

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

DANIEL W. GOETTSCHKE,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL SECURITY
ADMINISTRATION, MICHAEL
ASTRUE, Agent.

Defendant.

No. 4:07-cv-0191-JAJ

ORDER

I. INTRODUCTION

Plaintiff appeals the ruling of the Social Security Appeals Council on his claim for Social Security disability benefits. The Court finds that the Administrative Law Judge's treatment of various doctors' opinions was appropriate in Plaintiff's case. However, the Administrative Law Judge failed to apply the proper law in coming to a determination as to whether Plaintiff "equals a listed impairment." The Court remands Plaintiff's disability claim with instructions for the proper application of law.

II. PROCEDURAL BACKGROUND

Plaintiff Daniel W. Goettsche applied for disability insurance benefits under Title II on March 22, 2004 (Tr. 72-88), alleging an inability to work since November 24, 2003 (Tr. 72-74). Mr. Goettsche's applications were denied initially, and on reconsideration (Tr. 54-57, 60-63). On October 13, 2004, Mr. Goettsche filed a Request for Hearing by an Administrative Law Judge ("ALJ") (Tr. 67). A hearing before Thomas M. Donahue, ALJ, was held on March 16, 2006 (Tr. 205-30). The ALJ denied Mr. Goettsche's claim in a decision dated August 21, 2006 (Tr. 12-23). The Appeals Council denied Mr. Goettsche's request for review of the ALJ decision on March 6, 2007 (Tr. 6-9). This action for judicial review was filed on May 3, 2007 [Dkt. 1].

III. FACTUAL BACKGROUND

A. Medical History

Daniel Goettsche was first evaluated for mental disorders on January 24, 1968 (Tr. 151). The diagnostic impression was that he suffered from “hyperkinetic impulse disorder” or “minimal brain damage.” (Tr. 151). During a routine physical examination at age eighteen for the Rehabilitation Education and Services Branch, the doctor noted occasional inappropriate verbal response and suggested further psychological and intellectual evaluation for “questionable brain damage.” (Tr. 153). During a physical examination for the State of Iowa Department of Public Instruction Rehabilitation, Education and Services Branch at the age of twenty-five, Mr. Goettsche was diagnosed with “a degree of mental retardation” and given a functional limitation of “limited attention span and ability to follow detailed instructions.” (Tr. 156).

On December 6, 2001, at the age of forty, Mr. Goettsche was tested during a Disability Evaluation for a previous application for disability benefits. The evaluation was performed by Timothy Wahl, Ph.D. and Richard Martin, Ph.D. (Tr. 157-61). Mr. Goettsche was accompanied by his sister so that she could assist in giving a more complete history (Tr. 157). Mr. Goettsche indicated that the umbilical cord was wrapped around his neck when he was born and that air had been shut off to his brain for a period of time (Tr. 157). Mr. Goettsche reported that he lives in a home with his uncle who is “mildly retarded.” (Tr. 157). He has never been married and has no children (Tr. 157). He indicated that he has gout and that he had pain in his knee and foot (Tr. 157). He denied any history of serious head injuries, accidents or seizures.

Mr. Goettsche reported that he was treated for being “hyperactive” in kindergarten and was briefly placed on medication (Tr. 157). Mr. Goettsche’s sister reported that Mr. Goettsche gets “down” sometimes when he cannot find work, but Mr. Goettsche denied delusions/hallucinations, significant anxiety or depression. He admitted having trouble

with anger and has 3-4 “fits” per week (Tr. 157). During a fit Mr. Goettsche may throw things, cuss or break things (Tr. 157). He was attending anger classes twice per month (Tr. 157-58).

Mr. Goettsche graduated from high school and denied significant behavioral difficulties during his school years (Tr. 158). He was required to repeat kindergarten and was placed in a resource room throughout schooling (Tr. 158). He received mostly D’s and F’s (Tr. 158). After graduation he did attend some night classes in auto body work (Tr. 158).

Mr. Goettsche is able to manage activities of daily living on his own and his sister stated that he has lived independently since high school (Tr. 158). He is able to handle cooking, shopping and cleaning (Tr. 158). He has a driver’s license, has no problems with grooming or hygiene, is able to engage in the community effectively and supports himself on food stamps, help from his sister and by doing odd jobs for his family (Tr. 158).

Throughout his interview, Mr. Goettsche was able to understand everyday conversation but occasionally simpler words were required so that Mr. Goettsche could understand fully (Tr. 159). Observations of Mr. Goettsche all appeared to be normal and he was very personable although childlike in thinking at times (Tr. 159). Mr. Goettsche passed most mental status examinations and appeared to have fair long-term recall except that he struggled with recalling historical information such as past presidents (Tr. 159). Mr. Goettsche was somewhat limited in his knowledge of factual information and when asked to name large cities in the United States he named only towns in Iowa (Tr. 159). He could correctly add and subtract single digits but could not multiply or divide (Tr. 159). He was able to correctly perform serial threes without error (Tr. 159). Tasks measuring abstract thinking and reasoning were a challenge for Mr. Goettsche and he was somewhat childlike in his thinking (Tr. 159).

Mr. Goettsche obtained a Verbal IQ score of 71 on the WAIS-3, a Performance IQ score of 81 and a Full Scale IQ score of 74 (Tr. 159-60). His full scale score places him in the borderline range of intelligence (Tr. 160). In terms of employability, Drs. Wahl and Martin concluded that Mr. Goettsche will likely have trouble understanding instructions and procedures. Directions should be kept very simple and routine (Tr. 160). The doctors concluded that Mr. Goettsche had mild mental retardation as well as gout, high blood pressure and a Global Assessment of Functioning (GAF) score of 55 (Tr. 161).

