

PUBLICATION INFORMATION:

Weishaar v. Barnhart, ___ F. Supp. 2d ___, 2002 WL 1714279 (N.D. Iowa July 15, 2002)

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

GARY F. WEISHAAR,

Plaintiff,

vs.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

No. C 01-3048-MWB

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

This matter comes before the court pursuant to Magistrate Judge Paul A. Zoss's February 22, 2002, Report and Recommendation in this judicial review of denial by an administrative law judge (ALJ) of Title II disability insurance (DI) benefits under the Social Security Act. Plaintiff Gary F. Weishaar sought such benefits on the basis of a disability involving a combination of physical and mental impairments, which are the results of rotator cuff disease, borderline intellectual functioning, headaches, depression, somatoform disorder with secondary anxiety, and a personality disorder. However, the ALJ's denial of benefits was affirmed at each subsequent stage of the administrative procedures, and thus became the decision of the Commissioner of Social Security.

Judge Zoss concluded that the ALJ's decision to deny Weishaar's application for benefits had been in error, because the ALJ had failed to include in his hypothetical questions to a vocational expert (VE) Weishaar's borderline intellectual functioning, headaches, depression, somatoform disorder, or personality disorder, even though "the ALJ specifically found Weishaar suffered from all of these limitations." Report and Recommendation at 28-29. Judge Zoss, therefore, recommended that judgment enter in favor of Weishaar and against the Commissioner, and that this case be reversed and

remanded to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) for further proceedings, with instructions to the Commissioner to obtain additional testimony from the VE in connection with a proper hypothetical question that considers all of Weishaar's limitations.

On March 4, 2002, the Commissioner filed objections to Judge Zoss's Report and Recommendation. The thrust of the Commissioner's objections is that borderline intellectual functioning, headaches, depression, somatoform disorder, and personality disorder are "diagnoses," not "limitations," and that the ALJ's hypothetical question properly contained all of the credible limitations *caused* by the diagnosed conditions. More specifically, the Commissioner argues that the ALJ concluded, on the basis of a Psychiatric Review Technique Form, that Weishaar's mental impairments resulted in a moderate restriction of activities of daily living and moderate difficulties in maintaining social functioning, "often" resulted in deficiencies of concentration, persistence, or pace, and had "once or twice" resulted in episodes of deterioration or decompensation in work or work-like settings. The ALJ then found that Weishaar's functional limitations resulted in an inability to perform work requiring detailed instruction, work with the general public, or work that was not simple, routine, repetitive, and non-stressful in nature. These limitations, the Commissioner now contends, were adequately presented in the ALJ's hypothetical question to the VE. The Commissioner also argues that the ALJ properly discounted limitations from headaches that were controlled by over-the-counter medications. The Commissioner, therefore, contends that the ALJ's decision should be affirmed.

The standard of review to be applied by the district court to a report and recommendation of a magistrate judge is established by statute:

A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the

findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See, e.g., Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1)), *cert. denied*, 519 U.S. 860 (1996); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*). The Commissioner has made specific, timely objections in this case; therefore, *de novo* review of "those portions of the report or specified proposed findings or recommendations to which objection is made" is required here. *See* 28 U.S.C. § 636(b)(1).¹

Because *de novo* review has been triggered as to sufficiency of the ALJ's hypothetical question and the ALJ's conclusions based on the VE's response to that hypothetical question, it is well to consider the standard of review that this court must apply to the Commissioner's denial of benefits. The Eighth Circuit Court of Appeals has described the applicable review as "narrow":

"We will affirm the ALJ's findings if supported by substantial evidence on the record as a whole." *Beckley v. Apfel*, 152 F.3d 1056, 1059 (8th Cir. 1998). "Substantial evidence is less than a preponderance, but enough that a reasonable mind might accept it as adequate to support a decision." *Id.* If, after reviewing the record, the Court finds that it is possible to draw two inconsistent positions from the evidence and one of those positions represents the Commissioner's findings, the court must affirm the commissioner's decision. *See Young v. Apfel*, 221 F.3d 1065, 1068 (8th Cir. 2000). Even if we would have

¹This court concludes that, where *de novo* review is not required by specific objections, the court will instead review a report and recommendation only for clear error. *See Griffini v. Mitchell*, 31 F.3d 690, 692 (8th Cir.1994) (reviewing factual findings for plain error where no objections to magistrate judge's report were filed).

weighed the evidence differently, we must affirm the denial of benefits if there is enough evidence to support the other side. *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992).

Pearsall v. Massanari, 274 F.3d 1211, 1217 (8th Cir. 2001). Although this review is “narrow,” the Eighth Circuit Court of Appeals has also explained that, “[i]n reviewing administrative decisions, it is the duty of the Court to evaluate all of the evidence in the record, taking into account whatever in the record fairly detracts from the ALJ’s decision.’” *Hutsell v. Massanari*, 259 F.3d 707, 714 (8th Cir. 2001) (quoting *Easter v. Bowen*, 867 F.2d 1128, 1131 (8th Cir. 1989)); *Howard v. Massanari*, 255 F.3d 577, 581 (8th Cir. 2001) (“‘In assessing the substantiality of the evidence, we must consider evidence that detracts from the Commissioner’s decision as well as evidence that supports it.’”) (quoting *Black v. Apfel*, 143 F.3d 383, 385 (8th Cir. 1998), with internal quotations and citations omitted).

