently; he can sit, stand and walk 6 out of 8 hours; and he can occasionally perform postural activities (i.e., climbing, balancing, stooping, kneeling, crouching and crawling). From a mental standpoint, the claimant needs to have routine, repetitive work that does not require him to set goals, deal with job changes or have extended concentration, and work that can be done under ordinary supervision; and social interaction should be brief and superficial with the general public and co-workers.

(*Id.*) The ALJ concluded Wellenstein’s “medically determinable impairments could reasonably be expected to produce the alleged symptoms, but [his] statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely credible.” (R. 23) The ALJ further concluded that based on the entire record, the evidence “does not substantiate the claimant’s allegations with respect to the extent of his symptoms and limitations and does not support a finding of disability.” (R. 30)

The ALJ did not give significant weight to Dr. Brinck’s assessment of April 4, 2006. The ALJ noted Dr. Brinck checked “extreme” limitations in every area of functioning, even though Wellenstein “has never been hospitalized, he runs his own business, he can drive 30 miles to and from work, and he can be self-employed and meet with contractors and employees.” (R. 30-31) The ALJ concluded that Dr. Brinck “clearly does not understand” the term “extreme.” (R. 31) He also decided that Dr. Brinck’s assessment was not consistent with Wellenstein’s reported GAF of 60. (*Id.*) The ALJ noted that although Dr. Brinck opined Wellenstein was unable to work, a determination of whether a claimant is “disabled” or “unable to work” under the Act is reserved to the Commissioner, and the opinions of treating sources on this

subject are “never entitled to controlling weight or special significance.” (R. 31)

With regard to the checklist report by Diane Sorensen, Wellenstein’s therapist, the ALJ determined it was not entitled to significant weight because it was not supported by the evidence and because Sorensen was not an acceptable medical source pursuant to 20 C.F.R. § 404.1513 and 20 C.F.R. § 416.913. (R. 31)

The ALJ relied on the neuropsychological evaluation prepared by Dr. Meyers on March 8, 2005, which showed “all domains were average, except for possible schizoid adjustment on psychological profile, with no indication of cognitive impairment and an overall performance indicating the capability of performing even skilled work and ‘any area of vocational interest.’” (*Id.*) The ALJ also determined the record “does not indicate any physical impairments that would preclude the performance of all types of work activity.” (*Id.*)

The ALJ concluded that Wellenstein is unable to perform any past relevant work. (*Id.*) However, he also concluded “there are jobs that exist in significant numbers in the national economy that the claimant can perform.” (R. 32) These jobs include light housekeeper/cleaner, product assembler, and hand packager, as well as 80 to 85 percent of the full range of light work. (R. 32-33) Based on this conclusion, the ALJ found Wellenstein is “capable of making a successful adjustment to other work that exists in significant numbers in the national economy,” and he therefore is not disabled. (R. 33)

Docket no. 13.

Upon review of the record, and absent any objections to Judge Zoss’s factual findings, the court adopts all of Judge Zoss’s factual findings.

## ***II. LEGAL STANDARDS***

The court reviews the magistrate judge’s report and recommendation pursuant to the statutory standards found in 28 U.S.C. § 636(b)(1):

A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

28 U.S.C. § 636(b)(1) (2006); *see* Fed. R. Civ. P. 72(b) (stating identical requirements); N.D. IA. L.R. 72, 72.1 (allowing the referral of dispositive matters to a magistrate judge but not articulating any standards to review the magistrate judge’s report and recommendation). While examining these statutory standards, the United States Supreme Court explained:

Any party that desires plenary consideration by the Article III judge of any issue need only ask. Moreover, while the statute does not require the judge to review an issue *de novo* if no objections are filed, it does not preclude further review by the district judge, *sua sponte* or at the request of a party, under a *de novo* or any other standard.

*Thomas v. Arn*, 474 U.S. 140, 154 (1985). Thus, a district court *may* review *de novo* any issue in a magistrate judge’s report and recommendation at any time. *Id.* If a party files an objection to the magistrate judge’s report and recommendation, however, the district court *must* “make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1). In the absence of an objection, the district court is not required “to give any more consideration to the magistrate’s report than the court considers appropriate.” *Thomas*, 474 U.S. at 150.