On February 24, 2003, Dr. James S. Brooks performed a Psychiatric Evaluation of Mr. Goettsche due to his difficulty getting and keeping jobs (Tr. 162-65). At the time of the evaluation, Mr. Goettsche had last worked in 2000 (Tr. 162). Once again his sister accompanied him to the meeting and in addition to the previous medical history, assisted Mr. Goettsche in reporting a complete background (Tr. 162). Mr. Goettsche's sister reported that Mr. Goettsche may not have received good job references from his last employer because, when they let him go, they stated they would never hire him back due to his behavior (Tr. 162). While an employee at Iowa Malleable, Mr. Goettsche would cuss, carry on, and would slam pallets around if a pallet would fall off track (Tr. 162). At his last job, Mr. Goettsche got frustrated and threw a shovel that almost hit someone (Tr. 162). Mr. Goettsche's sister reported that he has a tendency to "over-talk" and gets caught up in socializing rather than working (Tr. 162).

Although Mr. Goettsche did not report depression or suicidal tendencies during his 2001 evaluation, in 2003 it was reported that Mr. Goettsche had a history of recurring depression (Tr. 162). They usually occur when he gets laid off or fired (Tr. 162). When his jobs don't work out, he often gets depressed and makes suicide threats (Tr. 162-63). He has talked about shooting himself or hanging himself at times (Tr. 163).

In concluding his evaluation, Dr. Brooks found that Mr. Goettsche has gout in his right foot and a spur in his left heel (Tr. 163). Dr. Brooks confirmed Mr. Goettsche's

diagnosis of mild mental retardation (Tr. 164). His GAF score was diagnosed in this meeting at 40-50 (Tr. 164). Dr. Brooks opined at that time that Mr. Goettsche is not likely to be able to get a job in the near future without a dramatic change in the job market (Tr. 164). He opined that disability benefits would be appropriate (Tr. 164).

The opinions of Drs. Wahl and Brooks were confirmed by Mr. Goettsche's treating physicians in their medical record notations. A treating physician noted as early as 1977 that Mr. Goettsche showed signs of mental retardation (Tr. 173). In 1980 a doctor noted that Mr. Goettsche displayed occasional inappropriate responses to questions, indicating intellectual abnormalities (Tr. 173). The next note from a treating physician regarding Mr. Goettsche's mental status was in 2002 (Tr. 172). At that time the doctor noted that Mr. Goettsche and his family seem to assume some sort of mental retardation stemming from some sort of birth injury (Tr. 171). The medical records note "well-proven gout in 1996." (Tr. 171). Mr. Goettsche saw Dr. Hunter on multiple occasions for symptoms from allergies, aggravated from jobs mowing lawns (Tr. 170-71). On March 31, 2004, Mr. Goettsche went to see his treating physician specifically for a discussion about his gout (Tr. 169). He had been prescribed Alopurinol for some time and the physician determined that he will have to stay on it indefinitely (Tr. 169). He has had serious flare-ups on the right foot that prevent him from walking (Tr. 169). On April 23, 2004, the same treating physician from March 31, Dr. Jeff Hunter, drafted a letter stating, "[Mr. Goettsche] has been shown to have diagnosis of gout but it has not seemed to be a large problem with him and is well treated with Alopurinol." (Tr. 168). Dr. Hunter also stated, "He has limitations due to his mental retardation but we have not fully elicited or established disability secondary to this issue and I would recommend formal neuro-psychiatric testing in order to evaluate the extent of his disability." (Tr. 168).

B. Plaintiff's Work History

On April 9, 2004, Mr. Goettsche filled out a work history form with the assistance of his sister (Tr. 101-08). In it, Mr. Goettsche listed six different positions in which he had been employed (Tr. 101). The first was a position as a laborer in a factory from April 1984 until September 1993 (Tr. 101, 102). In this position, Mr. Goettsche did janitorial work, grinding and flow coating small water pumps (Tr. 102). He had to bend over and carry pumps weighing less than 50 pounds a few feet to a work area for more than eight hours per day (Tr. 102).

The second position was as a laborer in a factory from November 1993 until December 1993 (Tr. 101, 103). In this position, Mr. Goettsche was a material handler, cutting tile and filling hoppers with sand (Tr. 103). He also sorted scrap metal and worked with forklifts (Tr. 103). He had to lift sand bags weighing 50 pounds a few feet and lifted ceramic tile weighing 30 pounds a few feet (Tr. 103). He worked eight hours per day at a rate of \$7.40 per hour (Tr. 103).

Mr. Goettsche's third job was as a laborer in a sawmill from November 1994 until January 1995 (Tr. 101, 105). He stacked lumber and cleaned up areas (Tr. 105). He had to lift stacks of lumber weighing less than 50 pounds and he worked eight hours per day at a rate of \$7.00 per hour (Tr. 105).

The fourth job was as a laborer at a concrete company from May 1995 until July 1995 (Tr. 101, 104). In this position, Mr. Goettsche did concrete work and ran a motorized "screed." (Tr. 104). He had to lift form boards to a table to clean them and they weighed 50 pounds (Tr. 104). He worked eight hours per day (Tr. 104).

The fifth job Mr. Goettsche listed was as a laborer in a factory from October 1995 until July 2000 (Tr. 101, 106). In this position, he operated an air tool, dumped molds and shoveled sand (Tr. 106). He had to lift castings off of a table in order to grind them and they typically weighed 10 pounds (Tr. 106). He worked eight hours per day (Tr. 106).

Mr. Goettsche last worked as a laborer in a factory from October 2002 until November of 2002 and then again from May 2003 until September of 2003 (Tr. 101, 107). He dumped molds, hooked castings, monitored and emptied casting tubs, shoveled sand and “sprued” castings as well as worked with a forklift (Tr. 107). He had to lift empty pallets weighing 50 pounds a couple of feet and carry shovelfuls of sand a few feet (Tr. 107). He worked eight hours per day at a rate of \$9.25 per hour (Tr. 107).