As to the key question in this case, the sufficiency of the ALJ’s hypothetical question and the VE’s response to satisfy the “substantial evidence” standard, the Eighth Circuit Court of Appeals recently explained as follows:

“A hypothetical question must precisely describe a claimant’s impairments so that the vocational expert may accurately assess whether jobs exist for the claimant.” *Newton v. Chater*, 92 F.3d 688, 694-95 (8th Cir. 1996). Testimony from a vocational expert based on a properly-phrased hypothetical constitutes substantial evidence. *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996). The converse is also true. See *Newton*, 92 F.3d at 695. However, “[w]hile the hypothetical question must set forth all the claimant’s impairments, [citation omitted], it need not use specific diagnostic or symptomatic terms where other descriptive terms can adequately define the claimant’s impairments.” *Roe*, 92 F.3d at 676.

Howard, 255 F.3d at 581-82; accord *Pearsall*, 274 F.3d at 1220.

It may be true, as the Commissioner contends, that borderline intellectual functioning, headaches, depression, somatoform disorder, and personality disorder are

“diagnoses,” not “limitations” or “impairments,” but that is not the end of the matter here. Rather, implicit in Judge Zoss’s conclusions, and readily apparent from *de novo* review of the record, is the absence of any adequate statement of limitations or impairments arising from Weishaar’s mental conditions in the hypothetical question as framed by the ALJ. *See* Transcript at 77. Although the Commissioner makes a valiant attempt to demonstrate, on the basis of case law, that the ALJ’s references to certain limitations in the hypothetical question adequately addressed the limitations or impairments arising from particular mental conditions, the ALJ’s hypothetical question is still deficient in that it fails to characterize properly the degree of these limitations in Weishaar’s case, as demonstrated by the record and the ALJ’s own findings. To put it another way, there is at least a scintilla of evidence supporting the ALJ’s characterization of Weishaar’s limitations, but considerably less than “enough that a reasonable mind might accept it as adequate to support a decision.” *Pearsall*, 274 F.3d at 1217 (quoting *Beckley*, 152 F.3d at 1059). Nor is this simply a case in which it is “possible to draw two inconsistent positions from the evidence and one of those positions represents the Commissioner’s findings,” such that “the court must affirm the commissioner’s decision,” *id.* (citing *Young*, 221 F.3d at 1068), or one in which this court would simply “have weighed the evidence differently,” which would also require affirmance, “if there is enough evidence to support the other side.” *Id.* (citing *Browning*, 958 F.2d at 822).

Rather, the evidence detracting from the ALJ’s characterization of Weishaar’s limitations arising from his mental conditions in the ALJ’s hypothetical question is so significant that the court cannot conclude that the ALJ’s decision is supported by substantial evidence. *See Hutsell*, 259 F.3d at 714 (the court must consider evidence that detracts from the ALJ’s conclusion as well as evidence that supports it); *Howard*, 255 F.3d at 581 (same). The ALJ’s hypothetical question was not properly-phrased; thus, the VE’s conclusion based on that flawed hypothetical question does not constitute substantial evidence in support of

the ALJ's decision. See *id.* (noting that "[t]estimony from a vocational expert based on a properly-phrased hypothetical constitutes substantial evidence," but that "[t]he converse is also true"). Here, the evidence detracting from the ALJ's conclusion is Weishaar's counsel's hypothetical questions, which properly characterized Weishaar's limitations, and the VE's conclusions, on the basis of such a proper characterization, that Weishaar would be precluded from employment. See Transcript at 78-80.

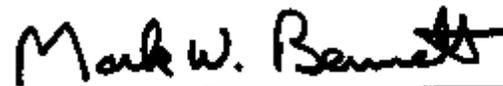
Indeed, even giving the ALJ's findings due deference, this court concludes that the evidence presented by the VE's conclusions on the basis of a properly-formulated hypothetical is so clear that there is no reason to prolong this case by remanding for further administrative proceedings, as Judge Zoss recommends. Instead, as in *Hutsell v. Massanari*, 259 F.3d 707 (8th Cir. 2001), "[t]he clear weight of the evidence points to the conclusion that [Weishaar] is disabled." See *Hutsell*, 259 F.3d at 714 (also reaching this conclusion after considering evidence that detracted from the ALJ's findings). "'Where further hearings would merely delay receipt of benefits, an order granting benefits is appropriate.'" *Id.* (quoting *Parsons v. Heckler*, 739 F.2d 1334, 1341 (8th Cir. 1984)). That is the case here. Accordingly, the decision of the Commissioner will be reversed and this matter remanded to the Commissioner only for the purpose of awarding benefits. *Id.*

THEREFORE, the Commissioner's March 4, 2002, objections to Judge Zoss's February 22, 2002, Report and Recommendation are **overruled**. Judge Zoss's February 22, 2002, Report and Recommendation is **modified** to the extent that the decision of the Commissioner is **reversed and this matter remanded to the Commissioner only for the**

purpose of awarding benefits, but the Report and Recommendation is otherwise **accepted**.
Judgment in favor of Weishaar shall enter accordingly.

IT IS SO ORDERED.

DATED this 15th day of July, 2002.



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