*De novo* review, of course, is nondeferential and generally allows a reviewing court to make an “independent review” of the entire matter. *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991) (noting also that “[w]hen *de novo* review is compelled, no form of appellate deference is acceptable”); see *Doe v. Chao*, 540 U.S. 614, 620-19 (2004) (noting *de novo* review is “distinct from any form of deferential review”). The *de novo* review of a magistrate judge’s report and recommendation, however, only means a district court “‘give[s] fresh consideration to those issues to which specific objection has been made.’” *United States v. Raddatz*, 447 U.S. 667, 675 (1980) (quoting H.R. Rep. No. 94-1609, at 3, reprinted in 1976 U.S.C.C.A.N. 6162, 6163 (discussing how certain amendments affect 28 U.S.C. § 636(b))). Thus, while *de novo* review generally entails review of an entire matter, in the context of § 636 a district court’s *required de novo* review is limited to “*de novo* determination[s]” of only “those portions” or “specified proposed findings” to which objections have been made. 28 U.S.C. § 636(b)(1); see *Thomas*, 474 U.S. at 154 (“Any party that desires plenary consideration by the Article III judge of any *issue* need only ask.” (emphasis added)). Consequently, the Eighth Circuit Court of Appeals has indicated *de novo* review would only be required if objections were “specific enough to trigger *de novo* review.” *Branch v. Martin*, 886 F.2d 1043, 1046 (8th Cir. 1989). Despite this “specificity” requirement to trigger *de novo* review, the Eighth Circuit Court of Appeals has “emphasized the necessity . . . of retention by the district court of substantial control over the ultimate disposition of matters referred to a magistrate.” *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994). As a result, the Eighth Circuit has been willing to “liberally construe[]” otherwise general *pro se* objections to require a *de novo* review of all “alleged errors,” see *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995), and to conclude that general objections require “full *de novo* review” if the record is concise, *Belk*, 15 F.3d at 815 (“Therefore, even had petitioner’s objections

lacked specificity, a *de novo* review would still have been appropriate given such a concise record.”). Even if the reviewing court must construe objections liberally to require *de novo* review, it is clear to this court that there is a distinction between making an objection and making no objection at all. *See Coop. Fin. Assoc., Inc. v. Garst*, 917 F. Supp. 1356, 1373 (N.D. Iowa 1996) (“The court finds that the distinction between a flawed effort to bring objections to the district court’s attention and no effort to make such objections is appropriate.”). Therefore, this court will strive to provide *de novo* review of all issues that might be addressed by any objection, whether general or specific, but will not feel compelled to give *de novo* review to matters to which no objection at all has been made.

In the absence of any objection, the Eighth Circuit Court of Appeals has indicated a district court should review a magistrate judge’s report and recommendation under a clearly erroneous standard of review. *See Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (noting when no objections are filed and the time for filing objections has expired, “[the district court judge] would only have to review the findings of the magistrate judge for clear error”); *Taylor v. Farrier*, 910 F.2d 518, 520 (8th Cir. 1990) (noting the advisory committee’s note to Fed. R. Civ. P. 72(b) indicates “when no timely objection is filed the court need only satisfy itself that there is no clear error on the face of the record”); *Branch*, 886 F.2d at 1046 (contrasting *de novo* review with “clearly erroneous standard” of review, and recognizing *de novo* review was required because objections were filed). The court is unaware of any case that has described the clearly erroneous standard of review in the context of a district court’s review of a magistrate judge’s report and recommendation to which no objection has been filed. In other contexts, however, the Supreme Court has stated the “foremost” principle under this standard of review “is that [a] finding is “clearly erroneous” when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a

mistake has been committed.’” *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). Thus, the clearly erroneous standard of review is deferential, *see Dixon v. Crete Medical Clinic, P.C.*, 498 F.3D 837, 847 (8th Cir. 2007) (noting a finding is not clearly erroneous even if another view is supported by the evidence), but a district court may still reject the magistrate judge’s report and recommendation when the district court is “left with a definite and firm conviction that a mistake has been committed,” *U.S. Gypsum Co.*, 333 U.S. at 395.

Even though some “lesser review” than *de novo* is not “positively require[d]” by statute, *Thomas*, 474 U.S. at 150, Eighth Circuit precedent leads this court to believe that a clearly erroneous standard of review should generally be used as the baseline standard to review all findings in a magistrate judge’s report and recommendation that are not objected to or when the parties fail to file any timely objections, *see Grinder*, 73 F.3d at 795; *Taylor*, 910 F.2d at 520; *Branch*, 886 F.2d at 1046; *see also* Fed. R. Civ. P. 72(b) advisory committee’s note (“When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.”). In the context of the review of a magistrate judge’s report and recommendation, the court believes one further caveat is necessary: a district court always remains free to render its own decision under *de novo* review, regardless of whether it feels a mistake has been committed. *See Thomas*, 474 U.S. at 153-54. Thus, while a clearly erroneous standard of review is deferential and the minimum standard appropriate

in this context, it is not mandatory, and the district court may choose to apply a less deferential standard.<sup>3</sup>