C. Plaintiff’s Subjective Complaints

On April 8, 2004, a third party function report was filled out on behalf of Mr. Goettsche by his sisters (Tr. 89). They stated that they see him or speak with him several times per week and discuss his lifestyle with him (Tr. 89). They stated that Mr. Goettsche eats, naps, watches T.V. and occasionally runs errands during the typical day (Tr. 89). During the summer he mows lawns (Tr. 89). He lives in a house with a disabled uncle who has in-home support staff visits (Tr. 90). Mr. Goettsche needs help from family members to manage finances and make legal decisions (Tr. 90). His uncle’s support staff helps him in cooking, cleaning, hygiene and social activity (Tr. 90). He has needed similar help his entire life because of mild mental retardation (Tr. 90). Mr. Goettsche sleeps a lot during periods of depression but during periods of physical pain his sleep is more restless (Tr. 90).

Mr. Goettsche’s sisters report that he is able to dress himself, bathe himself, shave, prepare his own food and use the restroom (Tr. 90). However, Mr. Goettsche’s clothes are ill fitting and not laundered well, does not bathe often enough, needs reminders for haircuts, overeats and makes poor food choices and has reported occasional urinary and bowel incontinence. His size is a factor in his ability to care for himself both in bathing and dressing and he needs assistance or reminders with other hygiene related issues (Tr. 90-91).

Mr. Goettsche's sisters claim that he needs help determining which over the counter medications to take for illnesses but is able to follow directions once he has the proper medications (Tr. 91). He is able to prepare his own meals composed of frozen or canned foods and cold meat or boxed meals (Tr. 91). He cooks these items in the microwave or on an electric skillet and it takes him up to half an hour to complete the preparation (Tr. 91). He is able to complete light housecleaning, laundry and yard work but he is very slow in completing these tasks and does not do them often (Tr. 91). Due to the slowness and infrequency with which he cleans, his home is very disheveled, dirty and has an odor. His sisters report that he hoards items that others would consider to be worthless (Tr. 91). He needs verbal reminders to keep up his house and could use physical assistance in completing these tasks (Tr. 91). Mr. Goettsche is generally able to get around, shop for himself and handle money (Tr. 92). Bills that are unfamiliar need to be explained to him and he needs help prioritizing his spending (Tr. 92).

Mr. Goettsche's sisters report that his interests include church, fishing, watching television and spending time with family (Tr. 93). He goes to church one or two times per week, fishes weekly during the summer, watches television daily and has family dinners at least once per month (Tr. 93). He has only one close friend, an elderly man who fishes with him (Tr. 93). His social inappropriateness limits his ability to engage in leisure activities (Tr. 93). He talks slowly and people complain about not being able to "get away from him" during conversation (Tr. 93). He is easily irritated and his temper outbursts lead to stomping, cursing and throwing items (Tr. 93).

In terms of physical limitations, Mr. Goettsche's sisters report that he has difficulty lifting and carrying items, kneeling, squatting due to breathlessness, bending due to weight, standing, stair-climbing and walking due to gout (Tr. 94). His sisters also report that he is slow in completing tasks and requires much instruction, has more difficulty with short term concentration than with long term, has a short attention span, appears to

understand more than he actually does and instructions must be clear, simple and one-to-two step (Tr. 94). He has difficulty getting along with others due to temper outbursts (Tr. 94).

Mr. Goettsche gets winded going up stairs and can only walk a couple of blocks before needing a rest (Tr. 94). After resting 5-10 minutes he can continue walking (Tr. 94). He can pay attention for 15-30 minutes at a time, and occasionally finishes what he starts, depending on the activity (Tr. 94). Written instructions can be too complex because his ability to read is limited (Tr. 94). He gets along with authority figures except for situations where he loses his temper (Tr. 94). He has been fired or laid off due to these problems (Tr. 95).

On April 9, 2004, Mr. Goettsche's sisters filled out a personal pain/fatigue questionnaire on his behalf (Tr. 97-100). He reported aching pain in his right foot that becomes a sharp pain requiring the use of a cane during "flare-ups" of gout (Tr. 97). The pain gets worse with standing on the foot and if he walks or stands for periods of more than one hour (Tr. 97). The pain is present at least once a week for a couple days and at the same intensity throughout the day (Tr. 97). Additionally, Mr. Goettsche feels sharp pains every other month lasting for nearly a month (Tr. 97). Mr. Goettsche takes Alopurinol when he can afford it but he experiences aching pain whether he takes the medication or not (Tr. 98). Ibuprofen occasionally helps; using a cane cuts down on the pressure on his foot (Tr. 98). The pain makes it harder to stand, walk, use stairs, get in and out of the bed or bath and it makes it difficult to maintain a consistent work schedule (Tr. 98). He can walk short distances for one hour with breaks or for one half hour without taking a break (Tr. 100). He can stand for one hour if he is moving, but if he is standing still with no movement, he requires a break after 15 minutes (Tr. 100). Mr. Goettsche has gained weight due to being unable to work (Tr. 99). He is irritable because of the pain and that causes him to have difficulty concentrating (Tr. 99).

