

UNPUBLISHED

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

JAMES F. JESSEN,
Plaintiff,

vs.

JO ANNE B. BARNHART,
Commissioner of Social Security
Administration,
Defendant.

No. C02-4058-MWB

**REPORT AND
RECOMMENDATION**

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I. INTRODUCTION

The plaintiff James F. Jessen (“Jessen”) appeals the decision by an administrative law judge (“ALJ”) denying him Title II disability income (“DI”) benefits and Title XVI supplemental security income (“SSI”) benefits. Jessen argues the record does not support the ALJ’s finding that Jessen “can respond appropriately to changes in the work setting. (Doc. No. 10 at 6)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On January 25, 2000, Jessen filed applications for DI and SSI benefits, alleging a disability onset date of January 21, 2000. (R. 70-72, 216-19) The applications were denied initially on May 23, 2000 (R. 43, 45-48, 220-24), and on reconsideration on January 12, 2001. (R. 44, 50-53, 225-29) Jessen requested a hearing (R. 57), which was held before ALJ Ronald Lahners in South Sioux City, Nebraska, on December 13, 2001. (R. 21-42) Attorney John S. Mueller represented Jessen at the hearing. Jessen testified at the hearing, as did Vocational Expert (“VE”) Sandra Tredour.

On April 9, 2002, the ALJ ruled Jessen was not entitled to benefits. (R. 10-20) The Appeals Council of the Social Security Administration denied Jessen’s request for review on June 19, 2002 (R. 6-7), making the ALJ’s decision the final decision of the Commissioner.

Jessen filed a timely Complaint in this court on July 11, 2002, seeking judicial review of the ALJ’s ruling. (Doc. No. 1) In accordance with 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 Jessen’s claim. Jessen filed a brief supporting his claim

on February 7, 2003. (Doc. No. 10) The Commissioner filed a responsive brief on March 20, 2003. (Doc. No. 11) The matter is now fully submitted, and pursuant to 42 U.S.C. § 405(g), the court turns to a review of Jessen’s claim for benefits.

B. Factual Background

1. Introductory facts and Jessen’s daily activities

At the time of the hearing, Jessen was 44 years old, and weighed about 280 pounds. He is approximately six feet tall. (R. 25) He lived alone in a duplex, and stated the “city housing deal” was paying his rent. (R. 33) He testified he had not worked since January 21, 2000,¹ when he “came down with a mental illness,” and his only income since that time has been retirement funds from Goodwill Industries.² (R. 25, 33)

Jessen graduated from high school. In response to the ALJ’s question, “Okay and while you were in high school and prior to going to high school were any of your classes in special education?” Jessen responded, “I don’t think I was.” (R. 26) However, Jessen told one of his treating physicians that he was in both special education and speech therapy courses in school. (See R. 214) He testified he can read newspapers and magazines, and he can write. He stated the Aide Center handles his money for him, and has been handling his money since 1982 or ‘83. He was unable to give a reason for having a third party handle his money. (R. 26, 37)

Jessen explained that he began suffering from depression in January 2000. He stated he has “a herniated disc in the lower part of [his] back.” (R. 27) In addition, he

¹At the hearing, the ALJ referred to February 21, 2000, rather than January 21, 2000. Jessen’s applications for benefits indicate a disability onset date of January 21, 2000, and the ALJ references the January 21st date in his opinion. (See R. 14) It appears the ALJ simply misspoke at the hearing when he referenced February 21, 2000.

