

**UNPUBLISHED**

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

LEE GAWTRY,

Plaintiff,

vs.

JO ANNE B. BARNHART,  
Commissioner of Social Security,

Defendant.

No. **C01-3034 MWB**

**REPORT AND RECOMMENDATION  
ON THE MERITS, AND ON THE  
PLAINTIFF'S MOTION FOR  
SENTENCE SIX REMAND**

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**TABLE OF CONTENTS**

<b>I.</b>	<b>INTRODUCTION</b> . . . . .	<b>2</b>
<b>II.</b>	<b>PROCEDURAL AND FACTUAL BACKGROUND</b> . . . . .	<b>2</b>
	<b>A. Procedural Background</b> . . . . .	<b>2</b>
	<b>B. Factual Background</b> . . . . .	<b>3</b>
	<b>1. Introductory facts and Gawtry's daily activities</b> . . . . .	<b>3</b>
	<b>a. Gawtry's testimony</b> . . . . .	<b>3</b>
	<b>b. Other evidence</b> . . . . .	<b>8</b>
	<b>2. Gawtry's medical history</b> . . . . .	<b>11</b>
	<b>3. Medical expert's testimony</b> . . . . .	<b>17</b>
	<b>4. Vocational expert's testimony and Gawtry's response</b> . . . . .	<b>18</b>
	<b>5. The ALJ's conclusion</b> . . . . .	<b>20</b>
<b>III.</b>	<b>DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD</b> . . . . .	<b>22</b>
<b>IV.</b>	<b>ANALYSIS</b> . . . . .	<b>27</b>
<b>V.</b>	<b>CONCLUSION</b> . . . . .	<b>32</b>

## ***I. INTRODUCTION***

The plaintiff Lee Gawtry (“Gawtry”) appeals the decision by an administrative law judge (“ALJ”) denying him Title XVI supplemental security income (“SSI”) benefits. Gawtry argues the ALJ erred in failing to develop the record fully and fairly, and in rejecting Gawtry’s subjective complaints. (See Doc. No. 14)

After the completing of briefing in this case, Gawtry filed a Motion for Remand and supporting brief, arguing this matter should be remanded for consideration of new evidence. (Doc. Nos. 18 & 19) The Commissioner has resisted the motion for remand, asserting the additional medical records upon which Gawtry relies in his motion would not have changed the ALJ’s determination, and do not constitute grounds either for reversal of the ALJ’s decision or for a sentence six remand. (Doc. No. 20)

## ***II. PROCEDURAL AND FACTUAL BACKGROUND***

### ***A. Procedural Background***

Gawtry filed a protective application for SSI benefits on May 24, 1995, alleging a disability onset date of May 1, 1995.<sup>1</sup> (R. 119-22) The application was denied initially on October 13, 1995 (R. 97-98, 101-04), and on reconsideration on February 15, 1996 (R. 99-100, 106-10). Gawtry requested a hearing which was held before ALJ David Washington on October 22, 1997, in Minneapolis, Minnesota. Attorney Ronald Ylitalo represented Gawtry at the hearing. Gawtry, Paul M. Reitman, Ph.D., and Vocational Expert (“VE”) Kenneth E. Ogren testified at the hearing. (R. 49-94)

On November 18, 1997, the ALJ ruled Gawtry was not entitled to benefits. (R. 19-34) The Appeals Council of the Social Security Administration denied Gawtry’s request for

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<sup>1</sup>Gawtry’s initial application contains a handwritten note indicating his disability began “(before) 1969.” (R. 119) All the determinations on his application, including the ALJ’s opinion, have relied on an alleged disability onset date of May 1, 1995.

review on January 23, 2001 (R. 8-10, 404-05), making the ALJ's decision the final decision of the Commissioner.

Gawtry filed a timely Complaint in this court on March 20, 2001, seeking judicial review of the ALJ's ruling. (Doc. No. 1) Pursuant to Administrative Order #1447, dated September 20, 1999, this matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition of Gawtry's claim. Gawtry filed a brief supporting his claim on December 3, 2001 (Doc. No. 14). On January 18, 2002, the Commissioner of Social Security filed a responsive brief (Doc. No. 17). Gawtry filed his motion for remand and supporting brief on March 4, 2002 (Doc. Nos. 18 & 19), and the Commissioner filed a resistance on March 7, 2002 (Doc. No. 20).

The court now deems the matter fully submitted, and pursuant to 42 U.S.C. § 405(g), turns to a review of Gawtry's claim for benefits and his motion for remand.

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

### ***1. Introductory facts and Gawtry's daily activities***

#### ***a. Gawtry's testimony***

At the time of the hearing, Gawtry was 44 years old, and single. He is right-handed, about six feet tall, and weighs "[g]ive or take 200 pounds." (R. 52-53) Gawtry has a G.E.D., and some military training. He does not own a vehicle, and does not drive. (R. 53, 70)

Gawtry was born in Illinois, and lived in Minnesota for a total of seven to eight years.<sup>2</sup> (R. 52) At the time of the hearing, Gawtry had been living at the Union Gospel

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<sup>2</sup>At the time Gawtry's claim was denied, and when he filed his request for hearing, he was living in Fort Dodge, Iowa. (See R. 106, 111) From Gawtry's testimony, it appears he moved to Minnesota, where he lived at the time the hearing was held in October 1997, but then returned to Iowa at some point.

Mission for about a year. He said he keeps his room “liveable,” but he does not use a vacuum cleaner. He eats his meals in the Mission’s cafeteria, and is not required to assist in the kitchen. (R. 63, 75) On a typical day, Gawtry spends a lot of time reading. He said it is “an exertion to go anywhere, it seems.” (R. 63) He has no social life, and just lies in his bed and reads. (R. 65) He gets up for meals, and to run a few errands, but has no other activity in his life. (*Id.*)

Gawtry has no assets at all and claims he is destitute. His possessions consist of his clothing and about \$100 to \$150. (R. 70) He has no income, and receives aid from ‘general assistance,’ which pays his rent. (R. 70-71)

Gawtry testified he broke his left leg<sup>3</sup> in about 1980, when he was cutting firewood, and some hardware was put in his leg in November 1981. (R. 55-56, 57) He stated he was scheduled for surgery on his leg the week after the hearing, when Dr. H. William Parke was going to remove a plate and some screws from his leg. Gawtry said his leg had been “giving out, falling out” lately, and was “unstable completely,” so he never knew when the leg was going to give out. (R. 55, 57) In addition to removing the hardware, the doctor was going to “try to scrape the cartilage.” (*Id.*)

In addition to the problems with his left leg, Gawtry testified about a number of other injuries and illnesses. He was in the U.S. Army from 1970 to 1973, as a helicopter flight engineer, and was exposed to Agent Orange. (R. 64, 72) He broke his right heel in 1977, when he fell off a ladder and landed on his heel. He broke his left clavicle in 1979, when he slipped on some ice. And at an unspecified time, he severely cut the middle finger of his right hand in a fan. The first joint of that finger no longer bends. (R. 67-68, 71) In

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(See Appeals Council’s denial of request for review dated January 23, 2001, addressed to Gawtry in Fort Dodge, Iowa, at R. 8-10)

<sup>3</sup>Gawtry later said he broke his “left knee.” (R. 67) Although note entirely clear from the record, it appears the broken knee is the same injury as the broken leg.

1979 or 1980, Gawtry was hospitalized for smoke inhalation. He was trapped in a friend's house when the house caught fire. (R. 71)

On February 11, 1986, Gawtry was diagnosed with post-traumatic stress disorder ("PTSD"), resulting from his service in Vietnam. (R. 64) Gawtry said he gets very depressed, "down and just stressed out something terrible. There's times when I just go bananas" and get "irritable, very, very irritable." (R. 65)

A couple of years prior to the hearing, Gawtry was riding a bicycle and was struck by an automobile. (R. 56) He hurt his back in the accident, and said that "[e]ver since then [his] back has really been messed up." (R. 72) Gawtry was wearing a corset at the time of the hearing. When asked if he wore the corset all the time, Gawtry replied, "Depending on what I'm going to have to do that day, it's to the point now basically because of the pain and everything I'm not able to get out of bed much." (R. 56) Doctors told Gawtry he has "a crushed disk or a herniated disk" in the lumbar area of his back as a result of the bicycle accident. (R. 57)

Gawtry had been seeing a psychiatrist, whom he identified as "Dr. Johnson," about once a month for depression and anxiety. (R. 57-58) He also had been seeing a Dr. Rumsey for his back condition, and had undergone a CT scan. (R. 58)

Gawtry said he currently takes Synthroid daily, for a hypothyroid condition (R. 64), and Prozac, Trazodone, and over-the-counter aspirin. (R. 58-59) The Prozac makes his hands twitch from time to time. (R. 59) He said the Prozac and Trazodone "are for mental conditions." (R. 65) He also was taking amoxicillin in preparation for some oral surgery. (*Id.*)

Gawtry testified he used to have a problem with alcohol, but he had been sober for three-and-a-half years. He attends AA meetings whenever possible, although he had not been to a meeting for awhile because "[t]ransportation is a big problem with me." (R. 63)

Before he stopped drinking, Gawtry was having “stomach problems and stuff . . . bleeding internally . . . bloody stools, et cetera.” (R. 68)

Gawtry stated he cannot stand for more than a half hour before he has to take a break and sit down. If he stands for too long, he gets a sharp pain in his lower left back. He said, “It’s just like everything crunches up and it smashes down there.” (R. 59) He also complained of difficulty walking, because of his left leg. However, it is the pain in his back that usually stops him. He avoids going to a mall or shopping because of his back pain. (R. 60) Gawtry said he probably could lift as much as 50 pounds, but it would hurt his back. (R. 60-61) He could lift five or ten pounds occasionally without causing him too much trouble. (R. 61)

Gawtry said he could sit for an hour before he would have to stand up or switch positions. He tries do to exercises whenever he can to lessen the pain in his back. (*Id.*) He has problems bending and stooping, which causes his back to ‘crack’ and ‘pop in and out.’ (R. 61-62) He also does not have full mobility in his left knee. (R. 62)

Gawtry could not estimate how long it had been since he last worked. He remembered his last job was as a carpenter, framing houses. (R. 53-54) He picked up his carpentry skills from on-the-job training; he never had a formal union apprenticeship. For a number of years, carpentry was Gawtry’s steady occupation. He stated he “always went back to carpentry,” but he was no longer physically able to do carpentry because of his age and the injuries he had sustained. (R. 54) At one time, Gawtry attended a brick-laying course at Master Builders of Iowa. His back hurt and he felt he could not pursue that type of work. (R. 71)

Gawtry said he had been unable to seek employment because he has difficulty getting around due to his physical condition. He said Dr. Rumsey told him he could not work while he was being treated for his back and leg problems. (R. 65-66) His leg gives out without warning, and he has found himself “laying on the ground a couple times.” (R. 66) He has

difficulty with arthritis, and in the morning, it takes him an hour to an hour-and-a-half before his “joints will allow [him] to go.” (*Id.*) Some mornings he is unable even to walk. The problem is worse when the weather changes. (R. 67)

Gawtry recalled working part-time at a can recycling company in 1994, where he counted cans. He was able to work irregular hours, at his own pace, resting when necessary. He has not been employed since that time. (R. 68-69) Gawtry attributed his unemployment to “mental problems mostly. . . . Mental problems were the start of it and then the physical problems became more and more involved.” (R. 69) However, alcoholism caused him to lose the job at the recycling company. Gawtry had a serious alcohol problem that resulted in several DWI charges. (R. 69-70)

Gawtry had filed a prior claim for Social Security benefits, but no one could contact him and he missed a psychiatric evaluation. (R. 72-73)

Gawtry was questioned briefly by the medical expert, Dr. Reitman. Gawtry clarified that he stopped drinking on his birthday in 1995, so he had been sober for about two-and-a-half years. He disputed a medical record in Exhibit 20F that said he “drank three weeks ago.” (R. 73) He said he has never had a relapse since he got sober. (R. 74) Gawtry said he had no criminal arrests or convictions other than alcohol-related traffic charges. He was dishonorably discharged from the Army because of his alcoholism. (R. 76)

The VE also questioned Gawtry briefly about his work history. Gawtry said the job as a can sorter lasted about three months. His only other “real job” was doing rough carpentry work, and he held intermittent carpentry jobs for six months to a year or longer. (R. 75-76)

***b. Other evidence***

Additional facts regarding Gawtry’s disability allegations appear in the record in the form of a Disability Report which Gawtry completed in connection with his application for

benefits (R. 128-39); a Supplemental Disability Report completed by Gawtry (R. 149-50); a Supplemental Disability Report completed by Gawtry's housemate at that time, Rita Barnes (R. 140-42); a Reconsideration Disability Report completed by Gawtry on December 27, 1995 (R. 143-46); and Gawtry's statement filed when he requested a hearing (R. 151-52) These documents present a fuller picture of Gawtry's condition and potential disability than is provided solely by his testimony.

In Gawtry's initial disability report, he listed his disabling condition as chest pain, alcohol dependency, and back problems, stating his condition caused him to quit working as of February 3, 1995. He described the history of his condition as follows:

My alcoholism and drug abuse progressed until I went to Vietnam where my mental & substance abuse escalated drastically [sic] until I was undesirably discharged due to said condition after serving honorably during my tour in Vietnam and returned to active stateside duty. I have a lengthy criminal file which preceeds [sic] my entry to the Army in 11-30-70 which was an ultamatim [sic] for an alcohol related offense. Upon returning to IA in 1973[,] my criminal activity contd. and was unable to maintain employment due to my substance abuse thru none attendance. [sic]

(R. 128, 134) Gawtry then provided a detailed chronology of his substance abuse and criminal history (R. 134-135), and concluded:

At present I am battling with my substance abuse and feel that I am making progress but at this time believe that employment would undermine the stability of the progress being made. I'm but human and have indulged a few times since Feb. [1995].

With the exception of my imprisonment, incarcerations and being detained thru treatment this is the longest period of voluntary sob[r]iety in my entire life.

(R. 135)

In an undated Supplemental Disability Report, Gawtry provided information about his daily activities. He stated he does not go out to visit friends due to lack of transportation

and funds. He noted, "I've isolated myself because I distrust society and the people who make it up. I too have physical & mental limitation." (R. 149) Gawtry listed his social activities as Alcoholics Anonymous and "Alano Club." (*Id.*) He stated he was living at the residence of Rita Barnes. Gawtry did his own cooking, but stated he only ate "one meal per day or not at all." (*Id.*) He did no household or outdoor chores, and no yard work. (*Id.*)

Gawtry stated he assisted in supervising one child about three times per week. The only hobby he listed was "grow[ing] flowers when in season." (R. 150) He listed no other recreational activities. Gawtry complained of trouble sleeping due to, "Insomnia, stress, insecurity of life not knowing what tomorrow will bring or if I'll be homeless again." (*Id.*) He would nap during the day "whenever exhaustion overtakes me." (*Id.*) Gawtry said due to his illness and his physical and mental complications, he is "unable to do a lot of the normal routines of everyday living." He stated he is "unable to be diagnost [sic] for heart condition due to deconditioning." (*Id.*)

Gawtry's housemate, Rita Barnes, completed a Supplemental Disability Report on August 28, 1995. (R. 140-42) She stated Gawtry goes out for AA meetings and to visit family, and goes with her on rides. Barnes said when she is home from work, she and Gawtry are usually together. She stated AA is Gawtry's only activity, and he has "chased off all childhood friends." (R. 140) Barnes claimed she prepares Gawtry's meals and he eats "whenever he wants to - no regular times." (*Id.*) Gawtry does not do routine household chores, although he has vacuumed the floor a couple of times and has done his own laundry once or twice. (*Id.*)

Barnes stated Gawtry mows the lawn, and he tills her garden in the spring. He also waters the plants. (R. 141) Gawtry helps watch Barnes's grandson, taking him to the park and playing games with him several times a week. She stated Gawtry needs no help running his own errands and shopping. She noted Gawtry sleeps a lot, and his "[s]leeping habits are

very irregular – long periods – 12-14 hours and up at night sometimes.” (*Id.*) He naps a lot during the day. (*Id.*) Barnes stated Gawtry’s illness has changed his life in that he “was impossible to live with while drinking.” (R. 142) She stated at that time, Gawtry had been sober for six to eight months, and was “easier to live with.” (*Id.*)

Gawtry completed a Reconsideration Disability Report on December 27, 1995 (R. 143-46), in which he stated there had been a change for the worse in his condition. Gawtry reported, “Back pains are becoming extremely severe, alcohol relapse, depression. Treating physician – Dr. Wong, Gastorial [sic] Intestinal Clinic Ia. City (University Hospital) ‘Non diagnostic, due to physical deconditioning.’” (R. 143) Gawtry reported he had been “attending therapy for back injury, regressing substance abuse due to lack of medications because of ineligibility for title 19 benefits because of refusal of benefits from Social Security Administration (decision denial) [and] severe chest pains, no transportation to hospitals.” (*Id.*) Gawtry claims his condition is deteriorating because he is unable to receive public assistance “without a favorable decision by the Social Security Administration which will make me eligible [sic] for medical assistance at the State level[.]” (R. 145)

At the time Gawtry requested a hearing, he stated his condition had “gotten much worse,” and he was “unable to perform more of the everyday duties.” (R. 151) He reported seeing doctors for his back problems, depression, and alcoholism, and stated he was taking Synthroid and Prozac daily. (R. 151-52)

## **2. Gawtry’s medical history**

A detailed chronology of Gawtry’s medical history is attached to this opinion as Appendix A. The record indicates Gawtry had knee surgery in late 1981, and was doing well in his recovery, although as of April 1982, Gawtry still was not completely satisfied with his progress. (R. 372) At the time of the ALJ hearing, Gawtry was scheduled for

further surgery on his knee, but the record does not include details of that surgery except to note that it was scheduled for March 31, 1998, and Gawtry planned to cancel and reschedule later in the spring. (See Doc. No. 18, Ex. 3)

On January 1, 1986, Gawtry was admitted to a chemical dependency treatment program, which he completed on January 25, 1986. (R. 373, 389-91) Gawtry participated well in the treatment program, although Dean Keegan, the counselor who wrote Gawtry's discharge report, noted Gawtry "is a difficult individual to work with in an institutional or agency setting. He seems extremely distrusting of authority figures." (R. 387) Mr. Keegan noted Gawtry is angry, cynical, and "an extremely troubled individual who [is] defensive towards others in reaction to his own inadequacies." (R. 389) The staff at the treatment center believed Gawtry might suffer from posttraumatic stress disorder secondary to his Viet Nam experience, and opined Gawtry would continue to "remain bitter and uncomfortable until he resolves his delayed stress issue. We doubt that comfortable sobriety is possible for this patient until he faces those issues which trouble him most." (R. 389, 390)

There is a significant gap in the medical records from the conclusion of Gawtry's treatment for alcoholism in January 1986, until March 1995. There are two entries when Gawtry was seen in the Hennepin County emergency room in June 1987 (R. 399) and August 1988 (R. 393-95). Further, as Gawtry noted in his testimony, there is evidence he missed scheduled appointments for psychiatric review in connection with his prior claim for benefits. (R. 355-63, 344-52)

The next evidence that Gawtry was seeking regular treatment begins in March 1995, after he was involved in the bicycle-car accident he described in his testimony. Gawtry saw Dr. John D. Birkett on March 25, 1995, complaining of back pain due to the accident. (R. 203) Dr. Birkett found no palpable abnormalities or obvious bruising on Gawtry's back. He noted Gawtry had declined to take Flexeril for his back pain because he was concerned

it would make him woozy, and Dr. Birkett prescribed ibuprofen for the pain. (*Id.*) Gawtry reported he was receiving physical therapy, which was helping his back; however, no physical therapy records appear in the record for this time period.

Gawtry's complaints relating to his back pain continued throughout the next two years, with intermittent improvement and regression. He was diagnosed with acute muscle spasm of the lower lumbar area by Dr. Virginia Geary on August 16, 1995. (R. 185-86) Dr. Geary prescribed Flexeril, Motrin, and warm soaks. Gawtry refused a shot to relieve his discomfort. (*Id.*) X-rays of Gawtry's lumbosacral spine taken on August 22, 1995, indicating a mild narrowing of the posterior L4-5 intervertebral disk spaces and minimal spondylosis, but no trauma. (R. 190) Gawtry underwent physical therapy from August 22, 1995, through September 7, 1995, and was showing improvement in mobility and pain (R. 191-92, 252-56), but Gawtry failed to return for follow-up visits and on October 12, 1995, his physical therapy file was closed. (R. 256)

On October 4, 1995, Dr. Lawrence F. Staples performed a Residual Physical Functional Capacity Assessment, and found that although Gawtry suffers from a back strain, he has no exertional limitations. (R. 206-13) Dr. Staples opined Gawtry would recover from his injury by May 1996, and would "then be in a nonsevere category as far as medical/physical RFC is concerned." (R. 204-05) Dr. Dennis A. Weis reviewed the record in February 1996, and concurred with Dr. Staples's opinion. (R. 206)

On June 18, 1996, Gawtry reported to a physical therapist at the University of Iowa Hospitals and Clinics that "he woke up last Wednesday paralyzed and feels that something must be done for him." (R. 277) Gawtry reported he was homeless and had been unable to get Social Security benefits, and he wanted to get his back fixed. Gawtry left the clinic angry and frustrated, and apparently later the same day, he was admitted to the University of Iowa Hospital complaining of back pain. (R. 278-80) Gawtry remained in the hospital from June 18-25, 1996. He arrived in a wheelchair, which he propelled himself. He did

not stay in his room much “because there is nothing to do,” and spent considerable time on the unit in the wheelchair. Gawtry reported he was under a lot of stress. No other diagnosis was reached with respect to Gawtry’s back pain during this hospital stay. (*Id.*)

The day of his release, June 25, 1996, Gawtry saw Dennis Bewyer, a physical therapist, who noted Gawtry was ambulating independently, although “very slowly and carefully.” (R. 283-85) He noted Gawtry had arrived in a wheelchair, and the therapist got Gawtry a cane so could “attempt to become more active as he can tolerate.” Gawtry requested pain medications, and scheduled a follow-up appointment with a Dr. Found on July 18, 1996. He was advised to continue exercising, and to keep his follow-up appointment. (*Id.*) No records from that follow-up appointment, if it occurred, appear in the record.

With respect to Gawtry’s claim of depression, he saw Josefina Hizon, M.D. on March 25, 1995, for evaluation. Gawtry said he thought it might be easier for him to maintain his sobriety if he were taking an antidepressant. Dr. Hizon prescribed Prozac to “see if this will improve his attitude and desire to maintain sobriety.” (R. 200-01) Dr. Hizon also prescribed Vistaril. (R. 199) Gawtry saw Dr. Hizon again on June 5, 1995, and reported he had been feeling fairly well with occasional mood swings. Gawtry “admitted there are times he forgets his medication,” and Dr. Hizon suggested he obtain a medication planner to help him remember to take his medications faithfully. She continued Gawtry’s treatment with Vistaril and Prozac. (R. 195)

Dr. Hizon completed a questionnaire relating to Gawtry’s Mental Residual Functional Capacity on June 12, 1995. She found Gawtry had a slight limitation in his ability to remember work-like procedures; understand, remember and carry out short and simple instructions; make simple work-related decisions; ask simple questions or request assistance; and be aware of normal hazards and take appropriate precautions. Gawtry had a moderate limitation in the ability to maintain attention for extended periods (2-hour

segments), and to complete a normal workday and workweek without interruptions from medically based symptoms. And Gawtry had a marked limitation in the ability to maintain regular attendance and be punctual within customary tolerances; sustain an ordinary routine without special supervision; work in coordination with or proximity to others without being unduly distracted by them; perform at a consistent pace without an unreasonable number and length of rest periods; accept instructions and respond appropriately to criticism from supervisors; and get along with co-workers or peers without unduly distracting them or exhibiting behavioral problems. (R. 196-97)

Gawtry missed his appointment with Dr. Hizon on August 7, 1995, and saw the doctor again on August 22, 1995, when the doctor noted,

Mr. Gawtry walked in the room like a robot. He said his back, neck and shoulders were sore. He said he was hit by a car while driving his bicycle. He is quite upset because he is not entitled yet to any social security. He claimed he had applied for benefits since 1969. He rattled on and on complaining of the difficulties getting any benefits. He then said that he has been drinking again. . . . He tends to complain. Again, I explained that we are trying to help people become functional and it may be easier to consider other options like being able to function in certain jobs. He does not seem to be interested in this and seems to be interested in pursuing his social security benefits.

. . .

(R. 193)

Herbert L. Notch, Ph.D., performed a Psychiatric Review Technique of Gawtry on October 8, 1995. (R. 214-22) He found Gawtry has a personality disorder and substance addiction disorder in remission, neither of which is severe. He found Gawtry to have only a slight degree of limitation in the activities of daily living, maintaining social functioning, and deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner. (*Id.*) Timothy L. Weissinger, M.D. reviewed Dr. Notch's evaluation and concurred in the conclusion. (R. 214)

The next record entries considered by the ALJ<sup>4</sup> with respect to Gawtry's depression begin with an Employment Capacities Report completed by Brad Dupre, M.D., on February 4, 1997. (R. 223) Dr. Dupre is a psychiatrist who saw Gawtry from February through July 1997. In the form, which was prepared for the Ramsey County Human Services Department, Dr. Dupre opined Gawtry was "not yet" able to return to his previous occupation due to depression and hypothyroidism, and Gawtry was unable to do any type of work from February 1, 1997, to May 1, 1997. Dr. Dupre scheduled follow-up appointments with Gawtry every two weeks thereafter. (*Id.*) However, none of Dr. Dupre's additional records appeared in the record before the ALJ, and it does not appear the ALJ sought to obtain those records.

The record before the ALJ indicates Gawtry saw Timothy Rumsey, M.D., beginning April 21, 1997 (R. 286-87), after Gawtry moved to the Union Gospel Mission in Minnesota. On June 11, 1997, Dr. Rumsey saw Gawtry for an evaluation of fainting spells and dizzy spells, which Gawtry reported had begun six to eight months earlier. (R. 228-29) The doctor ordered several tests and eventually a head CT, but no cause was found for the dizziness and fainting spells. (See R. 288-89, 292-98)

Dr. Rumsey also saw Gawtry for his continuing complaints of back pain. He ordered six sessions of physical therapy on July 28, 1997 (R. 292-94), but no physical therapy records appear in the record before the ALJ for this time period.

Dr. Rumsey completed an Employment Capacities Report on August 18, 1997, in which he opined Gawtry was not employable due to depression/anxiety, chronic low back pain, and syncope. He noted Gawtry should be restricted to no heavy lifting, and no standing over two hours at a time. Dr. Rumsey concluded, "Possibly employable in future." (R. 299) Dr. Rumsey completed a further Work Readiness opinion on October 16,

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<sup>4</sup>Gawtry offered additional medical records with his motion for sentence six remand, which are discussed later in this opinion.

1997, in which he stated Gawtry's condition was expected to last at least three months. He opined Gawtry would benefit from "voc rehab for . . . less physical work," and again noted Gawtry possibly could be employable in the future. (R. 301)

Gawtry offered some additional medical records with his motion for sentence six remand. These include evidence that Gawtry continued to complain of low back pain through June 1998. He also saw Dr. Dupre regularly for psychiatric follow-up of his depression and medication checks. Dr. Dupre opined Gawtry was unable to work from May through July 1997 (Doc. No. 18, Ex. 2) On July 14, 1997, Dr. Dupre noted Gawtry

Hopes to get SSD and wants my support. Accepted my explanation that he isn't mentally disabled and SSD wouldn't be helpful/approp[riate] in our plan to get him back to a normal state/condition.

(*Id.*) At Gawtry's next appointment on August 4, 1997, Dr. Dupre noted an employment capacity report had been altered, and therefore he was transferring Gawtry to another doctor pursuant to clinic policy. Gawtry reported he had "no idea how [the] form got altered."

(*Id.*)

Thereafter, Gawtry saw Dr. David L. Johnson for psychiatric care. Dr. Johnson diagnosed Gawtry with major depression, recurrent, and a personality disorder. (Doc. No. 18, Ex. 1) On October 17, 1997, Dr. Johnson suggested Gawtry might be exaggerating his symptoms to obtain Social Security benefits. Gawtry was not receptive to Dr. Johnson's suggestion that Gawtry begin seeing a counselor, and the doctor noted Gawtry "blames the world (and me) for his problems." (*Id.*) He opined Gawtry was "less obviously depressed today and more situationally unhappy, angry and may have really had more dysthymic presentation vs. depression." (*Id.*)

### **3. Medical expert's testimony**

From his review of Gawtry's treating doctors' records, Dr. Reitman stated "it sounds like [Gawtry is] being treated for depression." (R. 77) In his opinion, the medication dosages Gawtry was taking would be "indicative of a mild to moderate depression," and he did not "question the treating doctor's diagnosis as a major depressive disorder likely in early remission or in partial remission under 12.04." (*Id.*) He noted if Gawtry was still drinking, that would be contraindicated with his medications. Dr. Reitman did not believe Gawtry met any of the regulatory listings from a mental standpoint.

Dr. Reitman saw no foundation for Gawtry's claim that he suffers from PTSD. He also discounted that diagnosis because it was "offered up by a counselor . . . [who] is not competent in a diagnostic and assessment of mental disorders." (*Id.*) He stated Gawtry should be able to interact appropriately with people, and Gawtry would have moderate restrictions of daily living, and moderate deficiencies of concentration, persistence or pace. He noted one episode of deterioration or decompensation in work. (R. 78-79)

On cross-examination by Gawtry's attorney, Dr. Reitman reiterated his opinion that Gawtry suffers from mild to moderate depression that should not affect his ability to function. (R. 80) He declined to offer an opinion about Gawtry's physical disabilities, or how those disabilities, combined with the depression, would affect Gawtry's functional abilities. (R. 81, 82-85) The doctor said Gawtry should be able to perform "basically unskilled work," and have "brief and superficial contact with the public, coworkers and supervisors and low production goals." (R. 82)

#### **4. Vocational expert's testimony and Gawtry's response**

The VE indicated Gawtry's history of skilled work is as a "carpenter, actually framing carpenter with a weight of medium, a physical capacity of medium physical requirements." His transferable skills include "knowledge of tools, particularly carpentry

tools, [and] ability to measure and plan work.” The VE eliminated the can sorting job because it was short term and only on a part-time basis. (R. 86)

Assuming “a younger person who has a GED, who is . . . limited to light type work activity,” the VE opined Gawtry would be unable to return to carpentry work. (*Id.*) The ALJ posed the following hypothetical question to the VE, assuming such an individual who is limited to light work:

[T]he person should have a sit/stand type of an option in their work activity and I’ll take into consideration the claimant’s testimony about his inability to sit maybe for longer than an hour because of back problems. The person’s other functional limitations would involve brief superficial contact with coworkers, the public and supervisors. And by that I mean superficial contact would be the limitation. I’m not suggesting that there’s no contact. A low production type of work activity in the unskilled area with limitations to three, four-step type of work activity. With those, with those limitations, are there any jobs that exist in the regional economy that such a person could perform?

(R. 87) The VE responded as follows:

Yes, Your Honor. Generically under table worker which would include some assembly jobs, some jobs requiring activities like deburring, polishing, things like that. There would be approximately 2,500 jobs in the State of Minnesota and that’s the state that I’m using regarding that particular hypothetical. Other jobs would include hand cutters and trimmers and there would be approximately 3000 jobs like that in the State of Minnesota. That’s within the knitting or clothing industry. And the other job would include laundry worker and there would be approximately 4000 jobs in the State of Minnesota considering that hypothetical.

(*Id.*) The VE stated Gawtry would be able to perform the jobs he listed. (R. 88)

On cross-examination by Gawtry’s attorney, the VE explained that a laundry worker job “can involve folding, sorting, gathering, a lot of activities like that. They are found in

hospitals. They can be found in nursing homes. Could be found in motels/hotels.” (R. 91)

On re-examination, Gawtry opined he would not be able to perform any of the listed jobs because of his physical limitations. He expected the laundry worker job would involve a lot of bending, lifting and squatting, which he could not do. He felt he could not perform the bench work because he gets “real dizzy” and would not trust himself on machinery. In addition, Gawtry said he is limited in finding appropriate work because he has no transportation. He said that while he would like to find work, he doubts he would be able to find suitable work in light of his limitations. (R. 92-93)

## **5. *The ALJ’s conclusion***

The ALJ noted:

The medical evidence establishes that [Gawtry] is obese, has sharp chest pain of unclear etiology, hypothyroidism, hypertension, syncope, chronic low back pain, neck pain, degenerative joint disease of the left knee and a mental impairment under section 12.04, depression disorder, but he does not have an impairment of combination of impairments that meets or medically equal[s] the requirements of any impairment listed in the Listing of Impairments of Appendix 1, Subpart P, Regulations No. 4.

(R. 32, ¶ 2) He found Gawtry’s subjective complaints not to be credible.

Although the ALJ found Gawtry is unable to perform his past relevant work as a can sorter, he found Gawtry retains:

the residual functional capacity for a range of simple, repetitive, low stress work not requiring lifting or carrying weights of more than twenty pounds occasionally, ten pounds frequently, no pushing or pulling of more than twenty pounds occasionally, ten pounds frequently, no sitting, standing or walking for more than one hour at a time or for more than six hours out of an eight-hour work day, with the opportunity to

alternate between sitting and standing, no working with complex tasks, and, which does not require more than minimal interaction with co-workers and the public. [Citation omitted]

(R. 33, ¶ 4) Considering this residual functional capacity, together with Gawtry's age, education, and work experience, the ALJ found Gawtry "can be expected to make a vocational adjustment to work which exists in significant numbers in the national economy."

(*Id.*, ¶ 7) The ALJ cited examples of "an assembler like a table worker or a burning/polishing worker, a hand cutter/trimmer and a laundry worker." (*Id.*) The ALJ relied specifically on the VE's testimony in finding Gawtry "retains the residual functional capacity to perform a significant number of jobs existing in the national economy." (R. 32)

In discounting Gawtry's subjective complaints, the ALJ found Gawtry's "reports and testimony that he was subject to daily, severe pain from his multiple conditions inconsistent with the fact that he took only low level of pain medication for relief." (R. 29) He noted Gawtry was sometimes noncompliant with his medications, "and has been known to not take his medications as prescribed without discussing it with his physician." (*Id.*) The ALJ found Gawtry's failure to seek aggressive treatment for his pain, including stronger medications, surgery, biofeedback, and the like, detracted from the credibility of Gawtry's subjective complaints. (*Id.*) The ALJ explained:

The course of medical treatment is also completely inconsistent with [Gawtry's] subjective complaints. The evidence shows that [Gawtry] was conservatively treated with examinations, evaluations, imaging studies, physical therapy sessions, individual counseling sessions and oral medication. [Gawtry] has not received or required surgery, hospitalization, physical therapy or individual therapy on a consistent, long-term basis, for any of his conditions or for their complication or exacerbation. There is no indication that [Gawtry] requires anything more than the conservative treatment he has received so far.

(*Id.*) The ALJ noted “the failure to seek regular treatment is inconsistent with disabling symptoms[,]” citing *Siemers v. Shalala*, 47 F.3d 229, 301 (8th Cir. 1995).

The ALJ stated he was giving Gawtry “the benefit of every doubt” in concluding Gawtry’s mental impairment “has resulted in moderate limitations in activities of daily living and moderate restrictions in social functioning.” (R. 30)

After reviewing all the evidence, the ALJ held Gawtry was not under a disability, and he denied Gawtry’s claim for benefits. (R. 33-34)

### **III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD**

Section 423(d) of the Social Security Act defines a disability as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the claimant is “not only unable to do his previous work but cannot, considering . . . his age, education and work experience, engage in any other kind of substantial gainful work which exists in [significant numbers in] the national economy . . . either in the region in which such individual lives or in several regions of the country.” 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; see *Kelley*, 133 F.3d at 587-88 (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner must determine whether the claimant is currently engaged in substantial gainful activity. Second, he looks to see whether the claimant labors under a severe impairment; *i.e.*, “one that significantly limits the claimant’s physical or mental ability to perform basic work activities.” *Kelley*, 133

F.3d at 587-88. Third, if the claimant does have such an impairment, then the Commissioner must decide whether this impairment meets or equals one of the presumptively disabling impairments listed in the regulations. If the impairment does qualify as a presumptively disabling one, then the claimant is considered disabled, regardless of age, education, or work experience. Fourth, the Commissioner must examine whether the claimant retains the residual functional capacity to perform past relevant work.

Finally, if the claimant demonstrates the inability to perform past relevant work, then the burden shifts to the Commissioner to prove there are other jobs in the national economy that the claimant can perform, given the claimant's impairments and vocational factors such as age, education and work experience. *Id.*; *Hunt v. Heckler*, 748 F.2d 478, 479-80 (8th Cir. 1984) (“[O]nce the claimant has shown a disability that prevents him from returning to his previous line of work, the burden shifts to the ALJ to show that there is other work in the national economy that he could perform.”) (citing *Baugus v. Secretary of Health & Human Serv.*, 717 F.2d 443, 445-46 (8th Cir. 1983); *Nettles v. Schweiker*, 714 F.2d 833, 835-36 (8th Cir. 1983); *O’Leary v. Schweiker*, 710 F.2d 1334, 1337 (8th Cir. 1983)).

Step five requires that the Commissioner bear the burden on two particular matters:

In our circuit it is well settled law that once a claimant demonstrates that he or she is unable to do past relevant work, the burden of proof shifts to the Commissioner to prove, first that the claimant retains the residual functional capacity to do other kinds of work, and, second that other work exists in substantial numbers in the national economy that the claimant is able to do. *McCoy v. Schweiker*, 683 F.2d 1138, 1146-47 (8th Cir. 1982) (*en banc*); *O’Leary v. Schweiker*, 710 F.2d 1334, 1338 (8th Cir. 1983).

*Nevland v. Apfel*, 204 F.3d 853, 857 (8th Cir. 2000) (emphasis added) *accord Weiler*, 179 F.3d at 1110 (analyzing the fifth-step determination in terms of (1) whether there was sufficient medical evidence to support the ALJ's residual functional capacity determination and (2) whether there was sufficient evidence to support the ALJ's conclusion that there

were a significant number of jobs in the economy that the claimant could perform with that residual functional capacity); *Fenton v. Apfel*, 149 F.3d 907, 910 (8th Cir. 1998) (describing “the Secretary’s two-fold burden” at step five to be, first, to prove the claimant has the residual functional capacity to do other kinds of work, and second, to demonstrate that jobs are available in the national economy that are realistically suited to the claimant’s qualifications and capabilities).

Governing precedent in the Eighth Circuit requires this court to affirm the ALJ’s findings if they are supported by substantial evidence in the record as a whole. *Weiler v. Apfel*, 179 F.3d 1107, 1109 (8th Cir. 1999) (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); *Kelley v. Callahan*, 133 F.3d 583, 587 (8th Cir. 1998) (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) (“The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . .”). Under this standard, substantial evidence means something “less than a preponderance” of the evidence, *Kelley*, 133 F.3d at 587, but “more than a mere scintilla,” *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed. 2d 842 (1971); accord *Ellison v. Sullivan*, 921 F.2d 816, 818 (8th Cir. 1990). Substantial evidence is “relevant evidence which a reasonable mind would accept as adequate to support the [ALJ’s] conclusion.” *Weiler*, 179 F.3d at 1109 (again citing *Pierce*, 173 F.3d at 706); *Perales*, 402 U.S. at 401, 91 S. Ct. at 1427; accord *Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993); *Ellison*, 91 F.2d at 818.

Moreover, substantial evidence “on the record as a whole” requires consideration of the record in its entirety, taking into account “‘whatever in the record fairly detracts from’” the weight of the ALJ’s decision. *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95

L. Ed. 456 (1951)); accord *Gowell, supra*; *Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213). Thus, the review must be “more than an examination of the record for the existence of substantial evidence in support of the Commissioner’s decision”; it must “also take into account whatever in the record fairly detracts from the decision.” *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Gavin v. Heckler*, 811 F.2d 1195, 1199 (8th Cir. 1987)). The court, however, does “not reweigh the evidence or review the factual record *de novo*.” *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (quoting *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it “possible to draw two inconsistent positions from the evidence and one of those positions represents the agency’s findings, [the court] must affirm the [Commissioner’s] decision.” *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992) (citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); see *Hall v. Chater*, 109 F.3d 1255, 1258 (8th Cir. 1997) (citing *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996)). This is true even in cases where the court “might have weighed the evidence differently,” *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)), because the court may not reverse “the Commissioner’s decision merely because of the existence of substantial evidence supporting a different outcome.” *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997); accord *Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001); *Gowell, supra*.

On the issue of an ALJ’s determination that a claimant’s subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ’s credibility determinations are entitled to considerable weight. See, e.g., *Young v. Secretary of H.H.S.*, 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen*, 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v.*

*Secretary of H.H.S.*, 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.*, 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not discredit a claimant's subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only discredit subjective complaints if they are inconsistent with the record as a whole. *See Hinchey v. Shalala*, 29 F.3d 428, 432 (8th Cir. 1994); *see also Bishop v. Sullivan*, 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)). Under *Polaski*:

The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including 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.

*Polaski*, 739 F.2d at 1322.

#### **IV. ANALYSIS**

As noted previously, Gawtry claims the ALJ erred in two respects: (1) failing to develop the record fully and fairly, and (2) failing to credit Gawtry's subjective complaints. Addressing Gawtry's second argument first, the court finds the ALJ articulated in some detail the reasons he discounted Gawtry's subjective complaints. The ALJ adequately considered each of the factors required by *Polaski* in reaching his conclusion. The court finds no merit in Gawtry's argument, and further finds substantial evidence exists in the

record to support the ALJ's conclusion that Gawtry's subjective complaints were not fully credible.

Gawtry's first argument, however, regarding completeness of the record, requires a more detailed analysis, which the court now undertakes.

Gawtry argues the ALJ failed to develop the record fully and fairly by failing to obtain: (1) existing medical records, (2) an evaluation of Gawtry's residual functional capacity, and (3) a consultative examination regarding Gawtry's allegations of post-traumatic stress disorder.

Addressing the last point first, the court finds in the record insufficient support for Gawtry's claim that he suffers from post-traumatic stress disorder. A counselor in the substance abuse treatment program Gawtry attended in 1986, opined that Gawtry might suffer from the disorder, but the record contains no other medical evidence to support that opinion. The court finds a single opinion by a counselor more than ten years before Gawtry's hearing was not enough to require the ALJ to obtain a consultative examination regarding this allegation.

On the first point, Gawtry points to a number of medical records which he maintains were in existence at the time of the hearing, but which the ALJ failed to obtain and consider. Among these are records from Gawtry's monthly sessions with a psychiatrist, records from treating physician Dr. Rumsey, and records from Gawtry's surgeon, Dr. Parke.<sup>5</sup> (See Doc. No. 14, pp. 10-12) The Commissioner argues, in her response to Gawtry's motion for remand, that the medical records in question would not have changed the outcome of the ALJ's opinion, and do not constitute grounds either for reversal of the ALJ's decision or for a sentence six remand. (Doc. No. 20). The court has reviewed the additional records in detail (*see* App. A), and is somewhat concerned by the entry from Dr.

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<sup>5</sup>This doctor is sometimes referred to in the record as "Parks" and sometimes as "Parke." The court has elected to use the latter for consistency.

Dupre that indicates Gawtry was not employable up through at least September 1997. (Doc. No. 18, Ex. 2) However, the ALJ had for his review the records of Dr. Rumsey, who opined Gawtry was unemployable at least through January 1998. (R. 299, 301) Furthermore, the records Gawtry offers with his motion for remand are somewhat more damaging than helpful to Gawtry. Dr. Dupre stated Gawtry is not mentally disabled and “makes excuse after excuse for not moving ahead.” (Doc. No. 18, Ex. 2) Thus, although the additional records do constitute new evidence, the court agrees with the Commissioner that the records would not have altered the ALJ’s conclusion. The court therefore **recommends** Gawtry’s motion for sentence six remand be **denied**.

This does not, however, fully address Gawtry’s argument on the merits that the ALJ failed to develop the record fully and fairly. As noted above in the court’s summary of Gawtry’s medical history, there are significant gaps in the record. Although the record before the ALJ indicated Dr. Dupre scheduled regular appointments with Gawtry at two-week intervals following February 4, 1997, the ALJ did not attempt to obtain the doctor’s records from those appointments. Similarly, the record before the ALJ indicated Dr. Rumsey scheduled Gawtry for physical therapy sessions in late July 1997, but no physical therapy records appears in the record, nor does any notation that Gawtry failed to attend physical therapy sessions. The court concurs with Gawtry’s claim that the ALJ failed to obtain all the available medical records. However, the court has reviewed the additional records from Dr. Dupre, as noted above, and Gawtry has offered no additional records relating to physical therapy for his back. Therefore, the court finds the ALJ’s failure to obtain all the existing medical records constitutes harmless error, in that the additional records would not have changed the ALJ’s opinion.

Next, the court addresses Gawtry’s claim that the ALJ erred in failing to obtain an evaluation of Gawtry’s residual functional capacity. Although Gawtry only points to the ALJ’s failure to obtain an evaluation of Gawtry’s *mental* capacity, the court also notes the

ALJ failed to obtain a current evaluation of Gawtry's residual *physical* functional capacity. The court's primary area of concern in this case is the ALJ's discounting of the opinions of Gawtry's treating physicians relating to Gawtry's physical and mental suitability to return to work.

In June 1995, Dr. Hizon found Gawtry was markedly limited in his ability to maintain regular attendance and be punctual within customary tolerances; sustain an ordinary routine without special supervision; work in coordination with or proximity to others without being unduly distracted by them; perform at a consistent pace without an unreasonable number and length of rest periods; accept instructions and respond appropriately to criticism from supervisors; and get along with co-workers or peers without unduly distracting them or exhibiting behavioral problems. She found Gawtry to have less significant limitations in other areas relating directly to employability. (R. 196-97) The ALJ declined to adopt Dr. Hizon's assessment because, in the ALJ's opinion, the assessment was "conclusory and not supported by any specific medical factors." (R. 27) However, Dr. Hizon is not the only treating physician who opined Gawtry's condition prevented him from being employable.

On February 4, 1997, Dr. Dupre found Gawtry's depression and hypothyroidism prevented him from doing any type of work for the period from February 1, 1997, through May 1, 1997. (R. 223) He further found Gawtry was not yet able to return to his previous occupation. (*Id.*) On August 18, 1997, Dr. Rumsey found Gawtry was "inhibited from working at the moment due to his depression and anxiety and . . . physical problems." (R. 295-96, 299) He suggested Gawtry should not work for two months, noting Gawtry might be employable in the future. (*Id.*) On October 16, 1997, Dr. Rumsey opined Gawtry's prognosis was "guarded" and his condition was expected to last at least three months. (R. 301) The doctor suggested Gawtry needed vocational rehabilitation for some type of non-

physical work, and again noted Gawtry might be employable at some point in the future. (*Id.*)

While the court has some sympathy for the ALJ's task in trying to separate the wheat from the chaff in the context of Gawtry's many subjective complaints, these opinions from Gawtry's treating physicians made it incumbent upon the ALJ to obtain current mental and physical functional capacity assessments before arriving at the conclusion that Gawtry is able to work. See *Nevland v. Apfel*, *supra*, 204 F.3d at 858. Although it is the claimant's burden to prove his residual function capacity, see *Pearsall*, *supra*, 274 F.3d at 1217 (citing *Anderson v. Shalala*, 51 F.3d 777, 779 (8th Cir. 1995)), nevertheless, the ALJ must determine a claimant's residual functional capacity based on all the relevant evidence. *Id.* This includes a duty to develop the record fully and fairly to establish the claimant's physical and mental capacity by competent medical evidence. See *Vaughn v. Heckler*, 741 F.2d 177, 179 (8th Cir. 1984).

In *Prosch v. Apfel*, 201 F.3d 1010 (8th Cir. 2000), the Eighth Circuit Court of Appeals discussed the weight to be given to the opinions of treating physicians:

The opinion of a treating physician is accorded special deference under the social security regulations. The regulations provide that 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." 20 C.F.R. § 404.1527(d)(2). Consistent with the regulations, we have stated that a treating physician's opinion is "normally entitled to great weight," *Rankin v. Apfel*, 195 F.3d 427, 430 (8th Cir. 1999), but we have also cautioned that such an opinion "do[es] not automatically control, since the record must be evaluated as a whole." *Bentley v. Shalala*, 52 F.3d 784, 785-86 (8th Cir. 1995). Accordingly, we have upheld an ALJ's decision to discount or even disregard the opinion of a treating physician where other medical assessments "are

supported by better or more thorough medical evidence,” *Rogers v. Chater*, 118 F.3d 600, 602 (8th Cir. 1997), or where a treating physician renders inconsistent opinions that undermine the credibility of such opinions, see *Cruze v. Chater*, 85 F.3d 1320, 1324-25 (8th Cir. 1996).

Whether the ALJ grants a treating physician's opinion substantial or little weight, the regulations provide that the ALJ must “always give good reasons” for the particular weight given to a treating physician’s evaluation. 20 C.F.R. § 404.1527(d)(2); see also SSR 96-2p.

*Prosch*, 201 F.3d at 1012-13. Accord *Wiekamp v. Apfel*, 116 F. Supp. 2d 1056, 1063-64 (N.D. Iowa 2000) (Bennett, C.J.).

The ALJ set forth his reason for discounting Dr. Hizon’s opinion of Gawtry’s mental functional capacity. However, the ALJ failed to address the fact that Gawtry’s other treating physicians apparently agreed that Gawtry was unemployable at the time in question. The court finds the ALJ’s failure to do so was unfair and prejudicial to Gawtry. See *Onstad v. Shalala*, 999 F.2d 1232, 1234 (8th Cir. 1993). Accordingly, the court **recommends** this case be remanded for further development of the record consistent with this opinion.

## V. CONCLUSION

For the reasons set forth above, **IT IS RECOMMENDED**, unless any party files objections<sup>6</sup> to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this

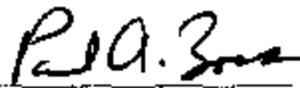
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<sup>6</sup>Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. See Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. See *Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

Report and Recommendation, that judgment be entered in favor of Gawtry<sup>7</sup> and against the Commissioner, and that this case be **reversed and remanded** to the Commissioner for further proceedings consistent with this opinion, pursuant to sentence four of 42 U.S.C. § 405(g).

**IT IS SO ORDERED.**

**DATED** this 29th day of March, 2002.



\_\_\_\_\_  
PAUL A. ZOSS  
MAGISTRATE JUDGE  
UNITED STATES DISTRICT COURT

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<sup>7</sup>If final judgment is entered for the plaintiff, the plaintiff's counsel must comply with the requirements of Local Rule 54.2(b) in connection with any application for attorney fees.