D. Residual Functional Capacity

On May 12, 2004, John F. Tedesco, Ph.D., completed a mental residual functional capacity assessment of Mr. Goettsche on behalf of Disability Determination Services (Tr. 186-191). Dr. Tedesco opined that Mr. Goettsche was moderately limited in the ability to understand and remember detailed instructions, but otherwise not significantly limited in other understanding and memory categories (Tr. 186-87). Dr. Tedesco opined that Mr. Goettsche was moderately limited in his ability to carry out detailed instructions, maintain attention and concentration for extended periods, and complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods, but was otherwise not significantly limited with regard to sustained concentration and persistence categories (Tr. 186-87). Dr. Tedesco opined that Mr. Goettsche was moderately limited in the ability to accept instructions and respond appropriately to criticism from supervisors as well as the ability to get along with coworkers or peers without distracting them or exhibiting behavioral extremes. Mr. Goettsche was otherwise not significantly limited in the remaining social interaction categories (Tr. 187). Dr. Tedesco opined that Mr. Goettsche was moderately limited in the ability to respond appropriately to changes in work setting but was otherwise not significantly limited in the remaining adaptation categories (Tr. 187).

In his notes, Dr. Tedesco stated that Mr. Goettsche's "[l]evel of impairment is severe, but not of sufficient severity so as to meet or equal any of the current listings." (Tr. 190). Dr. Tedesco stated that Mr. Goettsche had made a prior application for disability and he noted the results of Mr. Goettsche's previous cognitive testing (Tr. 190). Dr. Tedesco contacted the previous evaluating psychologist by phone to clarify the opinion regarding functioning level (Tr. 190). Mr. Goettsche's functioning level was clarified to be in the borderline range of intellectual abilities and not in the mentally retarded range

(Tr. 190, 192). Dr. Tedesco also noted the psychiatric examination that was done in regard to the current claim for benefits and considered the revised diagnosis of mild mental retardation as well as the GAF score of 40-50 (Tr. 190). Dr. Tedesco further considered the statements by Mr. Goettsche's sisters concerning his activities of daily living (Tr. 190). He noted reports from various sources detailing Mr. Goettsche's inability to control his temper (Tr. 190).

Based on his evaluation, Dr. Tedesco opined that evidence does not support the existence of marked functional impairments (Tr. 190). That opinion was based on the facts that Mr. Goettsche had worked at substantial gainful activity before, his temper is a long term problem that has been under control enough to work for a number of years, he is not diagnosed with any mental disorder, his CE results are based primarily on history, mental status exams do not show marked functional impairments and his activities of daily life are limited, but not to a marked extent (Tr. 190).

Dr. Tedesco opined that Mr. Goettsche is likely to experience limitations in social skills, concentration, memory, and pace (Tr. 190). He is capable however of handling simple tasks and getting along with others on a routine predictable basis (Tr. 190-91). There is no treating source opinion in Mr. Goettsche's case and the cognitive CE results were given primary weight (Tr. 191). CE results have been given lesser weight than is typically true because they are based on historical self-reports (Tr. 191).

In documenting the psychiatric review technique, Dr. Tedesco noted that an RFC Assessment was necessary and marked that he based the medical disposition upon two categories: 12.02 Organic Mental Disorders and 12.04 Affective Disorders (Tr. 174). With regard to Organic Mental Disorders, Dr. Tedesco noted that Borderline Intellectual Functioning (BIF) was a medically determinable impairment that was present but does not precisely satisfy the diagnostic criteria in that section (Tr. 175). With regard to Affective Disorders, Dr. Tedesco noted that a history of adjustment disorder was a medically

determinable impairment that was present but does not precisely satisfy the diagnostic criteria in that section (Tr. 177). Dr. Tedesco opined that the restriction of activities of daily living were mild in their degree of limitation (Tr. 184). He opined that the difficulties in maintaining social functioning and difficulties in maintaining concentration, persistence and pace were moderate in their degree of limitation (Tr. 184). He opined that evidence does not establish the presence of the “C” criteria of the listings (Tr. 185).¹

Dr. Rhonda Lovell, Ph.D. in reconsideration of Mr. Goettsche’s claim, made a notation on September 3, 2004 that she affirmed the determination as written (Tr. 186, 194). She stated that there was not evidence of additional treatment and Mr. Goettsche’s mental impairments continue to result in moderate functional limitations (Tr. 194).

On May 12, 2004, Dr. Claude H. Koons, M.D., completed a medical consultant review of Mr. Goettsche on behalf of Disability Determination Services (Tr. 193). He stated that the physical examination was essentially normal with no joint swelling or erythema (Tr. 193). At the time of the examination there was no recent foot pain, joint swelling or erythema, indicative of gout, and no other current problems or complaints (Tr. 193). Dr. Koons opined that the main problem was mental, that the gout is “well-treated” with Alopurinol and that Mr. Goettsche’s impairment from a physical standpoint is non severe (Tr. 193).

On September 9, 2004, J.D. Wilson, M.D., made a notation in response to Mr. Goettsche’s filing for reconsideration of his disability claim (Tr. 195). Dr. Wilson confirms the statements of Dr. Koons, that Mr. Goettsche is “well-treated” with Alopurinol, that Mr. Goettsche does not report any significant problems with gout and that

¹This opinion on the “C” criteria of the listings refers specifically to §§12.02, 12.03 or 12.04 and is applicable when paragraph B of each of those respective listings are not satisfied (Tr. 185). It is not to be confused with §12.05C which is the subject of this appeal.

his main problems are mental (Tr. 195). Dr. Wilson opined that Mr. Goettsche's physical complaints would qualify as "nonsevere." (Tr. 195).

As previously stated, Dr. Timothy Wahl and Dr. James Brooks evaluated Mr. Goettsche for the purpose of a previous disability benefits application (Tr. 157-65). Dr. Wahl opined that the proper diagnosis was, "317 Mild Mental Retardation R/O V62.89 Borderline Intellectual Functioning." (Tr. 161). Dr. Brooks opined that Mr. Goettsche was "not likely to be able to get a job, at least in the near future, unless the job market dramatically changes." (Tr. 164-65). Dr. Brooks also diagnosed mild mental retardation, but stated that this diagnosis is clear from "his speech and simplicity of ideas." (Tr. 164). The record includes no mention of testing for the purpose of diagnosis (Tr. 162-65).