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<sup>3</sup> The Eighth Circuit Court of Appeals, in the context of a dispositive matter originally referred to a magistrate judge, does not review a district court's decision in similar fashion. The Eighth Circuit Court of Appeals will either apply a clearly erroneous or plain error standard to review factual findings, depending on whether the appellant originally objected to the magistrate judge's report and recommendation. *See United States v. Brooks*, 285 F.3d 1102, 1105 (8th Cir. 2002) ("Ordinarily, we review a district court's factual findings for clear error . . . . Here, however, the record reflects that [the appellant] did not object to the magistrate's report and recommendation, and therefore we review the court's factual determinations for plain error." (citations omitted)); *United States v. Looking*, 156 F.3d 803, 809 (8th Cir. 1998) ("[W]here the defendant fails to file timely objections to the magistrate judge's report and recommendation, the factual conclusions underlying that defendant's appeal are reviewed for plain error."). The plain error standard of review is different than a clearly erroneous standard of review, *see United States v. Barth*, 424 F.3d 752, 764 (8th Cir. 2005) (explaining the four elements of plain error review), and ultimately the plain error standard appears to be discretionary, as the failure to file objections technically waives the appellant's right to appeal factual findings, *see Griffini v. Mitchell*, 31 F.3d 690, 692 (8th Cir. 1994) (stating an appellant who did not object to the magistrate judge's report and recommendation waives his or her right to appeal factual findings, but then choosing to "review[] the magistrate judge's findings of fact for plain error"). An appellant does not waive his or her right to appeal questions of law or mixed questions of law and fact by failing to object to the magistrate judge's report and recommendation. *United States v. Benshop*, 138 F.3d 1229, 1234 (8th Cir. 1998) ("The rule in this circuit is that a failure to object to a magistrate judge's report and recommendation will *not* result in a waiver of the right to appeal 'when the questions involved are questions of law or mixed questions of law and fact.'" (quoting *Francis v. Bowen*, 804 F.2d 103, 104 (8th Cir. 1986), in turn quoting *Nash v. Black*, 781 F.2d 665, 667 (8th Cir. 1986))). In addition, legal conclusions will be reviewed *de novo*, regardless of whether an appellant objected to a magistrate judge's report and recommendation. *See, e.g., United States v. Maxwell*, 498 F.3d 799, 801 n.2 (8th Cir. 2007) ("In cases like this one, 'where the defendant fails to file timely objections to the magistrate judge's report and recommendation, the factual conclusions underlying that defendant's appeal are reviewed for plain error.' We review the district court's legal conclusions *de novo*." (citation (continued...))

The parties have objected to each portion of Judge Zoss’s legal analysis. Although the court will review Judge Zoss’s findings, *de novo*, the court reviews the Commissioner’s decision to determine whether the correct legal standards were applied and “whether the Commissioner’s findings are supported by substantial evidence in the record as a whole.” *Page v. Astrue*, 484 F.3d 1040, 1042 (8th Cir. 2007) (citing *Haggard v. Apfel*, 175 F.3d 591, 594 (8th Cir.1999), in turn citing *Clark v. Apfel*, 141 F.3d 1253, 1255 (8th Cir.1998). Under this deferential standard, “[s]ubstantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner’s conclusion.” *Krogmeier v. Barnhart*, 294 F.3d 1019, 1022 (8th Cir. 2002); *see also Page*, 484 F.3d at 1042 (“Substantial evidence is relevant evidence which a reasonable mind would accept as adequate to support the Commissioner’s conclusion.”) (quoting *Haggard*, 175 F.3d at 594). Even if the court would have “‘weighed the evidence differently,’” the Commissioner’s decision will not be disturbed unless “it falls outside the available ‘zone of choice.’” *Nicola v. Astrue*, 480 F.3d 885, 886 (8th Cir. 2007) (quoting *Hacker v. Barnhart*, 459 F.3d 934, 936 (8th Cir. 2006)).

### ***III. LEGAL ANALYSIS***

The Commissioner objects to Judge Zoss’s finding that the ALJ performed an inadequate credibility analysis. Wellenstein objects to Judge Zoss’s finding that the ALJ gave proper weight to Dr. Brinck’s and Therapist Sorensen’s opinions, and he objects to Judge Zoss’s alleged failure to consider his argument that the record is not fully and fairly developed. The court will review Judge Zoss’s findings *de novo*. 28 U.S.C. § 636(b)(1)

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<sup>3</sup>(...continued)  
omitted)).