²Jessen did not know if he had received unemployment benefits after leaving Goodwill. (R. 35-36)

stated he had knee surgery in the late 1970s, and his knees “need to be operated on again.” (*Id.*) Jessen stated he was seeing “Dr. Faldmo” at Siouxland Community Health Center for his physical problems. (*Id.*) The court notes Mr. Faldmo is a physician’s assistant, rather than a doctor. (*See, e.g.*, R. 154-56)

Jessen stated he was “going to St. Luke’s at Partial Hospital,” where he received some type of counseling. (R. 28) He was taking Serzone for anxiety attacks, and stated the medication also helps him fall asleep at night. His Serzone dosage was 150 milligrams in the morning and 300 milligrams at night. He also was taking 40 milligrams of Prozac each morning for depression, and 30 milligrams of Lipitor at night for his cholesterol. (R. 28-29)

Jessen’s medications were prescribed by Ronald W. Brinck, M.D., a psychiatrist. (R. 27) Jessen had been seeing Dr. Rodney Dean for several months, and was transferred to Dr. Brinck on January 8, 2001. (R. 32; *see* R. 129-33, 143-48, 150-51, 210-15) He stated that in addition to his medications, Dr. Brinck had him on “a special diet” to deal with his cholesterol. (R. 32) Jessen stated his depression was getting a “little bit” better, although he still thinks about hurting himself “a couple times a day.” (R. 32-33)

Jessen worked at Goodwill for about 20 years. He sorted donated materials into sorting boxes or onto tables, and sometimes drove a forklift. (R. 26-27, 30, 95) When asked why he left Goodwill, Jessen stated, “They said I did quit,” and “I guess I quit there.” (R. 30) He stated he “was missing quite a bit because of [his] mental illness.” (*Id.*) He has not worked since leaving Goodwill, although he has looked for work “all over town but couldn’t find nothing.” (*Id.*) He tried on three separate occasions to go back to work at Goodwill, but he was not rehired. (R. 30-31) He has looked for work as a forklift driver, janitor, “or maybe working in a grocery store stocking shelves or

something, whatever I can get my hands on, whatever I'm able to do[.]” (R. 37) He stated he has no problems with his hands and arms or with walking. (R. 37-38)

Jessen testified he was hospitalized several months after he left Goodwill, stating, “I was having thoughts of hurting myself.” (R. 29-30, 31) He explained:

I went to the [Siouxland Community Health] center one morning and I was talking to a counselor and told her I wasn't feeling very good and wanted to hurt myself for some reason so she – I went to Dr. Felno's [sic] office in a taxi and from there they took me to the hospital, Mercy Medical, in a taxi.

(R. 31) He stayed in the hospital for “[a]bout three nights.” (*Id.*) Jessen stated he has thought of hurting himself on other occasions but he “wouldn't go through with it,” and he has not been hospitalized again. (R. 32-33) His thoughts of hurting himself normally last “[a]bout five or 10 minutes,” but his medication helps him control the thoughts. (R. 38)

Jessen stated he normally gets up at 6:00 or 7:00 in the morning. He sometimes has trouble falling asleep at night. Once in awhile, he will wake up in the middle of the night and have trouble getting back to sleep. When this occurs, he will read for awhile, which helps him fall back to sleep. (R. 34) He fixes his own breakfast, takes his medications, and watches a little TV. He then goes to the Partial Hospital or to Friendship House. Jessen explained Friendship House is a place to socialize, “where you can come in as a member with a mental illness and meet new friends and stuff there.” (*Id.*) He stated he goes to Friendship House “[a]bout once every day except for Sundays when it's closed.” (*Id.*) He usually arrives right before lunch and stays until closing at about 5:00 p.m. In the evening, he watches TV. (*Id.*)

Jessen has a driver's license but does not have a car. He likes to socialize with friends, and likes to play cards and “sport games.” (R. 35-36) Jessen's mother lives in

Kingsley. He has a sister in California, and a sister in Omaha, and he visits them only “[o]nce in a great while.” (R. 35) Jessen is able to fix his own meals, do household chores and cleaning, and do his own laundry. (R. 36)