E. Hearing Testimony

Mr. Goettsche testified at a hearing before ALJ Thomas Donahue on March 16, 2006 (Tr. 205-30). He testified that he was 44 years old, was 5 feet 4 inches tall and weighed around 300 pounds (Tr. 208). He was unaware of any fluctuations in his weight or whether he weighed the same as when he was working, but he thought that he did (Tr. 208-09). He lives in a one story house with his uncle who works at Tenco, a company for "handicap people." (Tr. 209). He is able to drive independently, has a high school degree where he took special education classes and can read although he struggles with comprehending what he reads (Tr. 209-10).

Mr. Goettsche testified that he worked at an iron company for nine years where he lifted more than the equivalent of five gallons of milk (possibly fifty pounds) (Tr. 210-11). He also worked in a saw mill for a couple of months where he moved and stacked lumber (Tr. 211-12). He lifted around 30 pounds in that job (Tr. 211). He worked at Creative Edge as a material handler for nearly five years and he moved materials at the verbal direction of two superiors (Tr. 212). For a few months, Mr. Goettsche worked

construction labor, moving materials weighing about the same as three gallons of milk (Tr. 213). He stated that he was able to get along with people in those jobs and that his ability to get along with people has not changed (Tr. 213).

Mr. Goettsche's attorney then brought his attention to the findings of doctors and asked him about physical problems and his ability to get along with people (Tr. 214). Mr. Goettsche testified that his feet would hurt if he was on them for a long time (Tr. 214). He also said that his doctor limited him to lifting 20 pounds because his back bothers him once in a while (Tr. 214). He also acknowledged past problems getting "angry and upset" with people (Tr. 214). He testified that he gets upset with people who "say something he doesn't like" whether he knows them or not (Tr. 214).

Mr. Goettsche was then questioned by the ALJ (Tr. 215). He testified that, of all of his jobs, he worked at Iowa Malleable the longest, last working there in 1993 (Tr. 215). The company went bankrupt and he lost his job (Tr. 215). He also worked at Creative Edge for nearly five years before being laid off (Tr. 216). He testified that many people got laid off and he was one of them (Tr. 216). He was laid off from his last job in September 2003 (Tr. 216). He testified that he was laid off because they "run out of work." (Tr. 216).

The ALJ ask Mr. Goettsche why he thought he was disabled and Mr. Goettsche answered "cause my feet bother me and back bothers me once in a while." (Tr. 216). He admitted however that he was not laid off from jobs because of these complaints (Tr. 216). He testified that he didn't know what would keep him from working if he were to be called back for seasonal work (Tr. 216-17).

Marcy Murphy, one of Mr. Goettsche's sisters next testified (Tr. 217). She stated that between herself, her sister and her father, someone in Mr. Goettsche's family speaks with him almost daily (Tr. 218). Mostly they help with problem-solving tasks like sorting out the mail and reading information for him that he does not understand (Tr. 218-19).

She testified that Mr. Goettsche has a temper that causes him to yell and curse when he gets frustrated (Tr. 219). She stated that he has been known to throw things and, although he doesn't do it on purpose, he has hurt others in the past (Tr. 219). He is typically set off by frustration and impatience (Tr. 220). He gets frustrated when he is having trouble understanding (Tr. 220). She testified that he also has trouble getting along socially (Tr. 220).

Ms. Murphy testified she agreed with an opinion offered by Dr. Timothy Wahl that Mr. Goettsche would likely not be able to successfully live independently without some type of aid or assistance on an on-going basis (Tr. 221). She testified that Mr. Goettsche's uncle has assistance from an in-home service provider who cleans, cooks, shops, and helps with financial matters (Tr. 221). Although these services are not for Mr. Goettsche's care, he benefits from the individuals helping in his home (Tr. 221). Ms. Murphy also testified she agreed with the opinion offered by "Dr. Brooks" that Mr. Goettsche's excessive talking at times seemed to upset his employers (Tr. 221). She testified that he was laid off from Creative Edge and "Paint Line" because he worked slowly, had low productivity and had incidents involving throwing objects when he was angry (Tr. 221-22). She testified that Mr. Goettsche's longest held job at Iowa Malleable was full of complaints from management about productivity and behavior (Tr. 222-23). Mr. Goettsche kept his job because his father worked there as well and was able to "take care of the situation." (Tr. 223). Ms. Murphy testified that she believed special allowances were made for her brother at his various places of employment (Tr. 223).

Julie Svec testified at the hearing as a vocational expert (Tr. 223-28). The ALJ posed the following hypothetical to Ms. Svec:

First hypothetical would be age 44, male, had special ed, with past relevant work and so forth...can lift up to 25 lbs. Occasionally, ten lbs. Frequently, sitting and standing up to two hours at a time for at least six of an eight hour day, walking up to three blocks. He cannot work in an

environment with excessive exposure to dust and gas. He can perform simple routine repetitive work which does not require constant close attention to detail or the use of independent judgment for decision making. He can have only occasional contact with co-workers and the general public and he requires close supervision. He can work at no more than regular pace and cannot work in environments with more than a moderate stress level. Could the claimant do his past relevant work under this hypothetical?

(Tr. 226).

In response, the vocational expert testified that under this hypothetical, Mr. Goettsche could work as a laborer/construction as described by the claimant (Tr. 226). There would not be transferable skills (Tr. 226). There would be unskilled jobs such as pricer, a tagger of which there are 1000 positions in the area and 50,000 nationwide. (Tr. 227). There is also work as a folder of which there are 900 positions locally and 50,000 nationwide (Tr. 227). There is work as a cleaner of which there are 1500 positions locally and 200,000 positions nationwide (Tr. 227).

The ALJ then posed the following hypothetical to the vocational expert:

[A]ge 44, a male, 12th grade special ed, past relevant work...lifting 25 lbs. Occasionally, ten lbs. Frequently, sitting and standing up to two hours at a time, walking up to three blocks. No more than an average stress level with five being in the middle and ten being most stressful and one being the least stressful, would be limited to simple routine tasks, would be required to have a job with limited contact with general public, limited contact with fellow workers, should avoid concentrated exposure to fumes, dust, odors, gas, poor ventilation. Due to mental impairment or any other reason the claimant would miss three or more days of work per month. Would there be any work under that hypothetical?

(Tr. 227).

The vocational expert responded that there would not be any work under this hypothetical (Tr. 227). Mr. Goettsche's attorney then posed the following hypothetical to the vocational expert:

[W]ould there be an impact on the answers to the judge's first hypothetical if the individual would likely have trouble understanding instructions and procedures?

(Tr. 228).

In response, the vocational expert testified that the judge's original hypothetical limited the opinion to simple routine repetitive tasks and these typically involve simple instructions or procedures and so it would not change the answer (Tr. 228).

Mr. Goettsche's attorney then asked if the first hypothetical would "result in a significant erosion of the unskilled occupational base." (Tr. 228). The vocational expert replied that the first hypothetical limited the worker to lighter, sedentary, unskilled positions and that the expert did not believe that the lighter unskilled base is significantly eroded (Tr. 316).

IV. CONCLUSIONS OF LAW

A. Scope of Review

Social Security Administration decisions are reviewed under various different standards. The application of the law by an ALJ is reviewed by the district courts de novo. See Hutchison for Hutchison v. Chater, 99 F.3d 286, 287-88 (8th Cir. 1996). The ALJ's findings of fact, however, must be upheld if supported by substantial evidence appearing in the record as a whole. See Lochner v. Sullivan, 968 F.2d 725, 727 (8th Cir. 1992); Cruse v. Bowen, 867 F.2d 1183, 1184 (8th Cir. 1989). Substantial evidence is more than a mere scintilla. It means relevant evidence a reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1997); Cruse, 867 F.2d at 1184; Taylor v. Bowen, 805 F.2d 329, 331 (8th Cir. 1986). The court

must also take into account evidence that fairly detracts from the ALJ's findings. Cruse, 867 F.2d at 1184; Hall v. Bowen, 830 F.2d 906, 911 (8th Cir. 1987). Substantial evidence requires "something less than the weight of the evidence" ("weight" meaning "preponderance"). Cruse, 867 F.2d at 1184 (quoting Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 620 (1966)). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." Id. The court must consider the weight of the evidence appearing in the record and apply a balancing test to contradictory evidence. Gunnels v. Bowen, 867 F.2d 1121, 1124 (8th Cir. 1989); Gavin v. Heckler, 811 F.2d 1195, 1199 (8th Cir. 1987).

B. ALJ's Disability Determination

Determining whether a claimant is disabled involves a five-step evaluation. See 20 C.F.R. § 404.1520(a)-(f); Bowen v. Yuckert, 482 U.S. 137, 140 (1987).

The five steps are:

- (1) If the claimant is engaged in substantial gainful activity, disability benefits are denied.
- (2) If the claimant is not engaged in substantial gainful activity, her medical condition is evaluated to determine whether her impairment, or combination of impairments, is medically severe. If the impairment is not severe, benefits are denied.
- (3) If the impairment is severe, it is compared with the listed impairments the Secretary acknowledges as precluding substantial gainful activity. If the impairment is equivalent to one of the listed impairments, the claimant is disabled.
- (4) If there is no conclusive determination of severe impairment, then the Secretary determines whether the claimant is prevented from performing the work she

performed in the past. If the claimant is able to perform her previous work, she is not disabled.

- (5) If the claimant cannot do her previous work, the Secretary must determine whether she is able to perform other work in the national economy given her age, education, and work experience.

Trenary v. Bowen, 898 F.2d 1361, 1364 n.3 (8th Cir. 1990) (citing Yuckert, 482 U.S. at 140–42); 20 C.F.R. § 404.1520(a)–(f).

“To establish a disability claim, the claimant bears the initial burden of proof to show that he is unable to perform his past relevant work.” Frankl v. Shalala, 47 F.3d 935, 937 (8th Cir. 1995) (citing Reed v. Sullivan, 988 F.2d 812, 815 (8th Cir. 1993)). If the claimant meets this burden, the burden of proof then shifts to the Commissioner to demonstrate that the claimant retains the physical residual functional capacity (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. Id.

The ALJ found that Mr. Goettsche was not performing substantial gainful work and that his impairments were “severe” within the meaning of the regulations (Tr. 17). However, the ALJ found that Mr. Goettsche’s impairments did not meet or medically equal any of the listed impairments in 20 C.F.R. Pt. 404, Subpt. P, App. 1, §12.05C (hereinafter “§12.05C”). The ALJ went on to consider whether Mr. Goettsche retains the residual functional capacity to perform the requirements of his past relevant work or other work existing in significant numbers in the national economy. The ALJ found that Mr. Goettsche has the residual functional capacity to lift 25 pounds occasionally and 10 pounds frequently; sit and stand up to 2 hours at a time for a total of 6 hours in an 8 hour work day; walk up to three blocks; avoid excessive exposure to dust and gas; and to perform only simple, routine, repetitive work with no constant close attention to detail and no

independent decision making (Tr. 18). Based on this RFC determination, the ALJ found Mr. Goettsche could return to past relevant work as a laborer in the construction field (Tr. 23). Therefore, the ALJ found that Mr. Goettsche was not “disabled” as defined for the purposes of receiving social security benefits (Tr. 23).

On appeal, Mr. Goettsche challenges the ALJ’s opinion, claiming that the ALJ “ignored the diagnosis of Dr. Wahl and Dr. Brooks” and because he claims that he medically equals the listings in §12.05C. Mr. Goettsche claims he meets the requirements of an IQ score of 70 or below, his mood and physical deficits qualify as an additional work-related limitation of function and that the condition has been present at current levels since age 22.

C. Treating Physician

Mr. Goettsche claims that Dr. Timothy Wahl and Dr. James Brooks were both treating physicians who diagnosed Mr. Goettsche with mild mental retardation. Plaintiff’s Brief, 4. He argues that the ALJ dismissed these diagnoses without explanation, finding instead that the proper diagnosis was borderline intellectual functioning. *Id.* at 4. Mr. Goettsche states that “the ALJ concluded that Dr. Wahl and Dr. Brooks were mistaken...based on boilerplate language that their opinions were not consistent with the objective medical evidence.” He alleges that the opinions of Dr. Wahl and Dr. Brooks are themselves objective medical evidence. He further contends that Dr. Brooks’s opinions were not considered at all, claiming that Dr. Brooks’s opinions were dismissed as conclusory. Mr. Goettsche claims that if there was any inconsistency in the diagnoses of Dr. Wahl, the ALJ should have further developed the record to clarify the discrepancy and that dismissing the opinion for lack of credibility is not the proper action. Furthermore, if the opinion is going to be dismissed, it must contain specific reason for the finding on

credibility. Mr. Goettsche also asserts that opinions from mental health professionals based on statements by third parties are frequently made and therefore credible.

The Social Security Commissioner responds that the opinions of Dr. Wahl were properly considered. Defendant's brief, 9. The Court agrees. The Commissioner argues that the ALJ did not give Dr. Wahl's opinions controlling weight because the opinions were based on statements made by Mr. Goettsche's sister, there was confusion in the diagnosis, the diagnosis was not consistent with the medical record as a whole and Dr. Wahl is not a "treating physician" whose opinions are entitled to controlling weight. The Commissioner claims that all of these reasons are set out in the ALJ's opinion. The Commissioner further contends that Dr. Brooks's opinion regarding mental retardation is related to his ability to work and that Dr. Brooks's opinion regarding Mr. Goettsche's ability to work is not supported by the record as a whole and based on an irrelevant factor. For these reasons, the Commissioner asserts that the ALJ correctly handled Dr. Brooks's opinion.

"A treating physician's opinion should not ordinarily be disregarded and is entitled to substantial weight. A treating physician's opinion regarding an applicant's impairment will be granted controlling weight, provided the opinion is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the record." Singh v. Apfel, 222 F.3d 448, 452 (8th Cir. 2000) (citation omitted). The regulations require the ALJ to give reasons for giving weight to or rejecting the statements of a treating physician. See 20 C.F.R. § 404.1527(d)(2). Whether the ALJ gives great or small weight to the opinions of treating physicians, the ALJ must give good reasons for giving the opinions that weight. Holmstrom v. Massanari, 270 F.3d 715, 720 (8th Cir. 2001). "The ALJ may discount or disregard such an opinion if other medical assessments are supported by superior medical evidence, or if the treating physician has offered inconsistent opinions." Hogan v. Apfel, 239 F.3d 958, 961 (8th Cir.

2001). Moreover, a treating physician's opinion does not deserve controlling weight when it is nothing more than a conclusory statement. Piepgras v. Chater, 76 F.3d 223, 236 (8th Cir. 1996). See also Thomas v. Sullivan, 928 F.2d 255, 259 (8th Cir. 1991) (holding that the weight given a treating physician's opinion is limited if the opinion consists only of conclusory statements).

Credibility and treatment of physicians' opinions are factual determinations made by an ALJ and reviewed for substantial evidence. The ALJ noted that Dr. Timothy Wahl evaluated Mr. Goettsche at the request of Disability Determination Services. He was involved as a consultative examiner. The ALJ states that "the record contains no further evidence of ongoing medical treatment of any of the claimant's conditions." (Tr. 22).

The ALJ explained that none of Dr. Wahl's opined restrictions precluded work activity for Mr. Goettsche (Tr. 22). The ALJ stated that none of the physicians involved in the case gave physical limitations other than Dr. Bedi, the consulting physician. The ALJ also stated that he did not give weight to Dr. Wahl's opinion because it was based on the statements made by Mr. Goettsche's sisters. Earlier in the same opinion, the ALJ dismissed the subjective complaints of Mr. Goettsche as well as the statements of his sisters due to their inconsistency with the record as a whole. Mr. Goettsche, while challenging the ALJ's treatment of the physicians' opinions, does not challenge the ALJ's credibility determination with regard to the subjective complaints. Stating that Dr. Wahl's opinions are discounted due to their reliance on the sister's reports is a sufficient explanation for his negative treatment of the opinions.

Furthermore, inconsistent opinions are sufficient reason for discounting opinions of physicians. In this case, Dr. Wahl gave diagnoses of "317 Mild Mental Retardation R/O V62.89 Borderline Intellectual Functioning," "mild mental retardation," and "borderline intellectual functioning." (Tr. 161, 166, 192) The ALJ notes these diagnoses and specifically states that "A state Agency medical consultant contacted Dr. Wahl" in

order to clarify the correct diagnosis. These three related, but demonstrably different diagnoses furnish grounds to discount Dr. Wahl's opinion.

With regard to Dr. Brooks, the ALJ stated that controlling weight was not given to his opinion because, "it is based on faulty assumptions which is a subject that is not relevant to the issue of disability." Dr. Brooks opined that Mr. Goettsche was not likely to get a job unless the job market dramatically changed (Tr. 22). Dr. Brooks also imposed significant mental limitations on Mr. Goettsche based on statements from his sister. The same reasons the ALJ discounted the sisters' subjective complaints applies to the ALJ's discounting this opinion. Substantial evidence in the record supports the ALJ's treatment of the opinions of Dr. Wahl and Dr. Brooks.

D. Equal To §12.05C Listing

Mr. Goettsche claims he "medically equals" the listings of impairments under §12.05C. He concedes that he does not meet the definition outright but that his mental impairments in combination with gout, obesity and seasonal allergies equals §12.05C under the ruling in Shontos v. Barnhart, 328 F.3d 418, 424 (8th Cir. 2003). He argues that his IQ score is low enough to qualify, his physical impairments are "more than slight or minimal" and his condition has been at present levels since before age twenty-two.

The Social Security Commissioner responds that the proper issue is not whether Mr. Goettsche qualifies under §12.05C, but rather, whether substantial evidence in the record supports the ALJ's finding that he does not. The Commissioner concedes that Mr. Goettsche has other severe impairments and that he has had the same level of functioning since the age of twenty-two. The Commissioner contends that substantial evidence supports a finding that Mr. Goettsche does not have the requisite intellectual deficits to equal §12.05C.

Mr. Goettsche acknowledges that none of the IQ test scores are between the requisite scores of 60-70. However, he argues that his scores of 71 on the Verbal IQ and 74 on the Full Scale IQ are only slightly higher than the requisite range. He claims that scores that are only “slightly higher” in combination with other factors support a finding of equivalence to §12.05C according to Shontos. The Commissioner responds that Mr. Goettsche’s case is not that factually similar to the Shontos case and that scores between 60-70 or below that range can still fail to meet §12.05C according to Miles v. Barnhart, 374 F.3d 694, 699 (8th Cir. 2004).

Pertinent to this argument, the Code of Federal Regulations states:

Mental retardation refers to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; i.e., the evidence demonstrates or supports onset of the impairment before age 22. The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied.

...

C. A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function.

20 C.F.R. Volume 20 Part 404, Subpt. P, App. 1, §12.05C

To meet listing §12.05C, a claimant must show both the requisite IQ score and an additional, significant work-related limitation of function. Maresh v. Barnhart, 438 F.3d 897, 899 (8th Cir. 2006). The claimant must also show onset of the impairment before age twenty-two because the initial paragraph is mandatory and not introductory. Id. The claimant does not need to show a formal diagnosis of mental retardation. Id. Although the POMS (Program Operations Manual System) guidelines are not binding on the Commissioner and have no legal force, ALJ’s must consider the POMS guidelines in making a determination about whether a claimant meets §12.05C. Shontos, 328 F.3d at 424. “Slightly higher IQ’s (e.g. 70-75) in the presence of other physical or mental

disorders that impose additional and significant work-related limitation of function may support an equivalence determination.” Id. (quoting POMS § DI 24515.056). The Commissioner may reject IQ scores which are inconsistent with the record and an ALJ may discredit an IQ score after considering daily activities, education and work history. Miles, 374 F.3d at 699-700.

The Commissioner is generally correct that the proper issue on appeal is whether substantial evidence supports the ALJ’s determination that Mr. Goettsche’s impairment does not medically equal a §12.05C listing. The Court finds, however, that the ALJ did not appropriately apply the law under Maresh and Shontos to Mr. Goettsche’s case. Therefore, the Court reviews de novo. The ALJ did not discuss in this section, or in any other, whether he considered the medical equivalency factors under §12.05C. The ALJ makes no mention about whether Mr. Goettsche’s mental impairments were present before age twenty-two or whether he suffered other mental or physical impairments that caused significant work-related limitations. The only mention of Mr. Goettsche’s IQ scores is in the ALJ’s RFC determination. In the §12.05C portion of the ALJ’s opinion, he stated that Mr. Goettsche “has mild restriction of his activities of daily living; moderate difficulties in maintaining social functioning; and moderate difficulties in maintaining concentration, persistence or pace.” (Tr. 17). The ALJ also stated that there were no episodes of decompensation and that the evidence “did not establish sufficient limitations to satisfy the “C” criteria.” (Tr. 17). As previously noted, the “C” criteria is a reference to §§12.02, 12.03 and 12.04 and does not refer to §12.05. The ALJ makes no mention of the rule established in Shontos or of the POMS guidelines. According to Shontos, the ALJ must consider the guidelines in coming to a determination of whether Mr. Goettsche medically equals the listing under §12.05C. The Court therefore remands this case to the ALJ for consideration of the claim that Mr. Goettsche “medically equals” the listing in §12.05C.

On remand, the ALJ must consider the POMS guidelines as required under Shontos. There is no dispute in the record over two of the three factors to “medically equal” a listing under §12.05C, namely, that Mr. Goettsche’s mental impairment existed prior to age twenty-two and that his other severe conditions (gout, obesity, etc.) qualify as significant work-related limitations. It is true that Miles permits an ALJ to discredit an IQ score after considering daily activities, education and work history. However, there is no evidence in the ALJ’s opinion that he hesitated to accept the IQ scores based on the record as a whole. Instead, the ALJ cited Mr. Goettsche’s IQ scores as accurate in his opinion. The ALJ failed to consider the POMS guidelines altogether.

IT IS SO ORDERED that the decision of the Commissioner of Social Security is hereby reversed and remanded for proceedings consistent with this order. The Clerk of Court shall enter judgment accordingly.

DATED this 1st day of May, 2008.



JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA