No.

In the Supreme Court of the United States

JOHN J. DAVIS, ET AL., PETITIONERS

v.

ANDREW M. SAUL, COMMISSIONER OF SOCIAL SECURITY

THOMAS HILLIARD, PETITIONER

v.

ANDREW M. SAUL, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a claimant seeking disability benefits or supplemental security income under the Social Security Act must exhaust an Appointments Clause challenge with the administrative law judge whose appointment the claimant is challenging in order to obtain judicial review of that challenge.

PARTIES TO THE PROCEEDING

Pursuant to Rule 12.4, this petition for a writ of certiorari covers the judgments in two cases.

Petitioners in *Davis* v. *Saul* are John J. Davis, Kimberly L. Iwan, and Destiny M. Thurman. Respondent is Andrew M. Saul, Commissioner of Social Security.

Petitioner in *Hilliard* v. *Saul* is Thomas Hilliard. Respondent is Andrew M. Saul, Commissioner of Social Security.

RELATED PROCEEDINGS

United States District Court (N.D. Iowa):

Davis v. *Berryhill*, Civ. No. 17-80 (July 27, 2018) (report and recommendation by magistrate judge)

Iwan v. *Commissioner*, Civ. No. 17-97 (July 12, 2018) (report and recommendation by magistrate judge)

Thurman v. *Commissioner*, Civ. No. 17-35 (June 28, 2018) (report and recommendation by magistrate judge)

Davis v. *Commissioner*, Civ. No. 17-80 (Sept. 10, 2018) (order by district court adopting report and recommendation)

Iwan v. *Commissioner*, Civ. No. 17-97 (Sept. 10, 2018) (order by district court adopting report and recommendation)

Thurman v. *Commissioner*, Civ. No. 17-35 (Sept. 10, 2018) (order by district court adopting report and recommendation)

United States District Court (S.D. Iowa):

Hilliard v. *Berryhill*, Civ. No. 18-156 (Nov. 14, 2018)

United States Court of Appeals (8th Cir.):

Davis v. *Saul*, Nos. 18-3422, 18-3451 & 18-3452 (June 26, 2020)

Hilliard v. *Saul*, No. 19-1169 (July 9, 2020)

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John J. Davis, Thomas Hilliard, Kimberly L. Iwan, and Destiny M. Thurman respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Eighth Circuit in these cases. Pursuant to Rule 12.4, petitioners file a single petition covering both of the judgments in these cases, as they arise from the same court and involve identical or closely related questions.

OPINIONS BELOW

The opinion of the court of appeals in *Davis* v. *Saul* (App., *infra*, 1a-9a) is reported at 963 F.3d 790. The opinion of the court of appeals in *Hilliard* v. *Saul* (App., *infra*, 10a-14a) is not yet reported but is available at 2020 WL 3864288. The opinions of the district courts in these cases (App., *infra*, 15a-18a, 19a-38a, 39a-60a, 61a-82a) are unreported. The reports and recommendations of the magistrate judges in these cases (App., *infra*, 83a-104a, 105a-131a, 132a-159a) are also unreported.

JURISDICTION

The judgment of the court of appeals in *Davis* was entered on June 26, 2020. The judgment of the court of appeals in *Hilliard* was entered on July 9, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Section 2 of Article II of the United States Constitution provides in relevant part:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

STATEMENT

These cases present a recurring question of enormous practical importance on which the courts of appeals are in conflict. The question is whether a claimant seeking disability benefits or supplemental security income under the Social Security Act must exhaust an Appointments Clause challenge with the administrative law judge (ALJ) whose appointment the claimant is challenging in order to obtain judicial review of that challenge.

Petitioners are Social Security claimants whose applications for disability insurance benefits and supplemental security income were denied shortly before this Court's decision in *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), which held that ALJs of the Securities and Exchange Commission are "Officers of the United States" for purposes of the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2, and therefore cannot be appointed by agency staff. While seeking judicial review of the denial of benefits by the Social Security Administration (SSA) in each of their cases, petitioners argued that, in light of *Lucia*, they were entitled to new hearings before properly appointed ALJs. It is undisputed that, under *Lucia*, the ALJs who heard their claims were improperly appointed, and the appropriate remedy is to conduct new hearings before properly appointed ALJs.

The district courts in these cases held that petitioners were barred from making Appointments Clause challenges in federal court because they had not first raised those challenges during their administrative proceedings. The court of appeals affirmed in two separate decisions, acknowledging a circuit conflict on the question. The court of appeals reasoned that imposing an issue-exhaustion requirement protected agency authority and promoted judicial efficiency. The court took the view that raising an Appointments Clause challenge before an ALJ

would not have been futile, even though neither an ALJ nor the SSA Appeals Council could have fixed the defect. The court further declined to exercise its discretion to consider the unexhausted issue under *Freytag* v. *Commissioner*, 501 U.S. 868 (1991).

The decisions below expressly and unambiguously create a circuit conflict on the question presented. Three courts of appeals have already addressed the question this calendar year alone, and many additional cases are currently pending in other circuits. See, *e.g.*, *Probst* v. *Saul*, No. 19-1529 (4th Cir.); *Fortin* v. *Commissioner*, No. 19-1581 (6th Cir.); *Duane* v. *Saul*, No. 20-1855 (7th Cir.); *Perez* v. *Commissioner*, No. 19-11660 (11th Cir.).

The decisions below are incorrect and are at odds with the logic of this Court's decision in *Sims* v. *Apfel*, 530 U.S. 103 (2000), with the untenable result that Social Security claimants are subject to an issue-exhaustion requirement not found in any statute or SSA regulation. Unless the Court intervenes, that judge-made rule will deprive hundreds of claimants of the right to have their benefits claims adjudicated by constitutionally appointed ALJs. In addition, because resolution of the question presented may entail determining whether Social Security claimants must exhaust issues before ALJs more generally, a decision in these cases could have implications for the still greater number of claimants who seek judicial review of Social Security benefits determinations each year.

These cases present an ideal vehicle for resolving the circuit conflict on the question presented. By virtue of its multiple petitioners, this petition provides the Court with an opportunity to address claimants who are arguably situated differently with respect to one aspect of the issue-exhaustion inquiry. While the better view is that all four petitioners lacked fair notice of any issue-exhaustion re-

quirement with the ALJs, it could be argued that claimants whose administrative proceedings were still pending in January 2018 had notice of such a requirement by virtue of SSA's initial guidance to its ALJs concerning Appointments Clause challenges following this Court's grant of review in *Lucia*. In these cases, three petitioners' administrative proceedings concluded in 2017, and only one was still pending in January 2018. These cases thus present the Court with the opportunity to address the full range of potential claimants.

In the decisions under review, the court of appeals erroneously adopted the rule that claimants seeking benefits under the Social Security Act must exhaust Appointments Clause challenges. The petition for a writ of certiorari should be granted.

A. Background

The Social Security Act authorizes SSA to provide two primary forms of benefits to eligible individuals. Title II of the Act "provides old-age, survivor, and disability benefits to insured individuals irrespective of financial need." *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1772 (2019) (citation omitted); see 42 U.S.C. 401-434. Title XVI of the Act "provides supplemental security income benefits to financially needy individuals who are aged, blind, or disabled regardless of their insured status." *Smith*, 139 S. Ct. at 1772 (internal quotation marks and citation omitted); see 42 U.S.C. 1381-1383f.

The regulations governing the two programs are materially equivalent, setting out a four-step process through which claimants must generally proceed before they can obtain judicial review. See *Smith*, 139 S. Ct. at 1772. A claimant must seek an initial determination as to eligibility for benefits; seek reconsideration of that initial determination; request a hearing conducted by an ALJ;

and seek review of the ALJ's decision by the Appeals Council. After exhausting each of those administrative remedies, the claimant may seek judicial review of the agency's benefit determination in federal court. See 42 U.S.C. 405(g); *Smith*, 139 S. Ct. at 1772.

The relevant regulations expressly provide that, absent a showing of good cause, a claimant who does not timely invoke each of the four steps in the administrative process "will lose" the "right to judicial review." 20 C.F.R. 404.900(b), 416.1400(b). But the statutes and regulations governing SSA proceedings do not provide that the failure to raise any particular *issue* in the administrative process will preclude a claimant from raising that issue in federal court, even though it is "common" for other agencies' regulations to do so. See *Sims*, 530 U.S. at 108; cf. 15 U.S.C. 77i(a); 29 U.S.C. 160(e); 30 U.S.C. 816(a)(1); 47 U.S.C. 405(a).

That absence comports with the nature of SSA proceedings. Unlike many administrative proceedings, SSA proceedings are not adversarial, but rather informal and "inquisitorial." See *Sims*, 530 U.S. at 111 (plurality opinion); 20 C.F.R. 404.900(b), 416.1400(b). A claimant requests a hearing before an ALJ (and subsequent review by the Appeals Council) by filling out a one-page form that provides only a few lines to summarize why the claimant disagrees with the benefits determination and why further review is warranted. Neither form states that the failure to raise a particular issue could preclude the claimant from raising the issue during subsequent judicial review. See SSA, Form No. HA-501-U5, Request for Hearing by Administrative Law Judge (Jan. 2015) <tinyurl.com/ssaform501>; SSA, Form No. HA-520-U5, Request for Review of Hearing Decision/Order (Jan. 2016) <tinyurl.com/ssaform520>.

Both the ALJ and the Appeals Council have a "duty to investigate the facts and develop the arguments both for and against granting benefits." *Sims*, 530 U.S. at 111 (plurality opinion). A claimant need not provide briefing or oral argument before the ALJ—or make any appearance at all unless the ALJ deems it necessary. The Commissioner of Social Security does not act as an opposing litigant in proceedings before the ALJ or the Council. See *ibid.* And the ALJ has wide latitude to consider issues never raised by the claimant. Where a claimant appears in person, the ALJ "typically conducts questioning of the claimant and all witnesses," regardless of whether the claimant is represented by counsel. Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 Colum. L. Rev. 1289, 1303 (1997); see 20 C.F.R. 404.939, 404.946, 404.949, 404.950, 416.1446, 416.1449, 416.1450.

B. Facts And Procedural History

1. Petitioners are four individuals—John Davis, Thomas Hilliard, Kimberly Iwan, and Destiny Thurman—who applied for Social Security benefits between 2013 and 2015. Petitioners Davis, Hilliard, and Iwan sought both disability benefits under Title II and supplemental security income under Title XVI; petitioner Thurman sought only supplemental security income under Title XVI. After SSA denied all four applications and then denied reconsideration, each petitioner requested and received an ALJ hearing. An ALJ denied each application. The Appeals Council denied review of Thurman's application in February 2017; Davis's application in June 2017; Iwan's application in July 2017; and Hilliard's application in March 2018. App., *infra*, 2a, 10a, 15a, 20a, 40a, 62a, 84a, 106a-109a, 133a-135a; *Hilliard* Gov't C.A. Br. 12.

2. On January 12, 2018—after the Appeals Council had denied review as to three of the four petitioners—this Court granted the petition for a writ of certiorari in *Lucia*, *supra*, on the question whether the ALJs of the Securities and Exchange Commission (SEC) are "Officers of the United States" who must be appointed consistent with the requirements of the Appointments Clause. On January 30, 2018, in light of that grant, SSA's Office of General Counsel issued an "emergency message" directed at ALJs, the Appeals Council, and their staff. That message instructed ALJs to note on the record any Appointments Clause challenges made by claimants but not to "discuss or make any findings related to the Appointments Clause issue," on the ground that SSA "lack[ed] the authority to finally decide constitutional issues such as these." SSA, EM-18003: Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process (2018).

At the time, ALJs were appointed by SSA staff members with no involvement by the Commissioner. See *Bandimere* v. *SEC*, 844 F.3d 1168, 1199 (10th Cir. 2016) (McKay, J., dissenting); *O'Leary* v. *OPM*, 708 Fed. Appx. 669, 670 (Fed. Cir. 2017). ALJs were selected through a merit-selection process administered by the Office of Personnel Management (OPM), which classified ALJs as "competitive service" jobs—*i.e.*, executive-branch jobs filled through "open, competitive examinations." 5 U.S.C. 1104(a)(2), 2102(a), 3304(a)(1); see 5 C.F.R. 930.201(b); *Bandimere*, 844 F.3d at 1176. ALJs who were ultimately appointed were required to be selected either with OPM's prior approval or from a list of eligible candidates prepared by OPM. See 5 C.F.R. 930.204(a).

On June 21, 2018, this Court decided *Lucia*, holding that ALJs of the SEC were "Officers of the United States" who must be appointed by the President, a court

of law, or a head of a department. See 138 S. Ct. at 2055. Because SEC ALJs had been appointed by SEC staff members, the Court ordered a "new hearing before a properly appointed official," different from the improperly appointed ALJ who originally presided over the proceeding. *Id.* at 2055 (internal quotation marks and citation omitted).

On June 25, 2018, SSA reiterated its instruction that ALJs should note but not address any Appointments Clause challenges raised by claimants. See SSA, EM-18003 REV 2: Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process – UPDATE (June 25, 2018). On July 10, 2018, the President issued an executive order that removed all ALJs from the competitive service, ending OPM's hiring control over them. See Executive Order 13843, *Excepting Administrative Law Judges From the Competitive Service*, 83 Fed. Reg. 32,755, 32,756 (July 10, 2018). And on July 16, 2018, the Acting Commissioner "ratified" the appointment of ALJs and Appeals Council judges and "approved those appointments as her own." See Social Security Ruling 19-1p, *Titles II and XVI: Effect of the Decision in Lucia v. Securities and Exchange Commission (SEC) on Cases Pending at the Appeals Council*, 84 Fed. Reg. 9,582, 9,583 (March 15, 2019).

Accordingly, on August 6, 2018, SSA revised its emergency instruction to ALJs to address the ratification; consistent with the earlier instructions, it ordered ALJs merely to note any Appointments Clause challenges raised before the ratification date of July 16, 2018. See SSA, EM-18003 REV 2: Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process – UPDATE (Aug. 6, 2018) <tinyurl.com/emaug2018>.

On March 15, 2019, SSA instituted a policy for addressing Appointments Clause challenges to decisions that ALJs issued before the Acting Commissioner's ratification. That policy applied only to claimants who timely requested Appeals Council review of ALJ decisions issued before the date of ratification. As to cases pending before the Appeals Council in which the claimant had raised an Appointments Clause challenge before the ALJ, SSA ordered the Appeals Council to vacate the ALJ's decision and order new proceedings before a different, properly appointed ALJ (or conduct a new rehearing itself), regardless of whether the claimant had also pressed the issue before the Appeals Council. A claimant who had failed to raise an Appointments Clause challenge before the ALJ but did raise the challenge before the Appeals Council also received new proceedings. See Social Security Ruling 19-1p, 84 Fed. Reg. 9,582, 9,583 (2019).

3. Before this Court's decision in *Lucia*, each petitioner filed a complaint in federal court, three in the United States District Court for the Northern District of Iowa and one in the United States District Court for the Southern District of Iowa, seeking judicial review of SSA's decision to deny benefits under 42 U.S.C. 405(g). In three of the cases, magistrate judges recommended that the district court affirm the denial of benefits.

Then, following *Lucia*, each petitioner filed a brief to address the intervening change in law, arguing that he or she was entitled to a new hearing before a new, properly appointed ALJ because the presiding ALJ had not been properly appointed. In each case, the government did not dispute that the ALJ was improperly appointed. Yet in each case, the district court affirmed the ALJ's benefits determination, expressly rejecting the Appointments Clause challenge on the ground that it had been forfeited because it had not been raised before the ALJ or Appeals

Council. App., *infra*, 4a, 17a, 37a-38a, 59a-60a, 80a-81a; D. Ct. Dkt. 7, at 30-32, *Hilliard* v. *Berryhill*, Civ. No. 18-156 (S.D. Iowa Nov. 14, 2018).

4. The court of appeals affirmed in two separate judgments, holding that Social Security claimants must exhaust Appointments Clause challenges before their ALJs. App., *infra*, 1a-9a, 10a-14a.

a. In *Davis*, which involved petitioners Davis, Iwan, and Thurman, the court of appeals began by recognizing that other courts "have disagreed on whether exhaustion of the issue before the agency is required." App., *infra*, 4a (citing *Carr* v. *Commissioner*, 961 F.3d 1267 (10th Cir. 2020), and *Cirko* v. *Commissioner*, 948 F.3d 148 (3d Cir. 2020)).

The court of appeals acknowledged that this Court had held in *Sims* v. *Apfel*, 530 U.S. 103 (2000), that Social Security claimants need not raise issues before the Appeals Council in order to preserve them for judicial review. App., *infra*, 5a. But the court of appeals distinguished *Sims* on the ground that it applied only to issue exhaustion before the Appeals Council, not before ALJs, noting that the deciding vote in *Sims* "turned on" the fact that, when SSA had instructed the claimant on how to seek Appeals Council review, it had told her that "only failing to request Appeals Council review would preclude judicial review." App., *infra*, 5a. Having thus distinguished *Sims*, the court of appeals concluded that there was an issue-exhaustion requirement as to ALJs, reasoning that such a requirement "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Id.* at 6a (citation omitted).

The court of appeals noted that it had previously required issue exhaustion in *Anderson* v. *Barnhart*, 344 F.3d 809 (8th Cir. 2003). App., *infra*, 6a. That an Appoint-

ments Clause challenge presented a constitutional question did not alter the analysis, in the court's view, because even "important" and "fundamental" constitutional challenges "can be forfeited." *Id.* at 7a (citation omitted). The court of appeals acknowledged that "a claimant need not litigate certain constitutional questions in order to satisfy the *jurisdictional* requirement of the judicial review statute" and that it was "unrealistic to expect" that the Commissioner would have "consider[ed] substantial changes in the current administrative review system at the behest of the single aid recipient raising a constitutional challenge in an adjudicatory context." *Id.* at 7a-8a (citation omitted). But the court concluded that "those observations" did not show that raising the challenge before an ALJ "would have been futile." *Id.* at 8a. According to the court, if the "hundreds of claimants" who could have raised Appointments Clause challenges before their ALJs had done so, SSA would have been "alerted to the issue" and "taken steps through ratification or new appointments to address [it]." *Ibid.*

The court of appeals also rejected petitioners' argument that it should at a minimum exercise its discretion to consider the unexhausted Appointments Clause challenges because they implicated "the strong interest in the judiciary in maintaining the constitutional plan of separation of powers." *Freytag* v. *Commissioner*, 501 U.S. 868, 879 (1991) (Scalia, J., concurring) (citation omitted). That interest, the court reasoned, was outweighed by the "practicalities of potentially upsetting numerous administrative decisions" in which Appointments Clause challenges had not been made. App., *infra*, 9a. The court added that "allowing claimants to litigate benefits before an ALJ without objection" and still obtain remands might create "perverse incentives" for SSA claimants. *Ibid.*

b. In *Hilliard*, the court of appeals summarily refused to consider petitioner Hilliard's unexhausted Appointments Clause challenge, citing its decision in *Davis*. App., *infra*, 14a.

REASONS FOR GRANTING THE PETITION

These cases present the Court with the opportunity to resolve an acknowledged circuit conflict on an important question: whether a Social Security claimant must exhaust an Appointments Clause challenge before an ALJ as a prerequisite to obtaining judicial review of that challenge. That conflict creates intolerable discord on an important issue that plainly will not be resolved without the Court's intervention. The decision below is incorrect and at odds with the logic of this Court's decision in *Sims* v. *Apfel*, 530 U.S. 103 (2000), with the untenable result that Social Security claimants are subject to an issue-exhaustion requirement not established by statute or SSA regulations.

If allowed to stand, the decisions below will deprive numerous claimants of their right to have their benefits claims adjudicated by constitutionally appointed inferior officers. There is no valid basis for a judge-made issue-exhaustion requirement that precludes judicial review of such a fundamental structural defect in administrative proceedings. Because these cases present an ideal vehicle for resolving the conflict on an important question of federal law, the petition for a writ of certiorari should be granted.

A. The Decisions Below Create A Conflict Among The Courts Of Appeals

As the court of appeals recognized, the decisions below establish an unambiguous circuit conflict on the question whether judicial review of a claimant's Appointments

Clause challenge to an SSA ALJ requires that the claimant exhausted that issue with the ALJ. That conflict warrants the Court's immediate resolution.

1. In *Cirko* v. *Commissioner*, 948 F.3d 148 (2020), the Third Circuit held that claimants who had failed to raise Appointments Clause challenges before SSA ALJs could still obtain judicial review of those challenges. See *id.* at 159. The Third Circuit remanded to SSA for "new hearings before constitutionally appointed ALJs other than those who presided over [the claimants'] first hearings." *Id.* at 159-160.

In so holding, the Third Circuit reasoned that, in the absence of a statutory or regulatory exhaustion requirement, this Court's decision in *McCarthy* v. *Madigan*, 503 U.S. 140 (1992), instructs courts to assess the "nature of the claim presented," the "characteristics of the particular administrative procedure provided," and the proper "balance" between the individual interests and governmental interests at stake. *Id.* at 153. Each of those factors, the Third Circuit concluded, weighed against requiring issue exhaustion of Appointments Clause challenges before SSA ALJs.

As to the nature of the claim, the Third Circuit reasoned that it is "generally inappropriate" to impose an issue-exhaustion requirement on Appointments Clause challenges because they "implicate both individual constitutional rights and the structural imperative of separation of powers." *Cirko*, 948 F.3d at 153. The court noted that the Appointment Clause "safeguard[s]" an "important individual liberty" and that an individual litigant "need not show direct harm or prejudice caused by an Appointments Clause violation." *Id.* at 154.

As to the particular administrative process at issue, the Third Circuit observed that this Court's decision in *Sims* v. *Apfel*, 530 U.S. 103 (2000), seemed to disfavor any

issue-exhaustion requirement in the SSA context. See *Cirko*, 948 F.3d at 155-156. While it acknowledged that the holding of *Sims* involved issue exhaustion only before the Appeals Council, the Third Circuit explained that the "rationales" of that case "generally apply to ALJs no less than [the Appeals Council]." *Id.* at 156. In both contexts, an issue-exhaustion requirement "would penalize claimants who did 'everything that the agency asked.'" *Id.* at 155 (quoting *Sims*, 530 U.S. at 114) (O'Connor, J., concurring in part and concurring in the judgment)). And in both contexts, the proceedings are "inquisitorial and driven by the agency rather than the claimant." *Id.* at 156.

As to the balance between individual and governmental interests, the Third Circuit reasoned that claimants' interest in judicial review was significantly greater than the government's interest in requiring issue exhaustion. See *Cirko*, 948 F.3d at 156-160. The court noted that an issue-exhaustion requirement "would impose an unprecedented burden on SSA claimants"—many of whom lack legal representation—by forcing them to "root out a constitutional claim" in an "informal, non-adversarial" process in which the ALJ ordinarily "plays [the] starring role" in identifying and developing the issues. *Id.* at 156-157. By contrast, the court deemed the government's interest "negligible at best," because constitutional questions are outside SSA's expertise and neither the ALJ nor the Appeals Council can cure the constitutionality of their own appointments. *Id.* at 157-159.

2. In the decisions below, by contrast, the Eighth Circuit squarely held that claimants who had failed to raise Appointments Clause challenges before SSA ALJs were barred from obtaining judicial review of those challenges.

a. In *Davis*, the Eighth Circuit reasoned that an issue-exhaustion requirement "serves the twin purposes of

protecting administrative agency authority and promoting judicial efficiency." App., *infra*, 6a (citation omitted). The court also noted that even "important" and "fundamental" constitutional challenges "can be forfeited" in the context of SSA proceedings. *Id.* at 7a (citation omitted). And it rejected the argument that raising the Appointments Clause challenge with an ALJ would have been futile because neither an ALJ nor the Appeals Council could have fixed the defect. See *id.* at 8a. In the court's view, if the "hundreds of claimants" who could have raised Appointments Clause challenges with their ALJs had done so, SSA would have been "alerted to the issue" and "could have taken steps through ratification or new appointments to address [it]." *Ibid.*

The Eighth Circuit also declined to exercise its discretion to consider the unexhausted issue under *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), concluding that any interest in guarding the separation of powers gave way to the "practicalities of potentially upsetting numerous administrative decisions" in which an Appointments Clause challenge had not been made. App., *infra*, 9a.

b. In *Hilliard*, the Eighth Circuit applied the categorical rule it had announced in *Davis* without any further discussion. App., *infra*, 14a. In so doing, the Eighth Circuit made clear that it would not entertain any Appointments Clause challenge that had not been raised before an SSA ALJ.

3. In addition to the clear conflict between the Third Circuit and the Eighth Circuit, there is an apparent intracircuit conflict in the Tenth Circuit.

a. In *Carr* v. *Commissioner*, 961 F.3d 1267 (2020), petition for cert. pending, No. 19-1442 (filed July 1, 2020), the Tenth Circuit held that claimants who had failed to raise Appointments Clause challenges before SSA ALJs could not seek judicial review. See *id.* at 1276. The court

reasoned that the failure to exhaust had "deprived the SSA of its interest in internal error-correction," and it concluded that, while an SSA ALJ "typically develops issues regarding benefits," a claimant "must object to an ALJ's authority." *Id.* at 1273, 1275. The court added that its decision comported with decisions of other courts that "have imposed an exhaustion requirement" more categorically in the SSA ALJ context. *Id.* at 1273 n.3 (citing *Shaibi* v. *Berryhill*, 883 F.3d 1102 (9th Cir. 2017); *Anderson* v. *Barnhart*, 344 F.3d 809 (8th Cir. 2003); and *Mills* v. *Apfel*, 244 F.3d 1 (1st Cir. 2001)).

b. But in *Hackett* v. *Barnhart*, 395 F.3d 1168 (2005), the Tenth Circuit had categorically held that "a plaintiff challenging a denial of disability benefits * * * need *not* preserve issues in the proceedings before the Commissioner or her delegates"—even though it resulted in an "unfortunate" remand "almost four years after the [initial ALJ] hearing." *Id.* at 1176 (citing *Sims*, 530 U.S. at 103) (emphasis added). Applying that categorical rule, the court reversed an ALJ decision on the basis of an unexhausted, non-constitutional argument that the ALJ had failed to reconcile a vocational expert's testimony with the Dictionary of Occupational Titles. See *ibid.*

Although the Tenth Circuit adopted a categorical rule that issue exhaustion was not required in *Hackett*, it made no mention of that rule in its subsequent decision in *Carr*; indeed, the *Carr* panel does not appear to have even been aware of it. There is therefore uncertainty about the Tenth Circuit's current position on the question presented. Cf. *Hiller* v. *Oklahoma ex rel. Used Motor Vehicle & Parts Commission*, 327 F.3d 1247, 1251 (10th Cir. 2003) (holding that, in the event of an intracircuit conflict, the earlier panel decision governs).

4. Additional appeals on the question presented are currently pending in several other circuits. See, *e.g.*,

Probst v. *Saul*, No. 19-1529 (4th Cir.); *Fortin* v. *Commissioner*, No. 19-1581 (6th Cir.); *Duane* v. *Saul*, No. 20-1855 (7th Cir.); *Perez* v. *Commissioner*, No. 19-11660 (11th Cir.). And countless district courts have divided on the question. Compare, e.g., *Little* v. *Saul*, Civ. No. 19-5, 2020 WL 3964723, at *3 (E.D. Ky. July 13, 2020); *Vazquez* v. *Commissioner*, Civ. No. 19-1613, 2020 WL 3868787, at *10 (E.D.N.Y. July 8, 2020); *Kavanaugh* v. *Commissioner*, Civ. No. 19-4771, 2020 WL 3118691, at *6 (D. Ariz. June 12, 2020); *Baglio* v *Saul*, Civ. No. 18-4294, 2020 WL 2733919, at *12 (N.D. Cal. May 26, 2020); *Wilson* v. *Saul*, Civ. No. 19-511, 2020 WL 1969538, at *8 (D.N.H. Apr. 24, 2020); *Akner* v. *Commissioner*, Civ. No. 18-13974, 2020 WL 1445734, at *9 (E.D. Mich. Mar. 25, 2020); *Ortiz* v. *Saul*, Civ. No. 19-942, 2020 WL 1150213, at *8 (S.D.N.Y. Mar. 10, 2020) (requiring issue exhaustion), with, *e.g.*, *McCary-Banister* v. *Saul*, Civ. No. 19-782, 2020 WL 3410919, at *8 (W.D. Tex. June 19, 2020); *Rosario Mercado* v. *Saul*, Civ. No. 19-11172, 2020 WL 2735980, at *7-*8 (D. Mass. May 26, 2020); *Morris W.* v. *Saul*, Civ. No. 19-320, 2020 WL 2316598, at *3 (N.D. Ind. May 11, 2020), appeal pending, No. 20-2248 (7th Cir.); *Jenny R.* v. *Commissioner*, Civ. No. 18-1451, 2020 WL 1282482, at *5 (N.D.N.Y. Mar. 12, 2020); *Morse-Lewis* v. *Saul*, Civ. No. 18-48, 2020 WL 1228678, at *4 (E.D.N.C. Mar. 12, 2020); *Suarez* v. *Saul*, Civ. No. 19-173, 2020 WL 913809, at *4 (D. Conn. Feb. 26, 2020) (not requiring issue exhaustion).

B. The Decisions Below Are Incorrect

The court of appeals erred by holding that the failure to raise Appointments Clause challenges before SSA ALJs barred claimants from obtaining judicial review of those challenges. That holding is at odds with the logic of this Court's decision in *Sims* and with the principle that

constitutional claims need not be exhausted in SSA proceedings. This Court should grant review and reverse the court of appeals' judgments.

1. The decisions below cannot be reconciled with the reasoning of this Court's decision in *Sims*.

a. In *Sims*, the Court declined to require claimants to exhaust issues before the SSA Appeals Council, emphasizing that SSA's statutes and regulations, unlike those of most agencies, did not require issue exhaustion. See 530 U.S. at 108. Because of the absence of an express requirement, the Court reasoned, any judicially created exhaustion requirement would depend on an analogy to a forfeiture rule in appellate litigation. See *id.* at 108-109. While a judicially created exhaustion requirement may be appropriate for adversarial administrative proceedings, the Court concluded, the rationale for such a rule is "much weaker" where the "administrative proceeding is not adversarial." *Id.* at 110.

On that basis, a majority of the Court concluded that there was no issue-exhaustion requirement for Appeals Council proceedings. In an opinion written by Justice Thomas, a four-Justice plurality did not fault claimants for failing to "identify issues for review," because the Appeals Council did "not depend much, if at all," on claimants' doing so given the "inquisitorial" nature of the proceedings. 530 U.S. at 110-111, 112. And in a concurring opinion, Justice O'Connor rejected an issue-exhaustion requirement for the simple reason that the agency had "fail[ed] to notify claimants" of such a requirement, noting that the claimant had done "everything that the agency asked of her" in its instructions. *Id.* at 113-114 (opinion concurring in part and concurring in the judgment).

To be sure, the Court expressly refrained from reaching the question "[w]hether a claimant must exhaust is-

sues before the ALJ." 530 U.S. at 107. But the ALJ process is the same as the Appeals Council process in every material respect. Just like Appeals Council judges, ALJs "investigate the facts and develop the arguments both for and against granting benefits" in an inquisitorial process, *id.* at 111, "look[ing] fully into the issues" and "decid[ing] when the evidence will be presented and when the issues will be discussed," 20 C.F.R. 404.944. Claimants need not present briefing or oral argument. And while claimants must exhaust administrative *remedies*, no statute or regulation requires them to exhaust individual *issues*—unlike the "common" practice of many other agencies. See *Sims*, 530 U.S. at 108; cf. 15 U.S.C. 77i(a); 29 U.S.C. 160(e); 30 U.S.C. 816(a)(1); 47 U.S.C. 405(a). To the contrary, the regulations expressly contemplate that ALJs will raise issues *sua sponte*. See p. 7, *supra*.

Just like Appeals Council judges, therefore, ALJs "do[] not depend much, if at all, on claimants to identify issues for review." 530 U.S. at 112 (plurality opinion); Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 Colum. L. Rev. 1289, 1303, 1325 (1997). And as with Appeals Council proceedings, the statutes and regulations governing ALJ proceedings "fail[] to notify claimants" of any issue-exhaustion requirement. *Sims*, 530 U.S. at 113 (O'Connor, J., concurring in part and concurring in the judgment); see 20 C.F.R. 404.900(b), 404.946, 404.949.

b. The decisions below contravene the logic of *Sims*. While the court of appeals paid lip service to *Sims*, it did not come to grips with the plurality's rationale. Instead, it focused exclusively on Justice O'Connor's "deciding vote," which it characterized as "turn[ing] on" the fact that, when SSA had instructed the particular claimant on how to seek Appeals Council review, it had told her that

"only failing to request Appeals Council review would preclude judicial review." App., *infra*, 5a. The court then cabined *Sims* to its facts—issue exhaustion before the Appeals Council—and it held that claimants are required to exhaust issues before ALJs on the ground that such a requirement "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Id.* at 6a (citation omitted).

Contrary to the court of appeals' suggestion, however, Justice O'Connor's deciding vote was based on the lack of notice by SSA of an issue-exhaustion requirement—not any considerations specific to the Appeals Council. Notice is lacking here, just as it was in *Sims*, because there is no "statute or regulation requiring issue exhaustion" and the agency did not otherwise "notify claimants of an issue exhaustion requirement." 530 U.S. at 113 (O'Connor, J., concurring in part and concurring in the judgment).

2. The court of appeals erred by concluding that the nature of the challenge in these cases—a structural constitutional challenge to the ALJ's appointment under the Appointments Clause—did not demand a different result.

a. This Court has repeatedly allowed Social Security claimants to raise constitutional issues for the first time in federal court. See, *e.g.*, *Califano* v. *Sanders*, 430 U.S. 99, 108-109 (1977); *Mathews* v. *Eldridge*, 424 U.S. 319, 329 n.10 (1976); *Weinberger* v. *Salfi*, 422 U.S. 749, 767 (1975); *Flemming* v. *Nestor*, 363 U.S. 603, 607 (1960). The Court has explained that judicial review of constitutional challenges is permissible even without exhaustion because those challenges "obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential." *Sanders*, 430 U.S. at 108-109. Appointments Clause challenges, in particular, "implicate" the "structural imperative of separation of powers" and "safeguard[]" an "important individual liberty."

Cirko, 948 F.3d at 153-154; cf. *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2202 (2020).

Raising Appointments Clause challenges before ALJs would also be affirmatively futile, because ALJs lack jurisdiction to make decisions about their own constitutionality. The jurisdiction of those ALJs is limited to making benefits determinations under the Social Security Act "on the basis of evidence adduced at [a] hearing." 42 U.S.C. 405(b)(1); see 42 U.S.C. 405(*l*); 20 C.F.R. 404.900(a)(6).

This Court has long held that litigants need not exhaust particular issues with a decisionmaker who "lack[s] authority to grant the type of relief requested." *McCarthy*, 503 U.S. at 148; see, *e.g.*, *McNeese* v. *Board of Education for Community United School District 187*, 373 U.S. 668, 675 (1963). Neither an ALJ nor the Appeals Council could have fixed the Appointments Clause problem by granting the proper relief—namely, by reassigning the matter to a different ALJ properly appointed by the Commissioner. See *Lucia*, 138 S. Ct. at 2055 & nn. 5-6. Indeed, even before *Lucia* was decided, the Acting Commissioner, through SSA's Office of General Counsel, instructed ALJs not to "discuss or make any findings related to the Appointments Clause issue" precisely because "SSA lacks the authority to finally decide constitutional issues such as these." SSA, EM-18003: Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process (2018); see p. 8, *supra*.

b. In the decisions below, the court of appeals violated those principles. The court concluded that SSA claimants can "forfeit[]" even "important" and "fundamental" constitutional challenges, misconstruing this Court's earlier SSA decisions as applying only to constitutional questions regarding whether "the *jurisdictional*

requirement of the judicial review statute" was satisfied. App., *infra*, 7a.

As to futility, the court of appeals acknowledged that it was "unrealistic to expect" that the Commissioner would have "consider[ed] substantial changes in the current administrative review system" if a single claimant had raised an Appointments Clause challenge. App., *infra*, 7a-8a (citation omitted). But the court reasoned that, if the "hundreds of claimants" who could have raised an Appointments Clause challenge before ALJs had done so, SSA would have been "alerted to the issue" and "could have taken steps through ratification or new appointments to address [it]." *Id.* at 8a.

That blinks reality. Both before and after *Lucia*, SSA showed awareness that its ALJ appointments might be unconstitutional, but instructed ALJs simply to note any Appointments Clause challenges made. In any event, even a more "alert" Commissioner could not have fixed the appointments problem until July 10, 2018, when the President issued an executive order removing SSA ALJs from the "competitive services" classification. Executive Order 13843, *Excepting Administrative Law Judges From the Competitive Service*, 83 Fed. Reg. 32,755, 32,756 (July 10, 2018). Until that date, ALJ appointments were subject to OPM approval. See pp. 8-9, *supra*.[*]

In short, the court of appeals' rule requiring issue exhaustion of Appointments Clause challenges to SSA ALJs

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[*] At a minimum, the court of appeals should have exercised its discretion to consider the unexhausted Appointments Clause challenge on the ground that such challenges implicate "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers." *Freytag* v. *Commissioner*, 501 U.S. 868, 879 (1991) (Scalia, J., concurring) (citation omitted). The court of appeals gave no valid reason for its refusal to do so—particularly given the reality that many claimants are not represented by counsel.

is inequitable and cannot be defended. This Court should grant review in these cases and reject that rule.

C. The Question Presented Is Exceptionally Important And Warrants Review In These Cases

The question presented in these cases is a frequently recurring one of substantial legal and practical importance. These cases, which cleanly present the question, constitute an optimal vehicle for the Court's review.

1. Resolution of the question presented has significant practical and legal implications for numerous SSA claimants. SSA has approximately 1,600 ALJs, the vast majority of whom were unconstitutionally appointed until July 16, 2018. See SSA, *FY 2021 Congressional Justification* 187 (2020) <tinyurl.com/ssafy2021>; pp. 8-9, *supra*. As a result, the question presented affects at least the "hundreds" of claimants "whose cases are already pending in the district courts" as of that date, with potentially more cases still in the pipeline to come. *Cirko*, 948 F.3d at 159. Early this year, the government represented that there were already more than fifty *appeals* pending on this question in various circuits. See Gov't Pet. for Reh'g at 2 & n.1, *Cirko*, *supra*, No. 19-1772 (Mar. 9, 2020). Since then, the numbers have only grown. See, *e.g.*, *Petty* v. *Saul*, No. 20-1573 (4th Cir.); *Duane* v. *Saul*, No. 20-1855 (7th Cir.); *Gagliardi* v. *Social Security Administration*, No. 20-10858 (11th Cir.).

Because the courts of appeals have taken divergent views on the question presented, the outcome for particular claimants will dramatically differ, depending on where they happen to litigate. That disparity cannot be tolerated in the context of Social Security benefits, which "provide[] a crucial lifeline for some of the nation's most vulnerable citizens," accounting for the majority of family in-

come for nearly half of their recipients. Melissa M. Favreault et al., Urban Institute, *How Important Is Social Security Disability Insurance to U.S. Workers?* 1 (June 2013) <tinyurl.com/importsocsec>. And an opportunity to have claims heard by properly appointed ALJs could significantly benefit many of the claimants affected by the question presented. Indeed, in the aggregate, SSA ALJs overseeing second hearings reverse earlier determinations and grant benefits more than half of the time. See GAO, *Social Security Disability: Additional Measures and Evaluation Needed to Enhance Accuracy and Consistency of Hearings Decisions*, GAO-18-37 at 14 (Dec. 7, 2017) <tinyurl.com/ssameasures>.

This Court's resolution of the question presented may also have longstanding effects that reach far beyond the Appointments Clause challenge at issue here. The underlying question whether the reasoning of *Sims* applies to ALJ proceedings affects nearly all of the approximately 18,000 claimants who seek judicial review of SSA administrative determinations each year. See SSA, Hearing and Appeals: Court Remands as a Percentage of New Court Cases Filed (2020) <tinyurl.com/ssahearingandappeals>.

2. Among the many cases currently pending in the lower courts, these cases constitute an unusually attractive vehicle in which to resolve the question presented. Not only is resolution of that question outcome-determinative with respect to all four petitioners, but these cases present the Court with an opportunity to address claimants who are arguably situated somewhat differently with respect to the fair-notice concerns articulated by Justice O'Connor in her concurring opinion in *Sims*. While the better view is that all four petitioners lacked fair notice of any issue-exhaustion requirement before the ALJs, it

could be argued that claimants whose administrative proceedings were still pending in January 2018 had notice of an issue-exhaustion requirement by virtue of SSA's initial guidance to its ALJs following this Court's grant of review in *Lucia*. See pp. 8, 21, *supra*. Here, such an argument would be relevant only to petitioner Hilliard, whose administrative proceedings concluded in March 2018; the other three petitioners' administrative proceedings concluded in 2017. See p. 7, *supra*. As a result, these cases present the Court with an unusual opportunity to address the whole range of potential claimants.

Because the arguments on both sides of the question presented have already been fully ventilated in the opinions of well-respected judges, there would be no material benefit from additional percolation in the courts of appeals. To the contrary, there would be a very real cost: numerous claimants who have been denied benefits will be precluded from receiving what the Constitution demands—adjudication by a properly appointed ALJ.

* * * * *

There is an intractable conflict among the court of appeals on the question whether a Social Security claimant must exhaust an Appointments Clause challenge before an ALJ as a prerequisite to obtaining judicial review of that challenge. Because the question presented is of extraordinary legal and practical importance, and because these cases constitute an ideal vehicle for the Court's review, the Court should grant the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2020

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 18-3422, No. 18-3451, No. 18-3452

John J. DAVIS, Plaintiff-Appellant,

v.

Andrew SAUL, Commissioner,
Social Security Administration,
Defendant-Appellee.

Destiny M. Thurman, Plaintiff-Appellant,

v.

Andrew Saul, Commissioner,
Social Security Administration,
Defendant-Appellee.

Kimberly L. Iwan, Plaintiff-Appellant,

v.

Andrew Saul, Commissioner,
Social Security Administration,
Defendant-Appellee.

Filed: June 26, 2020

Before: COLLOTON, WOLLMAN and BENTON, Circuit Judges.

OPINION

COLLOTON, Circuit Judge.

Appellants John Davis, Destiny Thurman, and Kimberly Iwan applied unsuccessfully for social security benefits in 2013 or 2014. Each brought an action in the district court, asserting that the administrative law judge who denied the application for benefits was not properly appointed in accordance with the Appointments Clause of the Constitution. Art. II, § 2, cl. 2. None of the claimants raised this argument during proceedings before the Social Security Administration (SSA). The district court[1] ruled in all three cases that the claimant waived the argument by failing to raise it before the agency. We conclude that the district court properly declined to consider the issue, and we affirm the judgments.

I.

The three claimants applied for disability insurance benefits and supplemental security income in either 2013 or 2014. The agency denied their applications on initial review and on reconsideration, and each claimant requested and received a hearing before an administrative law judge. After an ALJ denied each application, the claimants sought review by the agency's Appeals Council, and the Appeals Council denied review. None of the claimants ever objected to the manner in which the ALJ was appointed.

All three claimants sought review of the agency's decision in the district court under 42 U.S.C. § 405(g). While the cases were pending, the Supreme Court in *Lucia v.*

[1] The Honorable Linda R. Reade, United States District Judge for the Northern District of Iowa.

SEC, —— U.S. ——, 138 S. Ct. 2044, 201 L.Ed.2d 464 (2018), decided that administrative law judges of the Securities and Exchange Commission are "Officers of the United States" who must be appointed by the President, a court of law, or a head of a department. *Id.* at 2051, 2055. The Court ruled that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief." *Id.* at 2055 (internal quotation omitted).

As of 2017, administrative law judges in the Social Security Administration were not appointed by the head of the agency, but rather by lower-level officials. While *Lucia* was pending at the Court, the SSA issued several emergency measures. On January 30, 2018, the agency's Office of General Counsel warned ALJs that they might receive Appointments Clause challenges and instructed them not to "discuss or make any findings related to the Appointments Clause issue," because the "SSA lacks the authority to finally decide constitutional issues such as these." The agency directed the ALJs to acknowledge when the issue had been raised. *Soc. Sec. Admin., EM-18003: Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process* (2018).

On June 25, shortly after the Court decided *Lucia*, the SSA's Office of Hearing Operations issued a revised emergency measure. This direction continued to instruct ALJs to acknowledge, but not to address, challenges based on the Appointments Clause. *Soc. Sec. Admin., EM-18003 REV: Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process – UPDATE* (2018).

Finally, on August 6, the Office of Hearing Operations issued another revised version of the same emergency measure. This one announced that (i) the agency's Acting Commissioner recently had ratified the appointment of all ALJs, thereby curing any defect related to the Appointments Clause, and (ii) ALJs should continue to acknowledge and report any Appointments Clause challenges that were raised before the ratification date. *Soc. Sec. Admin., EM-18003 REV 2: Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process – UPDATE* (2018).

In their complaints, Davis, Thurman, and Iwan did not raise a challenge to the appointment of the ALJ who decided their cases. A magistrate judge, considering only the issues raised by each claimant, recommended that the district court affirm the agency's decision denying each application for benefits. In August 2018, each claimant moved for leave to file a supplemental brief that would raise an Appointments Clause challenge for the first time. The district court allowed briefing, but declined to consider the new argument. Citing *Anderson v. Barnhart*, 344 F.3d 809, 814 (8th Cir. 2003), the court ruled in each case that because the claimant did not raise an Appointments Clause challenge before the ALJ or Appeals Council, the claimant had waived the issue. Other circuits presented with the issue have disagreed on whether exhaustion of the issue before the agency is required. *Compare Carr v. Comm'r*, Nos. 19-5079, 19-5085, —— F.3d ——, 2020 WL 3167896 (10th Cir. June 15, 2020), *with Cirko v. Comm'r*, 948 F.3d 148 (3d Cir. 2020).

II.

The claimants sought review of the agency's decisions in federal court under 42 U.S.C. § 405(g). That section

provides that "[a]ny individual, after any final decision of the Commissioner of Social Security . . . may obtain a review of such decision by a civil action." Because the claimants presented their claims for benefits to the Commissioner, the district court had jurisdiction under § 405(g) to review the agency's decisions. *Mathews v. Eldridge*, 424 U.S. 319, 328, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976).

Even where a district court has jurisdiction under the statute, however, this court also has required a claimant to exhaust a particular issue before an administrative law judge in order to seek judicial review on that issue. *Anderson*, 344 F.3d at 814. The agency's regulations similarly require a claimant to notify an ALJ before the hearing if the claimant objects to the issues to be decided. 20 C.F.R. § 404.939.

In *Sims v. Apfel*, 530 U.S. 103, 120 S. Ct. 2080, 147 L.Ed.2d 80 (2000), the Supreme Court held that a claimant who was denied benefits by an administrative law judge was not required to exhaust an issue before the Appeals Council in order to seek judicial review. Although the Court said that the reasons for requiring exhaustion are much weaker in a non-adversarial proceeding than in an adversarial proceeding, *id.* at 109-10, 120 S. Ct. 2080, the case ultimately was decided on narrower grounds. The deciding vote turned on the fact that the agency told the claimant that she could seek review by sending a letter or filling out a one-page form that should take ten minutes, that only failing to request Appeals Council review would preclude judicial review, and that the Appeals Council would review her entire case for issues. *Id.* at 113-14, 120 S. Ct. 2080 (O'Connor, J., concurring in part and concurring in the judgment).

Foreshadowing *Sims*, this court held in *Harwood v. Apfel*, 186 F.3d 1039 (8th Cir. 1999), that a claimant did

not forfeit an issue by failing to raise it before the Appeals Council. *Id.* at 1042-43. The *Sims* plurality favorably cited *Harwood*. 530 U.S. at 112, 120 S. Ct. 2080 (plurality opinion). But this court in *Harwood* also acknowledged that failure to raise an issue before either the ALJ or the Appeals Council "perhaps present[s] a stronger case for a waiver rule." 186 F.3d at 1043 n.3. Other pre-*Sims* cases from this court appeared to require exhaustion of issues before an ALJ. *Pena v. Chater*, 76 F.3d 906, 909 (8th Cir. 1996); *Brockman v. Sullivan*, 987 F.2d 1344, 1348 (8th Cir. 1993). Whether a claimant must exhaust issues before an ALJ was not before the Court in *Sims*, 530 U.S. at 107, 120 S. Ct. 2080, and our post-*Sims* decision in *Anderson* expressly required that step. 344 F.3d at 814; *see also Forte v. Barnhart*, 377 F.3d 892, 896 (8th Cir. 2004).

The issue exhaustion requirement is consistent with longstanding principles of administrative law. "Ordinarily an appellate court does not give consideration to issues not raised below." *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S. Ct. 719, 85 L.Ed. 1037 (1941). "[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37, 73 S. Ct. 67, 97 L.Ed. 54 (1952). "Exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy v. Madigan*, 503 U.S. 140, 145, 112 S. Ct. 1081, 117 L.Ed.2d 291 (1992). In most cases, therefore, "an issue not presented to an administrative decisionmaker cannot be argued for the first time in federal court." *Sims*, 530 U.S. at 112, 120 S. Ct. 2080 (O'Connor, J., concurring in part and concurring in the judgment). In determining whether to allow an exception to the ordinary rule, courts should be

"guided by the policies underlying the exhaustion requirement." *Bowen v. City of New York*, 476 U.S. 467, 484, 106 S. Ct. 2022, 90 L.Ed.2d 462 (1986).

The claimants advance three interrelated arguments for excusing their failure to raise an Appointments Clause challenge during agency proceedings. They maintain that constitutional claims need not be exhausted, that exhaustion of this particular constitutional challenge would have been futile, and that the court should exercise its discretion to waive any applicable exhaustion requirement. This court has largely rejected those contentions in litigation arising from another agency. Presented with a constitutional challenge to appointments of members of the National Labor Relations Board, we held that a company waived its claim by failing to raise the issue before the Board: "Constitutional considerations, no matter how important or 'fundamental,' can be forfeited as Justice Scalia has emphasized: 'Appointments Clause claims, and other structural constitutional claims, have no special entitlement to review.' " *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 798 (8th Cir. 2013) (quoting *Freytag v. Comm'r*, 501 U.S. 868, 893, 111 S. Ct. 2631, 115 L.Ed.2d 764 (1991) (Scalia, J., concurring in part and concurring in the judgment)).

In the social security context, the Supreme Court has explained that a claimant need not litigate certain constitutional questions in order to satisfy the *jurisdictional* requirement of the judicial review statute. *Eldridge*, 424 U.S. at 329 n.10, 96 S. Ct. 893; *see Califano v. Sanders*, 430 U.S. 99, 109, 97 S. Ct. 980, 51 L.Ed.2d 192 (1977). And we may accept that "[i]t is unrealistic to expect that the [Commissioner] would consider substantial changes in the current administrative review system at the behest of the single aid recipient raising a constitutional challenge in an

adjudicatory context." *Eldridge*, 424 U.S. at 330, 96 S. Ct. 893.

But those observations do not demonstrate that exhaustion would have been futile here. Application of the exhaustion doctrine is supposed to be "intensely practical." *Bowen*, 476 U.S. at 484, 106 S. Ct. 2022 (quoting *Eldridge*, 424 U.S. at 331 n.11, 96 S. Ct. 893) (internal quotation omitted). As a practical matter, the claimants here maintain that hundreds if not thousands of social security claimants may raise for the first time in federal court a challenge to the manner in which administrative law judges were appointed. The practical effect of sustaining that position would be to require the agency to rehear a multitude of cases. Yet if hundreds of claimants had raised an Appointments Clause challenge before the agency, the Commissioner would have been in a position to avoid an administrative quagmire. "Repetition of [an] objection . . . might lead to a change of policy, or, if it did not, the [agency] would at least be put on notice of the accumulating risk of wholesale reversals being incurred by its persistence." *L.A. Tucker Truck Lines*, 344 U.S. at 37, 73 S. Ct. 67 . Even if an individual ALJ was powerless to address the constitutionality of her appointment, the agency head—alerted to the issue by claimants in the adjudicatory process—could have taken steps through ratification or new appointments to address the objection.

For similar reasons, we do not believe this is "one of those rare cases in which we should exercise our discretion" to consider a non-exhausted claim. *Freytag*, 501 U.S. at 879, 111 S. Ct. 2631. *Freytag* resolved a constitutional challenge to the appointment of Special Trial Judges of the United States Tax Court. The Court noted that although the petitioner did not raise the issue before the Tax

Court, the claim implicated "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers." *Id.* (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 536, 82 S. Ct. 1459, 8 L.Ed.2d 671 (1962)). This court, however, has not understood *Freytag* to mean that all Appointments Clause challenges are exempt from the typical requirements of issue exhaustion. *RELCO Locomotives*, 734 F.3d at 798. We consider here the practicalities of potentially upsetting numerous administrative decisions because of an alleged appointment flaw to which the agency was not timely alerted. We also recognize the perverse incentives that could be created by allowing claimants to litigate benefits before an ALJ without objection and then, if unsuccessful, to secure a remand for a second chance based on an unexhausted argument about how the ALJ was appointed. *See Freytag*, 501 U.S. at 895, 111 S. Ct. 2631 (Scalia, J., concurring in part and concurring in the judgment). Under all of the circumstances, we do not view this as a rare situation in which a federal court should consider an issue that was not presented to the agency.

The judgments of the district court are affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19-1169

Thomas HILLIARD, Plaintiff-Appellant

v.

Andrew SAUL, Commissioner, Social Security Administration, Defendant-Appellee

Filed: July 9, 2020

Before: COLLOTON, WOLLMAN and BENTON, Circuit Judges.

OPINION

BENTON, Circuit Judge.

In 2015, Thomas Hilliard applied for disability insurance benefits and supplemental security income. The Administrative Law Judge concluded he was not disabled because his residual functional capacity (RFC) made him eligible for light, unskilled work. The ALJ based his decision on the medical opinions of three consultative examiners, Hilliard's daily activities (including walking around the mall), his statements to clinicians, and his past relevant work as a fast food worker. The ALJ assigned partial weight to the opinion of Dr. Majed Barazanji, and little

weight to the opinion of David Yurdin, a physician assistant.

Hilliard also provided a test showing his reading comprehension at the second-grade level. In the hypothetical question to the vocational expert, the ALJ did not specifically reference this test. Instead, the ALJ asked whether a hypothetical person could perform past relevant work if "limited to unskilled work" with "short and simple" instructions.

The district court[1] affirmed the ALJ's denial. Hilliard appeals. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

This court "must affirm the [ALJ's] determination if substantial evidence in the record as a whole supports [the] decision." *Tang v. Apfel*, 205 F.3d 1084, 1086 (8th Cir. 2000) (cleaned up). "[T]he threshold for such evidentiary sufficiency is not high." *Biestek v. Berryhill*, —— U.S. ——, 139 S. Ct. 1148, 1154, 203 L.Ed.2d 504 (2019). "It means—and means only—'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.*, *quoting Consolidated Edison Co. of New York v. N.L.R.B.*, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L.Ed. 126 (1938). This court "may not reverse [the ALJ] because substantial evidence exists in the record that would have supported a contrary outcome, or because we would have decided the case differently." *Brown v. Barnhart*, 390 F.3d 535, 538 (8th Cir. 2004) (cleaned up).

[1] The Honorable Charles R. Wolle, United States District Judge for the Southern District of Iowa.

Hilliard argues that the ALJ's determination is not supported with substantial evidence because it: (1) improperly weighed the medical professionals' opinions, and (2) inadequately described Hilliard's cognitive limitation in the question to the vocational expert. Hilliard also raises an Appointments Clause challenge to the ALJ's appointment.

II.

According to Hilliard, the ALJ improperly weighed the opinions of medical professionals. "The interpretation of physicians' findings is a factual matter left to the ALJ's authority." *Mabry v. Colvin*, 815 F.3d 386, 391 (8th Cir. 2016).

Hilliard argues that the ALJ should have given greater weight to the opinion of Dr. Barazanji, who examined Hilliard one time as a consultant. Barazanji concluded that Hilliard could stand for no more than 30 minutes and walk no more than two blocks. The ALJ gave sufficient reasons for assigning partial weight to this opinion. First, other consultative examiners found no support for Barazanji's conclusions. Second, Barazanji examined Hilliard once. *See Kelley v. Callahan*, 133 F.3d 583, 589 (8th Cir. 1998) (holding "[t]he opinion of a consulting physician who examines a claimant once or not at all does not generally constitute substantial evidence"). Third, Barazanji's opinion was inconsistent with his medical observations that Hilliard had no pain, no observed abnormality in his joints, and full strength in his arms and legs. The ALJ properly assigned Barazanji's opinion partial weight.

Hilliard also disputes the ALJ's decision to disregard the opinion of Yurdin, the physician assistant, a primary caregiver to Hilliard. The ALJ ruled that a physician as-

sistant is not an acceptable medical source, but can provide information to help understand a claimant's impairments. *See Sloan v. Astrue*, 499 F.3d 883, 888 (8th Cir. 2007); *cf.* 20 C.F.R. § 404.1502(a)(8) (treating a licensed physician assistant as an acceptable medical source for claims filed on or after March 27, 2017). The ALJ did not give weight to Yurdin's opinion because he completed a checklist with brief commentary. A treating physician's assessments "possess little evidentiary value" when they "consist of nothing more than vague, conclusory statements," such as "checked boxes, circled answers, and brief fill-in-the-blank responses." *Thomas v. Berryhill*, 881 F.3d 672, 675 (8th Cir. 2018).

Hilliard believes that the ALJ should have produced additional medical evidence to determine his RFC. *See Nevland v. Apfel*, 204 F.3d 853, 857 (8th Cir. 2000) ("it is the duty of the ALJ to fully and fairly develop the record"); *Jenkins v. Apfel*, 196 F.3d 922, 925 (8th Cir. 1999) (reversing ALJ decision with "no other evidence in the record to support" the RFC "besides the non-treating physician's assessment"); *Lauer v. Apfel*, 245 F.3d 700, 706 (8th Cir. 2001) (requiring that the ALJ consider at least some supporting medical evidence from a professional). "[A]n ALJ is permitted to issue a decision without obtaining additional medical evidence so long as other evidence in the record provides a sufficient basis for the ALJ's decision." *Naber v. Shalala*, 22 F.3d 186, 189 (8th Cir. 1994). Sufficient evidence in the record supported the ALJ's decision, including clinical notes that Hilliard lost weight from moving around so much, left a clinical appointment with a brisk walk and no cane, and stated he was doing well after a total hip replacement.

III.

Hilliard claims that the hypothetical question to the vocational expert inadequately described his cognitive limitations. A hypothetical question to the vocational expert "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). It "should capture the 'concrete consequences' of those impairments." *Lacroix v. Barnhart*, 465 F.3d 881, 889 (8th Cir. 2006) (citation omitted).

The ALJ's question captured the concrete consequences of Hilliard's impairments. First, Hilliard successfully worked as a fast food worker from 2001 to 2009, and there was no evidence that his reading level had changed. *See* 20 C.F.R. § 404.1565(a) (stating "[w]ork you have already been able to do shows the kind of work that you may be expected to do"). Second, the ALJ's characterization for work with "short and simple" instructions adequately captured the concrete consequences of Hilliard's cognitive limitations. *See Howard v. Massanari*, 255 F.3d 577, 582, 584 (8th Cir. 2001) (upholding a hypothetical question that described claimant as capable of doing "simple work" when an intelligence test placed her at the second-grade level).

IV.

Finally, Hilliard did not raise to the ALJ an Appointments Clause challenge, so this court need not consider it. *See Davis v. Saul*, —— F.3d ——, 2020 WL 3479626 (8th Cir. June 26, 2020).

* * * * * * *

The judgment is affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

THOMAS HILLIARD, Plaintiff,

vs.

NANCY A. BERRYHILL,
Deputy Commissioner for Operations
of the Social Security Administration,
Defendant.

No. 4-18-cv-156-CRW-RAW

Filed: November 14, 2018

JUDICIAL REVIEW DECISION

Plaintiff Thomas Hilliard alleges disability. He seeks disability insurance benefits (dib) under Title II and supplemental security income (ssi) under Title XVI of the Social Security Act. The ALJ found plaintiff has the following severe impairments: degenerative disk disease, osteoarthritis/degenerative joint disease (right hip and right knee), migraines, and depression. The ALJ concluded plaintiff retains the residual functional capacity to perform his past relevant work as a fast food worker.

The court held a judicial review hearing by telephone conference call on November 6, 2018 and now affirms the ALJ decision in its entirety.

Plaintiff contends the ALJ improperly analyzed medical opinion. Granted, the ALJ stated that he gave "significant weight" to the opinions of non-treating consultants, while giving "partial weight" to the opinion of the treating consultant. But in so doing, the ALJ did not "abdicate" his fact-finding duty to the reviewing physicians. Rather, the ALJ engaged in a thorough assessment of the medical record, then articulated legitimate reasons for assigning the weights he assigned to the opinions. (T. 19-24).

Plaintiff contends the ALJ failed to consider how plaintiff's significant reading, writing, and mathematical limitations would impact his ability to perform his past relevant work. But the record imposed no such obligation on the ALJ. There is evidence in this record that in 2016 plaintiff could read, write, and do math at a mid-second grade level (T. 345), that he had recently worked for eight weeks in a homeless shelter kitchen (T. 46) and that he had been employed at fast food restaurants from 2001 through 2009 (T. 46). The ALJ propounded to the vocational expert a hypothetical question that reflected that evidence: unskilled work with instructions that are short and simple, not complex, as well as periods of focus, attention, and concentration for only up to two hours at a time (T. 18). Given that "unskilled work" is "work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time, 20 C.F.R. sections 404.1568(a), 416.968(a), the hypothetical question adequately described plaintiff's limitations. The ALJ did

not err in relying on the vocational expert's hearing testimony (T. 60) that plaintiff could return to his past, unskilled work as a fast food worker.[1]

Relying on *Sims v. Apfel*, 530 U.S. 103 (2000), plaintiff also contends that remand is mandated because the ALJ was not constitutionally appointed, But Sims is not dispositive here. See 530 U.S. at 107 (court specified that the issue before it was limited to whether a claimant must present all relevant issues to the Appeals Council to preserve the issue for judicial review). Plaintiff waived his argument by not challenging the ALJ's appointment before the ALJ or the Appeals Council. See *Anderson v. Barnhart*, 344 F.3d 809, 814 (8th Cir. 2003).

This court has taken into account that in the record that both supports and detracts from the ALJ decision. See *Pierce v. Bowen*, 835 F.2d 190, 191 (8th Cir. 1987). On balance, substantial evidence in this record as a whole supports the ALJ's findings and the conclusion that plaintiff is not under a disability, as defined in the Act.

The court affirms the ALJ's determination that plaintiff Thomas Hilliard is not entitled to disability insurance benefits (dib) under Title II and supplemental security income (ssi) under Title XVI of the Social Security Act.

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[1] There is vocational expert opinion evidence dated after the ALJ's opinion on a tighter hypothetical opinion. Vocational consultant Carma Mitchell opined on November 10, 2017 that if plaintiff's reading scores were taken into consideration, plaintiff would not be able to perform fast food work as normally performed. (T. 368). When given the opportunity to pose that hypothetical question to the vocational expert during the hearing, however, plaintiff did not pose it. (T. 61). The vocational expert's narrowed opinion was not in the record before the ALJ when he filed his July 24, 2017 opinion.

IT IS SO ORDERED.

Dated this 14th day of November, 2018.

WOLLE, J.

APPENDIX D

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

John J. DAVIS, Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,
Defendant.

No. 17-CV-80-LRR

Filed: September 10, 2018

ORDER

READE, Judge.

I. INTRODUCTION

The matter before the court is Plaintiff John J. Davis's Objections (docket no. 22) to United States Chief Magistrate Judge C.J. Williams's Report and Recommendation (docket no. 20), which recommends that the court affirm Defendant Commissioner of Social Security's ("Commissioner") final decision to deny disability benefits to Davis.

II. RELEVANT PROCEDURAL HISTORY

On July 24, 2017, Davis filed a Complaint (docket no. 3), seeking judicial review of the Commissioner's final decision denying Davis's applications for Title II disability insurance benefits and Title XVI supplemental security income ("SSI") benefits. On October 11, 2017, the Commissioner filed an Answer (docket no. 8). On January 10, 2018, Davis filed the Plaintiff's Brief (docket no. 14). On January 31, 2018, the Commissioner filed the Defendant's Brief (docket no. 15). On February 21, 2018, the matter was referred to Judge Williams for issuance of a report and recommendation. On July 27, 2018, Judge Williams issued the Report and Recommendation. On August 10, 2018, Davis filed the Objections. On August 14, 2018, Davis filed a Supplemental Brief (docket no. 25). On August 17, 2018, the Commissioner filed a Response to the Objections (docket no. 26). On August 29, 2018, the Commissioner filed a Response to the Supplemental Brief (docket no. 27).[1] On September 4, 2018, Davis filed a Reply Brief (docket no. 28). The matter is fully submitted and ready for decision.

III. STANDARD OF REVIEW

A. Review of Final Decision

The Commissioner's final determination not to award SSI benefits is subject to judicial review to the same extent as provided in 42 U.S.C. § 405(g). *See* 42 U.S.C. § 1383(c)(3). Pursuant to 42 U.S.C. § 405(g), the court has

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[1] The Commissioner's brief is untimely. *See* August 14, 2018 Order (docket no. 24) ("The Commissioner shall file any responsive brief to Davis's Supplemental Brief by no later than Monday, August 27, 2018.") (alterations omitted). Nevertheless, the court shall consider the Commissioner's Response. The Commissioner is cautioned to strictly comply with the court's orders in the future.

the power to "enter . . . a judgment affirming, modifying, or reversing the decision of the Commissioner . . . with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). The Commissioner's factual findings shall be conclusive "if supported by substantial evidence." *Id.* "The court 'must affirm the Commissioner's decision if it is supported by substantial evidence on the record as a whole.' " *Bernard v. Colvin*, 774 F.3d 482, 486 (8th Cir. 2014) (quoting *Pelkey v. Barnhart*, 433 F.3d 575, 577 (8th Cir. 2006)). "Substantial evidence is less than a preponderance, but enough that a reasonable mind might accept it as adequate to support a decision." *Fentress v. Berryhill*, 854 F.3d 1016, 1019-20 (8th Cir. 2017) (quoting *Kirby v. Astrue*, 500 F.3d 705, 707 (8th Cir. 2007)).

In determining whether the Commissioner's decision meets this standard, the court considers "all of the evidence that was before the [administrative law judge ("ALJ")], but [it] do[es] not re-weigh the evidence." *Vester v. Barnhart*, 416 F.3d 886, 889 (8th Cir. 2005). The court considers "both evidence that detracts from the Commissioner's decision, as well as evidence that supports it." *Fentress*, 854 F.3d at 1020; *see also Cox v. Astrue*, 495 F.3d 614, 617 (8th Cir. 2007) (providing that review of the Commissioner's decision "extends beyond examining the record to find substantial evidence in support of the [Commissioner's] decision" and noting that the court must also "consider evidence in the record that fairly detracts from that decision"). The Eighth Circuit Court of Appeals explained this standard as follows:

> This standard is "something less than the weight of the evidence and it allows for the possibility of drawing two inconsistent conclusions, thus it embodies a zone of choice within which the [Commissioner] may decide

> to grant or deny benefits without being subject to reversal on appeal."

Culbertson v. Shalala, 30 F.3d 934, 939 (8th Cir. 1994) (quoting *Turley v. Sullivan*, 939 F.2d 524, 528 (8th Cir. 1991)). The court "will not disturb the denial of benefits so long as the ALJ's decision falls within the available zone of choice." *Buckner v. Astrue*, 646 F.3d 549, 556 (8th Cir. 2011) (quoting *Bradley v. Astrue*, 528 F.3d 1113, 1115 (8th Cir. 2008)). "An ALJ's decision is not outside the zone of choice simply because [the court] might have reached a different conclusion had [the court] been the initial finder of fact." *Id.* (quoting *Bradley*, 528 F.3d at 1115). Therefore, "even if inconsistent conclusions may be drawn from the evidence, the [Commissioner's] decision will be upheld if it is supported by substantial evidence on the record as a whole." *Guilliams v. Barnhart*, 393 F.3d 798, 801 (8th Cir. 2005); *see also Igo v. Colvin*, 839 F.3d 724, 728 (8th Cir. 2016) (providing that a court "may not reverse simply because [it] would have reached a different conclusion than the [Commissioner] or because substantial evidence supports a contrary conclusion").

B. Review of Report and Recommendation

The standard of review to be applied by the 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); *see also* Fed. R. Civ. P. 72(b)(3) (providing that, when a party properly objects to a report

and recommendation on a dispositive motion, a district court must review de novo the magistrate judge's recommendation). The Eighth Circuit has repeatedly held that it is reversible error for a district court to fail to conduct a de novo review of a magistrate judge's report and recommendation when such review is required. *See, e.g.*, *United States v. Lothridge*, 324 F.3d 599, 600 (8th Cir. 2003); *Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir. 1996); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995); *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994). The statute governing review provides only for de novo review of "those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). When a party fails to object to any portion of a magistrate judge's report and recommendation, he or she waives the right to de novo review. *See Griffini v. Mitchell*, 31 F.3d 690, 692 (8th Cir. 1994). The United States Supreme Court has stated that "[t]here is no indication that Congress, in enacting § 636(b)(1)[ ], intended to require a district judge to review a magistrate's report to which no objections are filed." *Thomas v. Arn*, 474 U.S. 140, 152, 106 S. Ct. 466, 88 L.Ed.2d 435 (1985). However, "while the statute does not require the judge to review an issue de novo if no objections are filed, it does not preclude further review by the district judge, sua sponte or at the request of a party, under de novo or any other standard." *Id.* at 154, 106 S. Ct. 466.

The Eighth Circuit has suggested that in order to trigger de novo review, objections to a magistrate judge's conclusions must be specific. *See Branch v. Martin*, 886 F.2d 1043, 1046 (8th Cir. 1989); *see also Belk*, 15 F.3d at 815 (noting that some circuits do not apply de novo review when a party makes only general and conclusory objections to a magistrate judge's report and recommendation and finding that *Branch* indicates the Eighth Circuit's

"approval of such an exception"); *Thompson v. Nix*, 897 F.2d 356, 357-58 (8th Cir. 1990) (reminding the parties that "objections must be . . . specific to trigger de novo review by the [d]istrict [c]ourt of any portion of the magistrate's report and recommendation"). The Sixth Circuit Court of Appeals has explained the approach as follows:

> A general objection to the entirety of the magistrate's report has the same effects as would a failure to object. The district court's attention is not focused on any specific issues for review, thereby making the initial reference to the magistrate useless. The functions of the district court are effectively duplicated as both the magistrate and the district court perform identical tasks. This duplication of time and effort wastes judicial resources rather than saving them, and runs contrary to the purposes of the Magistrates Act. We would hardly countenance an appellant's brief simply objecting to the district court's determination without explaining the source of the error. We should not permit appellants to do the same to the district court reviewing the magistrate's report.

Howard v. Sec'y of Health & Human Servs., 932 F.2d 505, 509 (6th Cir. 1991); *see also Goney v. Clark*, 749 F.2d 5, 6 n.1 (3d Cir. 1984) (finding that "plaintiff's objections lacked the specificity necessary to trigger de novo review"); *Whited v. Colvin*, No. C 13-4039-MWB, 2014 WL 1571321, at *2-3 (N.D. Iowa Apr. 18, 2014) (concluding that, because the plaintiff "offer[ed] nothing more than a conclusory objection to . . . [the report and recommendation,] . . . [the plaintiff's] objection [should be treated] as if he had not objected at all"); *Banta Corp. v. Hunter Publ'g Ltd. P'ship*, 915 F. Supp. 80, 81 (E.D. Wis. 1995) ("De novo review of a magistrate judge's recommendation is required only for those portions of the recommendation for

which particularized objections, accompanied by legal authority and argument in support of the objections, are made.").

IV. OBJECTIONS

In the Objections, Davis argues that: (1) Judge Williams generally erred in concluding that the ALJ's credibility determination is supported by substantial evidence; (2) Judge Williams generally erred "in [his] treatment of the issue" of "evidence provided to the Appeals Council"; and (3) Judge Williams erred in concluding that the ALJ's residual functional capacity ("RFC") determination is supported by substantial evidence. *See* Objections 2-4. After conducting a de novo review of the objected-to portions of the Report and Recommendation and the Administrative Record ("AR") (docket nos. 9-1 through 9-9), the court shall overrule the Objections.

A. Credibility Determination

Here, Davis offers a purely conclusory argument, merely stating that he "continues to rely on his principal brief, and objects to the [Report and Recommendation] generally in its treatment of this issue." Objections at 2. The court presumes that Davis objects to Judge Williams's conclusions that "the ALJ did consider the record as a whole in deciding to discount [Davis's] subjective allegations" and that "the ALJ's decision was supported by substantial evidence on the record as a whole." Report and Recommendation at 11. Initially, the court notes that Davis's argument fails to comply with the Local Rules, which require "[a] party who objects to . . . a magistrate judge's report and recommendation" to "file *specific*, written objections to the . . . report and recommendation." LR 72A (emphasis added). Moreover, Davis's failure to object

to Judge Williams's findings regarding the ALJ's credibility determination with any specificity means that Davis has waived his right to de novo review of this issue. *See Thompson*, 897 F.2d at 357-58 (providing that "objections must be . . . specific to trigger de novo review by the [d]istrict [c]ourt of any portion of the magistrate's report and recommendation"). Nevertheless, out of an abundance of caution, and in this instance, the court shall review the ALJ's credibility determination de novo. *See Thomas*, 474 U.S. at 154, 106 S. Ct. 466 (providing that, while de novo review is not required when a party fails to object to a magistrate judge's report and recommendation, the court may apply "de novo or any other standard [of review]").

When assessing a claimant's credibility, "the ALJ must consider all of the evidence, including objective medical evidence, the claimant's work history, and evidence relating to the factors set forth in *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)." *Vance v. Berryhill*, 860 F.3d 1114, 1120 (8th Cir. 2017). In *Polaski*, the Eighth Circuit stated that:

> [t]he [ALJ] must give full consideration to all 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; [and] (5) functional restrictions.

739 F.2d at 1322. The ALJ, however, may not disregard "a claimant's subjective complaints solely because the objective medical evidence does not fully support them." *Renstrom v. Astrue*, 680 F.3d 1057, 1066 (8th Cir. 2012)

(quoting *Wiese v. Astrue*, 552 F.3d 728, 733 (8th Cir. 2009)).

Instead, an ALJ may discount a claimant's subjective complaints "if there are inconsistencies in the record as a whole." *Wildman v. Astrue*, 596 F.3d 959, 968 (8th Cir. 2010). If an ALJ discounts a claimant's subjective complaints, he or she is required to "make an express credibility determination, detailing the reasons for discounting the testimony, setting forth the inconsistencies, and discussing the *Polaski* factors." *Renstrom*, 680 F.3d at 1066 (quoting *Dipple v. Astrue*, 601 F.3d 833, 837 (8th Cir. 2010)); *see also Ford v. Astrue*, 518 F.3d 979, 982 (8th Cir. 2008) (stating that an ALJ is "required to 'detail the reasons for discrediting the testimony and set forth the inconsistencies found' " (quoting *Lewis v. Barnhart*, 353 F.3d 642, 647 (8th Cir. 2003))). Where an ALJ seriously considers, but for good reason explicitly discredits a claimant's subjective complaints, the court will not disturb the ALJ's credibility determination. *See Johnson v. Apfel*, 240 F.3d 1145, 1148 (8th Cir. 2001); *see also Schultz v. Astrue*, 479 F.3d 979, 983 (8th Cir. 2007) (providing that deference is given to an ALJ when the ALJ explicitly discredits a claimant's testimony and gives good reason for doing so); *Gregg v. Barnhart*, 354 F.3d 710, 714 (8th Cir. 2003) ("If an ALJ explicitly discredits the claimant's testimony and gives good reason for doing so, we will normally defer to the ALJ's credibility determination."). "The credibility of a claimant's subjective testimony is primarily for the ALJ to decide, not the courts." *Igo*, 839 F.3d at 731 (quoting *Pearsall v. Massanari*, 274 F.3d 1211, 1218 (8th Cir. 2001)).

In the decision, the ALJ determined that "[Davis's] medically determinable impairments could reasonably be

expected to cause some of the alleged symptoms; however, [Davis's] statements concerning the intensity, persistence and limiting effects of [the] symptoms [were] not consistent with the evidence to the extent they [were] inconsistent with the . . . [RFC] assessment." AR at 113. Specifically, the ALJ found that:

> [Davis's] allegations of disability are eroded by his activities of daily living. This includes independent living throughout the adjudicative period, performing his own personal care and grooming tasks, preparing simple meals, household cleaning, using public transportation, going shopping, and paying bills . . . .
>
> In addition to the above activities, the medical evidence is replete with references to [Davis] working and/or searching for employment throughout the period in which he has alleged disability. [Davis] frequently cited financial necessity as to why he needed to work. As recently as November 2015, he was working two jobs (per his testimony this was the coffee shop job and the janitorial job), 20 to 25 hours a week. Records in late 2014 show he had applied to be a "peer support person" through the Department of Human Services. He indicated he had completed a one-week training period and passed a written test for the position. He was ultimately turned down, however, because of a criminal background check . . . .
>
> [Davis's] specific allegations of functional deficits related to fibromyalgia pain, back pain, and knee pain do not appear consistent with the objective medical evidence. Despite his subjective pain complaints, physical examination findings have remained grossly intact throughout, as far as motor strength, sensation, reflexes, and a normal gait. [Davis] testified he was prescribed a cane for assistance with ambulation but the

> medical evidence of record does not appear to support this. [Davis] had a lumbar laminectomy procedure in early March of 2016. However, the evidence contains no record of follow-up visits.
>
> Similarly, [Davis's] reports of functional deficits related to mental health impairments do not appear consistent with the medical evidence. Aside from a low or agitated mood, mental status findings have been generally unremarkable throughout, with full alertness and orientation, appropriate dress and grooming, good eye contact, normal speech and thought process, intact cognition and memory function, and fair judgment/insight. Treatment notes indicate [Davis's] depression was largely situational, stemming from psychosocial and economic stressors.

Id. at 113-14.

It is clear from the ALJ's decision that she thoroughly considered and discussed Davis's treatment history, medical history, functional restrictions and activities of daily living in making her credibility determination. Thus, having reviewed the entire record, the court finds that the ALJ adequately considered and addressed the *Polaski* factors in determining that Davis's subjective allegations of disability were not credible. *See Goff v. Barnhart*, 421 F.3d 785, 791 (8th Cir. 2005) (noting that an ALJ is not required to explicitly discuss each *Polaski* factor, it is sufficient if the ALJ acknowledges and considers those factors before discounting a claimant's subjective complaints). Therefore, because the ALJ seriously considered, but for good reasons explicitly discredited, Davis's subjective complaints, the court will not disturb the ALJ's credibility determination. *See Johnson*, 240 F.3d at 1148. Even if inconsistent conclusions could be drawn on this issue, the court upholds the conclusions of the ALJ because

they are supported by substantial evidence on the record as a whole. *See Guilliams*, 393 F.3d at 801. Accordingly, the court shall overrule this objection.

B. New Evidence Provided to the Appeals Council

1. Factual background

On June 23, 2016, the ALJ filed the decision denying Davis disability benefits. AR at 116. On August 19, 2016, Davis filed a request for review of the ALJ's decision with the Appeals Council. *Id.* at 189, 106 S. Ct. 466. On November 30, 2016, Davis filed new evidence with the Appeals Council consisting of a medical source statement from Brenda Miller, a licensed social worker who treated Davis. *Id.* at 318-21. On June 23, 2017, the Appeals Council denied Davis' request for review. *Id.* at 8. In its decision, the Appeals Council stated that it found that the new evidence submitted by Davis did "not show a reasonable probability that it would change the outcome of the [ALJ's] decision." *Id.* at 9.

2. Applicable law

The Eighth Circuit has explained the effect of new evidence submitted to the Appeals Council for a reviewing court:

> The regulations provide that the Appeals Council must evaluate the entire record, including any new and material evidence that relates to the period before the date of the ALJ's decision. The newly submitted evidence thus becomes part of the "administrative record," even though the evidence was not originally included in the ALJ's record. If the Appeals Council finds that the ALJ's actions, findings, or conclusions are contrary to the weight of the evidence, including the new evidence, it will review the case.

Cunningham v. Apfel, 222 F.3d 496, 500 (8th Cir. 2000) (citations omitted). Applying these principles in *Cunningham*, the Eighth Circuit determined that:

> Here, the Appeals Council denied review, finding that the new evidence was either not material or did not detract from the ALJ's conclusion. In these circumstances, we do not evaluate the Appeals Council's decision to deny review, but rather we determine whether the record as a whole, including the new evidence, supports the ALJ's determination.

222 F.3d at 500 (citation omitted); *see also Van Vickle v. Astrue*, 539 F.3d 825, 828 (8th Cir. 2008) (stating that the final decision of the Commissioner should be affirmed if the decision "is supported by substantial evidence on the record as a whole, including the new evidence that was considered by the Appeals Council"); *Nelson v. Sullivan*, 966 F.2d 363, 366 (8th Cir. 1992) ("The newly submitted evidence is to become part of what we will loosely describe as the 'administrative record,' even though the evidence was not originally included in the ALJ's record . . . . If, as here, the Appeals Council considers the new evidence but declines to review the case, we review the ALJ's decision and determine whether there is substantial evidence in the administrative record, which now includes the new evidence, to support the ALJ's decision."). The Eighth Circuit has noted that a reviewing court "must speculate to some extent on how the [ALJ] would have weighed the newly submitted reports if they had been available for the original hearing." *Riley v. Shalala*, 18 F.3d 619, 622 (8th Cir. 1994).

3. Davis's objection

Davis again offers a purely conclusory argument and states only that he "continues to rely on his principal brief,

and objects to the [Report and Recommendation] generally in its treatment of this issue." Objections at 2. The court presumes that Davis objects to Judge Williams's conclusion that, based on "the entirety of the record . . . substantial evidence on the record as a whole would have supported the ALJ's decision, even if the ALJ had the benefit of Ms. Miller's opinion when deciding [Davis's] claim." Report and Recommendation at 15. Davis's argument fails to comply with the Local Rules, which require "[a] party who objects to . . . a magistrate judge's report and recommendation" to "file *specific*, written objections to the . . . report and recommendation." LR 72A (emphasis added).

Further, because Davis has failed to offer any specific objection to the Report and Recommendation with regard to the issue of new evidence provided to the Appeals Council, and only generally objects to Judge Williams's findings on this issue, the court finds that de novo review has not been triggered. *See Thompson*, 897 F.2d at 357-58 (providing that "objections must be . . . specific to trigger de novo review by the [d]istrict [c]ourt of any portion of the magistrate's report and recommendation"). Upon plain error review, *see Thomas*, 474 U.S. at 154, 106 S. Ct. 466, the court finds that there is no ground to reject or modify Judge Williams's thorough analysis and conclusion that the new evidence presented to the Appeals Council would not have changed the ALJ's decision had she been given the opportunity to review the new evidence.

Moreover, even if de novo review had been triggered, the court, having reviewed the entire record, including the new and additional evidence submitted to the Appeals Council, agrees with both the Appeals Council's decision and Judge Williams's Report and Recommendation that

the new evidence does not provide a basis for changing the ALJ's decision. *See Van Vickle*, 539 F.3d at 828 (providing that the final decision of the Commissioner should be affirmed if the decision "is supported by substantial evidence on the record as a whole, including the new evidence that was considered by the Appeals Council"). Accordingly, the court shall overrule the objection.

C. RFC Assessment

Davis objects to Judge Williams's conclusions that "the ALJ considered the medical records and notes of several treating physicians and other medical sources, and [Davis's] own testimony regarding his daily activities in determining that [Davis] had the RFC to do limited light work" and that "the ALJ's decision is supported by substantial evidence on the record as a whole." Report and Recommendation at 19. In general, Davis argues that the ALJ's RFC assessment is not supported by substantial evidence. *See* Objections at 2-4. In particular, Davis argues that Judge Williams erred in citing *Eichelberger v. Barnhart*, 390 F.3d 584 (8th Cir. 2004) for the proposition that "no further medical opinions were needed" in determining Davis's RFC. Objections at 3. Davis maintains that *Eichelberger* is inapplicable in this case because it was a step four case and this is a step five case.[2] *See id.*

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[2] Pursuant to the federal regulations, an ALJ must complete the five-step sequential evaluation process to determine whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 140-42, 107 S. Ct. 2287, 96 L.Ed.2d 119 (1987); *Moore v. Colvin*, 769 F.3d 987, 988-89 (8th Cir. 2014). The five steps an ALJ must consider are: "(1) whether the claimant is currently employed; (2) whether the claimant is severely impaired; (3) whether the impairment is or approximates an impairment listed in Appendix 1; (4) whether the claimant can perform past relevant work; and, if not, (5) whether the claimant can perform any other kind of work." *Hill v.*

When an ALJ determines that a claimant is not disabled, he or she concludes that the claimant retains the RFC to perform a significant number of other jobs in the national economy that are consistent with the claimant's impairments and vocational factors such as age, education and work experience. *See Beckley v. Apfel*, 152 F.3d 1056, 1059 (8th Cir. 1998). The ALJ is responsible for assessing a claimant's RFC, and his or her assessment must be based on all of the relevant evidence. *See Combs v. Berryhill*, 878 F.3d 642, 646 (8th Cir. 2017). Relevant evidence for determining a claimant's RFC includes "medical records, observations of treating physicians and others, and an individual's own description of his limitations." *Id.* (quoting *Strongson v. Barnhart*, 361 F.3d 1066, 1070 (8th Cir. 2004)). "Because a claimant's RFC is a medical question, an ALJ's assessment of it must be supported by some medical evidence of the claimant's ability to function in the workplace." *Id.* (quoting *Steed v. Astrue*, 524 F.3d 872, 875 (8th Cir. 2008)).

Additionally, an ALJ "has a duty to fully and fairly develop the evidentiary record." *Byes v. Astrue*, 687 F.3d 913, 915-16 (8th Cir. 2012); *see also Smith v. Barnhart*, 435 F.3d 926, 930 (8th Cir. 2006) ("A social security hearing is a non-adversarial proceeding, and the ALJ has a duty to fully develop the record."). "There is no bright line rule indicating when the Commissioner has or has not adequately developed the record; rather, such an assessment is made on a case-by-case basis." *Mouser v. Astrue*, 545 F.3d 634, 639 (8th Cir. 2008).

Colvin, 753 F.3d 798, 800 (8th Cir. 2014); *see also* Report and Recommendation at 3-5 (providing a thorough explanation of the five-step sequential evaluation process).

The ALJ thoroughly addressed and considered Davis's medical and treatment history. *See* AR at 111-12, 114 (providing a thorough discussion of Davis's overall medical history and treatment). The ALJ also properly considered and thoroughly addressed Davis's subjective allegations of disability in making her overall disability determination, including determining Davis's RFC. *See id.* at 113-14 (providing a thorough review of Davis's subjective allegations of disability). Therefore, having reviewed the entire record, the court finds that the ALJ properly considered Davis's medical records, observations of treating physicians and Davis's own description of his limitations in making the RFC assessment for Davis. *See id.* at 111-14 (providing a thorough discussion of the relevant evidence for making a proper RFC determination); *see also Combs*, 878 F.3d at 646 (explaining what constitutes relevant evidence for assessing a claimant's RFC). Furthermore, the court finds that the ALJ's decision is based on a fully and fairly developed record. *See Byes*, 687 F.3d at 915-16. Because the ALJ considered the medical evidence as a whole, the court concludes that the ALJ made a proper RFC determination supported by the medical evidence. *See Combs*, 878 F.3d at 646; *Guilliams*, 393 F.3d at 803.

Davis's argument that Judge Williams erred in citing *Eichelberger* is wholly without merit. Nowhere in the Report and Recommendation does Judge Williams cite *Eichelberger* for the proposition that "no further medical opinions were needed" in determining Davis's RFC. Instead, Judge Williams cites *Eichelberger* for the proposition that "[a] claimant's RFC is a medical question, and, thus, some medical evidence must support the determination of the claimant's RFC." Report and Recommendation at 16. Similarly, Judge Williams cited *Eichelberger* stating that

"the RFC is based on all relevant medical and other evidence." Report and Recommendation at 18. These are proper citations to *Eichelberger* because all RFC assessments must be based on all the relevant evidence in the record, including some medical evidence. *See Combs*, 878 F.3d at 646. Further, Judge Williams cites *Eichelberger* for the proposition that a claimant "has the burden to establish [his] RFC." Report and Recommendation at 18 (alteration in original). Again, this was a proper citation to *Eichelberger*, as the burden of establishing the RFC is always on the claimant. *See Hensley v. Colvin*, 829 F.3d 926, 932 (8th Cir. 2016) (stating that "the burden of persuasion to prove disability and to demonstrate RFC remains on the claimant, even when the burden of production shifts to the Commissioner at step five." (quoting *Goff*, 421 F.3d at 790)).

Because the ALJ made a proper RFC determination and Judge Williams did not err in citing *Eichelberger* in the Report and Recommendation, the court shall overrule the objection.

V. SUPPLEMENTAL BRIEF

In the Supplemental Brief, Davis contends that the ALJ that decided Davis's claim "was an inferior officer not appointed in a constitutional manner" and, therefore, the ALJ's decision must be vacated and the case must be remanded to be decided by a properly appointed ALJ. Supplemental Brief at 1-2. Davis relies on *Lucia v. S.E.C.*, — – U.S. ——, 138 S. Ct. 2044, —— L.Ed.2d —— (2018), which held that ALJs for the Securities and Exchange Commission are "Officers of the United States," and therefore, are subject to the Appointments Clause. 138 S. Ct. at 2055.

In *Lucia*, the Supreme Court stated that " 'one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief." *Id.* at 2055 (quoting *Ryder v. United States*, 515 U.S. 177, 182-83, 115 S. Ct. 2031, 132 L.Ed.2d 136 (1995)). The Supreme Court further stated that the plaintiff had "made just such a timely challenge: He contested the validity of [presiding ALJ's] appointment before the Commission, and continued pressing that claim in the Court of Appeals and this Court." *Id.* Unlike the plaintiff in *Lucia*, Davis did not contest the validity of the Social Security Administration ALJ who decided his case at the agency level. The record clearly demonstrates that Davis did not raise his Appointments Clause argument before either the ALJ or the Appeals Council. Rather, Davis raised this issue for the first time to this court on judicial review, after Judge Williams had issued the Report and Recommendation. Because Davis did not raise his Appointments Clause challenge before the ALJ or Appeals Council, the court finds that he has waived this issue. *See N.L.R.B. v. RELCO Locomotives, Inc.*, 734 F.3d 764, 798 (8th Cir. 2013) (concluding that a plaintiff who raised an Appointments Clause challenge "waived its challenge to the Board's composition because it did not raise the issue before the Board"); *Anderson v. Barnhart*, 344 F.3d 809, 814 (8th Cir. 2003) (finding that a claimant's failure to raise a disability claim during the administrative process "waived [the claim] from being raised on appeal"); *Shaibi v. Berryhill*, 883 F.3d 1102, 1109 (9th Cir. 2017) ("[W]hen claimants are represented by counsel, they must raise all issues and evidence at their administrative hearings in order to preserve them on appeal." (quoting *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999))); *Trejo v. Berryhill*, No. EDCV 17-0879-JPR, 2018 WL 3602380, at *3 n.3 (C.D. Cal. July 25, 2018) ("To the extent *Lucia* applies

to Social Security ALJs, [the] [p]laintiff has forfeited the issue by failing to raise it during her administrative proceedings.").

Davis cites *Sims* for the proposition that "[t]o preserve federal court review for all potential ALJ hearing decision errors, all a claimant must do is file a request for review." Supplemental Brief at 6. Davis's argument is without merit. The Ninth Circuit Court of Appeals addressed a similar argument and explained that "*Sims* concerned only whether a claimant must present all relevant issues *to the Appeals Council* to preserve them for judicial review; the [Supreme] Court specifically noted that '[w]hether a claimant must exhaust issues before the ALJ is not before us.' " *Shaibi*, 883 F.3d at 1109 (second alteration in original) (quoting *Sims*, 530 U.S. at 107, 120 S. Ct. 2080). Here, Davis did not present his Appointments Clause challenge to the ALJ *or* the Appeals Council. Thus, the Eighth Circuit's finding in *Anderson*, that a claimant's failure to raise an issue during the administrative process waives the claim from being raised on appeal, is not affected by the holding in *Sims*. *See* 344 F.3d at 814. The court concludes that Davis's Appointments Clause argument is waived.

VI. CONCLUSION

In light of the foregoing, it is hereby **ORDERED**:

(1) The Objections (docket no. 22) are **OVERRULED**;

(2) The Report and Recommendation (docket no. 20) is **ADOPTED** and the final decision of the Commissioner is **AFFIRMED**; and

(3) The Complaint (docket no. 3) is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

APPENDIX E

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

Kimberly L. IWAN, Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,
Defendant.

No. 17-CV-97-LRR

Filed: September 10, 2018

ORDER

READE, Judge.

I. INTRODUCTION

The matter before the court is Plaintiff Kimberly L. Iwan's Objections (docket no. 25) to United States Magistrate Judge Kelly K.E. Mahoney's Report and Recommendation (docket no. 17), which recommends that the court affirm Defendant Commissioner of Social Security's ("Commissioner") final decision to deny disability benefits to Iwan.

II. RELEVANT PROCEDURAL HISTORY

On September 20, 2017, Iwan filed a Complaint (docket no. 3), seeking judicial review of the Commissioner's final decision denying Iwan's applications for Title II disability insurance benefits and Title XVI supplemental security income ("SSI") benefits. On November 22, 2017, the Commissioner filed an Answer (docket no. 8). On February 25, 2018, Iwan filed the Plaintiff's Brief (docket no. 13). On March 22, 2018, the Commissioner filed the Defendant's Brief (docket no. 14). On April 4, 2018, Iwan filed a Reply Brief (docket no. 15). On April 5, 2018, the matter was referred to Judge Mahoney for issuance of a report and recommendation. On July 12, 2018, Judge Mahoney issued the Report and Recommendation. On July 19, 2018, Iwan filed a Supplemental Brief (docket no. 22). On July 26, 2018, Iwan filed the Objections. On August 2, 2018, the Commissioner filed a Response to the Objections (docket no. 28). On August 23, 2018, the Commissioner filed a Response to the Supplemental Brief (docket no. 29). On August 30, 2018, Iwan filed a Reply Brief (docket no. 30). The matter is fully submitted and ready for decision.

III. STANDARD OF REVIEW

A. Review of Final Decision

The Commissioner's final determination not to award disability insurance benefits is subject to judicial review. *See* 42 U.S.C. § 405(g). The court has the power to "enter . . . a judgment affirming, modifying, or reversing the decision of the Commissioner . . . with or without remanding the cause for a rehearing." *Id.* The Commissioner's factual findings shall be conclusive "if supported by substantial evidence." *Id.* The Commissioner's final determination not to award SSI benefits is subject to judicial review

to the same extent as provided in 42 U.S.C. § 405(g). *See Id.* § 1383(c)(3). "The court 'must affirm the Commissioner's decision if it is supported by substantial evidence on the record as a whole.' " *Bernard v. Colvin*, 774 F.3d 482, 486 (8th Cir. 2014) (quoting *Pelkey v. Barnhart*, 433 F.3d 575, 577 (8th Cir. 2006)). "Substantial evidence is less than a preponderance, but enough that a reasonable mind might accept it as adequate to support a decision." *Fentress v. Berryhill*, 854 F.3d 1016, 1019-20 (8th Cir. 2017) (quoting *Kirby v. Astrue*, 500 F.3d 705, 707 (8th Cir. 2007)).

In determining whether the Commissioner's decision meets this standard, the court considers "all of the evidence that was before the [administrative law judge ("ALJ")], but [it] do[es] not re-weigh the evidence." *Vester v. Barnhart*, 416 F.3d 886, 889 (8th Cir. 2005). The court considers "both evidence that detracts from the Commissioner's decision, as well as evidence that supports it." *Fentress*, 854 F.3d at 1020; *see also Cox v. Astrue*, 495 F.3d 614, 617 (8th Cir. 2007) (providing that review of the Commissioner's decision "extends beyond examining the record to find substantial evidence in support of the [Commissioner's] decision" and noting that the court must also "consider evidence in the record that fairly detracts from that decision"). The Eighth Circuit Court of Appeals explained this standard as follows:

> This standard is "something less than the weight of the evidence and it allows for the possibility of drawing two inconsistent conclusions, thus it embodies a zone of choice within which the [Commissioner] may decide to grant or deny benefits without being subject to reversal on appeal."

Culbertson v. Shalala, 30 F.3d 934, 939 (8th Cir. 1994) (quoting *Turley v. Sullivan*, 939 F.2d 524, 528 (8th Cir.

1991)). The court "will not disturb the denial of benefits so long as the ALJ's decision falls within the available zone of choice." *Buckner v. Astrue*, 646 F.3d 549, 556 (8th Cir. 2011) (quoting *Bradley v. Astrue*, 528 F.3d 1113, 1115 (8th Cir. 2008)). "An ALJ's decision is not outside the zone of choice simply because [the court] might have reached a different conclusion had [the court] been the initial finder of fact." *Id.* (quoting *Bradley*, 528 F.3d at 1115). Therefore, "even if inconsistent conclusions may be drawn from the evidence, the [Commissioner's] decision will be upheld if it is supported by substantial evidence on the record as a whole." *Guilliams v. Barnhart*, 393 F.3d 798, 801 (8th Cir. 2005); *see also Igo v. Colvin*, 839 F.3d 724, 728 (8th Cir. 2016) (providing that a court "may not reverse simply because [it] would have reached a different conclusion than the [Commissioner] or because substantial evidence supports a contrary conclusion").

B. Review of Report and Recommendation

The standard of review to be applied by the 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); *see also* Fed. R. Civ. P. 72(b)(3) (providing that, when a party properly objects to a report and recommendation on a dispositive motion, a district court must review de novo the magistrate judge's recommendation). The Eighth Circuit has repeatedly held that it is reversible error for a district court to fail to conduct

a de novo review of a magistrate judge's report and recommendation when such review is required. *See, e.g.*, *United States v. Lothridge*, 324 F.3d 599, 600 (8th Cir. 2003); *Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir. 1996); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995); *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994). The statute governing review provides only for de novo review of "those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). When a party fails to object to any portion of a magistrate judge's report and recommendation, he or she waives the right to de novo review. *See Griffini v. Mitchell*, 31 F.3d 690, 692 (8th Cir. 1994). The United States Supreme Court has stated that "[t]here is no indication that Congress, in enacting § 636(b)(1)[ ], intended to require a district judge to review a magistrate's report to which no objections are filed." *Thomas v. Arn*, 474 U.S. 140, 152, 106 S. Ct. 466, 88 L.Ed.2d 435 (1985). However, "while the statute does not require the judge to review an issue de novo if no objections are filed, it does not preclude further review by the district judge, sua sponte or at the request of a party, under de novo or any other standard." *Id.* at 154, 106 S. Ct. 466.

The Eighth Circuit has suggested that in order to trigger de novo review, objections to a magistrate judge's conclusions must be specific. *See Branch v. Martin*, 886 F.2d 1043, 1046 (8th Cir. 1989); *see also Belk*, 15 F.3d at 815 (noting that some circuits do not apply de novo review when a party makes only general and conclusory objections to a magistrate judge's report and recommendation and finding that *Branch* indicates the Eighth Circuit's "approval of such an exception"); *Thompson v. Nix*, 897 F.2d 356, 357-58 (8th Cir. 1990) (reminding the parties that "objections must be . . . specific to trigger de novo re-

view by the [d]istrict [c]ourt of any portion of the magistrate's report and recommendation"). The Sixth Circuit Court of Appeals has explained the approach as follows:

> A general objection to the entirety of the magistrate's report has the same effects as would a failure to object. The district court's attention is not focused on any specific issues for review, thereby making the initial reference to the magistrate useless. The functions of the district court are effectively duplicated as both the magistrate and the district court perform identical tasks. This duplication of time and effort wastes judicial resources rather than saving them, and runs contrary to the purposes of the Magistrates Act. We would hardly countenance an appellant's brief simply objecting to the district court's determination without explaining the source of the error. We should not permit appellants to do the same to the district court reviewing the magistrate's report.

Howard v. Sec'y of Health & Human Servs., 932 F.2d 505, 509 (6th Cir. 1991); *see also Goney v. Clark*, 749 F.2d 5, 6 n.1 (3d Cir. 1984) (finding that "plaintiff's objections lacked the specificity necessary to trigger de novo review"); *Whited v. Colvin*, No. C 13-4039-MWB, 2014 WL 1571321, at *2-3 (N.D. Iowa Apr. 18, 2014) (concluding that, because the plaintiff "offer[ed] nothing more than a conclusory objection to . . . [the report and recommendation] . . . [the plaintiff's] objection [should be treated] as if he had not objected at all"); *Banta Corp. v. Hunter Publ'g Ltd. P'ship*, 915 F. Supp. 80, 81 (E.D. Wis. 1995) ("De novo review of a magistrate judge's recommendation is required only for those portions of the recommendation for which particularized objections, accompanied by legal authority and argument in support of the objections, are made.").

IV. OBJECTIONS

In the Objections, Iwan argues that: (1) Judge Mahoney erred in finding that the ALJ's failure to address Listing 14.09D is harmless error; (2) Judge Mahoney generally erred in concluding that the ALJ's credibility determination is supported by substantial evidence; and (3) Judge Mahoney erred in finding that the ALJ properly weighed Dr. Mathew's opinions. *See* Objections 2-5. After conducting a de novo review of the objected-to portions of the Report and Recommendation and the Administrative Record ("AR") (docket nos. 9-1 through 9-8), the court shall overrule the Objections.

A. Listing 1409.D

Here, Iwan offers a purely conclusory argument stating only that she "continues to rely on her principal [brief] and reply brief, and objects to the [Report and Recommendation] generally in its treatment of this issue." Objections at 2. The court presumes that Iwan objects to Judge Mahoney's conclusion that "any error by the ALJ in failing to address Listing 14.09D was harmless." Report and Recommendation at 9. Initially, the court notes that Iwan's argument fails to comply with the Local Rules, which require "[a] party who objects to . . . a magistrate judge's report and recommendation" to "file *specific*, written objections to the . . . report and recommendation." LR 72A (emphasis added). Moreover, Iwan's failure to object to Judge Mahoney's findings on this point with any specificity means that Iwan has waived her right to de novo review of this issue. *See Thompson*, 897 F.2d at 357-58 (providing that "objections must be . . . specific to trigger de novo review by the [d]istrict [c]ourt of any portion of the magistrate's report and recommendation"). Nevertheless, out of an abundance of caution, and in this instance, the court shall review the ALJ's consideration of

Listing 14.09D at step three of the sequential evaluation de novo.[1] *See Thomas*, 474 U.S. at 154, 106 S. Ct. 466 (providing that, while de novo review is not required when a party fails to object to a magistrate judge's report and recommendation, the court may apply "de novo or any other standard [of review]").

In the Plaintiff's Brief, Iwan argues that "[g]enerally, an ALJ should provide a thorough and reviewable discussion as to whether a claimant's fibromyalgia, 'alone or in combination with her other impairments, meets or equals a Listed impairment at Step Three of the analysis.' " Plaintiff's Brief at 4 (quoting *Miller v. Colvin*, 114 F. Supp. 3d 741, 775 (D.S.D. 2015)). Iwan maintains that, "[i]n most cases where fibromyalgia is the principal limiting impairment, Listing 14.09D, the [l]isting for inflammatory arthritis, is the appropriate listing to evaluate when a claimant's primary claim of disability is due to fibromyalgia." *Id.* Iwan contends that the ALJ erred because he failed "to even address medical equivalence to Listing 14.09D." *Id.* at 5.

The Eighth Circuit has explained that:

> To qualify for disability benefits at step three, a claimant must establish that his [or her] impairment meets

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[1] Pursuant to the federal regulations, an ALJ must complete the five-step sequential evaluation process to determine whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 140-42, 107 S. Ct. 2287, 96 L.Ed.2d 119 (1987); *Moore v. Colvin*, 769 F.3d 987, 988-89 (8th Cir. 2014). The five steps an ALJ must consider are: "(1) whether the claimant is currently employed; (2) whether the claimant is severely impaired; (3) whether the impairment is or approximates an impairment listed in Appendix 1; (4) whether the claimant can perform past relevant work; and, if not, (5) whether the claimant can perform any other kind of work." *Hill v. Colvin*, 753 F.3d 798, 800 (8th Cir. 2014).

> or equals a listing. An impairment meets a listing only if it "meet[s] *all* of the specified medical criteria." "An impairment that manifests only some of those criteria, no matter how severely, does not qualify." To prove that an impairment or combination of impairments equals a listing, a claimant "must present medical findings equal in severity to *all* the criteria for the one most similar listed impairment."

KKC ex rel. Stoner v. Colvin, 818 F.3d 364, 370 (8th Cir. 2016) (second alteration in original) (citation omitted) (quoting *Sullivan v. Zebley*, 493 U.S. 521, 530-31, 110 S. Ct. 885, 107 L.Ed.2d 967 (1990)).

In this case, the ALJ determined at step three that:

> [Iwan's] impairments were evaluated singly and in combination under section 1.00ff of the Listings. The medical evidence of record does not contain findings supportive of listing level severity and state agency reviewing physicians concluded that [Iwan's] impairments did not meet or equal any section in the Listing of Impairments.

AR at 86.

Iwan's assertion that the ALJ erred by failing to address medical equivalence to Listing 14.09D is based on her reading of Social Security Ruling ("SSR") 12-2p, which states:

> [Fibromyalgia] cannot meet a listing in [A]ppendix 1 because [fibromyalgia] is not a listed impairment. At step [three], therefore, [the Social Security Administration] determine[s] whether [fibromyalgia] medically equals a listing (for example, listing 14.09D in the listing for inflammatory arthritis), or whether it medically equals a listing in combination with at least one other medically determinable impairment.

SSR 12-2p, 2012 WL 3104869, at *6 (July 25, 2012). Iwan argues that SSR 12-2p requires an ALJ to evaluate whether fibromyalgia is medically equal to Listing 14.09D. Other courts, however, read SSR 12-2p differently. *Compare Schleuning v. Berryhill*, No. Civ. 16-5009-JLV, 2017 WL 1102607, at *3-4 (D.S.D. Mar. 23, 2017) (discussing SSR 12-2p and finding that an "ALJ must evaluate [fibromyalgia] under Listing 14.09D") with *Clevenger v. Colvin*, No. 2:16-cv-14, 2016 WL 8938380, at *6 (N.D. W. Va. Aug. 31, 2016) ("SSR 12-2p provides 14.09D merely as an example thus, the ALJ does not err per se by failing to analyze 14.09D."); *Landefeld v. Comm'r of Soc. Sec.*, No. 2:15-cv-880, 2016 WL 304499, at *2 (S.D. Ohio Jan. 26, 2016) ("SSR 12-2p does not mandate express consideration of Listing 14.09D . . . ."); and *White v. Colvin*, No. 4:12-cv-11600, 2013 WL 5212629, at *22 (E.D. Mich. Sept. 16, 2013) ("SSR 12-2p does not require an ALJ to consider any specific listing, but simply requires him or her to consider a claimant's fibromyalgia against a relevant listing, citing Listing 14.09D as one such example."). The court is persuaded by the reading of SSR 12-2p in *Clevenger*, *Landefeld* and *White.* Therefore, the court finds that the ALJ did not err merely by not addressing Listing 14.09D in his decision.

Further, in order to meet medical equivalency for Listing 14.09D Iwan must prove:

> Repeated manifestations of inflammatory arthritis, with at least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss) and one of the following at the marked level:
>
> 1. Limitation of activities of daily living.
>
> 2. Limitation in maintaining social functioning.

> 3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

20 C.F.R Pt. 404, Subpt. P, App. 1 at § 14.09D. Iwan offers no evidence that her diagnosis of fibromyalgia is medically equal to Listing 14.09D. *See McDade v. Astrue*, 720 F.3d 994, 1001 (8th Cir. 2013) ("The claimant bears the burden of demonstrating that his [or her] impairment matches all the specified criteria of a listing."); *Johnson v. Barnhart*, 390 F.3d 1067, 1070 (8th Cir. 2004) ("The burden of proof is on the plaintiff to establish that his or her impairment meets or equals a listing. To meet a listing, an impairment must meet all of the listing's specified criteria."). Therefore, even if the ALJ had erred in not addressing Listing 14.09D, the court finds that Iwan has failed to meet her burden of showing that her diagnosis of fibromyalgia meets or equals Listing 14.09D.

Moreover, the ALJ addressed Listing 1.00ff and determined that Iwan's impairments, including her fibromyalgia diagnosis, "did not meet or equal any section in the Listing of Impairments." AR at 86. Based on the court's review of the entire record, the court finds that the ALJ's decision is supported by substantial evidence on the record as a whole. *See Vance v. Berryhill*, 860 F.3d 1114, 1118 (8th Cir. 2017) ("An ALJ's failure to address a specific listing or to elaborate on his [or her] conclusion that a claimant's impairments do not meet the listings is not reversible error if the record supports the conclusion."). Accordingly, the court shall overrule this objection.

B. Credibility Determination

Iwan again offers a purely conclusory argument and states only that she "continues to rely on her principal brief, and objects to the [Report and Recommendation]

generally in its treatment of this issue." Objections at 2. The court presumes that Iwan objects to Judge Mahoney's finding that "substantial evidence supports the ALJ's decision not to fully credit all of Iwan's subjective complaints." Report and Recommendation at 15. Iwan's argument fails to comply with the Local Rules, which require "[a] party who objects to . . . a magistrate judge's report and recommendation" to "file *specific*, written objections to the . . . report and recommendation." *Id.* (emphasis added). Moreover, Iwan's failure, again, to specify her objections to Judge Mahoney's findings regarding the ALJ's credibility determination means that Iwan has waived her right to de novo review of this issue. *See Thompson*, 897 F.2d at 357-58 (providing that "objections must be . . . specific to trigger de novo review by the [d]istrict [c]ourt of any portion of the magistrate's report and recommendation"). Nevertheless, out of an abundance of caution, and in this instance, the court shall review the ALJ's credibility determination de novo. *See Thomas*, 474 U.S. at 154, 106 S. Ct. 466 (providing that, while de novo review is not required when a party fails to object to a magistrate judge's report and recommendation, the court may apply "de novo or any other standard [of review]").

When assessing a claimant's credibility, "the ALJ must consider all of the evidence, including objective medical evidence, the claimant's work history, and evidence relating to the factors set forth in *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)." *Vance*, 860 F.3d at 1120. In *Polaski*, the Eighth Circuit stated that:

> [t]he [ALJ] must give full consideration to all the evidence presented relating to subjective complaints, including the claimant's prior work record, and observa-

> tions 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; [and] (5) functional restrictions.

739 F.2d at 1322. The ALJ, however, may not disregard "a claimant's subjective complaints solely because the objective medical evidence does not fully support them." *Renstrom v. Astrue*, 680 F.3d 1057, 1066 (8th Cir. 2012) (quoting *Wiese v. Astrue*, 552 F.3d 728, 733 (8th Cir. 2009)).

Instead, an ALJ may discount a claimant's subjective complaints "if there are inconsistencies in the record as a whole." *Wildman v. Astrue*, 596 F.3d 959, 968 (8th Cir. 2010). If an ALJ discounts a claimant's subjective complaints, he or she is required to "make an express credibility determination, detailing the reasons for discounting the testimony, setting forth the inconsistencies, and discussing the *Polaski* factors." *Renstrom*, 680 F.3d at 1066 (quoting *Dipple v. Astrue*, 601 F.3d 833, 837 (8th Cir. 2010)); *see also Ford v. Astrue*, 518 F.3d 979, 982 (8th Cir. 2008) (stating that an ALJ is "required to 'detail the reasons for discrediting the testimony and set forth the inconsistencies found' " (quoting *Lewis v. Barnhart*, 353 F.3d 642, 647 (8th Cir. 2003))). Where an ALJ seriously considers, but for good reason explicitly discredits a claimant's subjective complaints, the court will not disturb the ALJ's credibility determination. *See Johnson v. Apfel*, 240 F.3d 1145, 1148 (8th Cir. 2001); *see also Schultz v. Astrue*, 479 F.3d 979, 983 (8th Cir. 2007) (providing that deference is given to an ALJ when the ALJ explicitly discredits a claimant's testimony and gives good reason for doing so); *Gregg v. Barnhart*, 354 F.3d 710, 714 (8th Cir.

2003) ("If an ALJ explicitly discredits the claimant's testimony and gives good reason for doing so, we will normally defer to the ALJ's credibility determination."). "The credibility of a claimant's subjective testimony is primarily for the ALJ to decide, not the courts." *Igo*, 839 F.3d at 731 (quoting *Pearsall v. Massanari*, 274 F.3d 1211, 1218 (8th Cir. 2001)).

In this case, the ALJ determined that Iwan's "medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, [her] statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely consistent with the medical evidence and other evidence in the record for the reasons explained in this decision." AR at 90. The ALJ explained:

> Although [Iwan] described disabling symptoms as a result of the medical impairments, the record is not consistent with that conclusion. [Iwan] described activities of daily living that are not limited to the extent one would expect, given the complaints of disabling symptoms and limitations. [Iwan] reported no problems with her personal care; she prepared her own meals on a daily basis; she performed housework and yard work such as cleaning, laundry, small household repairs, and mowing on a rider; she got outside every day and traveled via walking, driving, or riding in a car; she shopped in stores for groceries, personal care, and clothing; she spent time with others two to three times a week going to bars and hanging out as well as playing pool although she did not[e] that she was not able to dance much; she stated that she could lift up to twenty to thirty-five pounds; she had no problems paying attention; she followed instructions very well; she

> got along with authority figures very well; and she handled changes in routine very well.

Id. at 91. Further, the ALJ stated:

> As discussed above, despite the allegations of symptoms and limitations preventing all work, the record reflects that since her alleged onset date, [Iwan] went bowling and hung out at bars two to three times a week, playing pool. Although bowling/hanging out at bars/playing pool and a disability are not necessarily mutually exclusive, [Iwan's] ability to go bowling, hang out at bars, and play pool tends to suggest that the alleged symptoms and limitations may have been overstated.

Id.

The ALJ also thoroughly reviewed Iwan's medical history and pointed out inconsistencies between her allegations of disabling limitations and the relief treatment and medication provided for her. *See generally id.* at 87-90. The ALJ referenced the opinions of Dr. Tracey Larrison, D.O., a non-treating physician, who noted in July 2014, that Iwan had been diagnosed with fibromyalgia but her "[e]xams had been normal with tenderness to palpation over various tender points" and her exams indicated that her "[g]ait was steady." *Id.* at 87-88. Dr. Larrison opined that Iwan's "allegations in terms of extent of functional loss were not fully supported by objective findings." *Id.* at 88. The ALJ also referenced the opinions of Dr. Laura Griffith, D.O., a non-treating physician, who noted in October 2014, that Iwan "alleged constant pain that impacted her mobility as well as her function. However, the inconsistency was that the level of severity alleged was simply not supported by [Iwan's] current treatment history." *Id.* The ALJ further noted that, at Iwan's yearly

physical in October 2014, Iwan "reported having no problems" and "[f]ollowing [the] examination, [she] was diagnosed as a healthy female." *Id.* The ALJ pointed out that in early 2015, Iwan's symptoms benefitted from aquatherapy. *Id.* at 89. The ALJ noted that, in May 2015, at a doctor's visit for medication refill to treat fibromyalgia and knee pain, Iwan "voiced no concerns" and her "medications were continued." *Id.* The ALJ further noted that in June 2015, Iwan underwent injections in her right and left knee. *Id.* The injections helped Iwan "feel like her pain and arthritis were improving." *Id.* After receiving the series of injections in both knees, Iwan stated that "she was doing very well," "her pain continued to improve," "she was having an easier time with mobility and [an] easier time going up and down stairs" and she had "decreased pain and improved mobility." *Id.* The ALJ pointed out that "August 2015 clinical notes indicated [Iwan] was independent in ambulation and all activities of daily living" and "in September 2015, it was noted that [Iwan's] fibromyalgia was controlled." *Id.* Finally, the ALJ noted that in April 2016, after left knee injections, Iwan "was doing very well and had responded well to the first injection." *Id.* at 90.

It is clear from the ALJ's decision that he thoroughly considered and discussed Iwan's treatment history, medical history, functional restrictions, activities of daily living and use of medications in making his credibility determination. Thus, having reviewed the entire record, the court finds that the ALJ adequately considered and addressed the *Polaski* factors in determining that Iwan's subjective allegations of disability were not credible. *See Goff v. Barnhart*, 421 F.3d 785, 791 (8th Cir. 2005) (noting that an ALJ is not required to explicitly discuss each *Polaski* factor, it is sufficient if the ALJ acknowledges and considers those factors before discounting a claimant's

subjective complaints). Therefore, because the ALJ seriously considered, but for good reasons explicitly discredited, Iwan's subjective complaints, the court will not disturb the ALJ's credibility determination. *See Johnson*, 240 F.3d at 1148. Even if inconsistent conclusions could be drawn on this issue, the court upholds the conclusions of the ALJ because they are supported by substantial evidence on the record as a whole. *See Guilliams*, 393 F.3d at 801. Accordingly, the court shall overrule this objection.

C. Dr. Mathew's Opinion

Iwan objects to Judge Mahoney's finding that "[i]t is unclear from Dr. Mathew's treatment records, as well as other evidence in the record, how Dr. Mathew arrived at many of the limitations in his RFC opinion" and her conclusion that, "[t]herefore, the ALJ did not err in assigning little weight to the limitations contained on Dr. Mathew's [Medical Source Statement] form." Report and Recommendation at 20. Iwan argues that the ALJ's reasoning for discounting Dr. Mathew's opinions is flawed because "[t]he only reason the ALJ gave for rejecting Dr. Mathew's opinions was due to the opinions being provided in a checklist or checkbox format." Objections at 3. Iwan argues that Judge Mahoney's "approach of providing missing good reasons for the weight afforded to Dr. Mathew's opinions was not appropriate." *Id.* at 5.

"The opinion of a treating physician is generally afforded 'controlling weight if that opinion is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the record.' " *Chesser v. Berryhill*, 858 F.3d 1161, 1164 (8th Cir. 2017) (quoting *Wildman*, 596 F.3d at 964). "Although a treating physician's opinion is entitled to great weight, it does not automatically control

or obviate the need to evaluate the record as a whole." *Hogan v. Apfel*, 239 F.3d 958, 961 (8th Cir. 2001). The ALJ may discount or disregard a treating physician's opinion if other medical assessments are supported by superior medical evidence, or if the treating physician has offered inconsistent opinions. *See Hamilton v. Astrue*, 518 F.3d 607, 610 (8th Cir. 2008). When an ALJ discounts a treating physician's opinion, he or she "must 'give good reasons' for doing so." *Chesser*, 858 F.3d at 1164 (quoting *Anderson v. Astrue*, 696 F.3d 790, 793 (8th Cir. 2012)). "Good reasons for assigning lesser weight to the opinion of a treating source exist where 'the treating physician's opinions are themselves inconsistent,' *Cruze [v. Chater*], 85 F.3d [1320,] 1325 [(8th Cir. 1996)], or where 'other medical assessments are supported by better or more thorough medical evidence,' *Prosch* [*v. Apfel*], 201 F.3d [1010,] 1012 [(8th Cir. 2000)]." *Id.*

In the decision, the ALJ addressed Dr. Mathew's opinions as follows:

> In January 2015, Stanley Matthew [sic], M.D., completed a form report on [Iwan's] behalf. Dr. Matthew [sic] opined [Iwan] was extremely limited. (Exhibits 5F, 8F). However, as the courts have long recognized, form reports in which the source's only obligation is to fill in a blank or check off a box are entitled to little weight in the adjudicative process. Accordingly, the undersigned assigns little weight to the form report completed by Dr. Matthew [sic].

AR at 88-89 (citations omitted). While the ALJ's decision focused on the checkbox form of Dr. Mathew's Medical Source Statement, the ALJ also referenced Exhibit 8F. *See id.* at 88. Exhibit 8F contains treatment records from Dr. Mathew. *See Id.* at 475-493. The ALJ addressed these treatment records in his decision. *See generally id.* at 89-

90. In discussing these records, the ALJ noted that, after treatment to her right knee, Iwan felt "like her pain and arthritis were improving." *Id.* at 89. The ALJ further noted that the records indicated Iwan was "doing very well" with treatment and had "an easier time with mobility and easier time going up and down stairs." *Id.* The ALJ also pointed out that Iwan had "improvement with her range of motion." *Id.* The ALJ addressed similar records dealing with treatment to Iwan's left knee which resulted in "decreased pain and improved mobility" and an ability "to ambulate functional distances independently." *Id.* Similarly, the ALJ pointed out that, in April 2016, treatment to Iwan's left knee resulted in Iwan "doing very well." *Id.* at 90. Even though the ALJ did not explicitly address Dr. Mathew's treatment notes while weighing Dr. Mathew's opinions, the ALJ implicitly found Dr. Mathew's treatment notes to be inconsistent with the extreme limitations found in his checkbox medical source statement. *See McCoy v. Astrue*, 648 F.3d 605, 616 (8th Cir. 2011) (upholding an ALJ's implicit finding because it was supported by substantial evidence); *Hogan*, 239 F.3d at 961 (providing that an ALJ may discount a treating source opinion "if the treating physician has offered inconsistent opinions").

Having reviewed the entire record, the court finds that the ALJ properly considered and weighed the opinion evidence provided by Dr. Mathew. The ALJ justifiably discounted Dr. Mathew's opinions because it was "inconsistent or contrary to the medical evidence as a whole." *Aguiniga v. Colvin*, 833 F.3d 896, 901 (8th Cir. 2016) (quoting *Martise v. Astrue*, 641 F.3d 909, 925 (8th Cir. 2011)). While the ALJ could have better articulated his reasons for affording Dr. Mathew's opinions "little weight," "[a]n arguable deficiency in opinion writing that had no practical effect on the decision . . . is not a sufficient

reason to set aside the ALJ's decision." *Hensley v. Colvin*, 829 F.3d 926, 932 (8th Cir. 2016) (second alteration in original) (quoting *Welsh v. Colvin*, 765 F.3d 926, 929 (8th Cir. 2014)). Even if inconsistent conclusions could be drawn on this issue, the court upholds the conclusions of the ALJ because they are supported by substantial evidence on the record as a whole. *See Guilliams*, 393 F.3d at 801. Accordingly, the court shall overrule this objection.

V. SUPPLEMENTAL BRIEF

In the Supplemental Brief, Iwan contends that the ALJ that decided Iwan's claim "was an inferior officer not appointed in a constitutional manner" and, therefore, the ALJ's decision must be vacated and the case must be remanded to be decided by a properly appointed ALJ. Supplemental Brief at 1-2. Iwan relies on *Lucia v. S.E.C.*, —— U.S. ——, 138 S. Ct. 2044, —— L.Ed.2d —— (2018), which held that ALJs for the Securities and Exchange Commission are "Officers of the United States," and therefore, are subject to the Appointments Clause. 138 S. Ct. at 2055.

In *Lucia*, the Supreme Court stated that " 'one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief." *Id.* at 2055 (quoting *Ryder v. United States*, 515 U.S. 177, 182-83, 115 S. Ct. 2031, 132 L.Ed.2d 136 (1995)). The Supreme Court further stated the plaintiff had "made just such a timely challenge: He contested the validity of [the presiding ALJ's] appointment before the Commission, and continued pressing that claim in the Court of Appeals and this Court." *Id.* Unlike the plaintiff in *Lucia*, Iwan did not contest the validity of the Social Security Administration ALJ who decided her case at the agency level. The record clearly demonstrates that Iwan did not raise her Appointments Clause argument before either the ALJ or the Appeals Council. Rather, Iwan

raised this issue for the first time to this court on judicial review, after Judge Mahoney had issued the Report and Recommendation. Because Iwan did not raise her Appointments Clause challenge before the ALJ or Appeals Council, the court finds that she has waived this issue. *See N.L.R.B. v. RELCO Locomotives, Inc.*, 734 F.3d 764, 798 (8th Cir. 2013) (concluding that a plaintiff who raised an Appointments Clause challenge "waived its challenge to the Board's composition because it did not raise the issue before the Board"); *Anderson v. Barnhart*, 344 F.3d 809, 814 (8th Cir. 2003) (finding that a claimant's failure to raise a disability claim during the administrative process "waived [the claim] from being raised on appeal"); *Shaibi v. Berryhill*, 883 F.3d 1102, 1109 (9th Cir. 2017) ("[W]hen claimants are represented by counsel, they must raise all issues and evidence at their administrative hearings in order to preserve them on appeal." (quoting *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999))); *Trejo v. Berryhill*, No. EDCV 17-0879-JPR, 2018 WL 3602380, at *3 n.3 (C.D. Cal. July 25, 2018) ("To the extent *Lucia* applies to Social Security ALJs, [the] [p]laintiff has forfeited the issue by failing to raise it during her administrative proceedings.").

Iwan asserts that "[i]t should be noted that *Sims v. Apfel*, [530 U.S. 103 (2000)] controls concerning the potential waiver issue . . . for parties wishing to raise Appointments Clause issues for the first time in federal court, as there is no waiver of issues by claimants for failing to present them to the Appeals Council." Supplemental Brief at 6. Iwan's argument is without merit. The Ninth Circuit Court of Appeals addressed a similar argument and explained that "*Sims* concerned only whether a claimant must present all relevant issues *to the Appeals Council* to preserve them for judicial review; the [Supreme] Court specifically noted that '[w]hether a claimant must exhaust

issues before the ALJ is not before us.' " *Shaibi*, 883 F.3d at 1109 (second alteration in original) (quoting *Sims*, 530 U.S. at 107, 120 S. Ct. 2080). Here, Iwan did not present her Appointments Clause challenge to the ALJ *or* the Appeals Council. Thus, the Eighth Circuit's finding in *Anderson*, that a claimant's failure to raise an issue during the administrative process waives the claim from being raised on appeal, is not affected by the holding in *Sims*. *See* 344 F.3d at 814. The court concludes that Iwan's Appointments Clause argument is waived.

VI. CONCLUSION

In light of the foregoing, it is hereby **ORDERED**:

(1) The Objections (docket no. 25) are **OVERRULED**;

(2) The Report and Recommendation (docket no. 17) is **ADOPTED** and the final decision of the Commissioner is **AFFIRMED**; and

(3) The Complaint (docket no. 3) is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

APPENDIX F

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

Destiny M. THURMAN, Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,
Defendant.

No. 17-CV-35-LRR

Filed: September 10, 2018

ORDER

READE, Judge.

I. INTRODUCTION

The matter before the court is Plaintiff Destiny M. Thurman's Objections (docket no. 20) to United States Magistrate Judge Kelly K.E. Mahoney's Report and Recommendation (docket no. 17), which recommends that the court affirm Defendant Commissioner of Social Security's ("Commissioner") final decision to deny disability benefits to Thurman.

II. RELEVANT PROCEDURAL HISTORY

On April 13, 2017, Thurman filed a Complaint (docket no. 3), seeking judicial review of the Commissioner's final decision denying Thurman's application for Title XVI Supplemental Security Income ("SSI") benefits. On June 23, 2017, the Commissioner filed an Answer (docket no. 7). On September 26, 2017, Thurman filed the Plaintiff's Brief (docket no. 11). On October 20, 2017, the Commissioner filed the Defendant's Brief (docket no. 15). On November 15, 2017, the matter was referred to Judge Mahoney for issuance of a report and recommendation. On June 28, 2018, Judge Mahoney issued the Report and Recommendation. On July 12, 2018, Thurman filed the Objections. On July 19, 2018, Thurman filed a Supplemental Brief (docket no. 22). On August 1, 2018, the Commissioner filed a Response to the Objections (docket no. 27). On August 23, 2018, the Commissioner filed a Response to the Supplemental Brief (docket no. 29). On August 30, 2018, Thurman filed a Reply Brief (docket no. 30). The matter is fully submitted and ready for decision.

III. STANDARD OF REVIEW

A. Review of Final Decision

The Commissioner's final determination not to award SSI benefits is subject to judicial review to the same extent as provided in 42 U.S.C. § 405(g). *See* 42 U.S.C. § 1383(c)(3). Pursuant to 42 U.S.C. § 405(g), the court has the power to "enter . . . a judgment affirming, modifying, or reversing the decision of the Commissioner . . . with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). The Commissioner's factual findings shall be conclusive "if supported by substantial evidence." *Id.* "The court 'must affirm the Commissioner's decision if it is supported by substantial evidence on the record as a

whole.' " *Bernard v. Colvin*, 774 F.3d 482, 486 (8th Cir. 2014) (quoting *Pelkey v. Barnhart*, 433 F.3d 575, 577 (8th Cir. 2006)). "Substantial evidence is less than a preponderance, but enough that a reasonable mind might accept it as adequate to support a decision." *Fentress v. Berryhill*, 854 F.3d 1016, 1019-20 (8th Cir. 2017) (quoting *Kirby v. Astrue*, 500 F.3d 705, 707 (8th Cir. 2007)).

In determining whether the Commissioner's decision meets this standard, the court considers "all of the evidence that was before the [administrative law judge ("ALJ")], but [it] do[es] not re-weigh the evidence." *Vester v. Barnhart*, 416 F.3d 886, 889 (8th Cir. 2005). The court considers "both evidence that detracts from the Commissioner's decision, as well as evidence that supports it." *Fentress*, 854 F.3d at 1020; *see also Cox v. Astrue*, 495 F.3d 614, 617 (8th Cir. 2007) (providing that review of the Commissioner's decision "extends beyond examining the record to find substantial evidence in support of the [Commissioner's] decision" and noting that the court must also "consider evidence in the record that fairly detracts from that decision"). The Eighth Circuit Court of Appeals explained this standard as follows:

> This standard is "something less than the weight of the evidence and it allows for the possibility of drawing two inconsistent conclusions, thus it embodies a zone of choice within which the [Commissioner] may decide to grant or deny benefits without being subject to reversal on appeal."

Culbertson v. Shalala, 30 F.3d 934, 939 (8th Cir. 1994) (quoting *Turley v. Sullivan*, 939 F.2d 524, 528 (8th Cir. 1991)). The court "will not disturb the denial of benefits so long as the ALJ's decision falls within the available zone of choice." *Buckner v. Astrue*, 646 F.3d 549, 556 (8th Cir. 2011) (quoting *Bradley v. Astrue*, 528 F.3d 1113, 1115 (8th

Cir. 2008)). "An ALJ's decision is not outside the zone of choice simply because [the court] might have reached a different conclusion had [the court] been the initial finder of fact." *Id.* (quoting *Bradley*, 528 F.3d at 1115). Therefore, "even if inconsistent conclusions may be drawn from the evidence, the [Commissioner's] decision will be upheld if it is supported by substantial evidence on the record as a whole." *Guilliams v. Barnhart*, 393 F.3d 798, 801 (8th Cir. 2005); *see also Igo v. Colvin*, 839 F.3d 724, 728 (8th Cir. 2016) (providing that a court "may not reverse simply because [it] would have reached a different conclusion than the [Commissioner] or because substantial evidence supports a contrary conclusion").

B. Review of Report and Recommendation

The standard of review to be applied by the 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); *see also* Fed. R. Civ. P. 72(b)(3) (providing that, when a party properly objects to a report and recommendation on a dispositive motion, a district court must review de novo the magistrate judge's recommendation). The Eighth Circuit has repeatedly held that it is reversible error for a district court to fail to conduct a de novo review of a magistrate judge's report and recommendation when such review is required. *See, e.g.*, *United States v. Lothridge*, 324 F.3d 599, 600 (8th Cir. 2003); *Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir. 1996);

Hudson v. Gammon, 46 F.3d 785, 786 (8th Cir. 1995); *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994). The statute governing review provides only for de novo review of "those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). When a party fails to object to any portion of a magistrate judge's report and recommendation, he or she waives the right to de novo review. *See Griffini v. Mitchell*, 31 F.3d 690, 692 (8th Cir. 1994). The United States Supreme Court has stated that "[t]here is no indication that Congress, in enacting § 636(b)(1)[ ], intended to require a district judge to review a magistrate's report to which no objections are filed." *Thomas v. Arn*, 474 U.S. 140, 152, 106 S. Ct. 466, 88 L.Ed.2d 435 (1985). However, "while the statute does not require the judge to review an issue de novo if no objections are filed, it does not preclude further review by the district judge, sua sponte or at the request of a party, under de novo or any other standard." *Id.* at 154, 106 S. Ct. 466.

The Eighth Circuit has suggested that in order to trigger de novo review, objections to a magistrate judge's conclusions must be specific. *See Branch v. Martin*, 886 F.2d 1043, 1046 (8th Cir. 1989); *see also Belk*, 15 F.3d at 815 (noting that some circuits do not apply de novo review when a party makes only general and conclusory objections to a magistrate judge's report and recommendation and finding that *Branch* indicates the Eighth Circuit's "approval of such an exception"); *Thompson v. Nix*, 897 F.2d 356, 357-58 (8th Cir. 1990) (reminding parties that "objections must be . . . specific to trigger de novo review by the [d]istrict [c]ourt of any portion of the magistrate's report and recommendation"). The Sixth Circuit Court of Appeals has explained this approach as follows:

> A general objection to the entirety of the magistrate's report has the same effects as would a failure to object. The district court's attention is not focused on any specific issues for review, thereby making the initial reference to the magistrate useless. The functions of the district court are effectively duplicated as both the magistrate and the district court perform identical tasks. This duplication of time and effort wastes judicial resources rather than saving them, and runs contrary to the purposes of the Magistrates Act. We would hardly countenance an appellant's brief simply objecting to the district court's determination without explaining the source of the error. We should not permit appellants to do the same to the district court reviewing the magistrate's report.

Howard v. Sec'y of Health & Human Servs., 932 F.2d 505, 509 (6th Cir. 1991); *see also Goney v. Clark*, 749 F.2d 5, 6 n.1 (3d Cir. 1984) (finding that "plaintiff's objections lacked the specificity necessary to trigger de novo review"); *Whited v. Colvin*, No. C 13-4039-MWB, 2014 WL 1571321, at *2-3 (N.D. Iowa Apr. 18, 2014) (concluding that, because the plaintiff "offer[ed] nothing more than a conclusory objection to . . . [the report and recommendation] . . . [the plaintiff's] objection [should be treated] as if he had not objected at all"); *Banta Corp. v. Hunter Publ'g Ltd. P'ship*, 915 F. Supp. 80, 81 (E.D. Wis. 1995) ("De novo review of a magistrate judge's recommendation is required only for those portions of the recommendation for which particularized objections, accompanied by legal authority and argument in support of the objections, are made.").

IV. OBJECTIONS

In the Objections, Thurman argues that: (1) Judge Mahoney generally erred in concluding that the ALJ's

credibility determination is supported by substantial evidence, and, in particular, asserts that Judge Mahoney improperly found that the ALJ correctly determined that Thurman's sporadic work history undermined her credibility; (2) Judge Mahoney improperly weighed medical opinions in the record; and (3) Judge Mahoney erred in concluding that the ALJ's residual functional capacity ("RFC") determination is supported by some evidence. *See* Objections at 2-4. After conducting a de novo review of the objected-to portions of the Report and Recommendation and the Administrative Record ("AR") (docket nos. 8-1 through 8-7), the court shall overrule the Objections.

A. Credibility Determination

Thurman objects to Judge Mahoney's finding that, "[b]ecause the ALJ in this case provided good reasons for not fully crediting Thurman's subjective complaints, [the ALJ's] assessment should be affirmed." Report and Recommendation at 9. Thurman raises two arguments in the Objections. First, relying on Plaintiff's brief, Thurman argues that Judge Mahoney erred "generally in [her] treatment of this issue." Objections at 2. Second, Thurman argues that Judge Mahoney improperly "endorsed the ALJ's finding that Ms. Thurman's sporadic work history undermined her credibility." *Id.*

When assessing a claimant's credibility, "the ALJ must consider all of the evidence, including objective medical evidence, the claimant's work history, and evidence relating to the factors set forth in *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)." *Vance v. Berryhill*, 860 F.3d 1114, 1120 (8th Cir. 2017). In *Polaski*, the Eighth Circuit stated that:

> [t]he [ALJ] must give full consideration to all 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; [and] (5) functional restrictions.

739 F.2d at 1322. The ALJ, however, may not disregard "a claimant's subjective complaints solely because the objective medical evidence does not fully support them." *Renstrom v. Astrue*, 680 F.3d 1057, 1066 (8th Cir. 2012) (quoting *Wiese v. Astrue*, 552 F.3d 728, 733 (8th Cir. 2009)).

Instead, an ALJ may discount a claimant's subjective complaints "if there are inconsistencies in the record as a whole." *Wildman v. Astrue*, 596 F.3d 959, 968 (8th Cir. 2010). If an ALJ discounts a claimant's subjective complaints, he or she is required to "make an express credibility determination, detailing the reasons for discounting the testimony, setting forth the inconsistencies, and discussing the *Polaski* factors." *Renstrom*, 680 F.3d at 1066 (quoting *Dipple v. Astrue*, 601 F.3d 833, 837 (8th Cir. 2010)); *see also Ford v. Astrue*, 518 F.3d 979, 982 (8th Cir. 2008) (stating that an ALJ is "required to 'detail the reasons for discrediting the testimony and set forth the inconsistencies found' " (quoting *Lewis v. Barnhart*, 353 F.3d 642, 647 (8th Cir. 2003))). Where an ALJ seriously considers, but for good reason explicitly discredits a claimant's subjective complaints, the court will not disturb the ALJ's credibility determination. *See Johnson v. Apfel*, 240 F.3d 1145, 1148 (8th Cir. 2001); *see also Schultz v. Astrue*, 479 F.3d 979, 983 (8th Cir. 2007) (providing that

deference is given to an ALJ when the ALJ explicitly discredits a claimant's testimony and gives good reason for doing so); *Gregg v. Barnhart*, 354 F.3d 710, 714 (8th Cir. 2003) ("If an ALJ explicitly discredits the claimant's testimony and gives good reason for doing so, we will normally defer to the ALJ's credibility determination."). "The credibility of a claimant's subjective testimony is primarily for the ALJ to decide, not the courts." *Igo*, 839 F.3d at 731 (quoting *Pearsall v. Massanari*, 274 F.3d 1211, 1218 (8th Cir. 2001)).

In the decision, the ALJ determined that, "[i]n terms of [Thurman's] alleged limitations, the medical evidence of record does not support a finding of total disability." AR at 17. The ALJ noted that:

> Generally, mental status examinations showed some anxiety, but there were no cognitive problems noted on exam. [Thurman's] Global Assessment of Functioning scores were consistently rated in the moderate range of symptoms/functioning in the 50s. She reported doing okay and denied problems with personal care or needing reminders to take care of personal needs/grooming or to take medication. She is able to drive a car and navigate the community independently. She reported shopping in stores and indicated that she is able to manage money.

Id. The ALJ further stated:

> Although [Thurman] has described significant symptoms and daily activities that are fairly limited, two factors weigh against considering these allegations to be strong evidence in favor of finding [Thurman] disabled. First, allegedly limited daily activities cannot be objectively verified with any reasonable degree of certainty. Secondly, even if [Thurman's] daily activities

> are truly limited as alleged, it is difficult to attribute that degree of limitation to [Thurman's] medical condition, as opposed to other reasons, in view of the relatively weak medical evidence and other factors discussed in this decision. Overall, [Thurman's] reported symptoms and limited daily activities are considered to be outweighed by the other factors discussed in this opinion.

Id. at 18. The ALJ also stated:

> Records indicate [Thurman] has sought treatment for her impairments. While her mental condition does cause some problems, she is able to handle [her] own affairs. While she may have some difficulty with extended periods of concentration and interacting with others, she is able to follow simple instructions and complete assigned tasks, is able to care for her personal needs, prepare simple meals, perform basic household chores, drive and shop when necessary. Based on the evidence, the undersigned has determined that she can adjust to other work that is unskilled in nature and requires limited contact with others.

Id. Finally, the ALJ noted that "[i]n her entire work history, [Thurman] has never worked long enough during the course of a calendar year to earn substantial gainful activity wages" and "[h]er sporadic work history raises some questions as to whether the current unemployment is truly the result of medical problems." *Id.* at 19.

It is clear from the ALJ's decision that he thoroughly considered and discussed Thurman's treatment history, medical history, functional restrictions, activities of daily living and use of medications in making his credibility de-

termination. The ALJ also properly considered Thurman's work history in finding her subjective allegations of disability less than credible. *See Julin v. Colvin*, 826 F.3d 1082, 1087 (8th Cir. 2016) (finding that a claimant's "poor employment history [which] suggested a lack of motivation to work" was a proper factor for the ALJ to rely on in discounting her subjective allegations of disability); *Wildman*, 596 F.3d at 968-69 (finding that consideration of a claimant's "sporadic work history" was a proper factor for the ALJ to rely on to discredit a claimant's subjective allegations of disability).

Thus, having reviewed the entire record, the court finds that the ALJ adequately considered and addressed the *Polaski* factors in determining that Thurman's subjective allegations of disability were not credible. *See Goff v. Barnhart*, 421 F.3d 785, 791 (8th Cir. 2005) (noting that an ALJ is not required to explicitly discuss each *Polaski* factor, it is sufficient if the ALJ acknowledges and considers those factors before discounting a claimant's subjective complaints). Therefore, because the ALJ seriously considered, but for good reasons explicitly discredited, Thurman's subjective complaints, the court will not disturb the ALJ's credibility determination. *See Johnson*, 240 F.3d at 1148. Even if inconsistent conclusions could be drawn on this issue, the court upholds the conclusions of the ALJ because they are supported by substantial evidence on the record as a whole. *See Guilliams*, 393 F.3d at 801. Accordingly, the court shall overrule this objection.

B. Medical Opinions

Thurman objects to Judge Mahoney's finding that "[t]he ALJ provided specific reasons, which . . . are supported by substantial evidence in the record, for not giving great weight to the opinions of Dr. Husman and the rest of Thurman's treatment team," which included Joan

Tatarka, a licensed social worker. Report and Recommendation at 11. Thurman argues that Judge Mahoney erred in finding that the ALJ's discussion of inconsistencies between Dr. Husman's opinions and Tatarka's opinions constituted "a good reason for the weight afforded to these opinions because it was never a reason relied on by the ALJ." Objections at 2. Thurman also argues that Judge Mahoney erred in accepting the ALJ's conclusion that the opinions of Dr. Husman and Tantarka should be discounted because "Thurman was not generally credibly reporting her limitations to social security, she probably was not generally credibly reporting her limitations to her treatment team, and her treatment team was probably parroting her reports." Objections at 3. Lastly, Thurman argues that Judge Mahoney erred in finding that a global assessment of functioning ("GAF") score "greater than 50 in a treating opinion provides a good reason for discounting that opinion." Objections at 4.

Dr. Husman, as Thurman's treating psychiatrist, is an "acceptable medical source." *See* 20 C.F.R. § 416.902(a) (providing that an "[a]cceptable medical source means a medical source who is a . . . [l]icensed physician (medical or osteopathic doctor)"). As such, "[t]he opinion of a treating physician is generally afforded 'controlling weight if that opinion is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the record.' " *Chesser v. Berryhill*, 858 F.3d 1161, 1164 (8th Cir. 2017) (quoting *Wildman*, 596 F.3d at 964). "Although a treating physician's opinion is entitled to great weight, it does not automatically control or obviate the need to evaluate the record as a whole." *Hogan v. Apfel*, 239 F.3d 958, 961 (8th Cir. 2001). The ALJ may discount or disregard a treating physician's opinion if other medical assessments are supported by superior medical evidence, or if the

treating physician has offered inconsistent opinions. *See Hamilton v. Astrue*, 518 F.3d 607, 610 (8th Cir. 2008). When an ALJ discounts a treating physician's opinion, he or she "must 'give good reasons' for doing so." *Chesser*, 858 F.3d at 1164 (quoting *Anderson v. Astrue*, 696 F.3d 790, 793 (8th Cir. 2012)). "Good reasons for assigning lesser weight to the opinion of a treating source exist where 'the treating physician's opinions are themselves inconsistent,' *Cruze [v. Chater*], 85 F.3d [1320,] 1325 [(8th Cir. 1996)], or where 'other medical assessments are supported by better or more thorough medical evidence,' *Prosch [v. Apfel*], 201 F.3d [1010,] 1012 [(8th Cir. 2000)]." *Id.*

Tatarka, however, as a licensed social worker, is not classified as an "acceptable medical source" under the Social Security Regulations. *See* 20 C.F.R. § 416.902(a) (listing medical providers that constitute an "acceptable medical source"); *see also Nowling v. Colvin*, 813 F.3d 1110, 1123 (8th Cir. 2016) (classifying a licensed clinical social worker/therapist as not an "acceptable medical source"); *Sloan v. Astrue*, 499 F.3d 883, 888 (8th Cir. 2007) (classifying licensed clinical social workers and therapists as "other sources" in contrast to "acceptable medical sources"); SSR 06-03p, 2006 WL 2329939, at *2 (Aug. 9, 2006) (providing that "other sources" include "[m]edical sources who are not 'acceptable medical sources,' " such as "nurse practitioners, physician assistants, licensed clinical social workers, naturopaths, chiropractors, audiologists, and therapists"). In *Sloan*, the Eighth Circuit has explained that:

> Information from these "other sources" cannot establish the existence of a medically determinable impairment, according to SSR 06-3p. Instead, there must be evidence from an "acceptable medical source" for this

> purpose. However, information from such "other sources" may be based on special knowledge of the individual and may provide insight into the severity of the impairment(s) and how it affects the individual's ability to function.

499 F.3d at 888 (quotations omitted). In considering "other souces," such as Tatarka, "the ALJ may consider, among other things, the length of treatment relationship, whether the opinion is consistent with other evidence, the evidence underlying the opinion, and the quality of the opinion's explanation." *Chesser*, 858 F.3d at 1166 (citing SSR 06-03p, 2006 WL 2329939 at *4-5). In determining the weight to be afforded to "other medical evidence," an "ALJ has more discretion and is permitted to consider any inconsistencies found within the record." *Raney v. Barnhart*, 396 F.3d 1007, 1010 (8th Cir. 2005).

The ALJ addressed Dr. Husman's and Tatarka's opinions as follows:

> [Thurman's] treating psychiatrist and licensed social worker offered medical source statements opining limitations in function due to [Thurman's] conditions (Exhibit 9F, 10F), as well as copies of the Iowa Department of Human Services "Report on Incapacity" forms (Exhibit 12F). The opinions offer significant levels of disability with marked to extreme limitations in various areas of functioning, although the psychiatrist and licensed social worker contradict each other in several areas from limits in daily activities versus concentration, persistence, and pace. They overall indicate that [Thurman] has significant restrictions in interacting with others and generally adhering to a work schedule/atmosphere. The providers apparently relied quite heavily on the subjective report of symptoms and

> limitations provided by [Thurman], and seemed to uncritically accept as true most, if not all, of what [Thurman] reported. Yet, as explained elsewhere in this decision, there exist good reasons for questioning the reliability of [Thurman's] subjective complaints. In turn, the provider's opinions are without substantial support from the other evidence of record, including h[er] own longitudinal treatment history of [Thurman] that was routine and conservative management with no more than moderate symptomology and Global Assessment of Functioning scores in similar range, which obviously renders it less persuasive. The undersigned therefore declines to afford these opinions great weight.

AR at 19. Additionally, in his decision, the ALJ thoroughly reviewed Thurman's mental health history and treatment, and noted inconsistencies between her claims of disability and her functional abilities and successful treatment. *See generally* AR at 17-18 (ALJ's review of Thurman's mental health history and treatment). For example, the ALJ found that:

> [Thurman] noted some mood swings at times but has often reported doing pretty well and [being] stable on her medication regimen . . . . Generally, mental status examinations showed some anxiety, but there were no cognitive problems noted on exam. Her Global Assessment of Functioning scores were consistently rated in the moderate range of symptoms/functioning in the 50s. She reported doing okay and denied problems with personal care or needing reminders to take care of personal needs/grooming or to take medication. She is able to drive a car and navigate the community independently. She reported shopping in stores and indicated that she is able to manage money . . . . During

> the course of treatment, [Thurman] did not report problems with memory, attention, or concentration noting she can pay attention for an hour and follow instructions well.

Id. at 17.

Having reviewed the entire record, the court finds that the ALJ properly considered and weighed the opinion evidence provided by Dr. Husman. The court further finds that the ALJ properly considered Tatarka's opinions in accordance with SSR 06-03p. The ALJ articulated good reasons for discounting the opinions of Dr. Husman and Tatarka, and for finding the opinions to be inconsistent with the record as a whole. *See Chesser*, 858 F.3d at 1164 (requiring an ALJ to give good reasons for discounting the opinions of a treating source, including discounting a treating source opinion "where the treating physician's opinions are themselves inconsistent"); *Raney*, 396 F.3d at 1010 (providing that in considering the opinions of a medical source that is not an "acceptable medical source," an "ALJ has more discretion and is permitted to consider any inconsistencies found within the record"); *Kirby*, 500 F.3d at 709 (providing that an ALJ is entitled to give less weight to a medical source opinion where the opinion is based on a claimant's subjective complaints rather than on objective medical evidence); *Halverson v. Astrue*, 600 F.3d 922, 931 (8th Cir. 2010) (providing that GAF scores between 52 and 60 supported an ALJ's finding of moderate symptoms and discounting a treating physician's more extreme opinions).[1] Even if inconsistent conclusions could

[1] Contrary to Thurman's assertion that the record lacks "a robust GAF score history," a review of the record shows that Dr. Husman assessed Thurman's GAF score seven times. In all seven assessments, Dr. Husman gave Thurman a GAF score between 62 and 64. *See* AR at 373, 387-88, 390, 432, 435, 437. Tatarka assessed Thurman's

be drawn on this issue, the court upholds the conclusions of the ALJ because they are supported by substantial evidence on the record as a whole. *See Guilliams*, 393 F.3d at 801. Accordingly, the court shall overrule this objection.

C. RFC Assessment

Here, Thurman offers a purely conclusory argument and states only that she "continues to rely on her principal brief, and objects to the [Report and Recommendation] generally in its treatment of this issue." Objections at 4. The court presumes that Thurman objects to Judge Mahoney's conclusions that "[t]he record contained sufficient information for the ALJ to determine Thurman's functional limitations, and the ALJ's RFC determination is supported by some medical evidence." Report and Recommendation at 22. Initially, the court notes that Thurman's argument fails to comply with the Local Rules, which require "[a] party who objects to . . . a magistrate judge's report and recommendation" to "file *specific*, written objections to the . . . report and recommendation." LR 72A (emphasis added). Moreover, Thurman's failure to object to Judge Mahoney's findings regarding the ALJ's RFC determination with any specificity means that Thurman has waived her right to de novo review of this issue. *See Thompson*, 897 F.2d at 357-58 (providing that "objections must be . . . specific to trigger de novo review by the [d]istrict [c]ourt of any portion of the magistrate's report and recommendation"). Nevertheless, out of an abundance of caution, and in this instance, the court shall review the ALJ's RFC determination de novo. *See Thomas*, 474 U.S. at 154, 106 S. Ct. 466 (providing that, while de novo review is not required when a party fails to object to

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GAF score twice with scores of 58 and 62 respectively. *See id.* at 352, 380.

a magistrate judge's report and recommendation, the court may apply "de novo or any other standard [of review]").

When an ALJ determines that a claimant is not disabled, he or she concludes that the claimant retains the RFC to perform a significant number of other jobs in the national economy that are consistent with the claimant's impairments and vocational factors such as age, education and work experience. *See Beckley v. Apfel*, 152 F.3d 1056, 1059 (8th Cir. 1998). The ALJ is responsible for assessing a claimant's RFC, and his or her assessment must be based on all of the relevant evidence. *See Combs v. Berryhill*, 878 F.3d 642, 646 (8th Cir. 2017). Relevant evidence for determining a claimant's RFC includes "medical records, observations of treating physicians and others, and an individual's own description of [her] limitations." *Id.* (alteration in original) (quoting *Strongson v. Barnhart*, 361 F.3d 1066, 1070 (8th Cir. 2004)). "Because a claimant's RFC is a medical question, an ALJ's assessment of it must be supported by some medical evidence of the claimant's ability to function in the workplace." *Id.* (quoting *Steed v. Astrue*, 524 F.3d 872, 875 (8th Cir. 2008)).

Additionally, an ALJ "has a duty to fully and fairly develop the evidentiary record." *Byes v. Astrue*, 687 F.3d 913, 915-16 (8th Cir. 2012); *see also Smith v. Barnhart*, 435 F.3d 926, 930 (8th Cir. 2006) ("A social security hearing is a non-adversarial proceeding, and the ALJ has a duty to fully develop the record."). "There is no bright line rule indicating when the Commissioner has or has not adequately developed the record; rather, such an assessment is made on a case-by-case basis." *Mouser v. Astrue*, 545 F.3d 634, 639 (8th Cir. 2008).

The ALJ thoroughly addressed and considered Thurman's medical and treatment history. *See* AR at 17-19

(providing a thorough discussion of Thurman's overall medical history and treatment). The ALJ also properly considered and thoroughly addressed Thurman's subjective allegations of disability in making his overall disability determination, including determining Thurman's RFC. *See id.* at 18-19 (providing a thorough review of Thurman's subjective allegations of disability). Therefore, having reviewed the entire record, the court finds that the ALJ properly considered Thurman's medical records, observations of treating physicians and Thurman's own description of her limitations in making the RFC assessment for Thurman. *See id.* at 17-19 (providing a thorough discussion of the relevant evidence for making a proper RFC determination); *see also Combs*, 878 F.3d at 646 (explaining what constitutes relevant evidence for assessing a claimant's RFC). Furthermore, the court finds that the ALJ's decision is based on a fully and fairly developed record. *See Byes*, 687 F.3d at 915-16. Because the ALJ considered the medical evidence as a whole, the court concludes that the ALJ made a proper RFC determination supported by some medical evidence. *See Combs*, 878 F.3d at 646; *Guilliams*, 393 F.3d at 803. Accordingly, the court shall overrule the objection.

V. SUPPLEMENTAL BRIEF

In the Supplemental Brief, Thurman contends that the ALJ that decided Thurman's claim "was an inferior officer not appointed in a constitutional manner" and, therefore, the ALJ's decision must be vacated and the case must be remanded to be decided by a properly appointed ALJ. Supplemental Brief at 1-2. Thurman relies on *Lucia v. S.E.C.*, —— U.S. ——, 138 S. Ct. 2044, —— L.Ed.2d —— (2018), which held that ALJs for the Securities and Exchange Commission are "Officers of the

United States," and therefore, are subject to the Appointments Clause. 138 S. Ct. at 2055.

In *Lucia*, the Supreme Court stated that " 'one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief." *Id.* at 2055 (quoting *Ryder v. United States*, 515 U.S. 177, 182-83, 115 S. Ct. 2031, 132 L.Ed.2d 136 (1995)). The Supreme Court further stated that the plaintiff had "made just such a timely challenge: He contested the validity of [the presiding ALJ's] appointment before the Commission, and continued pressing that claim in the Court of Appeals and this Court." *Id.* Unlike the plaintiff in *Lucia*, Thurman did not contest the validity of the Social Security Administration ALJ who decided her case at the agency level. The record clearly demonstrates that Thurman did not raise her Appointments Clause argument before either the ALJ or the Appeals Council. Rather, Thurman raised this issue for the first time to this court on judicial review, after Judge Mahoney had issued the Report and Recommendation. Because Thurman did not raise her Appointments Clause challenge before the ALJ or Appeals Council, the court finds that she has waived this issue. *See N.L.R.B. v. RELCO Locomotives, Inc.*, 734 F.3d 764, 798 (8th Cir. 2013) (concluding that a plaintiff who raised an Appointments Clause challenge "waived its challenge to the Board's composition because it did not raise the issue before the Board"); *Anderson v. Barnhart*, 344 F.3d 809, 814 (8th Cir. 2003) (finding that a claimant's failure to raise a disability claim during the administrative process "waived [the claim] from being raised on appeal"); *Shaibi v. Berryhill*, 883 F.3d 1102, 1109 (9th Cir. 2017) ("[W]hen claimants are represented by counsel, they must raise all issues and evidence at their administrative hearings in order to preserve them on appeal." (quoting *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th

Cir. 1999))); *Trejo v. Berryhill*, No. EDCV 17-0879-JPR, 2018 WL 3602380, at *3 n.3 (C.D. Cal. July 25, 2018) ("To the extent *Lucia* applies to Social Security ALJs, [the] [p]laintiff has forfeited the issue by failing to raise it during her administrative proceedings.").

Thurman asserts that "[i]t should be noted that *Sims v. Apfel*, [530 U.S. 103 (2000)] controls concerning the potential waiver issue . . . for parties wishing to raise Appointments Clause issues for the first time in federal court, as there is no waiver of issues by claimants for failing to present them to the Appeals Council." Supplemental Brief at 6. Thurman's argument is without merit. The Ninth Circuit Court of Appeals addressed a similar argument and explained that "*Sims* concerned only whether a claimant must present all relevant issues *to the Appeals Council* to preserve them for judicial review; the [Supreme] Court specifically noted that '[w]hether a claimant must exhaust issues before the ALJ is not before us.' " *Shaibi*, 883 F.3d at 1109 (second alteration in original) (quoting *Sims*, 530 U.S. at 107, 120 S. Ct. 2080). Here, Thurman did not present her Appointments Clause challenge to the ALJ *or* the Appeals Council. Thus, the Eighth Circuit's finding in *Anderson*, that a claimant's failure to raise an issue during the administrative process waives the claim from being raised on appeal, is not affected by the holding in *Sims. See* 344 F.3d at 814. The court concludes that Thurman's Appointments Clause argument is waived.

VI. CONCLUSION

In light of the foregoing, it is hereby **ORDERED:**

(1) The Objections (docket no. 20) are **OVERRULED**;

(2) The Report and Recommendation (docket no. 17) is **ADOPTED** and the final decision of the Commissioner is **AFFIRMED**; and

(3) The Complaint (docket no. 3) is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

APPENDIX G

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

John J. DAVIS, Plaintiff,

v.

Nancy A. BERRYHILL, Acting Commissioner of Social Security, Defendant.

No. 17-CV-80-LRR

Filed: July 27, 2018

REPORT AND RECOMMENDATION

WILLIAMS, Chief United States Magistrate Judge.

The claimant, John J. Davis ("claimant"), seeks judicial review of a final decision of the Commissioner of Social Security ("the Commissioner") denying his application for disability insurance benefits (DIB) and Supplemental Security Income (SSI), under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 401-34 (Act). Claimant contends that the Administrative Law Judge ("ALJ") erred in determining that claimant was not disabled. For the following reasons, I respectfully recommend that the Court **AFFIRM** the ALJ's decision.

I. BACKGROUND

I have adopted the facts as set forth in the parties' Joint Statement of Facts (Doc. 13) and, therefore, will summarize only the pertinent facts. Claimant was born in 1962, was 50 years old when he allegedly became disabled, and was 54 years old at the time of the ALJ's decision. (AR 115-16).[1] Claimant has prior work experience; his work activity since the alleged onset date, however, did not rise to the level of substantial gainful activity. (AR 107).

On February 10, 2014, claimant applied for a period of disability and disability insurance benefits. (AR 105). On December 22, 2014, claimant applied for supplemental security income. (*Id.*). In both applications, claimant alleged disability beginning May 1, 2013. (*Id.*). In 2014, the Commissioner denied claimant's application initially and on reconsideration. (AR 124-27, 134-37). On April 19, 2016, ALJ Julie Bruntz held a hearing at which claimant and a vocational expert testified. (AR 23-65). On June 23, 2016, the ALJ found claimant was not disabled. (AR 105-16). On June 23, 2017, the Appeals Council denied claimant's request for review of the ALJ's decision, making the ALJ's decision final and subject to judicial review. (AR 8-11).

On July 24, 2017, claimant filed his complaint in this Court. (Doc. 3). By January 31, 2018, the parties had submitted their respective briefs (Docs. 14; 15), and on February 21, 2018, the Court deemed this case fully submitted and ready for decision (Doc. 16). On May 21, 2018, the Honorable Linda R. Reade, United States District Court Judge, referred this case to me for a Report and Recommendation.

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[1] "AR" refers to the administrative record below.

II. DISABILITY DETERMINATIONS AND THE BURDEN OF PROOF

A disability is defined 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 12 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). An individual has a disability when, due to his physical or mental impairments, "he 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. §§ 423(d)(2)(A), 1382c(a)(3)(B). If the claimant is able to do work which exists in the national economy but is unemployed because of inability to get work, lack of opportunities in the local area, economic conditions, employer hiring practices, or other factors, the ALJ will still find the claimant not disabled.

To determine whether a claimant has a disability within the meaning of the Act, the Commissioner follows the five-step sequential evaluation process outlined in the regulations. *Kirby v. Astrue*, 500 F.3d 705, 707-08 (8th Cir. 2007). First, the Commissioner will consider a claimant's work activity. If the claimant is engaged in substantial gainful activity, then the claimant is not disabled. 20 C.F.R. § 416.920(a)(4)(i). "Substantial" work activity involves physical or mental activities. "Gainful" activity is work done for pay or profit, even if the claimant did not ultimately receive pay or profit.

Second, if the claimant is not engaged in substantial gainful activity, then the Commissioner looks to the severity of the claimant's physical and mental impairments. § 416.920(a)(4)(ii). If the impairments are not severe, then the claimant is not disabled. An impairment is not severe if it does "not significantly limit [a] claimant's physical or mental ability to do basic work activities." *Kirby*, 500 F.3d at 707.

The ability to do basic work activities means the ability and aptitude necessary to perform most jobs. *Bowen v. Yuckert*, 482 U.S. 137, 141 (1987). These include: (1) physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; (2) capacities for seeing, hearing, and speaking; (3) understanding, carrying out, and remembering simple instructions; (4) use of judgment; (5) responding appropriately to supervision, co-workers, and usual work situations; and (6) dealing with changes in a routine work setting. *Id.*; *see also* 20 C.F.R. § 404.1521.

Third, if the claimant has a severe impairment, then the Commissioner will determine the medical severity of the impairment. 20 C.F.R. § 416.920(a)(4)(iii). If the impairment meets or equals one of the presumptively disabling impairments listed in the regulations, then the claimant is considered disabled regardless of age, education, and work experience. *Kelley v. Callahan*, 133 F.3d 583, 588 (8th Cir. 1998).

Fourth, if the claimant's impairment is severe, but it does not meet or equal one of the presumptively disabling impairments, then the Commissioner will assess the claimant's residual functional capacity (RFC) and the demands of his past relevant work. 20 C.F.R. § 416.920(a)(4)(iv). If claimant can still do his past relevant

work, then he is considered not disabled. (*Id.*). Past relevant work is any work the claimant performed within the fifteen years prior to his application that was substantial gainful activity and lasted long enough for the claimant to learn how to do it. § 416.960(b). "RFC is a medical question defined wholly in terms of the claimant's physical ability to perform exertional tasks or, in other words, what the claimant can still do despite his [ ] physical or mental limitations." *Lewis v. Barnhart*, 353 F.3d 642, 646 (8th Cir. 2003) (citations and internal quotation marks omitted). The RFC is based on all relevant medical and other evidence. Claimant is responsible for providing the evidence the Commissioner will use to determine the RFC. *Eichelberger v. Barnhart*, 390 F.3d 584, 591 (8th Cir. 2004). If a claimant retains enough RFC to perform past relevant work, then the claimant is not disabled.

Fifth, if the claimant's RFC as determined in Step Four will not allow the claimant to perform past relevant work, then the burden shifts to the Commissioner to show there is other work the claimant can do, given the claimant's RFC, age, education, and work experience. The Commissioner must show not only that the claimant's RFC will allow him to make the adjustment to other work, but also that other work exists in significant numbers in the national economy. *Eichelberger*, 390 F.3d at 591. If the claimant can make the adjustment, then the Commissioner will find the claimant not disabled. At Step Five, the Commissioner has the responsibility of developing the claimant's medical history before making a determination about the existence of a disability. The burden of persuasion to prove disability remains on the claimant. *Stormo v. Barnhart*, 377 F.3d 801, 806 (8th Cir. 2004).

III. ALJ'S FINDINGS

The ALJ made the following findings at each step:

At Step One, the ALJ found that claimant had not engaged in substantial gainful activity since May 1, 2013, the alleged onset date of disability. (AR 107).

At Step Two, the ALJ found that claimant had the following severe impairments: "degenerative disc disease of the lumbar spine, osteoarthritis of the knees, fibromyalgia, asthma, affective disorder, personality disorder, and substance abuse disorder." (AR 108).

At Step Three, the ALJ found that none of claimant's impairments or combination of impairments met or medically equaled a presumptively disabling impairment listed in the relevant regulations. (*Id.*).

At Step Four, the ALJ found claimant had the RFC to perform light work with the following limitations:

> [Claimant] could lift and carry 20 pounds occasionally and 10 pounds frequently. He could stand and walk for six hours in an eight-hour workday and sit for six hours in an eight-hour workday. His ability to push and pull, including the operation of hand and foot controls, would be unlimited within these weights. He is left-hand dominant. He could occasionally climb ramps and stairs, balance, stoop, kneel, and crouch. He could never climb ladders, ropes, or scaffolds, and never crawl. He would need to avoid concentrated exposure to extreme cold, humidity, fumes, odors, gasses, poor ventilation, and dust. Further, he would be limited to performing simple, routine tasks. He could have only occasional contact with the public, coworkers, and supervisors.

(AR 109-10). Also at Step Four, the ALJ found that "comparing the claimant's current RFC with the demands of the claimant's past relevant work, the demands of said

work exceed the current RFC. Accordingly, the clamant is unable to perform past relevant work." (AR 115).

At Step Five, the ALJ found that considering claimant's age, education, work experience, and RFC, there were jobs that existed in significant numbers in the national economy that claimant could perform. (*Id.*). These included Assembler, Molding Machine Tender, and Mail Sorter. (AR 116). Therefore, the ALJ found that claimant was not disabled. (*Id.*).

IV. THE SUBSTANTIAL EVIDENCE STANDARD

The Commissioner's decision must be affirmed "if it is supported by substantial evidence on the record as a whole." *Pelkey v. Barnhart*, 433 F.3d 575, 577 (8th Cir. 2006); *see* 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. . .."). "Substantial evidence is less than a preponderance, but enough that a reasonable mind might accept as adequate to support a conclusion." *Lewis*, 353 F.3d at 645 (citations and internal quotation marks omitted). The Eighth Circuit Court of Appeals explains the standard as "something less than the weight of the evidence and [that] allows for the possibility of drawing two inconsistent conclusions, thus it embodies a zone of choice within which the [Commissioner] may decide to grant or deny benefits without being subject to reversal on appeal." *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citations and internal quotation marks omitted).

In determining whether the Commissioner's decision meets this standard, a court "consider[s] all of the evidence that was before the ALJ, but . . . do[es] not re-weigh the evidence." *Vester v. Barnhart*, 416 F.3d 886, 889 (8th

Cir. 2005) (citation omitted). A court considers both evidence that supports the Commissioner's decision and evidence that detracts from it. *Kluesner v. Astrue*, 607 F.3d 533, 536 (8th Cir. 2010). The Court must "search the record for evidence contradicting the [Commissioner's] decision and give that evidence appropriate weight when determining whether the overall evidence in support is substantial." *Baldwin v. Barnhart*, 349 F.3d 549, 555 (8th Cir. 2003) (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. Sec'y of Health & Human Servs.*, 879 F.2d 441, 444 (8th Cir. 1989). The Court, however, "do[es] not reweigh the evidence presented to the ALJ," *Baldwin*, 349 F.3d at 555 (citing *Bates v. Chater*, 54 F.3d 529, 532 (8th Cir. 1995)), 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 "find[s] it 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] denial of benefits." *Kluesner*, 607 F.3d at 536 (quoting *Finch v. Astrue*, 547 F.3d 933, 935 (8th Cir. 2008)). This is true even in cases where the Court "might have weighed the evidence differently." *Culbertson*, 30 F.3d at 939 (quoting *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)). The Court may not reverse the Commissioner's decision "merely because substantial evidence would have supported an opposite decision." *Baker v. Heckler*, 730 F.2d 1147, 1150 (8th Cir. 1984); *see Goff v. Barnhart*, 421 F.3d 785, 789 (8th Cir.

2005) ("[A]n administrative decision is not subject to reversal simply because some evidence may support the opposite conclusion" (citation omitted).).

V. DISCUSSION

Claimant argues that the ALJ erred in three ways. First, claimant argues the ALJ's RFC assessment is flawed because the ALJ discounted claimant's subjective allegations without identifying inconsistencies within the record as a whole. (Doc. 14, at 3-12). Second, claimant argues that new and additional evidence was erroneously omitted from the record by the Appeals Council. (Doc. 14, at 13-15). Third, claimant argues that because the ALJ's decision was not supported by substantial medical evidence from a treating or examining source, the ALJ's decision could not have been supported by substantial medical evidence on the record as a whole. (Doc. 14, at 15-17). I will address each argument in order.

A. Claimant's Subjective Allegations

Claimant argues that the ALJ's RFC assessment at Step Four was flawed because the ALJ did not have a sufficient reason for discounting claimant's subjective allegations. (Doc. 14, at 3). Claimant further contends that the objective record fully supports claimant's testimony. (*Id.*, at 3-12).

A claimant's subjective allegations are to be evaluated according to the standards set forth in *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984) (outlining the factors that the adjudicator must give full consideration to relating to subjective complaints). In addition to the objective medical evidence, the ALJ must consider, *inter alia*: "(i) [the] claimant's daily activities; (ii) the duration, frequency, and intensity of the claimant's pain; (iii) precipitating and aggravating factors; (iv) dosage, effectiveness,

and side effects of medication; and (v) functional restrictions." *Wheeler v. Berryhill*, No. C17-4038-LTS, 2018 WL 2266514, at *6 (N.D. Iowa May 17, 2018) (citing *Guilliams v. Barnhart*, 393 F.3d 798, 802 (8th Cir. 2005)).

Here, the ALJ referenced claimant's daily activities; the location, duration, frequency, and intensity of claimant's pain; factors that precipitate and aggravate the symptoms; effectiveness of medication or other treatment modalities; and any other factors that concern claimant's functional limitations. (AR 113); *accord Polaski*, 739 F.2d. at 1322. Although the ALJ did not specifically cite to the *Polaski* case, she nevertheless discussed the required relevant factors. Nothing more is needed. *See Myers v. Colvin*, 721 F.3d 521, 527 (8th Cir. 2013) (holding the ALJ "was not required to discuss each factor's weight in the credibility calculus"). "If the ALJ gives good reasons for discrediting some testimony, the court is bound by that finding unless it is not supported by substantial evidence on the record as a whole." *Wheeler*, 2018 WL 2266514, at *7 (citing *Robinson v. Sullivan*, 956 F.2d 836, 841 (8th Cir. 1992)). This Court, in *Wheeler*, pointed to several instances where the ALJ identified inconsistencies between claimant's complaints and the medical evidence of record as sufficient "good reasons" for the ALJ to discredit claimant's testimony. (*Id.*).

In her decision, the ALJ pointed to objective medical evidence in the medical record that eroded claimant's subjective allegations. (AR 114). The ALJ found that the physical examinations showed claimant's functions, such as motor strength, sensation, reflexes, and gait, had remained "grossly intact" throughout the medical record. (*Id.*). Further, the ALJ highlighted that although claimant had a consistently low or agitated mood, claimant's general mental status was unremarkable throughout the

medical record, and that treatment notes indicated that claimant's depression was largely situational. (*Id.*).

Further, the ALJ found it significant that the claimant's own statements and actions were inconsistent with claimant's subjective allegations. (AR 113-14). Specifically, the ALJ highlighted evidence within the record of the claimant's self-disclosed daily activities, including independent living, household cleaning, shopping trips, traveling out of state, and his prior work history, including two jobs claimant performed as recently as November 2015. (AR 113). The ALJ found that this level of activity contradicted claimant's subjective allegations of the intensity, persistence, and limiting effects of the alleged symptoms. (AR 114).

Claimant argues that a person does not have to be bedridden to be found disabled. (Doc. 14, at 11) (citing *Reed v. Barnhart*, 399 F.3d 917, 924 (8th Cir. 2005)). The Eighth Circuit, however, more recently held that "acts such as cooking, vacuuming, washing dishes, doing laundry, shopping, driving, and walking, are inconsistent with subjective complaints of disabling pain." *Medhaug v. Astrue*, 578 F.3d 805, 817 (8th Cir. 2009) (citation omitted). Additionally, the *Medhaug* court found that it was proper for the ALJ to consider claimant's employment occurring after the alleged onset of disability, because "[w]orking generally demonstrates an ability to perform a substantial gainful activity." *Id.*, at 816 (alteration in original) (citation and internal quotation marks omitted). Acts that are inconsistent with subjective allegations diminish a claimant's credibility. *Johnson v. Apfel*, 240 F.3d 1145, 1148 (8th Cir. 2001). Here, in support of her conclusion that claimant's subjective allegations contradicted the record, the ALJ referenced claimant's inaccurate reporting of his own

work history, failure to comply with recommended treatments, and that the record did not support claimant's testimony that he was prescribed a cane for ambulatory assistance. (*See* AR 110-14). When an ALJ explicitly discredits a claimant's testimony and gives good reasons for doing so, a court should normally defer to the ALJ's credibility determination because the ALJ has had the opportunity to observe the claimant firsthand. *Gregg v. Barnhart*, 354 F.3d 710, 714 (8th Cir. 2003). I find that the ALJ has given good reasons for discounting claimant's subjective allegations, and thus, I accept the ALJ's credibility determination.

While claimant correctly states that the ALJ gave little weight to claimant's close friend, Ms. Wendy Bruns' statement, claimant erroneously argues that the ALJ's rejection of Ms. Bruns' report was a reason the ALJ denied the claim. (Doc. 14, at 12). In fact, the ALJ simply stated that "great weight cannot be given to [Ms. Bruns'] report because it . . . is simply not consistent with the objective medical evidence in this case." (AR 112). Further, an ALJ may discount corroborating testimony on the same basis used to discredit the claimant's testimony. *See Black v. Apfel*, 143 F.3d 383, 387 (8th Cir. 2006) (stating that the ALJ's failure to give specific reason for disregarding a third-party's testimony was inconsequential, as the same reasons ALJ gave to discredit claimant could serve as the basis for discrediting the third-party). In this case, I find there are adequate grounds for the ALJ to find that Ms. Bruns' report could not establish claimant's disability, and that her statement was contradicted by the medical evidence in the record. Therefore, the ALJ could properly reject Ms. Bruns' statement.

Contrary to claimant's argument, the ALJ did consider the record as a whole in deciding to discount claimant's subjective allegations. I find that although claimant presented testimony and evidence of disabling limitations, the ALJ's decision was supported by substantial evidence on the record as a whole.

B. Evidence Provided to the Appeals Council

Claimant argues that the Commissioner erred in not including the statement of claimant's therapist, Ms. Brenda Miller, LISW, in the Administrative Record. (Doc. 14, at 14-15). Ms. Miller's statement was dated November 29, 2016, and was submitted along with claimant's brief to the Appeals Council. (AR 318). Although not referenced by either party, Claimant appears to rely on the Appeals Council's apparent failure to properly follow the Social Security Administration's Hearings, Appeals, and Litigation Law Manual ("HALLEX"). HALLEX I-3-5-20(C) requires that an analyst for the Appeals Council "associate" any additional evidence presented to the Appeals Council into the certified administrative record for judicial review. Ms. Miller's statement, however, was omitted from the record. Claimant alleges that this failure to follow the HALLEX regulations is reversible error, for which this Court must remand.

The Eighth Circuit Court of Appeals has not explicitly ruled on the legal effect of the HALLEX. *See, e.g., Mukakabanda v. Colvin*, No. 15-CV-00116-CJW, 2017 WL 405919, *12 n.7 (N.D. Iowa Jan. 30, 2017). Other circuits, however, have. The Ninth Circuit Court of Appeals has held that "HALLEX does not have the force and effect of law, it is not binding on the Commissioner[,] and we will not review allegations of noncompliance with the manual." *Moore v. Apfel*, 216 F.3d 864, 868-69 (9th Cir. 2000). Con-

versely, the Fifth Circuit Court of Appeals held that although HALLEX does not carry the authority of law, "if prejudice results from a violation [of internal rules, such as HALLEX], the result cannot stand." *Newton v. Apfel*, 209 F.3d 448, 459 (5th Cir. 2000) (citation omitted).

This Court has previously found that the HALLEX's "guidance is not binding on courts, but is instructive." *Markovic v. Colvin*, No. C15-2059-CJW, 2016 WL 4014683, at *5 (N.D. Iowa July 26, 2016). I, however, do not have to reach the question of the binding nature of HALLEX to provide a recommendation in this case, nor does the Court have to reach this question to render a final judgment.

Pursuant to Title 42, United States Code, Section 405(g), a court may order that additional evidence be taken before the Commissioner, and that the Commissioner "shall file with the court . . . in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based." Acting *sua sponte*, on June 22, 2018, the Court ordered the Commissioner to provide the Court with Ms. Miller's statement dated November 29, 2016. (Doc. 17). On July 9, 2018, the Commissioner filed "a copy of the statement by Ms. Brenda Miller dated November 29, 2016" with the Court.[2] (Docs. 18, at 1; 18-1).

Although the ALJ did not review Ms. Miller's statement, the Appeals Council did review the statement and concluded that it would not have changed the outcome,

[2] Ms. Miller's statement was filed by the SSA as pages 751-58 of the Certified Administrative Record, and I will cite to Ms. Miller's statement dated November 29, 2016, as AR 751-58 in this report and recommendation.

had the statement been provided to the ALJ. (AR 9). Significantly, although the Administrative Record before the ALJ did not include Ms. Miller's statement dated November 29, 2016, it did include Ms. Miller's notes from twenty sessions with claimant. (*See* AR 588-640). The ALJ considered these therapy notes when reviewing claimant's mental health medical evidence. (AR 112). These notes contradict Ms. Miller's statement regarding claimant's ability to work. (*Compare* AR 588-640 *with* AR 754-55). For example, on October 28, 2014, Ms. Miller enabled claimant to apply for a peer support program position. (AR 596). Yet, in her statement of November 29, 2016, Ms. Miller stated that claimant was unable to meet competitive standards in the areas of: "[i]nteract[ing] appropriately with the general public; [w]ork[ing] in coordination with or proximity to others without being unduly distracted; and [g]et[ting] along with co-workers or peers without unduly distracting them." (AR 754-55). Claimant was ultimately not accepted for the position not because of his impairments, but because of difficulties passing a background check. (AR 600; 602; 608). In response to claimant's difficulties finding work, Ms. Miller offered counseling on "steps [claimant] can take to find employment. (*Id.*). In contrast, Ms. Miller's statement states that claimant is either "seriously limited" or "unable to meet competitive work standards" in seventeen of twenty-two categories. (AR 754-55). Finally, Ms. Miller's statement regarding claimant's inability to meet competitive work standards as relayed in claimant's brief hews very closely to opining on issues reserved to the Commissioner. 20 C.F.R. § 404.1527(d); (AR 320). Because Ms. Miller's statement was inconsistent with the record as a whole, the ALJ would have been justified in discounting the weight of Ms. Miller's statement. *See Hacker v. Barnhart*, 459

F.3d 934, 937-38 (8th Cir. 2006) (holding an ALJ may discount an opinion's weight when it is inconsistent with the record as a whole). Therefore, I find that even had Ms. Miller's statement been available to the ALJ, the ALJ's decision would still be supported by substantial evidence in light of the record as a whole.

Further, Ms. Miller's statement contains her opinion on claimant's impairment-related limitations and is thus similar to that of a "medical opinion" pursuant to Title 20, Code of Federal Regulations, Section 404.1527(a)(1) (defining a medical opinion as a statement that "reflect[s] judgments about the nature and severity of . . . impairment(s)). Medical opinions are statements from acceptable medical sources. *Id.* Ms. Miller, however, is a Licensed Independent Social Worker, which is not classified as an "acceptable medical source." 20 C.F.R. § 404.1502. Thus, Ms. Miller's "opinion" is not entitled to controlling weight and, instead, must be evaluated based on several factors, including the opinion's consistency with the record as a whole. 20 C.F.R. § 404.1527(c)(4). The ALJ may discount the opinion of a treating provider when limitations within the opinion "stand alone" and were "never mentioned in the [provider's] numerous records or treatments." *Reed*, 399 F.3d at 921 (alteration changed). As described above, I find that there are sufficient inconsistencies between Ms. Miller's statements and her numerous treatment notes for the ALJ to have discounted Ms. Miller's statement.

In any case, Ms. Miller's statement does parallel the ALJ's RFC finding, in that the ALJ found that claimant could only perform simple, routine tasks and that he could "have only occasional contact with the public, coworkers, and supervisors." (AR 110). The similar result that the ALJ reached demonstrates that the ALJ evaluated the

evidence in a neutral fashion. *Snead v. Barnhart*, 360 F.3d 834, 838 (8th Cir. 2004) (citing *Richardson v. Perales*, 402 U.S. 389, 410 (1971) (offering the proposition that the ALJ possesses no interest in denying benefits and must act neutrally in developing the record)). Furthermore, I highlight the parallelism because it shows that the limitations the ALJ incorporated in claimant's RFC are in consonance with Ms. Miller's belatedly-produced opinion. (AR 110; 751-58).

The Eighth Circuit has recognized how peculiar a task it is for the Court to review how the ALJ might have weighed new evidence, and in fact, that such a task calls for "speculation" on the part of the Court. *Riley v. Shalala*, 18 F.3d 619, 622 (8th Cir. 1994). The Court must apply a balancing test when reviewing contradictory evidence—here, the Certified Administrative Record, as known to the ALJ, against the recently acquired statement of Ms. Miller. *Sobania*, 879 F.2d at 444. The record contains the evaluation of claimant's mental health by two separate state agency consultants (AR 79-81; 96-98), and more than fifty total records of claimant's mental health, including twenty notes regarding Ms. Miller's face-to-face counseling sessions with claimant. (AR 582-640). Ms. Miller's statement offers only eight pages of responses to primarily checkbox questions, some of which directly contradict her own treatment notes. (*See* AR 751-58). Applying the balancing test to the entirety of the record, I find that substantial evidence on the record as a whole would have supported the ALJ's decision, even if the ALJ had the benefit of Ms. Miller's opinion when deciding claimant's claim. Therefore, I recommend that the Court affirm the ALJ's decision denying benefits.

C. Residual Functional Capacity

Claimant argues that it is the ALJ's duty to ensure that the record includes evidence produced by a treating or examining physician that addresses claimant's impairments and cites *Nevland v. Apfel* in support of this proposition. (Doc. 14, at 15-17). In the absence of such evidence, "the ALJ's decision cannot be said to be supported by substantial evidence." (*Id.*) (relying on *Anderson v. Shalala*, 51 F.3d 777, 779 (8th Cir. 1995)).

The ALJ has the duty to fully develop the record, independent of the claimant's burden. *Vossen v. Astrue*, 612 F.3d 1011, 1016 (8th Cir. 2010). The ALJ, however, does not have to seek additional clarifying statements from a treating physician unless a crucial issue is undeveloped. *Stormo*, 277 F.3d at 806. Claimant is correct in that the administrative record does not contain a "medical opinion," directly addressing how claimant's impairments affect his ability to function now.[3] *See* 20 C.F.R. 404.1527(a)(1).

Eighth Circuit precedent, however, does not require a "medical opinion" when the ALJ relied on objective medical evidence in assessing claimant's RFC. *Hensley v. Colvin*, 829 F.3d 926, 932 (8th Cir. 2016). A claimant's RFC is a medical question, and, thus, some medical evidence must support the determination of a claimant's RFC. *Eichelberger*, 390 F.3d at 591. Nevertheless, the holding in *Nevland* "does not compel remand in every case in which

[3] "*Medical opinions.* Medical opinions are statements from . . . *acceptable medical sources* that reflect judgments about the nature and severity of your impairment(s), including your symptoms, diagnosis and prognosis, what you can still do despite impairment(s), and your physical or mental restrictions." 20 C.F.R. § 404.1527(a)(2) (emphasis added) (effective for claims filed before March 27, 2017).

the administrative record lacks a treating doctor's opinion." *Morrow v. Berryhill*, No. C16-2023-LTS, 2017 WL 3581014, at *7 (N.D. Iowa Aug. 18, 2017) (citation and internal quotation marks omitted). The Court may affirm the ALJ's decision, even without an opinion from a treating or examining source, if there is other medical evidence demonstrating the claimant's ability to function in the workplace. *Id.; see also Agan v. Astrue*, 922 F. Supp.2d 730, 756 (N.D. Iowa 2013) (upholding ALJ's decision where the ALJ's decision was supported by substantial evidence on the record as a whole, even though the ALJ did not rely on the opinion of a treating physician in formulating his opinion). "The question is whether there is sufficient evidence of 'how [the claimant's] impairments . . . affect [her] residual functional capacity to do other work,' or her 'ability to function in the workplace.' " *Morrow*, 2017 WL 3581014, at *7 (omission and alteration in original) (quoting *Hattig v. Colvin*, No. C12-4092 MWB, 2013 WL 6511866, at *11 (N.D. Iowa Dec. 12, 2013)). In the end, "there is no requirement that an RFC finding be supported by a specific medical opinion." *Hensley*, 829 F.3d at 932 (citing *Myers*, 721 F.3d at 526-27 (affirming RFC without medical opinion evidence), and *Perks v. Astrue*, 687 F.3d 1086, 1092-93 (8th Cir. 2012) (same)).

Here, the ALJ pointed to several exhibits within the record, which show that claimant: was capable of independent living throughout the adjudicative period; worked two jobs and applied for a position for which he was ultimately not hired due to background check issues; and was physically and mentally able to perform personal care tasks, prepare simple meals, and travel out of state. (AR 113-14). Specifically regarding claimant's physical health, the ALJ pointed to medical evidence throughout the record supporting grossly intact "motor strength, sensation, reflexes, and a normal gait." (AR 114). Similarly,

the ALJ identified mental health medical evidence supporting the finding that although claimant suffered from the medically determinable impairments of depression and anxiety, claimant's mental status was "generally unremarkable" and claimant's depression was "largely situational, stemming from psychosocial and economic stressors." (AR 114). Here, I find that the ALJ cited sufficient medical evidence to establish that claimant retains the RFC to do other work, despite the record lacking a treating or examining physician's medical opinion. (AR 114).

Claimant also argued that, based on a recent Eighth Circuit ruling, *Combs v. Berryhill*, 878 F.3d 642, 647 (8th Cir. 2017), the ALJ committed a reversible error when she applied her own reasoning when interpreting non-examining opinions. (Doc. 14, at 17). In *Combs*, the ALJ credited the medical opinion of one reviewing physician over that of another reviewing physician. *Combs*, 878 F.3d at 646-47.

Here, unlike in *Combs*, the ALJ was not faced with two contradictory opinions, but was instead presented with two state agency experts who provided similar opinions based on a review of the medical evidence. (AR 114). Additionally, the ALJ relied on the entirety of the record in her decision, not just the two non-examining state experts, when she found that claimant was not disabled. (AR 114). The ALJ noted that the state agency consultants, although experts, had limited exposure to claimant. (AR 114). Therefore, the ALJ granted their opinions only partial weight where appropriate and did not "rel[y] heavily on their opinions in determining . . . the [RFC]." (*Id.*). Further, the two state agency consultants, after reviewing all available medical evidence, independently arrived at the same RFC. (*See* AR 76-80, 94-96). I find that the

ALJ did not erroneously discount one expert opinion and grant improper weight to the other opinion.

Claimant additionally argues that the state agency consultants' opinions were inaccurate because they were unable to review new medical evidence regarding claimant's back pain and subsequent surgery. (Doc 14, at 16). Claimant, however, "has the burden to establish [his] RFC." *Eichelberger*, 390 F.3d at 591 (citing *Masterson v. Barnhart*, 363 F.3d 731, 737 (8th Cir. 2004)). It seems likely that post-operative medical evidence would not have been available for the ALJ's review because claimant's lumbar laminectomy back surgery occurred approximately six weeks prior to claimant's hearing with the ALJ, which likely would not provide adequate time for such evidence to be generated. (AR 23, 643). Yet, when claimant appealed to the Appeals Council five months after the ALJ's decision, claimant provided no new or material evidence that claimant's condition had degraded at the time of the ALJ's decision in June 2016. (AR 319-21). In contrast, claimant showed his ability to augment the record when claimant provided Ms. Miller's statement to the Appeals Council as new evidence. (*Id.*). I find that because the ALJ did account for claimant's alleged back pain when she determined claimant's RFC (AR 109-10), claimant's alleged back pain was not a crucial issue that was undeveloped. Therefore, I find that the ALJ was under no duty to seek additional evidence to augment the record. *Stormo*, 277 F.3d at 806.

As previously stated, the RFC is based on all relevant medical and other evidence. *Eichelberger*, 390 F.3d at 591. Ultimately, the ALJ pointed to several exhibits within the record, which showed that claimant: was capable of independent living throughout the adjudicative period; had worked two jobs and applied for a position for which he

was ultimately not hired due to background check issues; and was physically and mentally able to perform personal care tasks, prepare simple meals, and travel out of state. (AR 113-14). The medical record contains dozens of treatment notes detailing claimant's physical and mental limitations. I find that the ALJ considered the medical records and notes of several treating physicians and other medical sources, and claimant's own testimony regarding his daily activities in determining that claimant had the RFC to do limited light work. Thus, despite the recording lacking a statutorily-defined "medical opinion," I find that the ALJ's decision is supported by substantial evidence on the record as a whole.

VI. CONCLUSION

Therefore, I respectfully recommend that the District Court **AFFIRM** the Commissioner's determination that claimant was not disabled, and enter judgment against claimant and in favor of the Commissioner.

Parties must file objections to this Report and Recommendation within fourteen (14) days of the service of a copy of this Report and Recommendation, in accordance with 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b). Objections must specify the parts of the Report and Recommendation to which objections are made, as well as the parts of the record forming the basis for the objections. *See* FED. R. CIV. P. 72. Failure to object to the Report and Recommendation waives the right to *de novo* review by the District Court of any portion of the Report and Recommendation as well as the right to appeal from the findings of fact contained therein. *United States v. Wise*, 588 F.3d 531, 537 n.5 (8th Cir. 2009).

IT IS SO ORDERED this 27th day of July, 2018.

APPENDIX H

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

Kimberly L. IWAN, Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,[1] Defendant.

No. 17-CV-0097-LRR

Filed: July 12, 2018

REPORT AND RECOMMENDATION

MAHONEY, United States Magistrate Judge.

Plaintiff Kimberly L. Iwan seeks judicial review of a final decision of the Commissioner of Social Security (the

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[1] Nancy Berryhill is no longer the Acting Commissioner of Social Security, although she still leads that agency as the Deputy Commissioner. *See Edwards v. Comm'r of Soc. Sec*, No. 7:17-CV-00052-RN, 2018 WL 1413974, at *1 n.1 (E.D.N.C. Mar. 21, 2018). I substitute the Commissioner of Social Security for Ms. Berryhill in accordance with Federal Rules of Civil Procedure 17(d) and 25(d). *See also, e.g.*, *Gates v. Comm'r, Soc. Sec. Admin.*, 721 F. App'x 575 (8th Cir. 2018) (per curiam); *Stanley v. Comm'r, Soc. Sec. Admin.*, 720 F. App'x 818 (8th Cir. 2018) (per curiam); *Shelton v. Comm'r, Soc. Sec. Admin.*, 716 F. App'x 574 (8th Cir. 2018) (per curiam).

Commissioner) denying her applications for disability insurance (DI) benefits under Title II of the Social Security Act, 42 U.S.C. §§ 401-434, and supplemental security income (SSI) benefits under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1383f. Iwan argues that the ALJ, John E. Sandbothe, erred by failing to consider whether her impairments (including fibromyalgia) equaled Listing 14.09D and that the ALJ did not give good reasons for discounting her subjective complaints, the opinion of her treating physician, or third-party statements. I recommend **AFFIRMING** the Commissioner's decision.

I. BACKGROUND[2]

Prior to 2012, Iwan was steadily employed at various desk jobs. AR 20-21, 211.[3] She began working for a cell phone company in 2009, taking customers' calls and answering questions about their bills, cell phones, and plans. AR 254. She testified that she took a leave of absence in 2011 when she began suffering severe pain. AR 20-21. After Dr. Stanley Mathew diagnosed her with fibromyalgia, she returned to work, but she testified that she was fired within two weeks of her return. AR 21, 254; *see also* AR 452 (third-party letter from Iwan's relative indicates she was fired within "a couple of months" of returning to work). Although she had to miss work a few times due to pain (despite being provided with a standing desk, allowing her to shift positions at will), she testified that her employer ultimately cited misconduct or rudeness as the basis for her termination. AR 21-22. After being fired in August 2012, Iwan did not work until December 2013. AR 19-

[2] For a more thorough overview, see the Joint Statement of Facts (Doc. 12).

[3] "AR" refers to the administrative record below, filed at Docs. 9-2 to 9-8.

20, 253. She worked for a temporary-employment agency for a few months, processing life insurance claims, but she was fired after she failed to meet the required quotas. *Id.* She testified that she could not sit or stand for a sufficient period of time to do the work as quickly as required. AR 20.

Iwan filed applications for DI and SSI benefits on June 10, 2014, alleging disability based on fibromyalgia, hypothyroidism, and asthma beginning on August 1, 2012. AR 40-41, 49-50, 83. Iwan's applications were denied initially in August 2014 and upon reconsideration in October 2014. AR 38-79. In connection with those reviews, state agency medical consultants Dr. Tracey Larrison and Dr. Laura Griffith reviewed Iwan's treatment records and issued opinions evaluating Iwan's residual functional capacity (RFC).[4] Dr. Mathew, one of Iwan's treating physicians and a pain specialist, also provided an RFC opinion, and several of Iwan's friends and family members sent letters regarding her limitations. AR 365-68, 494-97.

The ALJ held a video hearing on May 5, 2016, at which Iwan and a vocational expert testified. AR 14-15. On June 22, 2016, the ALJ issued a written opinion following the familiar five-step process outlined in the regulations[5] to

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[4] RFC is " 'what the claimant can still do' despite his or her physical or mental limitations." *Lewis v. Barnhart*, 353 F.3d 642, 646 (8th Cir. 2003) (quoting *Bradshaw v. Heckler*, 810 F.2d 786, 790 (8th Cir. 1987)).

[5] "The five-part test is whether the claimant is (1) currently employed and (2) severely impaired; (3) whether the impairment is or approximates a listed impairment; (4) whether the claimant can perform past relevant work; and if not, (5) whether the claimant can perform any other kind of work." *King v. Astrue*, 564 F.3d 978, 979 n.2 (8th Cir. 2009); *see also* 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). The burden of persuasion always lies with the claimant to prove disability,

find Iwan was not disabled. AR 83-92. At step one, the ALJ determined that Iwan's work for the temporary-employment agency from December 2013 to March 2014 constituted substantial gainful activity. AR 85. Nevertheless, the ALJ concluded that "there has been a continuous 12-month period(s) during which the claimant did not engage in substantial gainful activity," so the ALJ proceeded to step two, with "[t]he remaining findings address[ing] the period(s) the claimant did not engage in substantial gainful activity." AR 86. At step two, the ALJ determined that Iwan suffered from the following severe impairments: fibromyalgia, degenerative disk disease, obesity, and degenerative joint disease of the bilateral knees. AR 86. Although the ALJ recognized that Iwan suffered from asthma, hypothyroidism, and myocardial infarction, the ALJ determined these impairments were not severe. AR 86. At step three, the ALJ determined that "[t]he claimant does not have an impairment or combination of impairments that meets or medically equals the severity of" a listed impairment. AR 86. The entirety of the ALJ's step-three discussion is included below:

> The claimant's impairments were evaluated singly and in combination under section 1.00[ ] of the Listings. The medical evidence of record does not contain findings supportive of listing level severity and state agency reviewing physicians concluded that the claimant's impairments did not meet or equal any section in the Listing of Impairments.

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but during the fifth step, the burden of production shifts to the Commissioner to demonstrate "that the claimant retains the RFC to do other kinds of work[ ] and . . . that other work exists." *Goff v. Barnhart*, 421 F.3d 785, 790 (8th Cir. 2005) (quoting *Eichelberger v. Barnhart*, 390 F.3d 584, 591 (8th Cir. 2004)).

AR 86. To evaluate whether Iwan's impairments prevented her from performing her past work (at step four), the ALJ determined Iwan's RFC, finding that she could perform sedentary work but "only occasionally balance, stoop, crouch, kneel, crawl, or climb." AR 86. In making this determination, the ALJ outlined the treatment records and assigned partial weight to the RFC opinions of Drs. Larrison and Griffith, little weight to the RFC opinion of Dr. Mathew, and little weight to the third-party letters. Neither did the ALJ find Iwan's symptoms as intense, persistent, or limiting as Iwan had described. AR 90-91. The ALJ found that Iwan could perform her past work and that she was thus not disabled. AR 92.

The Appeals Council denied Iwan's request for review on July 6, 2017 (AR 1-3), making the ALJ's decision the final decision of the Commissioner. *See* 20 C.F.R. §§ 404.981, 416.1481. Iwan filed a timely complaint in this court, seeking judicial review of the Commissioner's decision (Docs. 1, 3). *See* 20 C.F.R. § 422.210(c). The parties briefed the issues (Docs. 13, 14, 15), and the Honorable Linda R. Reade, United States District Judge for the Northern District of Iowa, referred this case to me for a Report and Recommendation.

II. DISCUSSION

A court must affirm the ALJ's decision if it "is supported by substantial evidence in the record as a whole." *Kirby v. Astrue*, 500 F.3d 705, 707 (8th Cir. 2007); *see also* 42 U.S.C. § 405(g). "Substantial evidence is less than a preponderance, but enough that a reasonable mind might accept it as adequate to support a decision." *Kirby*, 500 F.3d at 707. The court "do[es] not reweigh the evidence or review the factual record de novo." *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994). If, after reviewing the evidence, "it is possible to draw two inconsistent positions

from the evidence and one of those positions represents the [ALJ's] findings, [the court] must affirm the decision." *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992).

Iwan challenges the ALJ's finding at step three, arguing that the ALJ erred by failing to consider whether her impairments equaled Listing 14.09D. Iwan also challenges the ALJ's RFC determination, arguing that the ALJ did not give a good reason for discounting her subjective complaints, Dr. Mathew's RFC opinion, or letters from her friends and family.

A. Listing 14.09D

During the third step of the disability determination, the ALJ considers whether the claimant's impairment or combination of impairments meets or equals one of the listings of presumptively disabling impairments set forth at 20 C.F.R. part 404, subpart P, appendix 1. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). "[A claimant's] impairment[ ] meets the requirements of a listing when it satisfies all of the criteria of that listing, including any relevant criteria in the introduction, and meets the duration requirement." 20 C.F.R. §§ 404.1525(c)(3), 416.925(c)(3) (citation omitted).[6] A claimant can equal the listings in one of three ways:

> (1)(i) If [the claimant] ha[s] an impairment that is described in [the listings], but—

[6] New regulations went into effect on March 27, 2017, and some, by their terms, apply retroactively. *See* Revisions to Rules Regarding the Evaluation of Medical Evidence, 82 Fed. Reg. 5844 (Jan. 18, 2017). The Eighth Circuit has applied these new rules retroactively, which are substantively the same as the old rules. *See Chesser v. Berryhill*, 858 F.3d 1161, 1164 (8th Cir. 2017). I cite to the new 2017 regulations.

> (A) [The claimant] do[es] not exhibit one or more of the findings specified in the particular listing, or
>
> (B) [The claimant] exhibit[s] all of the findings, but one or more of the findings is not as severe as specified in the particular listing,
>
> (ii) [The Social Security Administration] will find that [the claimant's] impairment is medically equivalent to that listing if [the claimant] ha[s] other findings related to [the] impairment that are at least of equal medical significance to the required criteria.
>
> (2) If [the claimant] ha[s] an impairment(s) that is not described in [the listings], [the Social Security Administration] will compare [the claimant's] findings with those for closely analogous listed impairments. If the findings related to [the claimant's] impairment(s) are at least of equal medical significance to those of a listed impairment, [the Social Security Administration] will find that [the claimant's] impairment(s) is medically equivalent to the analogous listing.
>
> (3) If [the claimant] ha[s] a combination of impairments, no one of which meets a listing, [the Social Security Administration] will compare [the claimant's] findings with those for closely analogous listed impairments. If the findings related to [the claimant's] impairments are at least of equal medical significance to those of a listed impairment, [the Social Security Administration] will find that [the claimant's] combination of impairments is medically equivalent to that listing.

20 C.F.R. §§ 404.1526(b), 416.926(b). "To prove that an impairment or combination of impairments equals a listing, a claimant 'must present medical findings equal in sever-

ity to *all* the criteria for the one most similar listed impairment.' " *KKC ex rel. Stoner v. Colvin*, 818 F.3d 364, 370 (8th Cir. 2016) (quoting *Sullivan v. Zebley*, 493 U.S. 521, 531 (1990)).[7]

Social Security Ruling (SSR) 12-2p provides guidance on how to evaluate fibromyalgia at step three:

> [Fibromyalgia] cannot meet a listing . . . because [it] is not a listed impairment. At step [three], therefore, [the Social Security Administration] determine[s] whether [fibromyalgia] medically equals a listing (for example, [L]isting 14.09D in the listing for inflammatory arthritis) or whether it medically equals a listing in combination with at least one other . . . impairment.

77 Fed. Reg. 43640, 43644 (July 25, 2012). Relying on this, Iwan argues that the ALJ erred at step three in addressing medical equivalence because he did not specifically mention Listing 14.09D. Iwan points to several cases from the District of South Dakota holding that SSR 12-2p requires Listing 14.09D be considered and that remand was necessary because the ALJ provided no analysis, making it "practically impossible for a reviewing court to analyze whether the ALJ's reasoning regarding medical equivalence is sound." *See Wheeler v. Berryhill*, No. 16-5062-JLV, 2017 WL 4271428, at *3-4 (D.S.D. Sept. 26, 2017)

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[7] *Sullivan* in turn relied on the following regulatory language: "a claimant's impairment is 'equivalent' to a listed impairment 'if the medical findings are at least equal in severity' to the medical criteria for 'the listed impairment most like [the claimant's] impairment.' " 493 U.S. at 531 (alteration in original) (quoting 20 C.F.R. § 416.926(a) (1989)). The essentials of this regulatory language remain in effect today: "What is medical equivalence? [A claimant's] impairment(s) is medically equivalent to a listed impairment . . . if it is at least equal in severity and duration to the criteria of any listed impairment." 20 C.F.R. §§ 404.1526(a), 416.926(a).

(ALJ stated he evaluated all listed impairments, "specifically, 14.02, and does not find requisite medical findings . . . as the record does not reflect that the claimant has severe fatigue, fever, malaise, or involuntary weight loss"); *Schleuning v. Berryhill*, No. 16-5009-JLV, 2017 WL 1102607, at *3-5 (D.S.D. Mar. 23, 2017) (ALJ stated that claimant's impairments did not meet or equal any listing and that "[t]here is no evidence of inability to ambulate effectively as defined in section 1.00B(2)(b) or inability to perform fine and gross movements effectively as defined in section 1.00B(2)(c)"); *Sunderman v. Colvin*, No. 4:16-CV-04003-KES, 2017 WL 473834, at *6-7 (D.S.D. Feb. 3, 2017) (ALJ stated that claimant's impairments did not meet or equal a listing and that he "specifically considered listing 14.06"); *Jockish v. Colvin*, No. 5:15-CV-05011-KES, 2016 WL 1181680, at *6-8 (D.S.D. Mar. 25, 2016) (the ALJ stated that the claimant's impairments did not meet or equal a listing and that he "generally considered [fibromyalgia] under the musculoskeletal listings of 1.00"). In finding that the ALJ's conclusory step-three analysis required remand, all of the relied-upon cases quoted the "practically impossible" language in the previous sentence, which originated with *Miller v. Colvin*, 114 F. Supp. 3d 741, 774-75 (D.S.D. 2015) (holding that remand was required when the ALJ stated generally that claimant's fibromyalgia did not equal any listing but "did not . . . indicate which Listing he considered most closely analogous for purposes of comparison"). *Miller*, in turn, cited *Collins v. Astrue*, 648 F.3d 869, 872 (8th Cir. 2011), which held that the ALJ's failure to support a step-five determination with vocational-expert testimony or reference to the Grids was not harmless, despite the Commissioner's argument that "the Grids would have directed a finding of no disability had the ALJ consulted them." The

court found that because "[t]he ALJ was required to follow one of two paths at step five . . ., and there is no record indicating that the ALJ followed either path." *Id.* Thus, *Collins* did not address harmless error in the context of step three.

As the Commissioner notes, the Eighth Circuit has consistently held that "[a]lthough it is preferable that ALJs address a specific listing, failure to do so is not reversible error if the record supports the overall conclusion." *Pepper ex rel. Gardner v. Barnhart*, 342 F.3d 853, 855 (8th Cir. 2003); *see also Vance v. Berryhill*, 860 F.3d 1114, 1118 (8th Cir. 2017); *Scott ex rel. Scott v. Astrue*, 529 F.3d 818, 822-23 (8th Cir. 2008); *Karlix v. Barnhart*, 457 F.3d 742, 746-47 (8th Cir. 2006). "[R]emand is appropriate [only] where the ALJ's factual findings, considered in light of the record as a whole, are insufficient to permit [a court] to conclude that substantial evidence supports the Commissioner's decision." *Scott*, 529 F.3d at 822-23 (holding that remand was required when the record contained factual inconsistencies that the ALJ failed to resolve). Thus, even if the ALJ erred in failing to address Listing 14.09D, remand is not required if the record shows Iwan's impairments did not equal that Listing.

Listing 14.09D requires:

> Repeated manifestations of inflammatory arthritis, with at least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss) and one of the following at the marked level:
>
> 1. Limitation of activities of daily living.
>
> 2. Limitation in maintaining social functioning.

> 3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

20 C.F.R. pt. 404, subpt. P, app. 1 § 14.09D. Iwan argues that she suffers from marked limitations in activities of daily living and in social functioning. Doc. 13 at 6; AR 264. When determining Iwan's RFC, the ALJ did not include any limitations in social functioning, suggesting he did not find she suffered from marked limitations in that category. AR 86.[8] This determination is supported by substantial evidence: Iwan reported that she has no problems getting along with people and that she enjoys spending time with her friends at the bar, and Dr. Mathew routinely noted that she was pleasant and cooperative. AR 26, 225-27, 476-92, 501-05. The ALJ's RFC discussion also supports that he did not find Iwan markedly limited in her activities of daily living: the ALJ found that Iwan prepares meals, does yard work and housework, shops, drives, and goes to bars with friends, which the ALJ found demonstrated Iwan was not as limited "as one would expect[ ] given [her] complaints of disabling symptoms and limitations." AR 91. In sum, the record supports the overall conclusion that Iwan's impairments do not medically equal Listing 14.09D's requirement that the claimant suffer from a marked limitation in activities of daily living, social functioning, or concentration, persistence, or pace. *See Johnson v. Colvin*, No. 4:14CV3146, 2015 WL 5008642, at *10-11 (D. Neb. Aug. 20, 2015) (relying in part on the ALJ's RFC determination to find that the claimant suffered from no marked limitations in social functioning, activities of daily living, or concentration, persistence, or pace, and holding that the record did not support that the

[8] Neither did the ALJ include any limitations related to concentration, persistence, or pace. AR 86.

claimant's impairments medically equaled listing 14.09D). Although it would most certainly make review easier had the ALJ provided actual reasoning and explanation in his decision, any error by the ALJ in failing to address Listing 14.09D was harmless.

B. Weight to Subjective Complaints

When evaluating the weight to assign a claimant's subjective complaints—including pain or nervousness—the ALJ must consider the factors set forth in *Polaski v. Heckler*: "(1) the claimant's daily activities; (2) the duration, frequency and intensity of the pain; (3) dosage, effectiveness, and side effects of medication; (4) precipitating and aggravating factors; and (5) functional restrictions." *Black v. Apfel*, 143 F.3d 383, 386 (8th Cir. 1998); *accord Polaski*, 739 F.2d 1320, 1321-22 (8th Cir. 1984), *vacated*, 476 U.S. 1167 (1986), *reinstated*,[9] 804 F.2d 456 (8th Cir. 1986). "Other relevant factors include the claimant's relevant work history and the absence of objective medical evidence to support the complaints." *Black*, 143 F.3d at 386. The ALJ may not discredit the claimant's allegations based solely on the absence of objective medical evidence, but the ALJ may rest his credibility finding on "objective medical evidence to the contrary," *Ramirez v. Barnhart*, 292 F.3d 576, 581 (8th Cir. 2002); or "inconsistencies in the record as a whole," *Brockman v. Sullivan*, 987 F.2d 1344, 1346 (8th Cir. 1993). Courts must "defer to an ALJ's credibility finding as long as the 'ALJ explicitly discredits a claimant's testimony and gives a good reason for doing so.'" *Schultz v. Astrue*, 479 F.3d 979, 983 (8th Cir. 2007)

[9] The court did not explicitly say that it was reinstating the original *Polaski* opinion, but the Eighth Circuit has recognized that it "effectively reinstat[ed]" *Polaski. Jones v. Callahan*, 122 F.3d 1148, 1151 n.3 (8th Cir. 1997).

(quoting *Hogan v. Apfel*, 239 F.3d 958, 962 (8th Cir. 2001)). "The ALJ is not required to discuss each *Polaski* factor as long as the analytical framework is recognized and considered." *Tucker v. Barnhart*, 363 F.3d 781, 783 (8th Cir. 2004).[10]

At the hearing in May 2016, Iwan testified that driving for long distances causes pain, so recently, she has not been driving very often (she admitted, however, to driving forty minutes to appear at the hearing). AR 18. She testified that she cannot sit for any length of time and indicated that she was uncomfortable sitting to testify. AR 31. With regard to her ability to walk, she said that she can only walk for twenty minutes at a time without her back giving out and that when grocery shopping, she must lean on the cart or use a motorized cart. AR 24. She testified

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[10] Iwan argues that "the Eighth Circuit's relaxed approach at review of credibility determinations" is outdated, as the Social Security Administration recently replaced SSR 96-7p, 61 Fed. Reg. 34483 (July 2, 1996), with SSR 16-3p, 81 Fed. Reg. 14166 (Mar. 16, 2016). Doc. 13 at 10-14. As district courts in the Eighth Circuit have noted:

> Both SSR 96-7p and SSR 16-3p direct that evaluation of a claimant's subjective symptoms shall consider all evidence in the record. Both Rulings also incorporate the regulations . . . that identify factors to be considered . . . . But while SSR 96-7p expressly provided that a credibility finding was required to be made under those regulations, SSR 16-3p expressly provides that use of the term "credibility" was being eliminated because the [Social Security Administration] regulations did not use it.

Hayes v. Berryhill, No. 15-5253, 2017 WL 690556, at *3 (W.D. Ark. Feb. 21, 2017) (quoting *Martsolf v. Colvin*, No. 6:16-cv-00348-NKL, 2017 WL 77424, at *5 (W.D. Mo. Jan. 9, 2017)). Iwan points to language in SSR 96-7p requiring that the ALJ discuss "the factors pertinent to the evidence of record," but this language does not require that every *Polaski* factor be thoroughly analyzed, as Iwan suggests. As will be discussed, the ALJ's evaluation of Iwan's RFC adequately considers all the evidence in the record (as required).

that in the past year, her ability to do chores has decreased, and she can no longer stand long enough to cook anything other than frozen or microwave meals. AR 25-26. She testified that she constantly feels pain in her lower back, hips, thighs; that she feels like she will break if someone touches or hugs her; and that sometimes, it feels like she is walking on needles due to pain in her feet. AR 23. She testified that she suffers from migraines, poor sleep, fatigue, irritability, near-daily irritable bowel syndrome, and problems with memory and concentration. AR 23-24, 27-31.

The ALJ found that Iwan's subjective complaints were inconsistent with her activities of daily living. AR 91. In July 2014, Iwan reported going to the bars two to three times a week to spend time with friends and to play pool. AR 225. She reported that she is "not able to dance much now" and that she could not stand to talk very long before she needed to sit down, however. AR 226. At the time of her hearing in May 2016, she reported only going to the bars once or twice a month and "sitting there socializing," but not dancing. AR 26. The ALJ also noted that a treatment note from February 2016 indicated that Iwan had been bowling, although she had fallen while doing so, resulting in pain in her leg. AR 396. Iwan also reported in her July 2014 function report that she could mow the lawn using a riding lawn mower, do laundry, perform small household repairs, and clean, and she stated that she went shopping in stores once a week for one to two hours. AR 223-24. Iwan also stated that she could prepare multi-course meals, but only if she made things in stages throughout the day and sat down while chopping and peeling. AR 223. In August 2015, she told a provider that she is "active with light household chores including cooking," although she has assistance from her boyfriend at times.

AR 452. Here, the ALJ could find that Iwan's minimal limits in her activities of daily living were inconsistent with her allegations of disabling pain. *See Goff v. Barnhart*, 421 F.3d 785, 792 (8th Cir. 2005); *see also Medhaug v. Astrue*, 578 F.3d 805, 817 (8th Cir. 2009) ("[A]cts such as cooking, . . . washing dishes, doing laundry, shopping, driving, and walking[ ] are inconsistent with subjective complaints of disabling pain."); *Guilliams v. Barnhart*, 393 F.3d 798, 802 (8th Cir. 2005) (household chores such as cooking, laundry, and vacuuming, and participating in activities causing "calloused and greasy" hands were inconsistent with claims of disabling pain).

The ALJ also outlined the treatment records and concluded that the medical findings did not support limitations as great as Iwan alleged. AR 87. Despite Iwan's reports of migraines in her function report in July 2014 and at the hearing in May 2016, treatment records reflect that Iwan only once complained of migraines (in July 2013), which she reported suffering as a side effect to Lyrica (which was discontinued). AR 23-24, 221, 315. She never complained of irritable bowel syndrome to her providers and denied any bladder or bowel problems in August 2011, December 2012, December 2013, and September 2015. AR 297, 323, 351, 387. Although she was prescribed medication to help her sleep (AR 315), and she occasionally reported suffering poor sleep or fatigue (AR 385, 388, 390, 393, 436, 441-42), she just as often denied such symptoms (AR 297, 305, 351, 390, 393, 395-96, 398). Treatment records do not reflect that Iwan complained of problems with irritability or depression,[11] and providers routinely noted Iwan's normal mood and affect. AR 349, 353, 377, 379-80,

[11] Iwan did report to Dr. Mathew at her first appointment in January 2015 that she did "not feel she c[ould] work due to severe pain and depression." AR 475.

383, 385, 390-91, 395, 397, 399, 422, 426, 458; *see also* AR 493, 501-02, 504-05 (Dr. Mathew's treatment notes reflect Iwan was "pleasant and cooperative"). Although Iwan testified to limitations related to memory and concentration, the ALJ noted that she stated her impairments did not affect her ability to concentrate in her function report in July 2014. AR 91, 226. Iwan also denied decreased concentration when asked by providers in November 2015 and January and February 2016 (AR 390, 394, 396), and she denied "foggy memory" in December 2012 (AR 297). Substantial evidence supports that Iwan's complaints of migraines, poor sleep, fatigue, irritability, decreased memory and concentration, and irritable bowel syndrome are inconsistent with the treatment records and other evidence in the record.

With regard to her pain and resulting functional limitations, Iwan argues that the ALJ ignored the reality of fibromyalgia causing good days and bad days. The ALJ could find, however, that the treatment records as a whole support that most of the time, Iwan was not as limited as she claimed (she testified to constant pain and limitations). Iwan suffered a flare in pain in the summer of 2011, which resulted in her taking a leave of absence from work. AR 278-80, 323. By mid-October 2011 (and through June 2012), however, when Iwan sought treatment for other ailments, she did not report back or other pain. AR 329-46. In August 2012 (Iwan's disability onset date), Iwan lost her job and was diagnosed with fibromyalgia. In December 2012, at an appointment to establish care with a primary care provider, she reported suffering from fibromyalgia, which caused pain, as well as other ailments, and the provider prescribed medications and recommended "exercise including aqua-therapy." AR 297-300. When Iwan next saw the provider in April 2013, she reported that her fibromyalgia was "better" on medications but

that she "still ha[s] good and bad days with" the pain in her back, and she requested a handicap sticker, which the provider declined to give her because her "treatment involves increasing physical activity." AR 303. Iwan went to the emergency room in July 2013 and reported suffering a flare in fibromyalgia pain in her hips, and doctors recommended she "initiate an exercise program" and participate in physical therapy and aquatherapy. AR 315, 319-20. She again went to the emergency room in October 2013 with a flare in back pain, which happened when she was "moving belongings at home." AR 348-49. In December 2013, she reported muscle pain (but denied back pain) when she sought treatment for bronchitis. AR 351. Iwan worked at the substantial-gainful-activity level from December 2013 to March 2014, and from the treatment notes in the record, it does not appear Iwan sought any treatment from December 2013 until October 2014 (right after her disability claim was denied). At her yearly physical with her primary care provider in October 2014, she reported "no problems" but requested a referral to Dr. Mathew for pain control, and during the review of systems, she reported suffering pain in her daily life due to "a history of fibromyalgia." AR 373. Before she could reestablish care with Dr. Mathew, she presented to the emergency room complaining of increased back and hip pain (she was out of medications), and she followed up with her primary care provider to have her prescriptions refilled. AR 376, 420. She denied any musculoskeletal complaints in December 2014, however, when seeking treatment for shortness of breath. AR 424; *see also* AR 378-79 (treatment notes reflect Iwan denied musculoskeletal complaints during the review of systems, although the purpose of the appointment was to increase her pain medication dosage due to "increased pain").

At Iwan's appointment with Dr. Mathew in January 2015, she reported suffering from chronic pain, primarily in her low back, that was aggravated with activity and better with rest. AR 475. At Dr. Mathew's referral, Iwan participated in physical therapy and aquatherapy from January to March 2015. AR 428-49. At these appointments, she generally reported feeling sore (from land physical therapy and changes in weather) and benefitting from aquatherapy (but not land physical therapy). *See id.*; *see also* AR 381. She also reported pain in her knees during these physical therapy sessions. AR 428, 432, 434, 437, 441-41, 445, 447, 449. From March to the end of 2015, treatment records reflect Iwan primarily complained of knee pain, which was improved by a series of injections performed by Dr. Mathew (the injections also improved her functional abilities). AR 452, 477-92. Although treatment records reflect that Iwan continued to complain of fibromyalgia pain, providers also noted (as emphasized by the ALJ) that Iwan was "doing fairly well from [a] pain standpoint," that her medications "work[ed] well," that she voiced "no concerns," and that her fibromyalgia pain was stable or controlled. AR 383-92, 477-78. Iwan's primary care provider continued Iwan on the same prescriptions, and she recommended Iwan exercise for thirty minutes a day, five days a week. AR 383-92.

On January 1, 2016, Iwan went to the emergency room complaining of back pain from a fibromyalgia flare lasting a few days. AR 456-62. She reported that it had been "awhile, maybe a few months" since the last flare. AR 456. By mid-January 2016, a provider noted that her fibromyalgia pain was stable. AR 393. She suffered another fibromyalgia pain flare in February 2016 and went to the emergency room. AR 460-62. She also complained of pain in her thigh at appointments in February and March 2016, which she said started after she fell and slid on ice. AR

396-98. She also reported continuing to suffer pain in her left knee and requested another round of injections. AR 492. Dr. Mathew began a second round of left-knee injections in April 2016, which Iwan reported improved her pain. AR 501-05.

The treatment records provide further support that Iwan did not suffer from constant severe fibromyalgia pain, as alleged. Although the treatment records demonstrate that Iwan suffers pain and resulting limitations, substantial evidence supports the ALJ's decision not to fully credit all of Iwan's subjective complaints.

C. Dr. Mathew's RFC Opinion

When determining a claimant's RFC, the ALJ considers "medical opinions . . . together with the rest of the relevant evidence." 20 C.F.R. §§ 404.1527(b), 416.927(b). "The ALJ must give 'controlling weight' to a treating [source's] opinion if it 'is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence.' " *Papesh v. Colvin*, 786 F.3d 1126, 1132 (8th Cir. 2015) (quoting *Wagner v. Astrue*, 499 F.3d 842, 848-49 (8th Cir. 2007)); *see also* 20 C.F.R. §§ 404.1527(c)(2), 416.927(c)(2). "Although a treating physician's opinion is usually entitled to great weight, it 'do[es] not automatically control, since the record must be evaluated as a whole.' " *Reece v. Colvin*, 834 F.3d 904, 909 (8th Cir. 2016) (alteration in original) (quoting *Prosch v. Apfel*, 201 F.3d 1010, 1013 (8th Cir. 2000)). "Whether the ALJ gives the opinion of a treating [source] great or little weight, the ALJ must give good reasons for doing so." *Id.* The ALJ considers the following factors to determine the weight to assign a medical opinion:

> (1) whether the source has examined the claimant; (2) the length, nature, and extent of the treatment relationship and the frequency of examination; (3) the extent to which the relevant evidence, "particularly medical signs and laboratory findings," supports the opinion; (4) the extent to which the opinion is consistent with the record as a whole; (5) whether the opinion is related to the source's area of specialty; and (6) other factors "which tend to support or contradict the opinion."

Owen v. Astrue, 551 F.3d 792, 800 (8th Cir. 2008) (quoting the current 20 C.F.R. §§ 404.1527(c), 416.927(c)).

Dr. Mathew, Iwan's treating pain specialist, filled out a Medical Source Statement (MSS) form in January 2015 evaluating Iwan's RFC. AR 365-68. He noted her diagnosis of fibromyalgia and chronic pain, which caused symptoms of severe pain, low endurance, fatigue, and weakness, as well as low mood. AR 365, 368. When asked whether Iwan's medications cause side effects, Dr. Mathew wrote side effects include dizziness, drowsiness, and memory deficits. AR 365. He circled answers indicating that Iwan could only sit, stand, and walk for one hour at a time and elaborated (in response to a question) that she would need to alternate positions every twenty minutes. AR 365. He also checked boxes indicating that Iwan could lift ten pounds occasionally, but never more than that; that she could never squat, crawl, or climb; that she could not be around unprotected heights or machinery (it appears he originally checked that she had no limitations in these categories, scribbled it out, and then marked that she suffered total limitations); and that she had some limitations in her ability to be around temperature changes and dust. AR 366-67. Finally, Dr. Mathew

checked a box indicating that Iwan would need to take unscheduled breaks in an eight-hour day, explaining that she suffers "exacerbations of pain [one to two times a month, at which times she] will require rest break[s]" one to three times a month. AR 367.

The ALJ noted that Dr. Mathew's MSS form indicated Iwan was extremely limited. AR 88. The ALJ stated that "courts have long recognized[ ] form reports in which the source's only obligation is to fill in a blank or check off a box are entitled to little weight in the adjudicative process" and therefore assigned little weight to Dr. Mathew's opinion. AR 88-89. As Iwan argues, an ALJ may not "discount an [RFC opinion on an MSS form] on the basis that the 'evaluation by box category' is deficient *ipso facto*." *Reed v. Barnhart*, 399 F.3d 917, 921-22 (8th Cir. 2005) (holding that the ALJ did not give good reasons for discounting the treating source's RFC opinion contained on an MSS form when the ALJ assigned the opinion little weight because "evaluation by box" is categorically deficient; in addition, the ALJ found the limitations on the form inconsistent with and unsupported by the treatment records, but the court held this finding was not supported by substantial evidence); *see also Cline v. Colvin*, 771 F.3d 1098, 1104 (8th Cir. 2014) ("[A] checklist evaluation can be a source of objective medical evidence . . . .").[12] But an

[12] *Cf. Tippe v. Colvin*, 669 F. App'x 332, 334-35 (8th Cir. 2016) (per curiam) (upholding ALJ's reasons for discounting treating-source opinion contained on a checklist MSS form when the ALJ noted checklist forms are entitled to less weight but also cited the source's failure to take the claimant's noncompliance into account); *Toland v. Colvin*, 761 F.3d 931, 935-37 (8th Cir. 2014) (upholding ALJ's reason for discounting treating-source opinion when the ALJ found the "evaluation in the MSS . . . unsupported by [the claimant's] medical records, daily activities, and work history"); *Anderson v. Astrue*, 696 F.3d 790, 793-94 (8th Cir. 2012) (rejecting claimant's argument that

ALJ may "discount a treating physician's MSS where the limitations listed on the form 'stand alone,' and were 'never mentioned in [the physician's] numerous records or treatment' nor supported by 'any objective testing or reasoning.' " *Id.* at 921 (alteration in original) (quoting *Hogan v. Apfel*, 239 F.3d 958, 961 (8th Cir. 2001)). Here, although the ALJ did not explicitly state that he found the limitations contained in Dr. Mathew's opinion to "stand alone" without support from his treatment records, the ALJ outlined the treatment records (including Dr. Mathew's) to determine Iwan's RFC and concluded that "the medical

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the ALJ "incorrectly applied the law by summarily rejecting [the treating source's] evaluation because it appeared on a pre-printed, checkbox form" when, in addition to finding the form "conclusory," the ALJ also found the limitations on the form inconsistent with the treatment records); *Teague v. Astrue*, 638 F.3d 611, 615-16 (8th Cir. 2011) (upholding ALJ's reasons for discounting treating-source opinion when the ALJ found the treating source's checklist MSS form cited no "clinical test results or findings" and contained limitations inconsistent with the source's treatment records); *Wildman v. Astrue*, 596 F.3d 959, 964-66 (8th Cir. 2010) (upholding ALJ's reasons for discounting treating-source opinion when the ALJ noted the opinion was contained on a checklist MSS form and did not address the claimant's noncompliance); *Cain v. Barnhart*, 197 F. App'x 531, 533-34 (8th Cir. 2006) (per curiam) (upholding ALJ's reason for discounting the limitations contained on a treating source's MSS form when the ALJ also noted the limitations were inconsistent with other medical evidence); *Holmstrom v. Massanari*, 270 F.3d 715, 720-21 (8th Cir. 2001) (same); *but see Thomas v. Berryhill*, 881 F.3d 672, 675 (8th Cir. 2018) (after suggesting that the provider may not have been a treating source, despite the claimant's argument otherwise, the court noted the provider's RFC opinion consisted of "checked boxes, circled answers, and brief fill-in-the-blank responses"; "cite[d] no medical evidence[;] and provide[d] little to no elaboration"; and "on that basis alone, the ALJ did not err in giving [the opinion] little weight"; the court went on to note that the ALJ also found the opinion inconsistent with the record as a whole, which was supported by substantial evidence).

findings do not support the existence of limitations greater than the above listed [RFC]." AR 87-90. Thus, I will determine whether the limitations on Dr. Mathew's form stand alone, or whether the basis for his opinion is evident from his treatment records or the record as a whole. *See Hamman v. Berryhill*, 680 F. App'x 493, 494-95 (8th Cir. 2017) (per curiam) (holding that when the ALJ discounted a treating provider's physical RFC opinion contained on a checklist form because it was "unexplained, unsupported by reference to any positive medical findings, and suggested that psychosocial circumstances were a major factor in the assessment," the ALJ "did not err . . ., particularly given the other substantial evidence in the record supporting the ALJ's [RFC] assessment" (internal quotation marks omitted)).

It is unclear when Dr. Mathew first saw Iwan, but she testified that he diagnosed her with fibromyalgia in August 2012. AR 21, 297, 494. The extent of Dr. Mathew's treatment of Iwan at this time is unknown, as those treatment notes are not in the record, but in October 2014, Iwan indicated that she had not seen Dr. Mathew for two years and requested a referral "back" to Dr. Mathew. AR 373-74, 420. Iwan's first appointment with Dr. Mathew after this gap in treatment was on January 7, 2015, which is also the date Dr. Mathew filled out the MSS form evaluating Iwan's RFC. AR 365-68, 475. At this appointment, Iwan reported that she suffered chronic pain, primarily in her back; that her pain was aggravated with activity; that she had tried multiple injections with no relief; and that she could not work due to pain and depression. AR 475. Iwan's report of depression is perhaps why Dr. Mathew's MSS form indicates she suffers from "low mood," despite all of his treatment notes (including the notes from the January 7 appointment) indicating Iwan was pleasant and cooperative. AR 476-92, 501-05. No other treatment notes

in the record reflect that Iwan ever complained of depression; indeed, Iwan routinely denied psychological problems and was found to have a normal mood and affect. AR 286, 318, 349, 353, 375-85, 390-91, 395, 397, 399, 422, 426, 457-58, 462.

Dr. Mathew also opined that Iwan's symptoms would frequently be severe enough to interfere with her attention and concentration. AR 365. None of Dr. Mathew's treatment notes reflect such complaints, and as noted in the preceding section, treatment notes from other providers reflect Iwan denied any problems with concentration. AR 297, 390, 394, 396; *see also* AR 226, 238-39 (Iwan denied trouble concentrating in July 2014 function report but reported trouble concentrating in September 2014 pain questionnaire). Neither do Dr. Mathew's treatment notes (or other records) reflect any complaints of side effects of dizziness or drowsiness from medications. It is also unclear how Dr. Mathew arrived at his conclusions related to Iwan's ability to work around heights, machinery, temperature, and fumes.

Dr. Mathew also noted that Iwan's pain is exacerbated one to three times a month and that during those times, she would need to take unscheduled breaks. AR 367. Dr. Mathew's treatment notes do not reflect any reports of pain flares related to fibromyalgia (most of Dr. Mathew's treatment notes reflect treatment to Iwan's knees, a problem Iwan did not begin complaining about until after Dr. Mathew filled out his MMS form). As outlined in the preceding section, other evidence in the record demonstrates that Iwan suffers from pain flares due to her fibromyalgia, but not to the extent found by Dr. Mathew. From August to October 2011 (while Iwan was still employed, although she took a leave of absence), Iwan suffered increased pain and reported the last such "flare-up" had been in March

2010. AR 278-80, 323-29. In April 2013, she reported suffering "good and bad days with pain worse in her lower back." AR 303. In October 2013, she went to the emergency room complaining of severe back pain, which improved upon receiving an injection of morphine. AR 348-50. She also reported a three-day fibromyalgia flare in January 2016 (and noted that her last such flare had "maybe" been "a few months" ago) and again in February 2016. AR 456, 460.

It is unclear from Dr. Mathew's treatment records, as well as other evidence in the record, how Dr. Mathew arrived at many of the limitations in his RFC opinion. Therefore, the ALJ did not err in assigning little weight to the limitations contained on Dr. Mathew's MSS form.

D. Third-Party Letters

Iwan submitted three letters from April 2016 that were written by her daughter and son-in-law, whom she lived with from at least July 2011 to August 2012, and by her boyfriend, whom she began living with around April 2014. AR 494-95. Her daughter reported that Iwan is an "unhappy, depressed individual who can't do the smallest things such as walking through a mall . . . or babysitting her grandkids." AR 494. She further reported that Iwan cannot walk, stand, or sit for any length of time without suffering "extreme" back pain. *Id.* Iwan's son-in-law described Iwan's inability to clean, do laundry, and cook when she was first diagnosed, and he reported that Iwan currently lives "in constant pain," takes medications "round the clock just to be able to function," is "unable to do anything for an extended period of time," and is depressed. AR 495. Iwan's boyfriend wrote that Iwan has progressively gotten less sleep due to pain and that he "now ha[s] to vacuum the house and carry the laundry and groceries to and from the car to the house, since she is not

able to." AR 496-97. The ALJ noted (using boilerplate language) that he assigned the third-party statements little weight because Iwan's family members are not "disinterested third parties," and their statements were "not consistent with the preponderance of the opinions and observations by medical doctors." AR 91.

When determining the weight to assign a statement from a nonmedical source, the ALJ considers the same factors as with medical opinions. SSR 06-03p, 71 Fed. Reg. 45593, 45594-45596 (Aug. 9, 2006); *see also* 20 C.F.R. §§ 404.1527(f)(1), 416.927(f)(1) (regulations that went into effect in March 2017 codifying SSR 06-03p). The ALJ should explain the weight given to third-party statements or "otherwise ensure that the discussion of the evidence in the . . . decision" explains the ALJ's reasoning. SSR 06-03p, 71 Fed. Reg. at 45596; *accord* 20 C.F.R. §§ 404.1527(f)(2), 416.927(f)(2). Here, Iwan argues that the ALJ's use of boilerplate language when discussing the weight to afford Iwan's loved ones' statements requires reversal. But the ALJ's discussion of Iwan's RFC must be considered as a whole, and in addition to the paragraph of boilerplate language, the ALJ outlined the treatment records and other evidence of record. AR 87-90. As discussed in the preceding sections, the treatment records do not reflect that Iwan ever reported being depressed (or that providers observed anything other than a normal mood and affect). Iwan's activities of daily living (reflected in her function reports, the treatment notes, and her testimony) are inconsistent with an inability to walk or sit for "any length of time." Although I am concerned by the ALJ's use of boilerplate language, in this case, the ALJ did not err in assigning the third-party statements little weight.

III. CONCLUSION

I recommend that the district court **AFFIRM** the decision of the Social Security Administration and enter judgment in favor of the Commissioner.

Objections to this Report and Recommendation must be filed within fourteen days of service in accordance with 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b). Objections must specify the parts of the Report and Recommendation to which objections are made, as well as the parts of the record forming the basis for the objections. Fed. R. Civ. P. 72. Failure to object to the Report and Recommendation waives the right to *de novo* review by the district court of any portion of the Report and Recommendation, as well as the right to appeal from the findings of fact contained therein. *See United States v. Wise*, 588 F.3d 531, 537 n.5 (8th Cir. 2009).

APPENDIX I

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

Destiny M. THURMAN, Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,[1]
Defendant.

No. 17-CV-0035-LRR

Filed: June 28, 2018

REPORT AND RECOMMENDATION

MAHONEY, United States Magistrate Judge.

Plaintiff Destiny M. Thurman seeks judicial review of a final decision of the Commissioner of Social Security

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[1] Nancy Berryhill is no longer the Acting Commissioner of Social Security, although she still leads that agency as the Deputy Commissioner. *See Edwards v. Comm'r of Soc. Sec*, No. 7:17-CV-00052-RN, 2018 WL 1413974, at *1 n.1 (E.D.N.C. Mar. 21, 2018). I substitute the Commissioner of Social Security for Ms. Berryhill in accordance with Federal Rules of Civil Procedure 17(d) and 25(d). *See also, e.g.*, *Gates v. Comm'r, Soc. Sec. Admin.*, 721 F. App'x 575 (8th Cir. 2018) (per curiam); *Stanley v. Comm'r, Soc. Sec. Admin.*, 720 F. App'x 818 (8th Cir. 2018) (per curiam); *Shelton v. Comm'r, Soc. Sec. Admin*, 716 F. App'x 574 (8th Cir. 2018) (per curiam).

(the Commissioner) denying her application for supplemental security income (SSI) benefits under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1383f. Thurman argues that the administrative law judge (ALJ), John E. Sandbothe, erred in assessing Thurman's subjective complaints and in weighing medical opinions, and that some medical evidence does not support the ALJ's residual functional capacity (RFC) determination. I recommend **AFFIRMING** the ALJ's decision.

I. BACKGROUND[2]

Thurman protectively filed an application for SSI benefits on November 15, 2013, alleging disability due to anxiety and bipolar disorder. AR 64, 157, 161.[3] Thurman described experiencing severe panic attacks and difficulty being in public places and around unfamiliar people. AR 177. She has five children (ages 22, 19, 15, 14, and 4 at the time of the administrative hearing in 2015), and she lives with her four youngest children. AR 39, 56. Thurman graduated from high school and attended some college. AR 38-39, 162. She has no significant work history, having worked only as a part-time kitchen aide in 2004, as a temporary worker in 2006, and as a telemarketer for a few months in 2007. AR 37, 45, 167-70.

Thurman's application was denied initially in January 2014 and on reconsideration in April 2014. AR 64-84. As part of those reviews, state agency consultants from the Iowa Disability Determination Service (DDS) assessed Thurman's mental impairments: Russell Lark, Ph.D, completed an initial assessment regarding the severity of

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[2] For a more thorough overview, see the Joint Statement of Facts (Doc. 14).

[3] "AR" refers to the administrative record below, filed at Docs. 8-1 to 8-7.

Thurman's impairments (but made no RFC assessment) on January 16, 2014, and Scott Shafer, Ph.D, completed a review (including a mental RFC assessment) on April 24, 2014. AR 67-68, 70, 78-82, 84. There were no other medical opinions in evidence for either the initial or reconsideration reviews. AR 65-66, 74-76.

Thurman requested a hearing before an ALJ, and a video hearing was held on October 29, 2015. AR 35, 98. Thurman alleged a disability onset date of April 25, 2005, when she was 29 years old; she was 40 years old at the time of the administrative hearing. AR 35, 38, 64. The relevant time period, based on Thurman's prior application, runs from December 5, 2012. AR 11, 65. Both she and vocational expert (VE) Randall Harding testified at the administrative hearing. AR 35-36, 236. The record also included medical source statements from Thurman's psychiatrist, Keri Husman, MD, and her therapist, Joan Tatarka, MSW, LISW (both from Cedar Centre Psychiatric Group). AR 373-86. The ALJ issued a written opinion on December 29, 2015, following the familiar five-step process outlined in the regulations[4] for determining whether Thurman was disabled. AR 11-21. The ALJ found that

[4] "The five-part test is whether the claimant is (1) currently employed and (2) severely impaired; (3) whether the impairment is or approximates a listed impairment; (4) whether the claimant can perform past relevant work; and if not, (5) whether the claimant can perform any other kind of work." *King v. Astrue*, 564 F.3d 978, 979 n.2 (8th Cir. 2009); *see also* 20 C.F.R. § 416.920(a)(4). The burden of persuasion always lies with the claimant to prove disability, but during the fifth step, the burden of production shifts to the Commissioner to demonstrate "that the claimant retains the RFC to do other kinds of work[ ] and . . . that other work exists." *Goff v. Barnhart*, 421 F.3d 785, 790 (8th Cir. 2005) (quoting *Eichelberger v. Barnhart*, 390 F.3d 584, 591 (8th Cir. 2004)).

Thurman suffers from severe impairments of bipolar affective disorder, anxiety disorder, and obsessive compulsive disorder (OCD), but that none of her impairments meets or equals a listed impairment. AR 13-15. In evaluating whether these impairments prevented Thurman from performing work (at steps four and five), the ALJ determined Thurman's RFC[5] and found that she could perform work at all exertional levels but "only simple, routine, and repetitive work . . . at no production rate pace" and with "only occasional [contact] with coworkers and no contact with the public." AR 15. In determining Thurman's RFC, the ALJ considered, among other factors, the opinions of Dr. Husman, Therapist Tatarka, and the DDS non-examining consultants (Drs. Lark and Shafer). AR 19. The ALJ declined to give great weight to the opinions of Dr. Husman and Therapist Tatarka and gave substantial weight to the DDS consultants' opinions. *Id.* The ALJ also considered Thurman's statements about the intensity, persistence, and limitations of her symptoms, but found they were not substantiated by the record and were not fully credible. AR 16-19. The ALJ found that Thurman had no past relevant work but that she could perform other jobs, such as a laundry worker, cleaner, and router. AR 20-21.

The Appeals Council denied Thurman's request for review on February 9, 2017 (AR 1-4), making the ALJ's decision that Thurman is not disabled the final decision of the Commissioner. *See* 20 C.F.R. § 416.1481. The Appeals Council admitted additional medical records (from Mercy Medical Center and Cedar Centre Psychiatric Group) into

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[5] RFC is " 'what the claimant can still do' despite his or her physical or mental limitations." *Lewis v. Barnhart*, 353 F.3d 642, 646 (8th Cir. 2003) (quoting *Bradshaw v. Heckler*, 810 F.2d 786, 790 (8th Cir. 1987)).

the record. AR 2, 6, 428-38. Thurman filed a timely complaint in this court (Doc. 3). *See* 20 C.F.R. § 422.210(c). The parties briefed the issues (Docs. 11, 15), and the Honorable Linda R. Reade, United States District Judge for the Northern District of Iowa, referred this case to me for a Report and Recommendation.

II. DISCUSSION

A court must affirm the ALJ's decision if it "is supported by substantial evidence in the record as a whole." *Kirby v. Astrue*, 500 F.3d 705, 707 (8th Cir. 2007); *see also* 42 U.S.C. § 405(g). "Substantial evidence is less than a preponderance, but enough that a reasonable mind might accept it as adequate to support a decision." *Kirby*, 500 F.3d at 707. The court "do[es] not reweigh the evidence or review the factual record de novo." *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994). If, after reviewing the evidence, "it is possible to draw two inconsistent positions from the evidence and one of those positions represents the [ALJ's] findings, [the court] must affirm the decision." *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992).

Thurman argues that the ALJ erred in evaluating Thurman's subjective complaints and in weighing the medical opinions. Thurman argues these errors resulted in an RFC determination that is not supported by some medical evidence. As a result, Thurman argues the ALJ's opinion is not supported by substantial evidence. I address each of these arguments in turn.

A. Evaluation of Thurman's Subjective Complaints

Thurman argues the ALJ erred by discounting her subjective complaints without properly citing to how these complaints were inconsistent with the overall record. Doc. 11 at 25-27. In particular, Thurman takes issue with the ALJ not fully crediting her reports of having at

least two panic attacks per week and staying home because of fear at least three days per week.[6] When evaluating a claimant's subjective complaints—including nervousness—the ALJ must consider the factors set forth in *Polaski v. Heckler*: "(1) the claimant's daily activities; (2) the duration, frequency and intensity of the pain; (3) dosage, effectiveness, and side effects of medication; (4) precipitating and aggravating factors; and (5) functional restrictions." *Black v. Apfel*, 143 F.3d 383, 386 (8th Cir. 1998); *accord Polaski*, 739 F.2d 1320, 1321-22 (8th Cir. 1984), *vacated*, 476 U.S. 1167 (1986), *reinstated*,[7] 804 F.2d 456 (8th Cir. 1986). "Other relevant factors include the claimant's relevant work history and the absence of objective medical evidence to support the complaints." *Black*, 143 F.3d at 386. The ALJ may not discredit the claimant's allegations based solely on the absence of objective medical evidence, but the ALJ may rest a credibility finding on "objective medical evidence to the contrary," *Ramirez v. Barnhart*, 292 F.3d 576, 581 (8th Cir. 2002); or "inconsistencies in the record as a whole," *Brockman v. Sullivan*, 987 F.2d 1344, 1346 (8th Cir. 1993). The court defers to an

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[6] Thurman does not appear to challenge the ALJ's assessment of her ability to pay attention, concentrate, and follow instructions, and the record supports the ALJ's finding that she does not have significant limitations in these areas (other than as accounted for in the ALJ's RFC determination). *See* AR 80-81 (Dr. Shafer's RFC determination); AR 158, 182, 187, 387-88, 390, 432, 435, 437 (no apparent issues noted in treatment records); AR 351-53, 357, 361, 391-92, 394, 396, 398, 400, 402, 404, 406, 408, 411, 413, 414, 417, 433, 434, 436, 438 (able to sit through therapy sessions lasting approximately one hour); *but see* AR 199, 417, 208 (issues with concentration or focusing on the present).

[7] The court did not explicitly say that it was reinstating the original *Polaski* opinion, but the Eighth Circuit has recognized that it "effectively reinstat[ed]" *Polaski. Jones v. Callahan*, 122 F.3d 1148, 1151 n.3 (8th Cir. 1997).

ALJ's assessment of a claimant's subjective complaints so long as the "determination is 'supported by good reasons and substantial evidence,' 'even if every factor is not discussed in depth.' " *Smith v. Colvin*, 756 F.3d 621, 625 (8th Cir. 2014). "The ALJ [i]s not required to discuss methodically each *Polaski* consideration, so long as he acknowledge[s] and examine[s] those considerations before discounting [the claimant's] subjective complaints." *Lowe v. Apfel*, 226 F.3d 969, 972 (8th Cir. 2000).

The ALJ in this case listed the *Polaski* factors and provided analysis for his assessment of Thurman's subjective complaints. AR 16-19. The ALJ found that the medical evidence did not support Thurman's claims because she often reported she was doing well, mental status exams showed some anxiety but no cognitive problems, and her Global Assessment of Functioning (GAF) scores consistently showed no more than moderate symptoms. AR 17-18. Treatment records generally provide support that Thurman's anxiety is not as severe as she claims. *See* AR 357, 361, 396, 411, 413, 414, 417 (2014 and 2015 treatment notes that Thurman is able to calm herself down and that self-talk, advance planning, and exercise help her symptoms); AR 395 (able to control panic attacks and anxiety for the most part in March 2015); AR 403 (panic attacks and anxiety under control with medication in January 2014). These records are consistent with Thurman's testimony that medication, self-talk, and advance planning or being aware of what will happen help reduce or alleviate her symptoms. AR 49-50. Treatment records also demonstrate that although Thurman experiences stress, she is able to control her reaction and function appropriately. *See* AR 389, 392 (able to transition to new psychiatrist); AR 391 (able to complete Housing and Urban Development (HUD) home inspection); AR 400 (able to drop

clothes off at donation center); AR 436 (able to attend son's football game).

Treatment notes also show that Thurman's GAF scores were consistently in the range of only limited to moderate symptoms and improved over time: Therapist Tatarka noted GAF scores of 58 in December 2013 and 62 in July 2015 (AR 352, 380), while Dr. Husman noted a GAF score of 62 in May and June 2015, a score of 63 in July, August, and September 2015, and a score of 64 in November 2015 (AR 387-88, 390, 432, 435, 437). *See Partee v. Astrue*, 638 F.3d 860, 862 (8th Cir. 2011) (noting in background section that a GAF score between 55 and 65 indicates mild to moderate mental impairment); *Halverson v. Astrue*, 600 F.3d 922, 925 n.4 (8th Cir. 2010) (GAF scores of 51 through 60 are characterized by moderate symptoms, such as occasional panic attacks or moderate difficulty in social functioning (citing Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 34 (4th ed. 2000) (DSM-IV))). An ALJ may consider a GAF-score range reflecting only moderate symptoms when evaluating a claimant's subjective complaints. *See Lundgren v. Astrue*, No. 09-3395 (RHK/LIB), 2011 WL 882084, at *13 (D. Minn. Feb. 7, 2011) (report and recommendation), *adopted by* 2011 WL 883094 (D. Minn. Mar. 11, 2011); *see also Halverson*, 600 F.3d at 931 ("GAF scores may . . . be used to assist the ALJ in assessing the level of a claimant's functioning.").

The ALJ also discussed inconsistencies between Thurman's subjective complaints and her activities of daily living as well as her prior reports of limitations. AR 17-18. Thurman reported that although she avoids going out, being around crowds, and unfamiliar places, she is able to drive (including school drop-offs and pick-ups for her chil-

dren and taking her older son to sport practices), go shopping, and talk with family and friends by phone or in person on a daily basis. AR 40, 52, 54, 180-81, 194, 197-98, 206-07, 414; *but see* AR 191 (reported being limited to driving regular, familiar routes and avoiding stores when they are busy). She has also been able to take her son outside to ride his bike and to the park to play. AR 413, 417. In addition, Thurman reported that although her mental health issues affect her ability to get along with others (AR 182), she does not have any issues getting along with authority figures (AR 183, 200, 209). She testified that she does not do well being around males but that she trusts her male attorney because he is "an authoritative figure" and she knows he will not harm her. AR 46-47. Overall, the record supports the ALJ's finding that Thurman's activities of daily living show that her subjective complaints were not fully credible.

The ALJ also noted that Thurman's sporadic work history "raises some questions as to whether the current unemployment is truly the result of medical problems." AR 19. An ALJ may properly consider this factor in weighing a claimant's subjective complaints. *See Wildman v. Astrue*, 596 F.3d 959, 968-69 (8th Cir. 2010); *see also Julin v. Colvin*, 826 F.3d 1082, 1087 (8th Cir. 2016). Thurman has never worked long enough to have engaged in substantial gainful activity. AR 37, 45, 167-70. The record supports the ALJ's finding that this factor undermined Thurman's subjective complaints. *See Julin*, 826 F.3d at 1087 (claimant's "poor employment history suggested a lack of motivation to work" and provided proper basis for ALJ to

conclude unemployment may not be result of medical impairments).[8]

The ALJ did not completely disregard Thurman's reported limitations. The ALJ found that Thurman does not handle stress or changes in routines well. AR 17. After considering the effects of Thurman's mental impairments, the ALJ limited Thurman to unskilled work that requires only limited contact with others. AR 18. Courts must "defer to an ALJ's credibility finding as long as the 'ALJ explicitly discredits a claimant's testimony and gives a good reason for doing so.' " *Schultz v. Astrue*, 479 F.3d 979, 983 (8th Cir. 2007) (quoting *Hogan v. Apfel*, 239 F.3d 958, 962 (8th Cir. 2001)); *see also Halverson*, 600 F.3d at 932 (noting the ALJ weighed the *Polaski* factors in finding claimant's allegations were not fully credible). Although the record shows that Thurman's mental impairments cause some limitations, the ALJ could only find Thurman disabled if her anxiety was so severe that it prevented her from working. Because the ALJ in this case provided good reasons for not fully crediting Thurman's subjective complaints, his assessment should be affirmed.

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[8] Similarly, I note that in November 2013, Thurman told her treating psychiatrist at the time (R. Paul Penningroth, M.D.) that "[Thurman's] counselor wants her to get psychotherapy and this is necessary for her to get disability." AR 333. A claimant seeking treatment in support of a disability claim may be one factor, among others, that an ALJ can consider in evaluating a claimant's subjective complaints. *See Aguiniga v. Colvin*, 833 F.3d 896, 902 (8th Cir. 2016) (substantial evidence supported the weight the ALJ assigned to the claimant's subjective complaints when the ALJ considered, as one factor among many, that the claimant "seemed to return to the doctors only when she needed disability forms filled out").

B. Weight Given to Medical Opinions

When determining a claimant's RFC, the ALJ considers medical opinions "together with the rest of the relevant evidence." 20 C.F.R. § 416.927(b).[9] In determining Thurman's RFC, the ALJ considered medical source statements[10] from Dr. Husman (AR 373-79) and Therapist

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[9] New regulations for evaluating medical opinions went into effect on March 27, 2017, and some, by their terms, apply retroactively. *See* Revisions to Rules Regarding the Evaluation of Medical Evidence, 82 Fed. Reg. 5844 (Jan. 18, 2017). The Eighth Circuit has applied these new rules retroactively, which are substantively the same as the old rules. *See, e.g., Chesser v. Berryhill*, 858 F.3d 1161, 1164 (8th Cir. 2017). I cite only to the new regulations, except I cite to both the regulations currently in effect and in effect at the time of the ALJ's decision where the relevant section number differs between the 2018 and 2015 regulations.

[10] It is not completely clear at times which medical opinion(s) the ALJ is referring to in his written decision. He refers to the medical source statements from Thurman's "treating psychiatrist and licensed social worker" (which appear to be Dr. Husman and Therapist Tatarka based on reference to Exhibits 9F and 10F), as well as "the Iowa Department of Human Services 'Report on Incapacity' forms (Exhibit 12F)" (which included forms from both Therapist Tatarka and Dr. Penningroth). AR 19, 373-86, 418-27. The ALJ then wrote "the proivder's [sic] opinions are without substantial support from the other evidence of record, including his own longitudinal treatment history" as one of multiple factors for not giving "these opinions" great weight. AR 19. Based on context, it appears the ALJ considered each of the medical source opinions and declined to give any of them great weight for the reasons stated. Because I find the ALJ provided good reasons for the weight assigned to the medical opinions, "deficiency in opinion-writing technique" does not require reversal of the ALJ's decision. *See Hepp v. Astrue*, 511 F.3d 798, 806 (8th Cir. 2008) (deficiency in opinion-writing technique that has no bearing on the outcome does not require an administrative opinion be set aside).

Tatarka (AR 380-86). AR 19. Thurman argues[11] that the ALJ should have given Dr. Husman's opinion controlling weight because it is consistent with the medical evidence and other evidence in the record. Doc. 11 at 9-19. Thurman further argues that even if the ALJ was not required to give Dr. Husman's opinion controlling weight, the opinions of Thurman's treatment team should have been given great weight because the ALJ failed to provide specific reasoning for the weight to assign these opinions, and therefore the case should be remanded for the ALJ to give further consideration to the work-related restrictions provided by Dr. Husman and Therapist Tatarka. Doc. 11 at 19-20.

An ALJ must give "controlling weight" to a treating-source opinion "if it 'is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence.' " *Papesh v. Colvin*, 786 F.3d 1126, 1132 (8th Cir. 2015) (quoting *Wagner v. Astrue*, 499 F.3d 842, 848-49 (8th Cir. 2007)); *see also* 20 C.F.R. § 416.927(c)(2). "An ALJ may 'discount or even disregard the opinion of a treating physician where other medical assessments are supported by better or more thorough medical evidence, or where a treating physician renders inconsistent opinions that undermine the credibility of such opinions.' " *Goff v. Barnhart*, 421 F.3d 785, 790 (8th Cir. 2005) (quoting *Prosch v. Apfel*, 201 F.3d 1010, 1013 (8th Cir. 2000)). "Whether the ALJ gives the opinion of a treating [source] great or little weight, the ALJ must give good reasons for doing so." *Reece v. Colvin*, 834 F.3d 904, 909 (8th Cir. 2016).

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[11] Thurman does not challenge the ALJ's decision as it pertains to the form "Report on Incapacity" opinions from Therapist Tatarka and Dr. Penningroth.

As an initial matter, Therapist Tatarka is a licensed mental health counselor and therefore does not qualify as an acceptable medical source whose opinion is entitled to controlling weight. *See* 20 C.F.R. §§ 416.902(a), 416.927(a)(2) (treating source entitled to controlling weight must be an acceptable medical source, which includes licensed physicians and licensed psychologists); 20 C.F.R. §§ 416.902, 416.913(a), 416.927(a)(2) (2015) (same). An ALJ must still consider the opinions of other sources (such as Therapist Tatarka), however, using the following factors:

> (1) whether the source has examined the claimant; (2) the length, nature, and extent of the treatment relationship and the frequency of examination; (3) the extent to which the relevant evidence, "particularly medical signs and laboratory findings," supports the opinion; (4) the extent to which the opinion is consistent with the record as a whole; (5) whether the opinion is related to the source's area of specialty; and (6) other factors "which tend to support or contradict the opinion."

Owen v. Astrue, 551 F.3d 792, 800 (8th Cir. 2008) (quoting the current 20 C.F.R. § 416.927(c)); *see also* 20 C.F.R. 416. 927(f); Social Security Ruling 06-03p, 71 Fed. Reg. 45593, 45594-45596 (Aug. 9, 2006). The ALJ seems to have considered these factors in weighing Therapist Tatarka's opinion. It appears Dr. Husman qualifies as an acceptable medical source as Thurman's treating psychiatrist; although she had only seen Thurman twice before issuing her opinion, she appears to have taken over Thurman's medication management from Dr. Penningroth. *See* AR 387-89, 432, 435, 437. The ALJ provided specific reasons, which I find are supported by substantial evidence in the

record, for not giving great weight to the opinions of Dr. Husman and the rest of Thurman's treatment team.[12]

First, the ALJ noted that both Dr. Husman and Therapist Tatarka believed Thurman has extreme limitations, but that their opinions contradicted one another. AR 19. In particular, the ALJ noted differences in the opinions regarding Thurman's limitations in activities of daily living and concentration, persistence, and pace. *Id.* The record supports this finding:

Limitation	**Dr. Husman**	**Therapist Tatarka**
activities of daily living	marked	none-mild
maintaining concentration, persistence or pace	none-mild	marked

AR 378, 385. Although not listed by the ALJ, the record contains additional inconsistencies (albeit not always as significant) between these opinions:

Limitation	**Dr. Husman**	**Therapist Tatarka**
carry out short, simple instructions	unlimited or very good	seriously limited

[12] I agree with Thurman's assertion that her providers at Cedar Centre Psychiatric Group (Dr. Penningroth, Dr. Husman, and Therapist Tatarka, AR 47) constitute a treatment team and that their combined records should be considered in evaluating the weight given to the medical opinions in this case. *See Shontos v. Barnhart*, 328 F.3d 418, 426-27 (8th Cir. 2003).

maintain attention for 2 hours	limited but satisfactory	unlimited or very good
sustain ordinary routine	limited but satisfactory	seriously limited
work with others	unable to meet competitive standards	seriously limited
perform at consistent pace	seriously limited	limited but satisfactory
accept instruction and criticism from supervisors	unable to meet competitive standards	none (accept instructions), seriously limited (accept criticism)
respond appropriately to change in routine work setting	seriously limited	unable to meet competitive standards
deal with normal stress	seriously limited	no useful ability to function
average number of days absent from work	more than 4 days/month	3 days/month
maintaining social functioning	marked	extreme
episodes of decompensation	marked	moderate
residual disease process – likely decompensation	box checked	box not checked
anxiety related	box checked	box not

disorder and complete inability to function independently outside home		checked (although notation says can function "for relatively brief periods on a daily basis")

AR 376-78, 383-85. A finding that an opinion is inconsistent with other evidence in the record is a "good reason" for discounting the opinion of a treating physician, *see Goff*, 421 F.3d at 790, even if other factors weigh in favor of crediting the opinion, such as the fact that it was issued by a treating source, *see Dixon v. Barnhart*, 353 F.3d 602, 606 (8th Cir. 2003), or a specialist, *see Prosch*, 201 F.3d at 1014.

The ALJ next concluded that Dr. Husman's and Therapist Tatarka's opinions "relied quite heavily on [Thurman's] subjective report of symptoms and limitations." AR 19. Dr. Husman opined that Thurman would be seriously limited in responding to change in a routine work setting and dealing with normal work stress and that she would be unable to meet competitive standards of accepting instructions and criticism from supervisors and getting along with coworkers. AR 377. Dr. Husman explained that this was based in part on Thurman's "panic [and] OCD symptom." *Id.* Dr. Husman also believed that Thurman would be absent more than four days per month, although she provided no explanation for that finding. *Id.* Therapist Tatarka found that Thurman's "anxiety prevents her from going places [and] interacting with people" to the extent she would be seriously limited in responding to criticism from a supervisor, that she would be unable to meet competitive standards in getting along with coworkers and responding to changes in routine work setting,

and that she would have no useful ability to deal with normal work stress. AR 384. Therapist Tatarka believed Thurman would miss three days of work per month due to anxiety and panic attacks and having to work around other people. *Id.* To the extent these opinions were based on Thurman's anxiety and panic attacks, the opinions are inconsistent with the treatment records and appear to rely on Thurman's subjective complaints (which included her report as part of her application that she suffers panic attacks at least twice per week).

Dr. Penningroth noted in March 2014 that Thurman "continues to have panic attacks[and] cannot go any place that has people." AR 358. The same date, however, Therapist Tatarka noted that Thurman's anxiety increases "when she is away from home" and "when things come up unexpectedly" but did not mention recent panic attacks nor issues being around people. AR 357; *see also* AR 400-01 (Dr. Penningroth noted in December 2014 that Thurman has panic attacks at times, but one week later, Therapist Tatarka noted only Thurman's issues getting rid of clothing and not panic attacks). Although treatment notes reference ongoing panic attacks, Thurman provided details for only one such occurrence (in January 2014, when she drove on the interstate). AR 361. Since that time, treatment notes contain few reports of panic attacks: in March 2014, April 2014, December 2014, and August 2015. AR 358, 401, 416, 437. Treatment notes from October 2014 and May 2015 refer to panic attacks generally (from prior incidents or as part of Thurman's history). AR 389, 404. Dr. Husman did not mention panic attacks in June 2015 treatment notes. AR 388. Thurman reported feeling like she might have panic attacks in July 2015, although this appears to have been caused by medication. AR 387. In August 2015, Dr. Husman noted "[s]ome panic attacks,"

but things appeared to improve in September and November of that year. AR 432, 435, 437. Indeed, the most recent treatment notes in the record do not mention panic attacks (aside from August 2015). AR 432-38. Treatment records from the prior period (which constitute part of the treatment team's records as urged by Thurman) mention panic attacks only three times between 2006 and November 2012. AR 318, 324, 346.

Other portions of the record provide some support for the ALJ's conclusion that the providers relied on subjective complaints to form their opinions. During a mental status examination (MSE) in May 2015, Dr. Husman noted normal results, except that Thurman was "somewhat fidgety," had "some disorganization" in thought process, and appeared nervous (all of which appear to be based on Dr. Husman's observations). AR 389-90. Dr. Husman also noted under mood that "[i]t could be better" and that Thurman's affect was "pleasant but anxiety is my real problem" (which appear to be based on Thurman's reports). AR 390. Dr. Husman made similar MSE notes during Thurman's other visits: "I'm sick of feeling this anxious" for affect in June and August 2015 and "I'm irritable" under mood in August 2015 (AR 388, 437); "I'm still feeling anxious but I am more aware of it" for affect in July 2015 (AR 387); "I'm still feeling anxious at night" for affect in September 2015 (AR 435); and "I'm still feeling anxious but I think it's because of the holidays coming up" for affect in November 2015 (AR 432). Therapist Tatarka's treatment notes also included apparent observations (such as Thurman being nervous or worried), but also information reported from Thurman. *See* AR 391 (often takes son to school late to avoid crowds), 398 (sleep issues due to worrying; "[s]ometimes she is afraid to go to sleep"), 402 ("[s]he reports stress eating with weight

gain"), 404 ("feels overwhelmed" and has "difficulty leaving the house"), 413 ("[s]he reports that getting out of the house has been a struggle" followed by MSE notation "increased isolation"), 414 (excessive worrying and "uncomfortable in crowds"), 436 ("[s]he reports feeling a little more relaxed" and worries "especially at bedtime" and "sometimes has difficulty getting to sleep"), 438 ("[s]he notes increased irritability, which she attributes to [medication change]"); *but see* AR 406 (anxious mood and restricted affect), 411 ("somewhat anxious" mood and restricted affect), 413 (increased anxiety). Dr. Penningroth's treatment notes do not include MSE notations, except from Thurman's initial visit in April 2005 (where he noted "friendly cooperative woman" with normal mood and affect and intact memory). AR 325. I take Thurman's point that providers must rely upon a patient's allegations and reports in making mental health diagnoses but note that the opinion in *Flannery v. Chater*, 112 F.3d 346, 350 (8th Cir. 1997) (cited by Thurman, *see* Doc. 11 at 19) involved an ALJ's decision to discount a medical diagnosis, not an ALJ's decision to disregard a medical source opinion for relying on subjective complaints (in addition, there was no basis upon which to discredit the claimant's subjective complaints in *Flannery*).

Thurman also argues that the information contained in her treatment team's records constitute objective medical evidence, not subjective complaints. Thurman relies on *Hines v. Colvin*, No. C15-2004-LTS, 2016 WL 538469 (N.D. Iowa Feb. 9, 2016) in making this argument. This case is similar to, although distinguishable from *Hines*: the observed signs and symptoms found to constitute objective medical evidence in *Hines* (such as hearing voices, sleep disturbance, mood disturbance, panic attacks "every once in awhile," and having problems with a neighbor)

were likely based on the claimant's reports to the treatment team, while other signs and symptoms (including racing thoughts, appearing upset, poor insight and judgment, talking fast, jumping from subject to subject, and being emotionally reactive) were likely based on the treatment team's observations. *See id.* at *5-7. The ALJ in this case was allowed to give less weight to medical opinions that relied upon Thurman's subjective statements because the ALJ did not fully credit those statements. *See Vance v. Berryhill*, 860 F.3d 1114, 1121 (8th Cir. 2017) ("Because the ALJ reasonably concluded that [claimant's] statements lacked credibility, he could discount [the treating source's] opinion to the extent that it relied on [claimant's] subjective complaints."); *Julin*, 826 F.3d at 1085 (holding that the ALJ "permissibly declined to give controlling weight to [the treating doctor's] opinions on [claimant's] work-place limitations" that "relied on [claimant's] subjective complaints" of depression and anxiety when the ALJ had found the claimant not credible).

The ALJ also found that the treatment team's opinions were not substantially supported by the record, including the conservative nature of Thurman's treatment history and GAF scores that showed only moderate symptoms. AR 19. The record supports this finding. Treatment records demonstrate that Thurman was often doing well[13]

[13] Thurman argues that the DDS consultants (and the ALJ by relying on their opinions) "misinterpreted medical records, equating 'stable' or 'doing well' with 'not disabled.' " Doc. 11 at 23-24. A review of Dr. Penningroth's treatment notes, which range from 2006 to April 2015, show otherwise. Thurman first saw Dr. Penningroth in April 2005 after being referred by the Iowa Department of Human Services for a psychiatric evaluation. AR 324, 389. She reported she began having panic attacks the year before, which doctors first treated as heart issues. AR 324. Dr. Penningroth initially diagnosed Thurman with

or improving. AR 359-60 (doing okay), 393 (better month), 395 (doing better, but not great or bad; able to control panic disorder and anxiety "for the most part"), 399 (doing better), 403 (doing okay, panic attacks and anxiety under control), 405 (doing okay, not great or bad). Thurman is often able to calm herself down when she becomes anxious or has a panic attack. AR 357 (self-talk and planning when she goes places help), 361 (calmed herself during panic attack), 396 (logic and self-talk sometimes work), 414 (positive self-talk helps her get through anxiety-provoking situations). Exercise also helps her manage her anxiety. AR 411 (pretty good week, walking almost daily), 413 (not walking as much, increased symptoms), 414 (exercise helping), 417 (walking encouraged and helps with her stress), 435 (walking again and doing fairly well). Thurman also takes medication, and although modified at times, the record shows medication generally helped her symptoms. AR 336 ("[s]he feels they have a good mix with the medication"); 343 ("doing fairly well"), 393 (better month, medication complaint), 399 (doing better over the past month); *see also* AR 333-40, 343-45 (generally stable with no increased symptoms or other issues noted). Most recently, Dr. Husman noted "[s]ome panic attacks" in August 2015 (AR 437), but Thurman seemed improved with

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panic disorder without agoraphobia, and later diagnosed panic disorder with agoraphobia in January 2010, although there is no indication as to why the diagnosis changed. AR 286, 325. Dr. Penningroth's treatment records from April 2005 through November 2012 show that Thurman's primary issues were depression and mood swings (although some phobia and fear were noted in June 2010, AR 281) and that she was generally doing okay with medication (AR 258-325, 329, 333). Based on this history and context, subsequent treatment records (during the relevant time period) showing that Thurman was stable or doing well support the ALJ's decision to not give great weight to the medical opinions.

no panic attacks reported in September and November 2015 following a change in medication. *See* AR 435 (Thurman did not want to change medication and was "feeling fairly stable" in September), 432 (although stressed, medication was helping without side effects and with no change desired in November). Therapy sessions have also helped Thurman manage her anxiety. AR 350, 360 (psychotherapy going well), 389 (reported therapy is helpful), 416 (seeing psychotherapist helpful although reported continued panic attacks).

As discussed in the previous section, Thurman's GAF scores showed only limited to moderate symptoms. AR 352, 373, 380, 387-88, 390, 432, 435, 437. Those scores are inconsistent with the extreme limitations in Dr. Husman's and Therapist Tatarka's medical source statements. An ALJ may decline to give controlling weight to a physician's opinion where the physician's assigned GAF score contradicts the physician's findings of limitations. *Merritt v. Astrue*, 609 F. Supp. 2d 850, 864-65 (E.D. Mo. 2009) (finding GAF scores of 60 and "60-65" indicated only mild to moderate symptoms and were inconsistent with physician's opinion of marked limitations); *see also Halverson*, 600 F.3d at 931 (collecting cases). In particular, Dr. Husman assessed a GAF score of 62 in both May and June of 2015 (AR 373, 388, 390) but opined in June 2015 that Thurman had marked limitations and would be unable to meet competitive standards, including missing work more than four times per month (AR 376-78). Inconsistencies between the opinions and the GAF scores contained in their treatment notes provided a good reason for the ALJ to decline to give great weight to Dr. Husman's and Therapist Tatarka's opinions.

The ALJ also considered the RFC opinions of Dr. Lark and Dr. Shafer, the DDS non-examining consultants.[14] AR 19. Dr. Lark found that Thurman has only mild limitations in her abilities to engage in activities of daily living, to maintain social functioning, and to maintain concentration, persistence, and pace, and that her mental impairments cause only non-severe functional limitations. AR 67-68. Accordingly, Dr. Lark made no RFC determination. *See* AR 69. Dr. Shafer found moderate limitations in Thurman's abilities to remember and carry out detailed instructions; maintain attention and concentration for extended periods; perform within a schedule, be punctual, and maintain attendance; work in coordination or proximity to others; complete a normal work day without interruption from psychologically based symptoms; perform at a consistent pace; accept instructions and criticism from supervisors; get along with coworkers; respond to work-setting changes; and travel in unfamiliar places. AR 80-81. Dr. Shafer also found that Thurman has marked limitations in her ability to interact with the general public. AR 80. He concluded that Thurman's ability to maintain attention, concentration, and pace "are adequate for routine tasks not requiring sustained attention or extensive contact with others," that she can "interact appropriately

[14] The ALJ refers to the "conclusions reached by the [DDS] physicians" (plural), notes that the examiners' opinions (plural) were internally consistent, and concludes the opinions (plural) were entitled to substantial weight. AR 19. During the initial review, Dr. Lark provided opinions about the severity of Thurman's medically determinable impairments and whether those impairments meet or equal any applicable Listing but made no RFC assessment. *See* AR 67-69 (noting "[n]o RFC/[mental]RFC assessments are associated with this claim"). Accordingly, I will disregard Dr. Lark's opinion and consider only the ALJ's review of Dr. Shafer's opinion

with known coworkers and supervisors on at least a limited basis," and that she can adjust to work-place changes with supportive supervision. AR 80-81. Thus, Dr. Shafer found that Thurman could perform routine tasks that do not require sustained attention and involve limited contact with others. AR 81-82.

The ALJ found these conclusions were entitled to substantial weight because they were "well supported with specific references to medical evidence" and were "consistent with the evidence as a whole."[15] *Id.* Because the ALJ gave a good reason for declining to give great weight to Dr. Husman's and Therapist Tatarka's opinions, the ALJ could properly assign greater weight to RFC opinions from non-treating, nonspecialist sources. *See Ponder v. Colvin*, 770 F.3d 1190, 1194-95 (8th Cir. 2014) (concluding that the treating physician's RFC opinion "cannot trump" three non-examining consultants' opinions "solely because he was [claimant's] primary care physician" when his opinion was inconsistent with claimant's daily activities and contemporaneous treatment records); *see also Vance*, 860 F.3d at 1121 (holding that when the ALJ gives a good reason for discounting a treating physician's opinion, the ALJ may "rely instead on the opinions of the state

[15] The ALJ's decision, especially in regard to the weight given the DDS opinions, consists largely of "a series of generalized statements" and "boilerplate language" without specific or extensive citation to the record. *See Hines*, 2016 WL 538469, at *5-6 (finding the ALJ's boilerplate reasoning for the weight given to state agency opinions "meaningless" but noting "[t]he ALJ did not even bother to state that the consultants' opinions [we]re consistent with . . . the record as a whole"). I find, nevertheless, that the ALJ provided adequate reasons and explanation for his findings.

agency medical consultants," as long as those opinions are "more consistent with the medical evidence").[16]

C. Some Medical Evidence

Thurman argues the ALJ's RFC determination is not supported by substantial evidence from a treating or examining source. Doc. 11 at 22-25. When determining a claimant's RFC, the ALJ must consider "all of the relevant evidence, including the medical records, observations of treating physicians and others, and an individual's own description of his limitations." *McKinney v. Apfel*, 228 F.3d 860, 863 (8th Cir. 2000). The ALJ's RFC determination must be supported by at least some medical evidence that "addresses the claimant's ability to function in the workplace." *Hutsell v. Massanari*, 259 F.3d 707, 712 (8th Cir. 2001) (quoting *Lauer v. Apfel*, 245 F.3d 700, 704 (8th Cir. 2001)).

Thurman argues the ALJ failed to properly develop the record because the ALJ's RFC determination is not supported by the opinion of a treating or examining medical source and relies on *Nevland v. Apfel*, 204 F.3d 853 (8th Cir. 2000) and *Strongson v. Barnhart*, 361 F.3d 1066 (8th Cir. 2004). Those cases require the ALJ to develop the record to ensure it contains an opinion from a treating physician or consultative examiner about the functional limitations caused by a claimant's impairments; the ALJ

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[16] Thurman also relies on *Allen v. Astrue*, 534 F. Supp. 2d 923, 929 (S.D. Iowa 2008), to argue the ALJ did not make a reasonable choice among the available medical opinions. That case, however, is distinguishable because the court in *Allen* found that the ALJ improperly weighed treating-source medical opinions (including from a state agency psychologist and claimant's treating psychiatrist). *Id.* at 928-29.

cannot rely on only the opinions of non-treating, non-examining sources in forming an RFC determination. *Strongson*, 361 F.3d at 1071-72 (discussing *Nevland*); *Nevland*, 204 F.3d at 857-58. Here, however, the record contains RFC opinions from Thurman's treating providers (although the ALJ assigned these opinions little weight), and as discussed in the preceding sections, the ALJ conducted an independent review of the medical evidence to formulate an RFC consistent with the treatment records and with the DDS consultant's opinion.[17] Some medical evidence thus supports the ALJ's RFC determination. *See Kamann v. Colvin*, 721 F.3d 945, 948-51 (8th Cir. 2013) (rejecting claimant's argument that the ALJ

[17] Dr. Shafer opined that Thurman suffered from marked limitations in her ability to interact with the general public. AR 80. He also found that she suffered from moderate limitations in other categories but could ultimately perform "routine tasks not requiring sustained attention" and "interact appropriately with known coworkers and supervisors on at least a limited basis." AR 80-81. Thurman argues that Dr. Shafer's opinion is not consistent with the ALJ's RFC determination because the ALJ limited only her ability to interact with coworkers, not supervisors. Doc. 11 at 22. Although this argument may have merit on a different record, *see, e.g., Young v. Barnhart*, 362 F.3d 995, 1002-03 (7th Cir. 2004); *Wood v. Astrue*, No. 1:11-CV-3198-JSA, 2012 WL 5507330, at *4-7 (N.D. Ga. Nov. 14, 2012); here, it is clear that the ALJ's limitation on Thurman's ability to interact with coworkers included supervisors, as the relevant hypothetical to the VE explicitly limited Thurman to "only occasional contact with coworkers or supervisors" (AR 58). *See also* AR 58-60 (VE testified that jobs as a laundry worker or janitor involve work that can be done in non-public settings, such as in the evening, and are fairly isolated and not highly managed). For this same reason, even if the ALJ erred in failing to explicitly note in the opinion that Thurman was limited in her ability to interact with supervisors, any error was harmless. *See Hann v. Colvin*, No. 12-CV-06234-JCS, 2014 WL 1382063, at *21-24 (N.D. Cal. Mar. 28, 2014).

"formulated his own medical opinion" when the ALJ assigned little weight to the RFC opinion of the one-time examining psychologist and instead relied on a "thorough[ ] review[ ] [of] years of medical evidence on record" to formulate an opinion "consistent with the views of . . . the reviewing agency psychologist"); *Hacker v. Barnhart*, 459 F.3d 934, 939 (8th Cir. 2006) (rejecting claimant's argument "that the ALJ should not have based his decision upon the opinions of" non-examining medical consultants when their opinions "were consistent with the administrative record," and the ALJ gave good reasons for discounting the treating physicians' RFC opinion); *Stormo v. Barnhart*, 377 F.3d 801, 806-807 (8th Cir. 2004) (holding that some medical evidence supported the ALJ's physical RFC determination when it was consistent with the state agency medical consultants' opinions, and at least one treating physician's physical RFC opinion was in the record but assigned non-controlling weight); *see also Symens v. Colvin*, No. CIV 13-3006-RAL, 2014 WL 843260, at *26 (D.S.D. Mar. 4, 2014) (holding that remand is not required under *Nevland* when "the ALJ engaged in an extensive review of the medical evidence . . . [that] supported the ALJ's" RFC and "was also consistent with the reports from the" nonexamining state agency consultants). Also, the ALJ did not completely discount the opinions from Dr. Husman and Therapist Tatarka, nor Thurman's subjective complaints; the RFC determination included limitations in Thurman's ability to interact with others. *See Julin*, 826 F.3d at 1089 (holding that some medical evidence supported the ALJ's RFC determination when the ALJ adopted some of the limitations set forth by the treating physician, but not those limitations "premised on [claimant's] subjective complaints"); *see also Anderson v. Shalala*, 51 F.3d 777, 779-80 (8th Cir. 1995) (holding that

the ALJ's RFC determination was supported by substantial evidence when the ALJ relied on the opinions of two reviewing physicians; adopted some, but not all, of the limitations set forth by the treating physicians; and "conducted an independent analysis of the medical evidence").

The record contained sufficient information for the ALJ to determine Thurman's functional limitations, and the ALJ's RFC determination is supported by some medical evidence.

III. CONCLUSION

I recommend that the district court judge **AFFIRM** the decision of the Commissioner.

Objections to this Report and Recommendation must be filed within fourteen days of service in accordance with 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b). Objections must specify the parts of the Report and Recommendation to which objections are made, as well as the parts of the record forming the basis for the objections. Fed. R. Civ. P. 72. Failure to object to the Report and Recommendation waives the right to *de novo* review by the district court of any portion of the Report and Recommendation, as well as the right to appeal from the findings of fact contained therein. *See United States v. Wise*, 588 F.3d 531, 537 n.5 (8th Cir. 2009).

DONE AND ENTERED this 28th day of June, 2018.