(The district court *must* “make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made.”).

### ***A. Credibility Assessment***

The Commissioner claims that the ALJ properly assessed Wellenstein’s credibility and objects to Judge Zoss’s finding to the contrary. In *Polaski v. Heckler*, 739 F.2d 1320

(8th Cir. 1984), the Eighth Circuit Court of Appeals first articulated the standard for evaluating subjective complaints:

In *Polaski*, we stated that the ALJ must consider the claimant’s prior work record, and observations by third parties and treating and examining physicians relating to such matters as:

1. the claimant’s daily activities;
2. the duration, frequency and intensity of the pain;
3. precipitating and aggravating factors;
4. dosage, effectiveness and side effects of medication;
5. functional restrictions.

*Id.* at 1322.

*Heino v. Astrue*, 578 F.3d 873, 880-81 (8th Cir. 2009). “The claimant’s work history and the absence of objective medical evidence to support the claimant’s complaints are also relevant.” *Finch v. Astrue*, 547 F.3d 933, 935 (8th Cir. 2008) (citing *Wheeler v. Apfel*, 224 F.3d 891, 895 (8th Cir. 2000)). An ALJ is not, however, “free to accept or reject the claimant’s subjective complaints solely on the basis of personal observations.” *Id.* at 880. “Subjective complaints may be discounted if there are inconsistencies in the evidence as

a whole.” *Id.* (citing *Polaski*, 739 F.2d at 1322). Nevertheless, the Eighth Circuit Court of Appeals requires that the ALJ give his or her reasons for their credibility determination:

If, based on the *Polaski* . . . factors, the ALJ determines that the claimant’s subjective complaints are not fully credible, he must make an express credibility finding and give his reasons for discrediting the claimant’s testimony. *See Hall v. Chater*, 62 F.3d 220, 223 (8th Cir.1995) . . . “We will not disturb the decision of an ALJ who seriously considers, but for good reasons explicitly discredits, a claimant’s testimony of disabling pain.” *Browning v. Sullivan*, 958 F.2d 817, 821 (8th Cir.1992).

*Jones v. Callahan*, 122 F.3d 1148, 1151 (8th Cir. 1997); *see also Finch*, 547 F.3d at 935-936 (“[Q]uestions of credibility are for the [ALJ] in the first instance. If an ALJ explicitly discredits a claimant’s testimony and gives a good reason for doing so, we will normally defer to that judgment.”) (quoting *Karlix v. Barnhart*, 457 F.3d 742, 748 (8th Cir.2006), in turn quoting *Dixon v. Sullivan*, 905 F.2d 237, 238 (8th Cir.1990)).

In this case, the ALJ cited the credibility factors in 20 C.F.R. §§ 404.1529 and 416.929<sup>4</sup>, *see R.* at 20, summarized the hearing testimony, *see R.* at 20-23, and concluded that Wellenstein’s “medically determinable impairments could reasonably be expected to produce the alleged symptoms, but that [Wellenstein’s] statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely credible.” *R.* at 23. The ALJ, then, summarized the record, *see R.* at 23-30 and, again, discredited Wellenstein’s subjective complaints. *See R.* at 30. The ALJ, however, neglected to give

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<sup>4</sup>The Eighth Circuit Court of Appeals has explained that an ALJ is not required to cite *Polaski*: “Although the ALJ never expressly cited *Polaski* (which is our preferred practice), the ALJ cited and conducted an analysis pursuant to 20 C.F.R. §§ 404.1529 and 416.929, which largely mirror the *Polaski* factors.” *Schultz v. Astrue*, 479 F.3d 979, 983 (8th Cir. 2007) (citing *Randolph v. Barnhart*, 386 F.3d 835, 842 (8th Cir.2004)).

her “reasons for discrediting” Wellenstein’s subjective complaints. *Jones*, 122 F.3d at 1151 (citing *Hall*, 62 F.3d at 223).

The Commissioner argues that, “[a]lthough the ALJ did not point to a particular inconsistency when reiterating [her] finding, the entire seven-page analysis sets out the appropriate factors and evidence and plainly shows the inconsistencies.” Docket no. 14. Even if the alleged inconsistencies were “plainly” set out in the ALJ’s summary of the hearing testimony and record, the Eighth Circuit Court of Appeals requires the ALJ to identify the alleged inconsistencies on which they rely. *See id*; *see also Wagner v. Astrue*, 499 F.3d 842, 851 (8th Cir. 2007) (“An ALJ who rejects such [subjective] complaints must make an express credibility determination explaining the reasons for discrediting the complaints.”) (citing *Singh v. Apfel*, 222 F.3d 448, 452 (8th Cir.2000)); *Pelkey v. Barnhart*, 433 F.3d 575, 578 (8th Cir. 2006) (“Although ‘[s]ubjective complaints may be discounted if there are inconsistencies in the evidence as a whole,’ *Polaski*, 739 F.2d at 1322, the ALJ ‘must give reasons for discrediting the claimant,’ *Strongson [v. Barnhart]*, 361 F.3d [1066,] 1072 [(8th Cir. 2004].”). The court finds that the ALJ’s analysis was inadequate for failing to state the reasons for discrediting Wellenstein’s subjective complaints.

The court understands that it should “not set aside an administrative finding based on an ‘arguable deficiency in opinion-writing technique’ when it is unlikely it affected the outcome.” *Strongson*, 361 F.3d at 1072 (quoting *Brown v. Chater*, 87 F.3d 963, 966 (8th Cir. 1996), in turn citing *Benskin v. Bowen*, 830 F.2d 878, 883 (8th Cir.1987)). However, in this case, the VE opined that Wellenstein would be unable to work if the ALJ credited his subjective complaints, *see R.* at 330 (“[Wellenstein’s] testimony would indicate that he would, as he describes the visual phenomenon, they would interfere with his being able to carry out a full-time situation. The visual episodes that—the auras, the

flashes of light, et cetera, would preclude his being able to function as they would interfere with his thinking process and his concentration process.”), and the court is unable to ascertain on this record whether the ALJ considered appropriate factors when discounting these, and other, subjective complaints. The court finds that the ALJ inadequately assessed Wellenstein’s credibility and that, absent proper consideration of Wellenstein’s subjective complaints, there is not substantial evidence in the record as a whole to support the ALJ’s finding that Wellenstein is not disabled. *See Page*, 484 F.3d at 1042 (citations omitted); *see also Krogmeier*, 294 F.3d at 1022 (“Substantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner’s conclusion.” ).

***B. Dr. Brinck’s and Therapist Sorensen’s Opinions***

Wellenstein objects to Judge Zoss’s finding that the ALJ gave proper weight to Dr. Brinck’s and Therapist Sorensen’s opinions. The ALJ did not give Dr. Brinck’s opinions controlling, or even great, weight, and Judge Zoss found that was appropriate because, “he did not provide any psychotherapy himself and he spent little time with Wellenstein from which he could derive the opinions set forth in his medical source statement.” Docket no. 13. Wellenstein claims that Dr. Brinck had seen Wellenstein five times prior to formulating his opinions in September 2006. In addition, Wellenstein emphasizes that Siouxland Mental Health Center uses a team approach and implies that his visits with other mental health professionals at the facility should be considered when determining whether Dr. Brinck should be given treating source status.

Wellenstein also claims that Dr. Brinck’s opinions are consistent with the treatment record. Wellenstein recognizes, to a certain extent, that the treatment record contains evidence that Wellenstein “is somewhat out of touch with reality; over-dramatizes life

situations and his physical complaints; makes changes to his medication regimen on his own, without consulting his treating sources; and is resistant to treatment recommendations by his therapists and treating sources.” Docket no. 15 (quoting Report and Recommendation, docket no. 13). However, Wellenstein claims that these aspects of his personality are connected to his disabling condition, and to disagree with Dr. Brinck’s opinions amounts to impermissibly playing doctor. *See* docket no. 15 (citing *Pate-Fires v. Astrue*, 564 F.3d 935, 946-47 (8th Cir. 2009); *Hartmann v. Astrue*, 592 F.Supp.2d 100, 1104 (S.D.Iowa 2009) (Pratt, C.J.)). Lastly, Wellenstein stresses that Dr. Brinck’s assessment of his condition is consistent with the rest of the record—he specifically argues that it is consistent with Therapist Sorensen’s opinions.

“‘Treating source’ is defined as the claimant’s ‘own physician, psychologist, or other acceptable medical source’ who provides the claimant with medical treatment or evaluation on an ongoing basis.” *Tindell v. Barnhart*, 444 F.3d 1002, 1005 (8th Cir. 2006) (citing 20 C.F.R. § 416.902). In *Casey v. Astrue*, the Eighth Circuit Court of Appeals explained the ALJ’s duty in evaluating a treating source’s opinions:

While a “ ‘treating physician’s opinion is generally entitled to substantial weight[,] ... such an opinion is not conclusive in determining disability status, and the opinion must be supported by medically acceptable clinical or diagnostic data.’” *Pena v. Chater*, 76 F.3d 906, 908 (8th Cir.1996) (quoting *Davis v. Shalala*, 31 F.3d 753, 756 (8th Cir.1994)); *see also* 20 C.F.R. § 404.1527(d)(2) (“If we find that a treating source’s opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight.”). “[A]n ALJ may credit other medical evaluations over that of the treating physician when such other assessments are supported by better

or more thorough medical evidence.” *Prosch v. Apfel*, 201 F.3d 1010, 1014 (8th Cir.2000) (quotation and citation omitted). In considering how much weight to give a treating physician’s opinion, an ALJ must also consider the length of the treatment relationship and the frequency of examinations. 20 C.F.R. § 404.1527(d)(2)(i).

*Casey v. Astrue*, 503 F.3d 687, 691-92 (8th Cir. 2007); *see also Shontos v. Barnhart*, 328 F.3d 418, 426 (8th Cir. 2003) (“A treating source’s opinion is to be given controlling weight where it is supported by acceptable clinical and laboratory diagnostic techniques and where it is not inconsistent with other substantial evidence in the record.”). A medical sources’ opinions may be given treating source status when the medical source was part of a “team approach,” involving other medical sources, including therapists and nurse practitioners. *See Tindell v. Barnhart*, 444 F.3d 1002, 1005 (8th Cir. 2006) (citing *Shontos*, 328 F.3d at 426). The Eighth Circuit Court of Appeals explained that, “the treatment team in *Shontos* included a psychologist whose participation in the claimant’s care gave the entire treatment team treating-source status.” *Lacroix v. Barnhart*, 465 F.3d 881, 886 (8th Cir. 2006) (citing *Shontos*, 328 F.3d at 426-27). The Code of Federal Regulations explains that the ALJ “will always give good reasons in [his or her] notice of determination or decision for the weight we give your treating source’s opinion.” 20 C.F.R. § 404.1527.

Dr. Brinck saw Wellenstein five times prior to writing the September, 2006, letter containing his opinions. His treatment relationship, though relatively short considering most of the five visits took place within about a year of each other, was supplemented by care from members of the treatment team at the Siouxland Mental Health Center as far back as 2002—on a consistent basis starting in 2003.

The ALJ refused to give Dr. Brinck's opinions, alone or in conjunction with Therapist Sorensen's and others at the Siouxland Mental Health Center, even significant weight. According to the ALJ, Dr. Brinck's opinions were inconsistent with the other medical sources and with other substantial evidence in the case. The ALJ stated:

Significant weight is not given to Dr. Brinck's assessment of April 4, 2006. In this regard, it is noted that Dr. Brinck checked "extreme" limitations in every area of functioning, when the claimant has never been hospitalized, he runs his own business, he can drive 30 miles to and from work, and he can be self-employed and meet with contractors and employees. Such functioning does not represent "extreme" limitations in activities of daily living, and Dr. Brinck clearly does not understand the terms. Such assessment is also not consistent with a reported GAF of "60."

R. at 30-31.

In Dr. Brinck's April 4, 2006, Medical Source Statement, he found that Wellenstein was unlimited, or had "[n]o loss of ability to perform the named activity," concerning his ability to ask simple questions or request assistance and to be aware of normal hazards. R. at 191-92. Wellenstein was only mildly limited, or had "[s]ome loss of ability to perform the named activity, but still capable of performing it in regular, competitive, employment," concerning the following: the ability to remember work-like procedures; the ability to understand and remember very short and simple instructions; the ability to carry out very short and simple instructions; the ability to maintain attention for extended periods of 2 hour segments; the ability to work in coordination with or in proximity to others without being (unduly) distracted by them; and the ability to make simple work-related decisions. *Id.* Dr. Brinck found him seriously limited, or having a "severe loss of ability to perform the named activity in regular, competitive employment and, at best, could do so only in a sheltered work setting where special supervision, considerations and

attention are provided,” in the following: the ability to sustain ordinary routine without special supervision; the ability to accept instructions and respond appropriately to criticism from supervisors; the ability to get along with co-workers or peers without unduly distracting them or exhibiting behavior extremes; and the ability to respond appropriately to changes in a routine work setting. *Id.* Lastly, Dr. Brinck found that Wellenstein was markedly limited, or having a “[n]early complete loss of ability to perform the named activity in regular, competitive employment and even in a sheltered work setting; could only do so to meet basic personal needs,” in the following activities: the ability to maintain regular attendance and be punctual within customary tolerances; the ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and perform at a consistent pace without an unreasonable number and length of rest periods, and which requirements are usually strict.” *Id.* When rating the impairment’s severity under the listings, Dr. Brinck found that Wellenstein’s mental impairments were extreme under all four factors: 1) restrictions of activities of daily living; 2) difficulties in maintaining social functioning; 3) deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner (in work settings or elsewhere); and 4) past episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or experience exacerbation of signs and symptoms (which may include deterioration of adaptive behaviors). R. at 194.

The ALJ claims that Dr. Brinck’s checking of “‘extreme’ limitations in every area of functioning” was inconsistent with having never been hospitalized, running his own business, driving 30 miles to and from work, and meeting with contractors and employees. R. at 30-31. However, the record reflects that Wellenstein has consistently attended appointments with the Siouxland Mental Health Center for his symptoms, attempted to

manage his symptoms with various medications, and has reported visiting the emergency room on multiple occasions because of his symptoms. Although Wellenstein has run his own business, Judge Zoss's factual findings—which have been adopted by this court—explain that he works only two to four hours per week and depends on his wife's help in running the business.

The ALJ also relies on the presence of a GAF of “60,” in the record, in finding Dr. Brinck's opinions are inconsistent with the record. A GAF of “60,” “indicates the individual has ‘[m]oderate symptoms . . . or moderate difficulty in social, occupational, or social functioning. . . .’” *Pate-Fires*, 564 F.3d at 938 n. 3 (quoting Diagnostic and Statistical Manual of Mental Disorders, 32 (4th ed. Am. Psychiatric Ass'n 1994) (DSM-IV)). The Eighth Circuit Court of Appeals has found that a score within the “51-60” range is “not inconsistent with [an] opinion that [the claimant] was permanently disabled for any type of employment, nor does it constitute substantial evidence supporting the ALJ's conclusion she is not disabled.” *Id.* at 944 (citing *Colon v. Barnhart*, 424 F.Supp.2d 805, 813-14 (E.D.Pa. 2006), “indicating an ALJ must consider a claimant's total GAF score history, and remanding the case for reconsideration where ALJ failed to consider or discuss a claimant's lowest scores”). This was not Wellenstein's lowest GAF, and a GAF of “60” does not, in itself, demonstrate that Wellenstein is not disabled, and the ALJ failed to explain how Dr. Brinck's opinion was otherwise inconsistent with a GAF of “60.” In other words, the bare assertion that Wellenstein was given a GAF of “60,” in the record, is not a good reason for giving less than significant weight to Dr. Brinck's opinions and the other opinions at Siouxland Mental Health Center.

Rather than giving significant weight to Dr. Brinck's opinions, the ALJ primarily relied on Dr. Meyer's opinions. The court recognizes that an ALJ may give less weight to a treating physician's opinion if it is not “supported by acceptable clinical and laboratory

diagnostic techniques” or “inconsistent with other substantial evidence in the record,” and “an ALJ may credit other medical evaluations over that of the treating physician when such other assessments are supported by better or more thorough medical evidence.” *Casey*, 503 F.3d at 691-92 (citing *Prosch*, 201 F.3d at 1014). However, the court finds that the ALJ did not properly support her decision to give Dr. Brinck’s opinions less weight, and her findings concerning the weight to be given to Dr. Brinck’s and Therapist Sorensen’s opinions were not “supported by substantial evidence in the record as a whole.” *Page*, 484 F.3d at 1042 (citations omitted). The ALJ did not discuss whether Dr. Brinck’s opinions were the product of unacceptable clinical or laboratory technics, and she did not explain how Dr. Meyer’s opinions were based on better or more thorough medical evidence. Thus, the court will order the ALJ, on remand, to reconsider, and properly support, the weight she decides to give to the opinions in this case.

### ***C. Full and Fair Development of the Record***

Judge Zoss found, without discussion, that on remand the ALJ should further develop the record regarding Wellenstein’s work-related mental and physical limitations. Judge Zoss found that, “it would be appropriate to remand the case for further proceedings, including further development of the record regarding Wellenstein’s work-related mental and physical limitations.” Docket no. 13, p. 30. Wellenstein objects to this portion of Judge Zoss’s Report and Recommendation, and claims that Judge Zoss failed to consider his argument that the record should be further developed. Although Wellenstein apparently overlooked Judge Zoss’s recommendation that remand in this case include “further development of the record,” *see id.*, the court has reviewed this issue *de novo*, and finds that the ALJ should further develop the record as he or she finds necessary pursuant to 20 C.F.R. § 404.1512, and consistent with the court’s above findings.

#### **IV. REMAND**

The Eighth Circuit Court of Appeals has explained:

Ordinarily, when a claimant appeals from the Commissioner's denial of benefits and we find that such a denial was improper, we, out of "our abundant deference to the ALJ," remand the case for further administrative proceedings. *Cox v. Apfel*, 160 F.3d 1203, 1210 (8th Cir.1998). Consistent with this rule, we may enter an immediate finding of disability only if the record "overwhelmingly supports" such a finding. *Thompson v. Sullivan*, 957 F.2d 611, 614 (8th Cir.1992); *see Fowler v. Bowen*, 866 F.2d 249, 253 (8th Cir.1989); *Talbott v. Bowen*, 821 F.2d 511, 514 (8th Cir.1987).

*Buckner v. Apfel*, 213 F.3d 1006, 1011 (8th Cir. 2000). The court does not find that there is "overwhelming" support for a finding that Wellenstein is disabled and will not enter an immediate finding of disability. Rather, the court will remand the case for further proceedings.

On remand, the ALJ is directed to perform a proper assessment of the credibility of Wellenstein's subjective complaints under *Polaski v. Heckler*, 739 F.2d 1320 (8th Cir. 1984) and progeny. The ALJ shall also re-evaluate the medical opinions in the record, keeping in mind the Eighth Circuit Court of Appeals's recognition of the "team approach," *see Shontos*, 328 F.3d at 426-27; *Tindell*, 444 F.3d at 1005 (citing *Shontos*, 328 F.3d at 426); *Lacroix*, 465 F.3d at 886 (citing *Shontos*, 328 F.3d at 426-27), and the proper ways in which one can give less weight to a treating physician's opinions or give other medical opinions more weight than the treating physician's opinions. *See Casey*, 503 F.3d at 691-92 (citations omitted). The ALJ must give "good reasons in [his or her] notice of determination or decision for the weight [the ALJ] give[s] a treating source's opinion." 20 C.F.R. § 404.1527. Lastly, the ALJ shall further develop the record, as is necessary and pursuant to 20 C.F.R. § 404.1512.

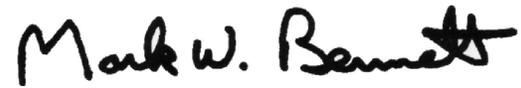
The court notes that the ALJ's provision of reasons is especially important when dealing with a claimant who alleges somatoform disorders. Somatoform disorders consist of "[p]hysical symptoms for which there are no demonstrable organic findings or known physiological mechanisms." 20 C.F.R. Part 404, Subpart P, Appendix 1, § 12.07. Therefore, the ALJ is presented with a particularly challenging task of determining the claimant's credibility and whether the medical sources have used acceptable techniques in formulating their opinions. The line between malingering and genuine symptoms from one's somatoform disorders may be hard to draw. Because an ALJ is not allowed to "play doctor," he or she must be careful to articulate the reasons for giving more weight to some opinions and less to others. *See Pate-Fires*, 564 F.3d at 946-47 ("[T]he ALJ's determination Pate-Fires's medical noncompliance is attributable solely to free will is tantamount to the ALJ "playing doctor," a practice forbidden by law.) (citing *Rohan v. Chater*, 98 F.3d 966 (7th Cir. 1996), "ALJs must not succumb to the temptation to play doctor and make their own independent medical findings.").

## V. CONCLUSION

THEREFORE, the court finds that the ALJ's determination that Wellenstein is not disabled is not supported by substantial evidence in the record as a whole. Judge Zoss recommended remanding the case to allow the ALJ to perform a proper credibility determination and for further development of the record regarding Wellenstein's work-related mental and physical limitations. The court agrees that the case should be remanded for those reasons but **modifies** Judge Zoss's report and recommendation to also require the ALJ to reassess the weight given to the medical opinions in this case, as discussed above. The court **reverses** the Commissioner's decision that Wellenstein is not disabled and remands the case for further proceedings consistent with this opinion.

**IT IS SO ORDERED.**

**DATED** this 24th day of February, 2010.

Handwritten signature of Mark W. Bennett in black ink.

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MARK W. BENNETT  
U. S. DISTRICT COURT JUDGE  
NORTHERN DISTRICT OF IOWA