2. *Jessen’s medical history*

A summary of Jessen’s medical history is attached to this opinion as Appendix A. The Record indicates that on February 24, 2000, about a month after Jessen claims his disability began, he was evaluated by Michael P. Baker, Ph.D. at the request of Disability Determination Services. Jessen told Dr. Baker he was applying for disability benefits because of his “learning ability.” (R. 126) Dr. Baker noted Jessen had “exaggerated time lapses before responses,” and noted, “Responding seemed to necessitate a great deal of energy on Mr. Jessen’s part.” (*Id.*) Jessen reported feeling lonely and sometimes sad, being too tired to go visit friends, and sometimes not eating. (*Id.*) The doctor noted Jessen had poor eye contact, and “some level of tension or anxiety.” (R. 127) He exhibited poor short-term memory, poor concentration, and “quite low” self-esteem, and he appeared “rather inhibited and unsure of himself.” (*Id.*)

Dr. Baker administered the Wechsler Adult Intelligence Scale-Revised and found Jessen to be “functioning in the borderline range,” with a Verbal IQ of 79, Performance IQ of 76, and Full Scale IQ of 77. He was particularly weak in the area of comprehension and judgment. Dr. Baker opined Jessen

would appear to be limited in work related activities, for instance in remember[ing] and understanding instructions, procedures and locations due primarily . . . to anxiety interference and concentration, and perhaps even more memory problems that could be measured through testing. The same problems would limit his ability to carry out instructions. Interacting appropriately might be adequate once

sufficient rapport is established on a one-to-one basis, but with public or less strong acquaintance would be difficult for Mr. Jessen. He has in the past needed a conservator and would seem to continue to have that need.

(R. 127)

On April 11, 2000, Jessen saw physician's assistant David N. Faldmo for a problem with a draining eye. Mr. Faldmo noted in his record of the visit that Jessen "[a]ppears to have a learning disability." (R. 155) When Jessen returned on April 21, 2000, for a follow-up visit, Mr. Faldmo noted Jessen "is a poor historian and doesn't appear to be fully functioning." (R. 154)

On May 7, 2000, Dee E. Wright, Ph.D. prepared a psychiatric review technique of Jessen. Dr. Wright found Jessen to have a slight degree of limitation in the activities of daily living and social functioning, and frequent deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner. (R. 189-97) In a concurrent residual mental functional capacity assessment, Dr. Wright found Jessen to be moderately limited in his ability to understand, remember, and carry out detailed instructions; maintain attention and concentration for extended periods; sustain an ordinary routine without special supervision; complete a normal work day and work week without interruptions from psychologically based symptoms; perform at a consistent pace without an unreasonable number and length of rest periods; and respond appropriately to changes in the work setting. (R. 198-201)

Dr. Wright reviewed the records from Dr. Baker's evaluation, and concluded as follows:

The preponderance of the evidence in file would suggest moderate restrictions of function in this claimant's case. His borderline intelligence would preclude him [from] consistently performing extremely complex cognitive activity that would

require prolonged attention to minute details and rapid shifts in alternating attention. Despite this restriction the claimant currently appears able to sustain sufficient concentration and attention to perform a range of non-complex repetitive and routine cognitive activity when he is motivated to do so.

(R. 202) Dr. Wright noted Jessen possessed “adequate social skills to sustain short lived superficial interaction with others,” and Jessen had no significant restrictions of function from a psychological perspective in the areas of self-care and activities of daily living. (*Id.*) He opined Jessen “can engage in independent goal oriented activity when he is motivated to do so,” and found no evidence to suggest he “could not perform simple, unskilled, repetitive work-like activity.” (*Id.*)

Jessen began counseling at Siouxland Mental Health on June 20, 2000. At Jessen’s intake evaluation, social worker Gary Lewis found him to have “major problems functioning in the community due to borderline intellectual functioning.” (R. 174) Mr. Lewis assessed Jessen as having a current GAF of 55, with the highest level in the preceding year of 65. (R. 173) He found Jessen’s judgment to be fair, but his insight to be lacking and impaired. He noted Jessen was “very slow to process thinking processes,” and found Jessen to have impaired concentration and poor memory. (R. 172) Mr. Lewis noted Jessen “has strong desire to find work and engage in Rehab. but [he] is limited intellectually and culturally in terms of finding his way through the system.” (*Id.*)

At Jessen’s next visit, on July 3, 2003, Mr. Lewis noted Jessen “is more confused today, [and] said he is doing some volunteer work to pay for food stamps.” (R. 170) He noted Jessen’s “recall of info is severely limited and this transitional time is very difficult for him.” (*Id.*) Jessen missed his next appointment with Mr. Lewis on July 10, 2000. On July 18, 2000, Jessen saw Mr. Lewis and reported he had been feeling depressed and

suicidal for two weeks. Jessen reported missing his job at Goodwill, and stated he had a job prospect as an elevator operator. (R. 168)

On July 20, 2000, Jessen saw Mr. Faldmo again, complaining of dizziness and leg weakness. Mr. Faldmo noted Jessen was “majorly depressed and suicidal.” (R. 157) Jessen was sent to the emergency room at Mercy Medical Center for a psychiatric evaluation. Rodney J. Dean, M.D. evaluated Jessen and admitted him into the hospital. The doctor prescribed Prozac, and noted that once he was on the medication, Jessen became very interactive with the hospital staff and other patients, and he would “eat anything in sight.” (R. 129) Jessen “really did well on the unit,” and was reluctant to leave the hospital when it came time to discharge him. (*Id.*) Dr. Dean noted Jessen clearly was very lonely and had not been taking good care of himself. The doctor set up an outpatient treatment strategy for Jessen through the Partial Hospitalization Program at St. Luke’s, where he would attend from 8:30 a.m to 4:30 p.m., Monday through Friday. Dr. Dean scheduled a home health worker to assist Jessen with cleaning his apartment and paying bills, signed him up to receive a community support worker, and talked with his vocational rehabilitation counselor about finding Jessen different housing. Jessen was discharged on 20 milligrams of Prozac per day. (*Id.*; see R. 129-33, 141-42, 151)

Dr. Dean prepared an individualized treatment program for Jessen’s outpatient treatment, estimating Jessen would remain in treatment through July and August 2000. Dr. Dean noted Jessen “will be discharged when he is able to manage symptoms and when he has adequate supportive services available in the community, when he is able to function in possibly a part time low stress job or volunteer job, [and] when his depression and suicidal thoughts subside.” (R. 150) Target goals for Jessen’s treatment

were effective symptom management, and establishment of a structured daily living pattern. (*Id.*)

Jessen continued to see Mr. Lewis for regular counseling, with sessions on August 1, 8, 14, 22, and 28; September 11, 18 and 25; and October 3, 2000. He saw Dr. Dean for progress checks on August 23, September 25, and October 18, 2000. During this period of time, Jessen's depressive symptoms improved gradually. He learned some relaxation techniques to help with difficulty sleeping. His GAF remained consistent at 40-41.³ Jessen worked with a vocational rehabilitation counselor to explore training and employment opportunities, but although he expressed an interest in working part time while he continued his involvement in the Partial Hospitalization program, he remained unemployed. In October 2000, Dr. Dean noted that if it were not for Jessen's involvement in the program, he likely would require inpatient hospitalization. (R. 143)

Dr. Dean prepared an updated individualized program plan for Jessen's treatment on October 18, 2000, noting Jessen would continue in the Partial Hospital program through October and November, 2000. In January 2001, Jessen was referred to Ronald W. Brinck, M.D., a psychiatrist at the Siouxland Mental Health Center, for evaluation and further treatment. Dr. Brinck noted Jessen "had been on SSI for years, presumably secondary to severe learning disabilities or Mental Retardation." (R. 213) Jessen did not know why he had been on disability previously, or why he was no longer receiving benefits. Jessen gave Dr. Brinck a thorough history, noting he had been in Special Education and Speech Therapy courses in school, but he was "vague in most details."

³A GAF of 31-40 indicates "some impairment in reality testing or communication or major impairment in several areas such as work, family relations, and judgment," while a GAF of 41-50 indicates "serious symptoms or serious impairment with social and occupational functioning." *Bartrom v. Apfel*, 234 F.3d 1272 (Table), 2000 WL 1412777, at *1 n.3 (7th Cir. Sept. 20, 2000). See American Psychiatric Assoc., *Diagnostic and Statistical Manual of Mental Disorders*, at 32 (4th ed. 1994).

(R. 214) Dr. Brinck noted Jessen “seems to have genuine misunderstandings about the events at work and his Social Security Disability.” (*Id.*)

Dr. Brinck reached the following initial assessment of Jessen:

The patient is a 44 year old white male who has a long history of learning disabilities and apparently an old diagnosis of Schizoid Personality Disorder and seems to have a genuine episode of depression, after some rather severe stressors which he seems to have been unable to understand and figure out a solution to. He would seem to meet many criteria for a Schizoid Personality Disorder and in retrospect may have met criteria for Autism as a child, though we may never know unless old records can be found.

(R. 214)

Jessen told the doctor he would feel better if he was working, and Dr. Brinck noted “the best possible work and social settings happen through [Jessen’s] Goodwill job.”

(R. 213, 215) The doctor diagnosed Jessen with a Depressive Disorder, Not Otherwise Specified, and noted he needed to rule out Schizoid Personality Disorder, and Borderline Intellectual Functioning vs. Mental Retardation. He gave Jessen a current GAF of 60.⁴

(R. 215) His treatment plan included encouraging Jessen to keep taking Prozac and Serzone as prescribed, and he noted the “[i]nitial goal would be to get [Jessen] back on SSI.” (*Id.*) Dr. Brinck indicated he would work with the Partial Hospital staff to try to find “another supportive and understanding work place that [Jessen] could work for the next 20 years.” (*Id.*)

On January 10, 2001, John F. Tedesco, Ph.D. completed a Psychiatric Review Technique. (R. 175-88) Based on his review of Jessen’s records, Dr. Tedesco concluded

⁴A GAF of 51-60 indicates “moderate symptoms or moderate difficulty with social and occupational functioning.” *Id.*

Jessen has a moderate degree of limitation in the activities of daily living, social functioning, and maintaining concentration, persistence, or pace. He found the evidence does not establish the presence of an organic mental disorder or affective disorder sufficient to meet the criteria of the Listings. Dr. Tedesco also completed a Mental Residual Functional Capacity Assessment (R. 203-06). He agreed with Dr. Wright's assessment of May 7, 2000, with one exception. Where Dr. Wright had found Jessen to be moderately limited in his ability to accept instructions and respond appropriately to criticism from supervisors, Dr. Tedesco found him not to be limited significantly in that area.

In his Medical Consultant Review Summary (R. 207-08), Dr. Tedesco noted Jessen likely was unable to work as of January 2001, but he could be expected to improve and "return to baseline," and his condition would not remain severe for at least twelve months. Dr. Tedesco found Jessen's "diagnosed medically determinable mental impairment does create some moderate restriction of function for [him], but these restrictions of function do not currently meet or equal 12.02 listing severity." (R. 208) He found Jessen's allegation of disability to be credible, "to the extent that he does have [a] diagnosed medically determinable impairment [*i.e.*, "borderline intellectual functioning"], which does create moderate restrictions of function for him." (*Id.*) However, he found Jessen's depression was "due, at least in part, to situational factors which should improve."⁵ (R. 207) He noted Jessen "showed marked improvement in the context of his hospital treatment," and opined the "improvement should be able to be sustained with proper treatment and treatment compliance." *Id.*

⁵The court notes Dr. Tedesco states, in his report, that Jessen "quit his job to find a better job." (R. 207) The court has found no evidence in the Record to support this statement.

Jessen continued to see Dr. Brinck every two to three months for follow-up and medication checks. On March 9, 2001, Dr. Brinck noted Jessen was still attending the Partial Hospitalization program three days a week. He continued to have trouble sleeping, his mood fluctuated, and he had suffered a recent panic attack. The doctor increased Jessen's dosage of Serzone, and Jessen continued to take Prozac and Lipitor. (R. 212)

Jessen next saw Dr. Brinck on May 8, 2001, and he reported his anxiety had improved with the increased dosage of Serzone. He reported he was sleeping better and his appetite was good. He continued to attend the Partial Hospitalization program three days a week, and he was attending Peer Support activities and going to Friendship House. Dr. Brinck continued Jessen on his current medications. (R. 211)

Jessen saw Dr. Brinck again on August 6, 2001. He reported his "anxiety comes and goes," and he was attending Partial Hospitalization groups twice a week. He reported going to Friendship House five or six days a week. He had some continued anxiety and was feeling tired during the day. Dr. Brinck again increased Jessen's Serzone dosage, and continued his Prozac and Lipitor. (R. 210)

3. Vocational expert's testimony

VE Sandra Tredour testified at the hearing. Preliminarily, she noted she recognized Jessen from her prior work at Goodwill. (R. 39) The ALJ asked Ms. Tredour to consider an individual of Jessen's "age, education and past work history, both as to exertional as well as skill level and with some very minor transferable skills" (R. 39-40), and the following limitations:

[S]uch a person could lift up to 40 pounds on occasion, 20 to 25 pounds on a regular basis and such a person could stand for six hours or sit for six hours in an eight hour day with

normal breaks included in a normal work day, that there are no other further physical reservations, though mentally such an individual would be moderately limited in the following respects. The ability to understand and remember detailed instructions or to carry out the same. The ability to maintain attention or concentration for extended periods. The ability to sustain an ordinary routine without special supervision. The ability to respond appropriately to changes in the work setting and the ability to complete a normal work day and work week without interruption from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods.

(R. 40) Given these limitations, the ALJ asked if the hypothetical individual would be able to perform any of Jessen's past relevant work.

Ms. Tredour stated the hypothetical individual would be able to work as a forklift operator. She stated other jobs that would fit the individual's limitations and abilities would include assembler, hand packager, laundry worker, and order filler, each of which jobs exists in sufficient numbers in the local and national economies. (R. 40-41)

4. *The ALJ's conclusion*

The ALJ found Jessen had not engaged in substantial gainful activity since his alleged disability onset date of January 21, 2000. (R. 14; R. 19 ¶ 2) The ALJ found Jessen to have "borderline intellectual functioning and major depressive disorder, single episode," but concluded those impairments, although severe, were not severe enough to meet or medically equal one of the impairments listed in the Regulations. (R. 16; R. 19 ¶¶ 3 & 4) The ALJ gave "little weight to Dr. Brinck's diagnosis of schizoid personality disorder, which he found in some unidentified notes he had found." (R. 16) Therefore, the ALJ concluded, "Based on the objective findings of borderline intellectual functioning and on the diagnosis of major depressive disorder, single episode, without psychosis

given at the time of his inpatient hospital treatment, the undersigned finds that the criteria necessary for the severity of the claimant's symptoms to meet or equal Listings 12.04 or 12.05 are not met." (*Id.*)

The ALJ found Jessen to be mildly limited in his activities of daily living, and his ability to maintain social functioning; moderately limited in his ability to maintain concentration; and had no prolonged episodes of decompensation. (R. 17; R. 19 ¶ 4)

The ALJ gave substantial weight to a Work Performance Assessment of Jessen prepared by the Director of Vocational Services and the Production Manager at Goodwill. The ALJ noted the following:

A work performance assessment provided by the claimant's previous employer on April 4, 2000, noted that the claimant needed close supervision and was able to do his assigned tasks well when he was motivated. He was described as a lazy worker who needed reminders even though he knew what needed to be done. It was noted that the claimant missed quite a bit of work and was occasionally late. The claimant was felt to have the skills, abilities, and knowledge to perform full-time, simple, and unskilled competitive employment[.] [Citation omitted.]

(R. 17-18; see R. 95-97)

Based on this work performance assessment, and "the opinion of the State Agency psychological consultants," the ALJ concluded Jessen has the residual functional capacity identical to that presented to the VE in the hypothetical question quoted above. (R. 18; R. 20 ¶ 7) The ALJ found Jessen's allegations regarding his limitations were "not totally credible," and his medically determinable impairments do not prevent him from performing his past relevant work. (R. 19, ¶ 5; R. 20, ¶ 9) Therefore, the ALJ concluded Jessen was not disabled and was not entitled to benefits. (R. 20)

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

A. Disability Determinations and the Burden of Proof

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 either in the region where 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 v. Callahan*, 133 F.3d 583, 587-88 (8th Cir. 1998) (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.*; accord *Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001) (“ [I]f the claimant cannot perform the past work, the burden then shifts to the Commissioner to prove that there are other jobs in the national economy that the claimant can perform.”) (citing *Cox v. Apfel*, 160 F.3d 1203, 1206 (8th Cir. 1998)).

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 v. Apfel*, 179 F.3d 1107, 1110 (8th Cir. 1999) (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).

B. The Substantial Evidence Standard

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. *Krogmeier v. Barnhart*, 294 F.3d 1019, 1022 (8th Cir. 2002) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000)); *Weiler, supra*, 179 F.3d at 1109 (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); *Kelley, supra*, 133 F.3d at 587 (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, "[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, id.*; *Weiler, id.*; 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).

Moreover, substantial evidence "on the record as a whole" requires consideration of the record in its entirety, taking into account both "evidence that detracts from the Commissioner's decision as well as evidence that supports it." *Krogmeier*, 294 F.3d at 1022 (citing *Craig*, 212 F.3d at 436); *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)); *Gowell, id.*; *Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213); *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 *Steadman v. S.E.C.*, 450 U.S. 91, 99, 101 S. Ct. 999, 1006, 67 L. Ed. 2d 69 (1981)). 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.” *Id.* (quoting *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992), and 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)); accord *Krogmeier*, 294 F.3d at 1022 (citing *Woolf*, 3 F.3d at 1213). 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*, 274 F.3d at 1217; *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)). As the court explained in *Polaski v. Heckler*:

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 1320, 1322 (8th Cir. 1984). Accord *Ramirez v. Barnhart*, 292 F.3d 576, 580-81 (8th Cir. 2002).

IV. ANALYSIS

In his only assignment of error, Jessen argues, "The record does not support the finding that [he] can respond appropriately to changes in the work setting." (Doc. No. 10 at 6) He argues his depression and borderline intellectual functioning prevent him from working. (*Id.*) Certainly, the evidence of record indicates Jessen has a limited ability to cope in many work and social situations. However, Jessen has not shown, nor does the Record support the conclusion, that he is unable to perform any type of work.

As the Commissioner points out in her brief, none of Jessen's doctors placed any type of work restrictions on him at any time, and Jessen has come forward with no evidence that he is unable to perform his past relevant work. (See Doc. No. 11 at 12-14) Jessen has continued to look for work, and has indicated on more than one occasion that he wants to work. In addition, Jessen obviously believes he is capable of performing his past job at Goodwill because he has tried repeatedly to be rehired there.

Jessen cares for himself and his apartment, visits friends and socializes at Friendship House, and controls his depression well with his medication. The court finds the record supports Dr. Tedesco's conclusion that Jessen's inability to work could not be expected to last more than 12 months, and the ALJ's conclusion that Jessen is not disabled as defined by the Social Security regulations. The Record contains substantial evidence to support the ALJ's findings, and the Commissioner's decision to deny Jessen benefits should be affirmed.

IV. CONCLUSION

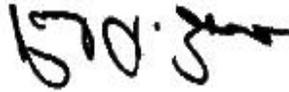
For the reasons discussed above, **IT IS RESPECTFULLY RECOMMENDED**, unless any party files objections⁶ to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service

⁶Objections 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).

of a copy of this Report and Recommendation, that judgment be entered in favor of the Commissioner and against Jessen.

IT IS SO ORDERED.

DATED this 22nd day of July, 2003.

A handwritten signature in black ink, appearing to read "P.A. Zoss", written over a horizontal line.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT