UNPUBLISHED

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

STACY L. MERNKA, Plaintiff, vs. JOANNE B. BARNHART, Commissioner of Social Security, Defendant.	No. CR04-3006-MWB **REPORT AND RECOMMENDATION**

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I. INTRODUCTION

The plaintiff Stacy L. Mernka ("Mernka") appeals a decision by an administrative law judge ("ALJ") denying her application for Title II disability insurance ("DI") benefits. Mernka claims the ALJ erred in failing to find that her impairments met the requirements of the Listings, rejecting the opinions of her treating physicians, and failing to conduct a proper credibility analysis. (*See* Doc. No. 6)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On May 6, 1999, Mernka filed an application for DI benefits, alleging a disability onset date of August 7, 1998. (R. 46-48). Mernka alleges she was disabled due to Hepatitis C, Scleritis, Rheumatoid Arthritis, and Depression. She claims these conditions prevent her from standing for very long; cause joint pain in her hands, fingers, and wrists; produce excessive fatigue; and affect her ability to sustain any activity for very long. (*See* R. 73) Her application was denied initially on September 2, 1999 (R. 33, 35-38), and on reconsideration on March 3, 2000. (R. 34, 41-46) On March 9, 2000, Mernka requested a hearing (R. 47), and a hearing was held before ALJ Jean M. Ingrassia on November 7, 2000, in Clear Lake, Iowa. (R. 347-90) Mernka was represented at the hearing by non-attorney Nancy Withers. Mernka and her husband, Dennis Mernka, testified at the hearing. Vocational Expert ("VE") Brian Paprocki also testified.

On April 26, 2001, the ALJ ruled Mernka was not entitled to benefits. (R. 9-25) Mernka appealed the ALJ's ruling, and on November 18, 2003, the Appeals Council of

the Social Security Administration denied Mernka's request for review (R. 5-7), making the ALJ's decision the final decision of the Commissioner.

Mernka filed a timely Complaint in this court on January 20, 2004, seeking judicial review of the ALJ's ruling. (Doc. No. 1) In accordance with Administrative Order #1447, dated September 20, 1999, this matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition of Mernka's claim. Mernka filed a brief supporting her claim on April 26, 2004. (Doc. No. 6) On June 14, 2004, the Commissioner filed a motion to reverse and remand the case pursuant to sentence four of 42 U.S.C. § 405(g). (Doc. No. 7) Mernka filed a resistance to the motion on June 21, 2004. (Doc. No. 8) At the court's direction, the Commissioner then filed a brief on the merits on July 1, 2004. (Doc. No. 10)

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

B. Factual Background

1. Introductory facts and Mernka's testimony

At the time of the hearing, Mernka was 33 years old. She had a high-school education, and no other education or training beyond high school. She was married to Dennis Mernka, and the couple had an eight-year-old daughter. (R. 350-51)

In August 2000, Mernka began working part-time at Chris's Front Porch, a small gift shop. She still held that job at the time of the hearing. She stated she would show customers around the store, bring their purchases up to the counter, take their money, and make change. Her hours were from 9:00 a.m. to 1:00 p.m. on Mondays and Fridays. Prior to this job, Mernka last worked in 1998, at Design Two, another gift shop. She

worked there for approximately a year, starting in the summer of 1997 and leaving in August 1998. (R. 351-53) She stated she left the job because she was "sick a lot," and she was missing a lot of work due to her doctor appointments and health problems. (R. 358)

In 1997, Mernka worked as a sales clerk in the housewares department at Wal-Mart. She held that job for a little more than two years. (R. 353) She left the job because she was unable to stay on her feet as long as the job required. She had a bunion removed from her right foot thinking that would help, but it only made matters worse. (R. 358) She stated she has "always had trouble being on [her] feet a lot," but she did not know why until she was diagnosed with arthritis. (R. 358)

Before Wal-Mart, she worked briefly for Trinity Regional Hospital, and before that, she worked for Principal Life Insurance Company as a records clerk or file clerk. (R. 353-54) She was at Principal during 1990 and 1991. (R. 354) Prior to that, she worked at Art Works Corporation, where she and her former husband sold pizza for a Domino's Pizza franchise. Mernka was a counter clerk and cashier; she did not make the pizza. (R. 354-55)

Prior to that, she worked for a month or two at a Super 8 Motel as a desk clerk. She worked at Wal-Mart on other occasions, as well, always doing the same type of work. She worked as a cashier at a Casey's, and worked at a Bonanza restaurant filling the salad bar. None of her jobs required heavy labor. She stated the Wal-Mart job required the most lifting and carrying because she had to stock shelves in different departments. However, she did not think she ever had to lift over twenty pounds. She stated none of her other jobs required any heavy lifting. (R. 355-57)

Mernka did not feel she could work more than the eight hours per week that she was working at the time of the hearing. She explained that her arthritis pain and other health

problems cause a lot of fatigue. After she has put up with the pain for awhile, she "just can't function anymore," and has to stop and rest. (R. 358)

She stated she has pain in both of her feet, worse in the right foot. Her feet feel achy and stiff. The pain worsens when she is on her feet, and if she walks for awhile, her feet will swell. Her doctors have told her to stay off her feet and elevate them. (R. 358-59) She stated being on her feet causes her to "get really tired and have to rest." (R. 359)

Mernka also experiences pain, aching, and stiffness in her back. The pain keeps her from sleeping at night. Doctors have given her muscle relaxants, but if she takes them, she is so tired the next day that she cannot get out of bed. Nevertheless, she will take them if the pain gets too bad. Her back pain gets worse if she is unable to move around frequently. (R. 359-60)

Mernka also has pain in her hands. The pain is worst when she gets up in the morning. The stiffness and aching in her hands worsens throughout the day and goes up into her wrists. She takes some medication, but she has not found anything that completely relieves the pain. She stated that because of the pain, she "can't do things with [her] hands." (R. 360-61) Doctors had her try soaking her hands in cold water and then hot water, alternating back and forth, but according to Mernka, that only made her hands swell worse, so the doctors told her to stop. (R. 363)

Mernka has had two surgeries on her feet. She stated it was about three months after the last surgery before she could walk, and she still has difficulty walking. Right after the surgery, her foot was badly swollen. She stated she elevates her feet every day. On days she works, she comes home and sits with her feet elevated for the remainder of the day, or she will take a nap or lay with her feet elevated on a pillow. (R. 361)

Mernka also has problems with her eyes. She stated she has "recurring scleritis," which she described as inflammation of the whites of the eyes. She never knows when the

condition will occur, and when it does, she will have a bad headache. She stated she "almost lost [her] right eye because of it." (R. 362) According to Mernka, she has frequent eye infections because of the scleritis. Her eyes water excessively, and she gets headaches due to photosensitivity. Her eyes water "constantly," so she wipes them and then gets infections from wiping her eyes. She stated that doctors at the Mayo Clinic have suggested the problem is due to her Hepatitis C, but they are unsure. She treats the condition with Prednisone. (*Id.*)

Mernka described side effects she experiences from her medications. She stated her stomach is upset frequently. The first arthritis medication she tried made her so sick that she could not take it. Her current medication also makes her nauseous, but she is able to tolerate it. (R. 362-63)

Mernka stated that because of her eye problems and rheumatoid arthritis problem, she has not been able to undergo standard treatment for Hepatitis C. According to Mernka, her doctors have told her the Hepatitis C medication "would make [her] scleritis worse and then [she] could lose [her] eyes and the arthritis would flare up worse." (R. 363) She stated the Hepatitis causes her right side to hurt and her liver to swell. (*Id.*)

Mernka stated she is unable to stand for very long in one position because her feet will begin hurting badly. She stated her tolerance for standing changes daily, but at the most, she could only stand or walk for thirty minutes at a time. If she stands longer than that, her feel swell up and hurt. In addition, if she is on her feet for too long, she experiences even worse pain the next day. She stated that when the pain gets really bad in any one spot, it makes the pain throughout the rest of her body more difficult to tolerate. (R. 363-64) Mernka also stated she cannot sit for very long in one position because her back will begin hurting. She opined she could sit for about twenty minutes before she

would have to change position. As a result of her problems sitting and standing, she changes positions frequently. (R. 363-65)

Mernka stated she has problems lifting objects, and sometimes she cannot grasp things. Her ability to grasp and lift objects changes daily, and is at its worst first thing in the morning. She opined she normally can lift up to ten pounds. (R. 364-65) She sometimes drops objects, both large and small. First thing in the morning, she has difficulty buttoning, tying shoes, and the like. She is unable to write for long periods because her hand will begin to shake, her writing gets sloppy, and she is unable to hold onto the pen. Her fingers get stiff, and she stated "it's hard to make them move back to a normal . . . position." (R. 365)

Mernka described her ordinary activities. If she works on Monday, then she will rest on Tuesday, or if she becomes very tired at work, it might take her longer than one day to rest up. Before she got the part-time job, she sometimes only left her house once a week. She often has difficulty driving because of problems with her eyes and feet. Her eyes will water so badly that she cannot see. When she is unable to drive, her husband drives her around. She stated that before she began having the eye and foot problems, she used to leave her house and drive herself places. (R. 366)

Mernka stated her husband does a lot of the household tasks like cooking and cleaning. She helps when she can, but she will start a task, like washing dishes, and then have to take a break and rest before she can finish. She can only work at a task for twenty to thirty minutes before she has to take a break and rest. (R. 366-67)

Mernka and her husband do not have friends or family over to visit very often, and she does not belong to any social organizations or have any hobbies. She stated she used to enjoy shopping and visiting people, but "it's just too hard now." (R. 367) If she goes out, she will "pay for it by being tired and grouchy," and she will have to rest. (*Id.*) She

stated her energy level will vary from day to day, and during any given day. On a better day, she can try to do some cleaning or cooking, but she will have to rest during the task and sometimes is unable to complete the task. She has to be careful not to wear herself out. On bad days, she sleeps a lot and maybe watches some television. She stated she has more bad days than good days. (R. 367-68)

Mernka stated she usually sleeps a lot. She goes to bed by 10:30 or 11:00 p.m. and gets up at 7:00 a.m. Then she usually goes back to bed about 8:30 a.m. and sleeps until 11:00 a.m. When she gets up, if she does anything like cleaning a room, she will have to lay down again later. On days when she works from 9:00 a.m. to 1:00 p.m., she comes home from work and takes a nap for a couple of hours or more. According to Mernka, her doctors have told her that she sleeps so much because of her Hepatitis and arthritis pain, both of which cause fatigue. She stated if she does not get enough rest, she will be "really grouchy" and she gets angry because she is unable to keep going. Mernka stated she naps every day; there is never a day when she does not take a nap. (R. 368-69)

Mernka stated that for her, the most troubling part of her illness is her arthritis pain, which is present in some part of her body constantly. She opined she was able to work at her part-time job because the store had few customers, and she could change positions as often as necessary to be comfortable. (R. 369-70)

The ALJ questioned Mernka about her medical records. Mernka stated she was first diagnosed with Hepatitis C in 1998, when she went to the Mayo Clinic. Her doctors do not know how she contracted the disease. She was under the impression she also was diagnosed with arthritis because they put her on an arthritis medication, Arthrotec. The ALJ noted Dr. Burdt, identified by Mernka as her arthritis doctor, had indicated Mernka had "a history of chronic Hepatitis C, which can cause this symmetric polyarthritis clinically and distinguishable from rheumatoid arthritis." (R. 370, 372) The doctor also

noted that X-rays of Mernka's hands had failed to show any rheumatoid changes or erosions. (R. 371) In August 2000, Dr. Burdt indicated Mernka's "inflammatory polyarthritis is under fairly good control with the two medications prescribed." (*Id.*)

In response, Mernka stated the medications "help some with the pain," but she still experienced a lot of swelling and pain. (*Id.*) The ALJ stated Dr. Burdt had noted only minimal swelling and tenderness in Mernka's hands, no swelling in her wrists, slight swelling in her ankles, and no tenderness over her fingers. The ALJ asked if the swelling "seems to come and go," and Mernka agreed that was the case. (*Id.*)

Mernka stated she had seen a Dr. Foreman for an eye infection, but when her scleritis flares up, she calls Dr. Mahr at the Mayo Clinic. She stated the condition had flared up about five times in the previous two years, and she noted it goes from one eye to the other. (R. 371-72)

She stated her foot doctor is Dr. Dayton. In her first foot surgery, she had a bunion removed. She could not remember the year, but recalled she was working at Wal-Mart at the time. In December 1999, Dr. Dayton repaired a torn tendon in Mernka's right foot. Mernka stated she was in rehabilitation to get her foot moving again, and she still was having problems with her foot. (R. 373-73)

With regard to her back, Mernka stated Dr. Burdt put her on the arthritis medication for pain and told her to go to a chiropractor. She stated she went to a chiropractor a few times, but it did not help her. (R. 373)

Mernka stated she had a right ankle problem, and she underwent surgery to repair her posterior tibial. (R. 373) The ALJ pointed out that doctor's records indicate she "would have no significant risk of fibrosis over the next 10 to 15 years," but Mernka understood her doctor to say that because she "had a lot of synovitis in the ankle," her fibrosis "could just come right back." (R. 374)

Mernka indicated she takes Synthroid for an underactive thyroid. She stated she and her husband had seen a mental health counselor for awhile, but it had not helped them much so they quit going. (R. 375)

2. Dennis Mernka's testimony

Dennis Mernka ("Dennis") is Mernka's husband. He is employed as a police lieutenant by the City of Fort Dodge. At the time of the hearing, he was working from 7:40 p.m. until 3:40 a.m. (R. 376) He stated he had changed to the night shift a couple of years earlier so he could help out more at home. Mernka is usually in bed by 10:00 or 10:30 p.m., so she sleeps while Dennis is at work. Then he is available to do housework and help take care of their daughter during the day. (R. 378)

At the time of the hearing, Dennis had known Mernka for seven years. According to Dennis, before Mernka became ill they used to go shopping at the mall, do things with their daughter, and generally be a lot more active. Since the onset of Mernka's illness, they had become much less active and "hardly ever do anything with the child." (R. 377) He stated that if Mernka goes to visit her mother or something similar, that evening or the next day her feet will ache. He stated she naps frequently. She is unable to work much around the house, and for the previous couple of years, he had taken over a lot of the household duties. He stated when Mernka starts a task, he frequently has to finish it. (*Id.*)

Dennis said he can tell when Mernka is fatigued and in a lot of pain. According to him, Mernka will begin grabbing her hands and wrists, she will sit on the recliner and put her feet up, and she will get moody. He said their daughter will come to him sometimes and let him know Mernka is "real grouchy." (R. 378) Dennis said he often asks Mernka to go lay down for awhile. (*Id.*) He stated Mernka sleeps quite a bit. She takes a nap in

the afternoon at least five days out of every seven. When she does not take a nap, she will be very tired and moody. (R. 379)

3. Mernka's medical history

Because of the variety of Mernka's impairments, the court has separated its discussion into sections dealing individually with her foot problems, eye problems, general medical problems including Hepatitis C, and depression. Notably, however, there are areas of significant overlap, and the court's discussion of any particular symptom or treatment under a specific heading does not necessarily reflect the court's assessment of Mernka's overall condition.

a. Foot problems

Mernka apparently has a history of chronic bilateral foot pain. (*See* R. 306) In January 1997, she saw Paul Dayton, D.P.M., complaining of pain from bunions, and also complaining that her second toe was riding up on top of her big toe and third toe on both feet. The doctor noted Mernka was working on her feet using ladders. He diagnosed Mernka with hallus abductovalgus, right foot, and hammer digit syndrome, second toe, right foot. Dr. Dayton explained to Mernka that she should only have surgery on one foot at a time, and he scheduled surgery on her right foot for January 2, 1997. The record does not contain surgical notes from the procedure itself, but it appears she underwent a bunionectomy with distal first metatarsal osteotomy and internal screw fixation. (*See* R. 304; *see also* R. 163)

Mernka continued to complain of some foot and ankle problems, but there are no significant complaints or treatment records of note until September 7, 1999, when she saw Dr. Dayton with complaints of swelling and aching at night that were keeping her awake.

She had tried elevating her feet, taking Ibuprofen, and using ice, all with no relief. X-rays showed no bone or joint abnormalities. Dr. Dayton diagnosed her with Posterior Tibial Tenosynovitis. He scheduled an MRI of her right ankle, and applied a cast boot to her right ankle. (R. 298-300)

Mernka returned to see Dr. Dayton for follow-up on September 9, 1999. Her MRI study had revealed the following:

1. Mild edema in the subcutaneous fat of the distal right lower leg and ankle posteromedially. No significant swelling.
2. Subtle changes in the distal posterior tibialis tendon, just above the insertion, including mild expansion of the tendon, slightly increased signal on the T1 weighted images and a small amount of fluid surrounding the tendon and the tendon sheath. The possibility of a partial tear is suggested.

(R. 301) She reported some improvement wearing the cast boot and engaging in minimal activity. They discussed the MRI report. Dr. Dayton instructed Mernka to continue wearing the cast boot, use ice three times daily, limit her activity, and return for follow-up in ten days. (R. 297)

Mernka saw Dr. Dayton again on September 21, 1999. She stated her pain was worse and her right leg was aching even at rest. The doctor noted swelling along her posterior tibial tendon. He prescribed crutches and no weight bearing on the right leg. Noting Mernka could not tolerate a cast, he applied a Scott brace and cast boot, and directed her to return in two weeks. (R. 296)

On September 28,1999, Mernka called Dr. Moder at the Mayo Clinic to discuss the situation with her right foot and ankle. Dr. Moder suggested she have her MRI and X-ray films sent to him for review, and then he could schedule an appointment to see her and perhaps have her see an orthopedist, if indicated. (R. 327)

On October 5, 1999, Mernka again saw Dr. Dayton. She reported her leg was better since she had not been putting weight on it and limiting her activity significantly. Dr. Dayton noted reduced edema in Mernka's right leg and foot. She still had pain in the foot and ankle. The doctor instructed her to continue non-weight-bearing and wear the brace. (R. 296)

When Mernka returned to see Dr. Dayton on November 2, 1999, she reported she was no better at all and felt about the same as before. The doctor noted marked pain along Mernka's right posterior tibial tendon, and indicated resistive testing was not possible due to her pain. He observed swelling along the tendon and reduced range of motion. He discussed with Mernka the possibility of a synovectomy, and directed her to continue non-weight-bearing and wearing the cast boot. (R. 295)

Dr. Dayton responded to some written interrogatories on or about November 4, 1999. He indicated he was treating Mernka for posterior tibial tenosynovitis, and his objective findings that supported the diagnosis included pain, swelling, and consistent MRI findings. He noted she was restricted to non-weight-bearing on her right leg and she was wearing a cast boot. She was taking Sulindac, which had been prescribed by Kenneth W. Adams, D.O. Dr. Dayton stated Mernka had a history of persistent joint pain, swelling and tenderness in her feet and ankles which had been present for at least three months. He opined she could lift, push, and pull zero pounds in the course of regular and continuing employment, and she could not stand or walk for more than one hour. He stated her condition could be expected to produce pain or fatigue, and noted Mernka had complained of these. He opined her condition would cause her to have unpredictable and excessive work absences if she were to return to work, and she would require more rest than the usual fifteen-minute morning and afternoon breaks and 30 to 60 minute lunch break. The

doctor opined Mernka's pain and fatigue would "have a major daily impact" on her ability to perform tasks on a productive and sustained basis during an eight-hour day. (R. 293-94)

On November 8, 1999, Mernka called Dr. Adams's office to ask if she could take anti-inflammatory medications for her pain. She stated Dr. Dayton was hesitant to prescribe an anti-inflammatory because of the possible effect on her liver. Dr. Adams stated she could take nonsteroidal anti-inflammatories. (R. 247)

On November 19, 1999, Dr. Moder made a progress note in Mernka's file indicating she had told the scheduling secretary at his office that Dr. Dayton refused to send copies of Mernka's MRI and X-rays films to Dr. Moder. Dr. Moder noted, "I am uncertain why this would be the case . . . there should be no reason these outside films cannot be forwarded to us for our review." (R. 326)

On November 19, 1999, Mernka saw James D. Wolff, M.D. to obtain a second opinion regarding her right foot pain. She reported a three-month history of pain along the medial aspect of her heel. She stated that non-weight-bearing in the CAM boot and using Naprosyn twice daily had not given her any significant relief. She reported increasing pain on her lateral ankle for one month, localized at the inferior and posterior aspect of the lateral malleolus in the anterior ankle region. She expressed concern because her foot had been "turning red with purple spots after showering." (R. 292)

Dr. Wolff noted Mernka was "nearly tearful" and her affect was "slightly flat." (R. 291) He observed some redness in color to Mernka's lower extremities, and some swelling around her right ankle. She exhibited significant tenderness along the tibialis posterior tendon, and lesser tenderness along the peroneal tendon laterally. She could not do a toe raise on the right side, and she exhibited some weakness with resisted inversion with her foot in a plantar flexed position. An MRI of her right foot and ankle revealed "increased fluid signal in the tibialis posterior tendon sheath as well as the flexor digitorum

tendon sheath[, and] also a smaller amount of fluid collection in the flexor hallucis longus tendon sheath." (R. 291) The MRI also indicated "some attenuation or partial tearing of the tibialis posterior tendon posterior and inferior to the medial malleolus." (*Id.*)

Dr. Wolff's clinical impressions were as follows:

> 1. Tibialis posterior tendonitis which is in a later stage beyond initial immobilization and nonsteroidal anti-inflammatory treatment.
> 2. Milder peroneal tendonitis, lateral aspect, right foot.
> 3. Decreased range of motion of the metatarsophalangeal joint which causes an alteration in gait and probably contributes to the refractoriness of her symptoms and progression now to the peroneal tendonitis.
> 4. Hepatitis C with an increased rheumatoid factor. Wou[l]d recommend that she be seen and evaluated for her Hepatitis C and increased rheumatoid factor and management of those conditions be maximized before any surgical treatment would be entertained. I do believe surgical treatment of the tibialis posterior tendon is warranted, however, the evidence of increased fluid in the flexor digitorum tendon and the flexor hallucis tendon is worrisome. I think a trial of Lidocaine, Marcaine, and steroid injection in the tendon sheath, avoiding direct injection into the tendon itself may be helpful in mitigating her symptoms of pain. I believe that there is some risk to the tendon, however, the tendon has demonstrated that it has been injured and a more extensive surgery than a simple synovectomy of the tendon sheath is probably warranted. In addition, at the time of any surgery for her tendonitis, a capsulotomy or tenyolysis as well as a manipulation of the metatarsophalangeal joint to improve motion would be warranted and that postoperative immobilization for the ankle would not include the metatarsophalangeal joint in that therapy for motion of that joint could be undertaken postoperatively. The patient also had a flat affect and was somewhat tearful. I believe that she may have some depression related to chronic pain. I also

> recommend referral to her family practitioner for evaluation of this.

(R. 291)

Mernka elected to go forward with surgery for her tendonitis. Dr. John Birkett performed a pre-operative physical examination and history on December 8, 1999. (R. 277-78) On December 10, 1999, Dr. Dayton performed a "[r]epair and advancement of posterior tibial tendon with long flexor tendon transfer, right foot" and "[t]ibialis posterior synovectomy, right foot." (R. 271; *see* R. 271-76) Mernka tolerated the procedure well, and was discharged with a prescription for a codeine pain medication, and instructions to remain non-weight-bearing on her right lower extremity with crutches. She was instructed to follow up in Dr. Dayton's office in three to four days. (R. 272-73)

On December 11, 1999, Mernka returned to the hospital complaining that she had vomited several times and was unable to keep anything down. She was admitted to the hospital to control her vomiting. She was given I.V. fluids, and Demerol for pain control. (R. 262-70) She apparently was discharged on December 12, 1999. (*See* R. 264)

Mernka saw Dr. Dayton for post-surgical follow-up on January 3, 2000. She was doing well and having no significant pain. Dr. Dayton put her in a short-leg walking cast to begin only partial weight-bearing for two weeks. (R. 290)

On January 17, 2000, Mernka was seen by Mark A. Burdt, D.O., a rheumatologist, for evaluation of synovitis and inflammatory polyarthritis. Apparently, during the surgery to repair her tendon, Dr. Dayton noted significant synovitis in Mernka's right ankle. Dr. Burdt concurred with Dr. Dayton's assessment of an inflammatory polyarthritis. Dr. Burdt's evaluation is discussed in more detail in subsection C, below.

At her next visit on January 31, 2000, Mernka reported no pain, although she reported having some aching after a long day of activity. She also reported continued

bilateral ankle and foot edema with daily activity. Dr. Dayton opined this was due to her systemic arthritis. He instructed her to continue using the Scott ankle brace, return to a regular shoe, and follow up in one month. (R. 289)

Mernka returned to see Dr. Dayton on February 14, 2000. She complained of new onset of right lateral ankle pain. Dr. Dayton found "focal tenderness of the distal fibula just above the malleolus," and "very mild focal edema in this area." (*Id.*) X-rays of her right ankle revealed "question of very mild periosteal lifting along the lateral fibula which may be consistent with early stress fracture in this area." (*Id.*) Dr. Dayton directed Mernka to return to using the cast boot for any significant walking activity, and to return for a repeat X-ray in two weeks. (*Id.*)

At her next follow-up exam on February 24, 2000, Mernka reported "having a lot of trouble getting back to activity secondary to lateral ankle pain." (R. 322) Repeat X-rays showed no evidence of a stress fracture. Dr. Dayton explained that Mernka needed gradual mobilization, and he referred her to physical therapy. (*Id.*) Mernka returned for follow-up on March 3, 2000. She was having no pain in the area of her surgery, but she complained of "some lateral ankle pain about the peroneal tendons as the course inferiorly to the fibula." (*Id.*) She felt she was turning her foot in somewhat when walking, causing some instability. She stated she had been to physical therapy twice and was doing well and regaining some strength. She was wearing a regular shoe and not using any ambulatory aids. Dr. Dayton put a lateral wedge in her shoe to help her balance. He instructed her to return for follow-up in two weeks. (*Id.*)

Mernka evidenced continued improvement in her condition at follow-up appointments on March 17 and April 13, 2000. She still had some stiffness but was not having any pain and was walking without difficulty. Dr. Dayton noted Dr. Burdt had Mernka on two medications that "seem to be giving her quite a bit of relief." (R. 321) She completed

her course of physical therapy, was making "[e]xcellent progress," and was released to increase her activity as tolerated. (R. 321)

Mernka saw Dr. Burdt and Dr. Dayton on May 8, 2000, complaining of bilateral wrist pain and swelling. She also complained that her right foot continued to have swelling. She was directed to continue taking Celebrex 400 mg. daily and hydroxychloroquine 400 mg. daily. She was scheduled for follow-up in two to three months to see if her medications were proving effective by that time. (R. 329, 346)

On July 17, 2000, she saw Dr. Dayton for follow-up. She reported she had "actually been doing quite well with regards to her foot and ankle over the past month or so." (R. 346) Apparently, the medications Dr. Burdt had prescribed for her wrist, elbow, and arm swelling also were effective for her foot and ankle problems. Her right foot and ankle evidenced no edema at all, and Dr. Dayton noted, "[T]his is the best I have seen it in months." (*Id.*) Her range of motion was much improved, she was not having pain or crepitus, her surgical incisions were healed nicely, and she had appropriate strength. She was directed to continue activity as tolerated, wearing "good solid tennis shoes," and follow up as needed. (*Id.*)

On November 6, 2000, Dr. Dayton responded to several written interrogatories regarding Mernka's condition. He indicated he was treating her for tendonitis and synovitis in multiple joints, causing pain, swelling, and decreased range of motion in her foot and ankle. He noted that resting with her foot elevated helped reduce her pain and swelling. He estimated Mernka could stand and walk for thirty to sixty minutes before having to sit down and rest. He noted her current treatment consisted of anti-inflammatory medications and orthotic inserts. He opined she could stand for no more than one to two hours "total per day non-consecutive." (R. 345)

b. Eye problems

On June 23, 1998, Mernka saw Allen J. Blume, O.D., complaining of itchy, scratchy eyes for the previous three weeks. Mernka stated another doctor had given her some eye drops that had not helped and had made her eyes red. The doctor noted Mernka's right eye was "very red," but her vision did not seem to be affected. (R. 217) Dr. Blume prescribed anti-bacterial eye drops (Blephamide). (*Id.*) When Mernka returned a week later, her eyes were feeling better. Dr. Blume reduced the dosage of the eye drops. (R. 216)

Mernka returned to see Dr. Blume on Thursday, July 9, 1998, complaining that her eyes hurt and she had a headache behind her eyes. She had removed her contact lenses the previous Tuesday, and had not worn them since. Dr. Blume noted Mernka's eyes seemed to be getting worse. He changed her eye drops and told her to return the following Monday. (R. 216)

On July 12, 1998, Mernka went to the emergency room complaining that her right eye had worsened. Doctor's notes indicate Mernka was slightly feverish and her face was flushed. She was told to stop using all eye drops and the doctor prescribed Darvocet for her discomfort. She was advised to follow up with either Dr. Blume, or Dr. Bligard in the Wolfe Eye Clinic, the next day. (R. 132-33) Blume cancelled her appointment for the next day with Dr. Blume, reporting that she had made an appointment at the Wolfe Eye Clinic. (R. 216)

On July 13, 1998, Mernka was seen at the Wolfe Clinic by Gregory A. Olson, M.D. (R. 141) Mernka stated she had not worn her contact lenses for two weeks, and she had not used any drops in her eyes since her visit to the E.R. the preceding day. Dr. Bligard opined that trichiasis was the cause of Mernka's discomfort. He also noted she had two "aberrant lashes" that were rubbing on the bulbar conjunctiva in her right eye.

He removed the two lashes, told her not to wear her contact lenses for a few more days, and prescribed two weeks of a steroidal eye drop. He instructed Mernka to return for follow-up in two weeks. (R. 141)

Mernka underwent a head CT on July 20, 1998, on clinical indications of migraine headaches and red, swollen, painful eye. The CT was normal. (R. 142)

Mernka returned to see Dr. Olson on July 20, 1998, reporting that her eye was no better. The doctor noted some swelling of the upper and lower lids on Mernka's right eye. Dr. Olson elected to treat Mernka for an infection, and also to do a culture to rule out a sector episcleritis. He prescribed Tobradex drops and Indocin, and told her to return for follow-up the next day. (R. 140) When she returned, her eye had not worsened, and Dr. Olson continued her current medications and told her to return the next day. (R. 139) On July 22nd, the doctor noted Mernka's conjunctivitis appeared to be coming under control, and she reported her eye was much more comfortable. Her cultures had come back negative. The doctor told her to return for follow-up the next day. (R. 138)

The next day, Mernka reported having clear, thick drainage from her right eye that morning, and she stated her right eye felt swollen when she blinked. The doctor noted the lids of both eyes were slightly swollen. He noted, "I am now concerned about systemic causes for this. Possibility of Graves disease exists if there's thyroid activity problem." (R. 137) Dr. Olson stopped the Tobradex and started Mernka on Lotemax. He continued the Indocin. He directed her to see Dr. Birkett for a work-up, and she was instructed to see Dr. Olson again in two days. (*Id.*)

When Mernka returned on July 25th, Dr. Olson noted much less edema in Mernka's right eye and virtually none in her left eye. He felt her condition was settling down but still wanted her to have a physical work-up with Dr. Birkett. He continued the Lotemax in both eyes and instructed Mernka to return in three days. (R. 136) Mernka returned for

follow-up on July 28, 1998, reporting that her eyes felt somewhat better. She was having stomach irritation from the Indocin and was instructed to take it with food. Mernka's conjunctivitis appeared to be improving. She had some slight edema remaining in her left eye, and less in her right eye. She was instructed to keep her appointment with Dr. Birkett, and return to see Dr. Olson in one week. (R. 135)

When Mernka returned to see Dr. Olson on August 4, 1998, he noted her "work-up with Dr. Birkett is proceeding and there's concern over the possibility of rheumatoid arthritis, possibly even lupus." (R. 134) Mernka's conjunctivitis had stabilized. Dr. Olson reduced her Lotemax dosage, and noted she had stopped taking the Indocin due to gastrointestinal side effects. (*Id.*)

On August 10, 1998, Mernka was seen at the Mayo Clinic on referral from Dr. Birkett, "for further evaluation of a painful right eye, severe headaches, and a positive rheumatoid factor in her blood." (R. 150) Kevin Moder, M.D. noted Mernka needed "an urgent evaluation," consisting of "a general exam together with an urgent ophthalmology appointment and neurology evaluation regarding headaches and the eye." (*Id.*)

An eye exam was completed by Michael A. Mahr, M.D., who diagnosed Mernka with nodular scleritis. He consulted with Dr. Moder, who prescribed a course of Prednisone. (R. 151-52) Dr. Moder advised Mernka of "the very serious nature of her scleritis . . ., including the potential for visual loss." (R. 147) When Dr. Mahr saw Mernka again on August 14, 1998, she reported feeling much better and her headaches had resolved. The doctor noted Mernka's general medical exam had been significant for Hepatitis C, but his search of the literature revealed no known association between Hepatitis C and scleritis. (R. 155) He saw Mernka again on August 18, 1998, and noted her scleritis was responding well to the Prednisone. She reported her eye felt much better

and she had no eye pain, although she stated she had felt a "twinge" that morning. She stated she was not having headaches at that time. (R. 154)

Dr. Mahr saw Mernka again on August 25, September 4, and September 11, 1998, and she continued to report that she felt well and was not having eye pain or headaches. (R. 156-57) She was still having what she called a "twinge" in the mornings, but otherwise she had no symptoms from the scleritis. (R. 157) On September 24, 1998, she reported occasional redness in her eyes, and occasional itching eyes and runny nose when she went outside, which the doctor noted could be due to allergies. (R. 159) At a follow-up exam on October 26, 1998, she was still doing well and had tapered down her Prednisone dosage to 10 mg. four times daily. She denied any redness or pain in her right eye. (R. 158)

Mernka returned to see Dr. Mahr on November 23, 1998. She reported no pain in her right eye and no headaches since ending her course of Prednisone, but she noted her eyes sometimes were red. He noted "some mild slight smoldering inflammation in her right eye," and some continued evidence of scleritis in her left eye. He recommended treatment with nonsteroidal drops, and told Mernka to contact him immediately if her condition worsened. (R. 178-79l *see* R. 173)

It appears Mernka saw Dr. Mahr on January 19, 1999, complaining of a recurrence of her scleritis. Although her right eye was somewhat improved, her left eye was red and painful, and she complained of having had a headache for three days. The doctor's treatment notes are illegible. (R. 177)

On February 15, 1999, Mernka saw an optometrist complaining of watery, thick discharge from her left eye in connection with a cold. The doctor noted Mernka no longer wore contact lenses. He observed that Mernka could have either a bacterial or a viral infection in her eye, and he prescribed Blephamide drops. (R. 213) At a follow-up visit

on February 19, 1999, Mernka reported feeling much better and having no watering or redness in her eye. The doctor reduced the frequency of the eye drops. He told Mernka to return for follow-up in three days, but the record does not contain evidence that she did so. (*Id.*)

On May 14, 1999, Dr. Blume wrote an opinion letter to the DDS examiner regarding Mernka's condition. He recited her history of eye problems and appointments with his clinic. He noted that because he had not seen Mernka in over three months, he could not comment on her present physical capabilities. However, he further noted that when he last saw her on February 19, 1999, her bacterial conjunctivitis was resolving, her visual ability appeared unimpaired, and her mobility did not appear to be incapacitated. (R. 211-12)

Mernka saw Dr. Mahr for follow-up on June 29, 1999. The doctor's notes are illegible (*see* R. 195), but Dr. Moder's summary indicates Dr. Mahr felt Mernka's "eye examination was satisfactory," and he recommended she use nonsteroidal anti-inflammatories as needed. (R. 189)

Mernka saw Kenneth W. Adams, D.O. on December 9, 1999, complaining of a flare-up of her scleritis. Dr. Adams prescribed Prednisone eye drops. (R. 250)

Mernka's scleritis appears to have improved because the next record entry concerning her eyes is not until August 18, 2000, when she saw Jeffrey S. Foreman, O.D. Mernka reported that she had been doing much better until recently, when her right eye had started mattering. The doctor noted a slight discharge from Mernka's right eye. He diagnosed her with acute bacterial conjunctivitis. It appears he prescribed some eye drops, although the court cannot discern the type of medication. (R. 338-39)

Mernka returned to see Dr. Foreman for follow-up on September 1, 2000. She stated her eye had gotten better, but then had started watering or mattering again. She also

complained of itching and burning in her right eye. Dr. Foreman noted tenderness and discharge from the eye. He prescribed Amoxicillin. (R. 336-37) Mernka returned for follow-up on September 14, 2000, reporting much improvement. The doctor noted no mucous discharge from her right eye. (R. 334-35)

In a brief summary dated October 4, 2000, Dr. Foreman stated he had seen Mernka "for an Acute Bacterial Dacryocycstitis and a Bacterial Conjunctivitis," both of which "resolved without any permanent vision problem." (R. 333) He noted her symptoms had been mattering; a sore, swollen eyelid; and excessive watering, but no headaches. He indicated both conditions were resolved, were unrelated to her past history of scleritis, and also were unrelated to headaches or light sensitivity. He stated, "Her prognosis for this condition is excellent but may reoccur in the future. There should be no work restrictions at all." (R. 333)

c. General medical conditions, including Hepatitis C

On August 10, 1998, Mernka underwent a complete evaluation at the Mayo Clinic by Kevin Moder, M.D., a Rheumatologist. Dr. Moder referred her to Dr. Mahr for an eye evaluation, as discussed above. He also planned to obtain an MRI of her head and refer her to Neurology in connection with her headaches; check her lipids and thyroid levels; and have her seen by an ENT to rule out any systemic inflammatory condition affecting her ears, and to rule out Wegener's Granulomatosis (a rare condition that causes inflammation of blood vessels in the upper respiratory tract, lungs, kidneys, and other body systems). (R. 148-49) After confirming that Mernka was not pregnant, he also ordered X-rays of her feet and ankles, and a chest X-ray. (R. 148)

Mernka's lab studies essentially were unremarkable, "except for a positive rheumatoid factor and a positive initial test for Hepatitis C." (R. 147) Her X-rays did not

show any erosive changes, and she had no other clinical evidence of rheumatoid arthritis. Dr. Moder noted the presence of the rheumatoid factor in her blood could be secondary to her Hepatitis C, if, in fact, she actually had Hepatitis C, which still was undetermined. He opined her headaches could be related to her scleritis. (*Id.*)

Bruce A. Evans, M.D., a neurologist, examined Mernka on August 13, 1998. Her neurological examination was normal. Dr. Evans opined Mernka's headaches were related to her scleritis. (R. 146-47)

Also on August 13, 1998, Mernka saw John J. Poterucha, M.D. in the Gastro-enterology and Hepatology clinic, for evaluation of her positive Hepatitis C antibody. Dr. Poterucha noted Mernka also had "a mildly elevated ALT which makes it likely that she is currently infected with hepatitis C." (R. 146) He also noted that despite the doctors' failure to find any literature on the subject, it was likely her scleritis was associated with her Hepatitis C. (*Id.*) However, he was not confident enough in that opinion to recommend treatment with Interferon. Instead, he advised she get the scleritis under control first, and then undergo a liver biopsy and consider treatment for Hepatitis C. The doctor noted that Interferon treatment "could worsen the scleritis." He also noted Mernka was of child-bearing age, and pregnancy would be contraindicated if she were treated with Interferon and Ribavirin, which would provide the best treatment for the disease. (R. 146) Doctors planned to treat Mernka's scleritis with a high dose of corticosteroids. (*See* R. 144)

Mernka's audiologic evaluation revealed "no evidence of significant underlying ENT disease," including Wegener's. (R. 144-45) X-rays of her feet, ankles, and chesk, and the MRI of her head, all were negative essentially. An ultrasound of her liver, gallbladder, kidneys, and spleen was negative. (R. 163)

On November 18, 1998, Mernka called Dr. Moder to request an appointment. She indicated she was off Prednisone and her eye was doing relatively well, but she was having increasing pain in her knees. She had been taking Ibuprofen for the pain but was developing some dyspepsia. Dr. Moder told her to stop taking the Ibuprofen. He arranged appointments with himself, Dr. Mahr, and Dr. Poterucha, and he scheduled laboratory and X-ray studies. (R. 176)

Mernka saw Dr. Moder on November 23, 1998. He noted her knee X-rays and lab studies were "essentially normal." (R. 174l *see* R. 163) Mernka described "a variety of arthralgias," predominantly in her knees, and she complained of cramping in her knees at night. (R. 175) Dr. Moder found no evidence of inflammatory arthritis or avascular necrosis. He opined Mernka's knee cramping was muscle cramps that sometimes occur when a patient is either taking steroids or is withdrawing from high-dose steroids. He also opined Mernka could have "a subtle steroid-induced myopathy," noting her cramping was worse after increased activity. (*Id.*) The doctor expected Mernka's symptoms to improve the longer she was off the Prednisone. He recommended she drink Gatorade in the evening before bed. For her GI problems, he prescribed Arthrotec, which is less likely to cause GI problems than Ibuprofen, and Pepcid. (*Id.*)

Mernka underwent an ultrasound-guided liver biopsy on December 15, 1998. The biopsy revealed histologic changes consistent with minimal Hepatitis C, without abnormal fibrosis. (R. 163-64, 173) Mernka saw Dr. Poterucha for further evaluation on December 16, 1998. The doctor believed the indications for treatment with Interferon and Ribavirin were "modest at best," and he recommended Mernka have annual liver monitoring and a repeat liver biopsy in three to five years. (R. 173) He noted she was "at the lower risk for disease progression," making treatment "optional." (R. 171) Dr. Moder agreed that Mernka should not be treated for Hepatitis C at that time, but the

doctors noted the decision could be revisited should Mernka develop persistent scleritis. (*Id.*)

On January 8, 1999, Mernka called Dr. Moder to report that she was continuing to have significant GERD-type symptoms despite taking the Pepcid. He recommended she contact her local doctor and have further tests to evaluate the problem. In response to her query, he also suggested she not become pregnant while taking Arthrotec and Pepcid, and he recommended she consult further with an obstetrician. (R. 201)

On February 18, 1999, Mernka saw Francisco Peralia, M.D. at the Allergy-Immunology clinic in Fort Dodge, Iowa. She gave a history of scleritis, chronic rhinitis with sinusitis and nasal allergy symptoms, weight gain due to steroid treatment, headaches associated with her scleritis, lethargy, and generalized weakness. Allergy testing was negative. Dr. Peralia directed Mernka to continue her current medications. He did not suggest any further treatment, but told her to return as needed, and to follow up with Dr. Mahr for her scleritis. (R. 255)

On May 5, 1999, Mernka saw Dr. Birkett briefly for follow-up and repeat thyroid blood profile. Her T4 values were minimally depressed. Dr. Birkett noted Mernka's Hepatitis C was "stable but she suffers from chronic fatigue with this along with chronic headaches and long term depression[.]" (R. 209-10)

On May 10, 1999, Mernka talked with Dr. Poterucha of the Mayo Clinic by phone. She reported some swelling of her right abdomen after eating and at night, and problems involving arthralgias of her hands. She also reported that her mother had been diagnosed recently with antiphospholipid syndrome. Dr. Poterucha advised Mernka to coordinate a visit with him and Dr. Moder for further evaluation. Mernka talked with Dr. Moder, who scheduled several laboratory studies and appointments with himself and Dr. Poterucha. (R. 199-200)

Mernka saw Dr. Moder on June 28, 1999, for "follow-up of arthralgias and myalgias, a history of Hepatitis C, history of scleritis, and desiring some peri-pregnancy counseling." (R. 193) She also expressed interest in an evaluation for antiphospholipid syndrome due to her mother's recent diagnosis. Dr. Moder's examination of Mernka's extremities revealed tenderness over a number of the PIP and MCP joints in both of her hands; tenderness diffusely over the MTP joints of both feet; and "some fibromyalgia tender points over the trapezius, occiput, subscapular area, and trochanteric bursa bilaterally together with pes bursae." (*Id.*) A neurological exam revealed normal muscle strength and tone, but "a positive Tinel's sign and positive Phalen's sign in the right hand." (*Id.*)

Dr. Moder ordered lab studies including a liver function test, Hepatitis C PCR, lipid screen, and thyroid cascade. He also ordered a check of her anticardiolipin antibodies and "a circulating lupus anticoagulant," to address Mernka's concern arising from her mother's recurrent strokes. He noted Mernka was scheduled to see a specialist in high-risk obstetrics to discuss potential risks from her Hepatitis C, and if her pregnancy test was negative, he planned to schedule X-rays of her hands and wrists, feet and ankles. He noted Mernka "likely has a component of myofascial-type pain," opining it would be reasonable to obtain a spine X-ray, as well. Dr. Moder planned to wait for the lab results and completion of Mernka's other consultations before addressing treatment options. (R. 193-94)

The obstetrical specialist advised Mernka there was a five to ten percent risk of transmitting Hepatitis C to a baby. (R. 188; *see* R. 196-97) Mernka's pregnancy test was negative, so Dr. Moder ordered X-rays to look for erosive changes. (R. 192) Mernka consulted with Dr. Gross regarding her Hepatitis C (*see* R. 190-91), and he ordered some specialized testing to quantify her viral levels. (R. 188, 190-91)

Mernka returned to see Dr. Moder on June 30, 1999, following her other consultations. Dr. Moder summarized the team's findings regarding Mernka's Hepatitis C, and her myalgias and arthralgias, as follows:

> #1 Hepatitis C
>
> The patient's liver-transaminases remain elevated and she does continue to have a positive Hepatitis C PCR. Dr. Gross has ordered some specialized studies to attempt to quantitate the viremia. The patient met with Dr. Gross and he discussed options with her regarding potential antiviral therapy. Given the fact that the patient and her husband would like to have another baby, they prefer not to embark on this at present.
>
> #2 Myalgias and arthralgias
>
> Dr. Gross agrees these conceivably could be related to Hepatitis C but we cannot be for certain. At present I do not find any synovitis on examination and her x-rays do not show any erosive changes. The patient does have a positive rheumatoid factor in the blood, but this may well be secondary to Hepatitis C also. I discussed with the patient the fact that some of her symptoms could be consistent with fibromyalgia, but that fibromyalgia can also be seen in the setting of Hepatitis C. One could consider therapy in the Fibromyalgia Treatment Program but if, in fact, her symptoms are related to hepatitis C, I do not know that this would necessarily be of benefit to her. Given the fact she would like to become pregnant, I think it would be best to avoid use of medications if possible.

(R. 188)

Mernka also saw Karla Thompson, a Physical Therapist, and Julie Edvenson, an Occupational Therapist, with regard to her hand pain, back pain, and generalized arthralgias. Mernka received instruction in general hand care/joint protection principles; adaptive equipment options to protect her joints in connection with functional activities like

opening jars; and compensatory techniques to reduce joint strain when she performs household activities (e.g., sliding items on counter tops). (R. 186-87)

On July 9, 1999, Dr. Gross made the following record entry after reviewing the results from Mernka's specialized testing:

> #1 Chronic hepatitis C
> The liver disease related to chronic hepatitis C infection is minimal, by recent liver biopsy, examination, and biochemistries. Even without treatment, Mrs. Mernka would have no significant risk of fibrosis over the next 10-15 years. We typed her infection as genotype 1b, which means that it would be more difficult to eradicate with combination antiviral therapy using interferon and ribavirin than some of the other types. I would rate her chances of complete elimination of virus at around 25-30 percent with one year of combination therapy.
>
> #2 Myalgias and arthralgias
> It is difficult to know if these recent symptoms are related to her HCV infection, and the serum cryoglobulins were absent. However, the rheumatoid factor was positive and there is a remote possibility that some of these symptoms might improve by eliminating or, at least, suppressing virus activity. The pros and cons of treatment were discussed with the patient and her husband, and they will let us know if she wishes to proceed. The main problem, from her point of view currently, is that they would like to have a child and ribavirin is a known cause of birth defects.

(R. 198; *see* R. 185, letter containing same conclusions)

It appears that on or about August 13, 1999, Dennis A. Weis, M.D. completed a Physical Residual Functional Capacity Assessment form regarding Mernka. The form itself is not part of the record, but Dr. Weis's Medical Consultant Review Comments are in the record. (R. 234) Dr. Weis found no significant, ongoing evidence in the record of

vision impairment, back impairment, inability to use her hands for fine manipulative activities, inflammatory arthritis, synovitis, joint pain, swelling, or fusion. He found Mernka's subjective complaints regarding her inability to use her hands not to be supported by the evidence. He concluded her impairments were non-severe in nature, and he found no evidence to establish a severe medically-determinable impairment that would limit Mernka's residual functional capacity significantly. (*Id.*)

On October 14, 1999, Mernka saw Kenneth W. Adams, D.O., a gastroenterologist, for follow-up of her chronic Hepatitis C. Dr. Adams took her history and examined her, reaching the following assessment: "1) Arthralgia with positive rheumatoid factor, possibly representing rheumatoid arthritis, although there has been no history or demonstratable evidence for synovitis on today's examination. 2) Chronic HCV with genotype I. Liver biopsy demonstrating no fibrosis. 3) Right Achilles' tendinitis." (R. 253) He prescribed Clinoril (a nonsteroidal anti-inflammatory agent). He planned to continue monitoring her condition and recommended follow-up and repeat lab tests in eight weeks. (R. 253-54)

As noted previously, on January 17, 2000, Mernka was evaluated by rheumatologist Mark A. Burdt, D.O. The evaluation was prompted when Dr. Dayton noticed significant synovitis at Mernka's right ankle during her tendon surgery. Mernka provided the following history:

> [S]he has had problems with pain and swelling in her feet and ankles for nearly a decade, and for the past two years she has also had problems with pain, stiffness and swelling in her hands. [Mernka] reports that she will have a couple of hours of stiffness in her hands with pain localized over the MCP and PIP joints. She has also noted intermittent swelling in these regions. She has also noted intermittent arthralgias in her shoulders and knees as well over the course of the past two years. As part of the treatment for her ankles, [Mernka] was at one time placed on Celebrex which she states provided

> considerable relief in terms of the pain and stiffness in her hands.
>
> [Mernka] has a long and somewhat complicated medical history. She was diagnosed with chronic Hepatitis-C infection a couple of years ago which apparently historically may have been present for up to a decade. She has undergone a liver biopsy and no specific treatment has been offered yet at this point. She has also been treated for recurrent scleritis at the Mayo Clinic. During her evaluation for scleritis she was worked up for inflammatory arthritis by a rheumatologist at the clinic there. Apparently she had elevated rheumatoid agglutinins, however a firm diagnosis of rheumatoid arthritis was not established. The only specific treatment given was that of nonsteroidal anti-inflammatory drugs.

(R. 279-80)

Dr. Burdt diagnosed Mernka with "symmetric, inflammatory polyarthritis in the setting of chronic Hepatitis-C infection and elevated rheumatoid agglutinins." (R. 281) He noted Hepatitis C "can cause this symmetric polyarthritis clinically and distinguishable from rheumatoid arthritis. The presence of the chronic infection could also cause elevation in the rheumatoid factor as well." (*Id.*) He prescribed Celebrex, ordered repeat X-rays of Mernka's hands, and scheduled a follow-up appointment in one month. (R. 281-82) An addendum note indicates the X-rays of Mernka's hands showed no rheumatoid erosions or changes, and good bone density. (R. 282)

Mernka returned to see Dr. Burdt on February 14, 2000. He noted her comprehensive metabolic profile was normal. Further, although her rheumatoid factor was positive qualitatively, it was negative when quantitation was done. Dr. Burdt's assessment remained inflammatory polyarthritis, with the following notes:

> It is still unclear whether [Mernka] has seronegative rheumatoid arthritis versus that of chronic hepatitis C.

> Nonetheless, she is doing very poorly functionally, and I think we should treat her. First, I asked that she increase her Celebrex up to 200 mg twice daily. In addition, we are going to initiate therapy with hydroxychloroquine. I believe anti-malarial therapy should not [a]ffect the status of her chronic viral hepatitis, yet it will hopefully be effective in treating some of her joint symptomology. I warned her about possible side effects including GI irritation, diarrhea, and even retinal toxicity. I told her that she would need to have retinal screening exams done yearly while on this medication, and she understands. She is going to start taking 200 mg once daily for one week. If tolerated, she will increase up to 400 mg daily thereafter.

(R. 318) Dr. Burdt directed Mernka to return for follow-up in three months. (R. 319)

On February 29, 2000, Lawrence F. Staples, M.D. completed a Residual Functional Capacity Assessment of Mernka. (R. 307-14) From his review of the record, Dr. Staples concluded Mernka could lift up to twenty pounds occasionally and ten pounds frequently; stand and/or walk, with normal breaks, for a total of six hours in an eight-hour workday; sit for six hours in an eight-hour workday; and push or pull without limitation. He indicated she frequently would have trouble balancing, and occasionally would have problems with climbing, stooping, kneeling, crouching, and crawling. He found she would be limited in her ability to perform fine manipulation or fingering skills. He found no other limitations on Mernka's ability to work. (*Id.*)

In his review summary, Dr. Staples indicated Mernka had medically-determinable, severe impairments of inflammatory polyarthritis; "s/p ileal tendon surgery, right"; and chronic hepatitis C, but he found none of these, singly or in combination, met the Listing requirements. (R. 315) The doctor apparently spoke with Mernka as part of his assessment, and he noted the following from their conversation:

> In a phone call to the claimant on 2/29/2000 indicates she has difficulty with fingers and wrists for the past year and has difficulty with buttons, zippers and prefers to wear T-shirts and sweat pants-clothing without buttons and zippers. She can't get her fingers to move at times. She is always tired. She has been placed on Plaquenil and Ultram. She hadn't noticed an effect yet. Her husband does the dishes and at times he helps. He also does the majority of the cleaning. She still wears a boot if she goes out to the mall. She is able to write some for a little at a time.

(R. 316) Dr. Staples found "no significant inconsistency compared with the general body of the record . . . and the allegations are considered to be credible." (*Id.*) In a somewhat confusing statement, the doctor indicated, "The claimant has improved from her surgery on right ankle and it may be expected she will be able to perform the RFC as outlined well by 9/2000." (*Id.*)

Mernka returned to see Dr. Burdt for follow-up on May 8, 2000, reporting things had not gone well since her last visit. She complained of continued small joint poly-arthralgias, particularly in her hands, feet, and knees. She reported more swelling in her left wrist and prominence of the styloid process. She also reported problems with her eyes tearing, especially the right eye, but stated the Mayo Clinic ophthalmologist had seen no evidence that her scleritis had recurred and no abnormalities or retinal problems. Mernka noted she also was having biocular double vision. (R. 329)

Dr. Burdt's assessment remained "[i]nflammatory polyarthritis in the setting of chronic hepatitis C infection." (*Id.*) He told her to continue taking Celebrex 400 mg daily and hydroxychloroquine 400 mg daily. He explained it can take four to six months to see benefit from the Plaquenil. He recommended she use artificial tears, explaining that

"many patients with dry eyes related to their arthritis actually have the perception of excessive tearing." (*Id.*) He directed her to return for follow-up in three months. (R. 330)

At her next follow-up visit on August 7, 2000, Mernka reported problems with conjunctivitis in her right eye, and she stated an ophthalmologist had placed her on Tobramycin eye drops. She stated her arthritis was a little bit better, noting particular improvement with regard to her right ankle despite the continuance of some swelling and tenderness over the lateral aspect. She complained of some myofascial pain across the trapezius, at the base of her skull, and pain and spasms in her low back which often kept her awake at night. (R. 331) Dr. Burdt noted Mernka was "enjoying fairly good control with hydroxychloroquine and celecoxib." (*Id.*) He directed her to continue those medications, and he suggested she try cyclobenzaprine 5-10 mg before bed as a sleep aid. He scheduled her next follow-up in four months. (R. 331-32)

On October 26, 2000, Dr. Burdt answered some written interrogatories related to Mernka's disability application. (R. 342-44) He indicated Mernka had a "10 year history of non-erosive polyarthritis with synovitis of ankles/hands/feet." (R. 342) He listed objective clinical findings corroborating his diagnosis, and noted she was being treated with Plaquenil and Celebrex without any untoward side effects. Dr. Burdt opined Mernka would have difficulty performing a job that required reaching, pushing, pulling, handling/grasping, significant use of her hands, or good bilateral manual dexterity. He opined significant use of her upper extremities would cause exacerbation of Mernka's pain. (R. 342-43)

Dr. Burdt opined Mernka likely would be unable to work full time on a sustained basis, and her condition likely would result in unpredictable and excessive absences from work. He noted her arthritis would reduce her ability for prolonged standing or walking,

and opined she likely could stand and walk, with normal breaks, for no more than two hours in an eight-hour day. He opined she could lift/carry up to twenty pounds on a limited basis, sit continuously for forty-five minutes before having to change positions, and sit for a total of about two hours in an eight-hour day. He noted she would have to change positions and alter her postures frequently to relieve pain or other symptoms. (R. 343-44)

d. Depression

On May 9, 1999, Mernka underwent an intake evaluation by social worker Kyle McCard at the North Central Iowa Mental Health Center. Her husband Dennis accompanied her to the visit. Mernka stated that since her physical problems began a year earlier, she and her husband had been experiencing sexual difficulties. She stated her doctors had advised her to stop working because of her scleritis, and she had quit working in August 1998. She voiced concern about transmitting her Hepatitis C to her husband through sexual contact, and she stated her liver functioning was deteriorating gradually and she might have to consider a liver transplant in the future. She also stated she had "a severe case of rheumatoid arthritis in her feet which definitely limits her mobility." (R. 229)

Mr. McCard noted that Mernka's score on the Burns Depression Checklist "would certainly put her in the severe range of depression." (R. 229-30) Mernka appeared to be "completely overwhelmed with the multitude of major medical disorders she has and the effect it has had on her life and also her relationship with her husband." (R. 230) She expressed a need for individual treatment for her depression, and both the therapist and Mernka's husband agreed it would be appropriate to address Mernka's depression and her feelings about her medical conditions. She was scheduled for an evaluation with Uzoma C. Okoli, M.D., a psychiatrist. (*Id.*; *see* R. 226-28)

Mr. McCard diagnosed Mernka with Major Depression, single episode, and Partner relational problem. He assessed her current GAF at 50, indicating either serious symptoms or a serious impairment in social/occupational functioning. *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) ("DSM-IV"), at 32.

When Mernka saw Dr. Okoli, she gave a similar history of her current problems. She noted she had lost several friends since her Hepatitis C diagnosis because they did not want to be around her due to the diagnosis. She reported having arthritis pain that made it hard for her to enjoy sex and also caused her problems initiating sleep, although she reported sleeping well once she was able to fall asleep. She felt her current depressive feelings were due to the Hepatitis. She denied feeling unduly anxious or suicidal. Dr. Okoli diagnosed Mernka with Depressive Disorder, not otherwise specified, and assessed her current GAF at 50. He recommended she try an antidepressant medication but Mernka declined, stating she was "sensitive to medications." (R. 228) The doctor referred Mernka to therapist Marni Moody for both individual and family therapy with her husband. (R. 226-28)

On May 27, 1999, Mernka underwent a mental status evaluation by P.E. Lonning, Ph.D., upon referral from Disability Determination Services. (R. 218-21) Dr. Lonning noted Mernka was "applying for disability because of severe Scleritis of the eyes, problems with rheumatoid arthritis in her feet and hands, Hepatitis C and an underactive thyroid." (R. 218) Mernka reported having problems writing, standing, walking, and opening things with her hands. She also reported getting headaches upon flare-up of her scleritis, which she stated "happens often when she's in the sun, wind or bright lights." (*Id.*)

Dr. Lonning noted Mernka's eye contact was poor, and her mood was "somewhat reserved and flat." (R. 219-20) However, her speech was clear, and she had average memory, cognitive ability, judgment, and insight. The doctor diagnosed Mernka with an Adjustment Disorder with Depressed Mood, and assessed her current GAF at 55, indicating moderate symptoms or moderate difficulty in social and occupational functioning. *See* DSM-IV at 32. He reached the following impressions regarding Mernka's mental status:

> The patient is having some marital problems for which they are seeking help. She has had physical pain for years before being diagnosed last summer at the Mayo Clinic with rheumatoid arthritis and was also diagnosed with Scleritis of the eyes.
>
> It is this examiner's opinion that the patient has the ability to remember and understand instructions, procedures and locations but is unable to carry out instructions, maintain attention, concentration and pace due to her physical problems. She should be able to interact appropriately with supervisors, coworkers and the public. Her judgment to respond appropriate to changes in the work place appears to be good.

(R. 220)

Mernka and her husband saw therapist Marni Moody for an intake session on June 1, 1999. (R. 225) On June 8, 1999, Mernka and her husband returned for a counseling session with Ms. Moody. The session focused primarily on the couple's relationship. Mernka stated that if a miracle were to happen, she would be free from her health problems and could return to work and do things she used to do, including having a fun relationship with her husband and renewed friendships. The therapist provided some instructions for the couple to use during the following week to work on their relationship. (R. 223)

At the couple's next appointment with Ms. Moody on June 21, 1999, both reported a marked improvement in their relationship. In addition, Mernka "was pleased to report a drastic improvement in her ability to cope and a drastic decrease in family conflict." (R. 222) She stated she had recognized the importance of tapping into a support system and enjoying social activities, and she rated her level of life satisfaction at a 7 or 8 on a scale of 10. (*Id.*) Although Mernka was scheduled for a return visit in two weeks, there is no evidence in the record of further treatment by this, or any other, therapist.

On August 26, 1999, Beverly Wester, Ph.D. completed a Psychiatric Review Technique form regarding Mernka. (R. 236-45) She found Mernka to have diagnoses of Depressive Disorder, not otherwise specified, and Adjustment Disorder, Depressed Mood. (R. 239) She found Mernka's impairments were not severe, and opined Mernka had only slight limitations and work-related deficiencies as a result of her mental impairments. (R. 236, 243) Dr. Wester noted Mernka had no difficulty concentrating, she spent a lot of time on the Internet, and she had refused medications. (R. 245) Dr. Wester found "no evidence to support significant functional restrictions from a mental standpoint," and she stated Mernka's credibility was partly eroded because she was citing depression as a disabling condition, which Dr. Wester found to be inconsistent with the medical evidence of record. (R. 235) On November 12, 1999, David A. Christiansen, Ph.D. reviewed Dr. Wester's assessment and affirmed her conclusions. (R. 236)

4. Vocational expert's testimony

VE Brian Paprocki testified all of Mernka's past relevant work is semi-skilled. The ALJ asked the VE the following hypothetical question:

> She's 34. She has a twelfth grade education. If she were able to occasionally lift 20 pounds and frequently lift ten, and sit,

> stand, walk with normal breaks for an hour at a time but for six hours out of an eight hour day, with no significant restrictions on repetitive use of her upper extremities for either gross or fine manipulation, no environmental or communicative limitations, occasional climbing, bending, stooping, and kneeling. Pushing and pulling to the extent of the amount of weight she can lift and carry. Could she be able to perform any of the work that you've listed [on her past relevant work summary]?

(R. 390) The ALJ clarified that Mernka would need to change positions every hour, but she could remain in any one position for an hour at a time. (*Id.*) The VE responded as follows:

> I think the only position that would possibly allow the frequency of change with that rapidity would be the file clerk, probably as either as performed in the national economy or most likely as performed by her. Those jobs generally involve an individual pulling files and being on one's feet for awhile and then sitting for awhile. The other jobs, I think, would entail being on her feet, standing or walking, more than one hour at a time.

(R. 380-81)

The ALJ asked if Mernka would have any transferable skills from her prior work that would allow her to perform other jobs within the parameters of the hypothetical. The VE responded as follows:

> Oh, I think she does. The ability to deal with people. In all the jobs, except the file clerk position, she was dealing with the general public. She was handling money, keeping records, using a cash register. I think those factors could be transferable to jobs that would allow more latitude for positional change and we could be talking about someone who is a – I would say a library clerk is one example. Library clerk is – according to the DOT is code number 205.367-034.

> It's a semi-skilled, light job, not unlike the type of clerking or – sales clerking or cashier work that was done at a number of jobs in the past. This would allow some latitude for a change between sitting and standing. The number of jobs presently being performed in the State of Iowa is about 2200. We're talking about 125,000 nationwide. Another job I think might be feasible would be that of a ward clerk. This is a person who essentially is a file clerk or a keeper of files in a medical facility, let's say a medical floor, keeping the patient files. It's a light job. Code number is 245.362-014. It's a combination, again, of sitting and standing pretty much at will in many instances. 500 positions of that type statewide, about 25,000 jobs in a nationwide basis.

(R. 381)

The VE stated Mernka also would have skills transferable to sedentary jobs. As examples, the VE cited check cashier, auction clerk, and receptionist. (R. 382-83)

If Mernka were required to nap for one hour every afternoon, the VE stated "most employers are not going to be able to accommodate something like that," but with some accommodation from an employer, it likely would not preclude employment altogether. (R. 384)

The VE noted that sedentary jobs do not involve any significant walking, and usually would not allow someone to walk around for any length of time. Sedentary jobs are performed primarily while sitting, and light jobs predominantly are standing. (R. 385)

If Mernka were limited to sitting, standing, and walking for a total of two hours out of an eight-hour day, then she would be precluded from competitive employment. (R. 385-86) In addition, if she had to be absent due to doctors' appointments or illness for at least three days per month, the VE stated that would be "in excess of what the normal employer generally allows," noting the "standard is one to two days per month." (R. 390)

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

A. Disability Determinations and the Burden of Proof

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

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step sequential evaluation process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *Dixon v. Barnhart*, 353 F.3d 602, 605 (8th Cir. 2003); *Kelley v. Callahan*, 133 F.3d 583, 587-88 (8th Cir. 1998) (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner 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. § 404.1520(4)(I).

Second, if the claimant is not engaged in substantial gainful activity, the Commissioner looks to see "whether the claimant has a severe impairment that significantly limits the claimant's physical or mental ability to perform basic work activities." *Dixon*, 353 F.3d at 605; *accord Lewis v. Barnhart*, 353 F.3d 642, 645 (8th Cir. 2003). The United States Supreme Court has explained:

> The ability to do basic work activities is defined as "the abilities and aptitudes necessary to do most jobs." . . . Such abilities and aptitudes include "[p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling"; "[c]apacities for seeing, hearing, and speaking"; "[u]nderstanding, carrying out and remembering simple instructions"; "[u]se of judgment"; "[r]esponding appropriately to supervision, co-workers, and usual work situations"; and "[d]ealing with changes in a routine work setting."

Bowen v. Yuckert, 482 U.S. 137, 140-42, 107 S. Ct. 2287, 2291, 96 L. Ed. 2d 119 (1987) (citing 20 C.F.R. §§ 404.1521(b), 416.921(b)).

Third, if the claimant has a severe impairment, then the Commissioner will consider the medical severity of the impairment. 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, or work experience. 20 C.F.R. § 404.1520; *Kelley*, 133 F.3d at 588.

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") to determine the claimant's "ability to meet the physical, mental, sensory, and other requirements" of the claimant's past relevant work. 20 C.F.R. §§ 404.1520(4)(iv); 404.1545(4); *see Lewis*, 353 F.3d at 645-46 ("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 or her physical or mental limitations.") (citing *Bradshaw v. Heckler*, 810 F.2d 786, 790 (8th Cir. 1987); 20 C.F.R. § 404.1520(e) (1986)); *Dixon*, *supra*. The claimant is responsible for providing evidence the Commissioner will use to make a finding as to the claimant's RFC, but the Commissioner is responsible for developing the claimant's "complete medical

history, including arranging for a consultative examination(s) if necessary, and making every reasonable effort to help [the claimant] get medical reports from [the claimant's] own medical sources." 20 C.F.R. § 404.1545(3). The Commissioner also will consider certain non-medical evidence and other evidence listed in the regulations. *See id.* If a claimant retains the RFC to perform past relevant work, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(iv).

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 prove that there is other work that [the claimant] can do, given [the claimant's] RFC [as determined at step four], age, education, and work experience." Clarification of Rules Involving Residual Functional Capacity Assessments, etc., 68 Fed. Reg. 51,153, 51,155 (Aug. 26, 2003). The Commissioner must prove not only that the claimant's RFC will allow the claimant to make an adjustment to other work, but also that the other work exists in significant numbers in the national economy. *Id.*; 20 C.F.R. § 404.1520(4)(v); *Dixon, supra*; *Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001) ("[I]f the claimant cannot perform the past work, the burden then shifts to the Commissioner to prove that there are other jobs in the national economy that the claimant can perform.") (citing *Cox v. Apfel*, 160 F.3d 1203, 1206 (8th Cir. 1998)); *Nevland v. Apfel*, 204 F.3d 853, 857 (8th Cir. 2000). If the claimant can make an adjustment to other work that exists in significant numbers in the national economy, then the Commissioner will find the claimant is not disabled. If the claimant cannot make an adjustment to other work, then the Commissioner will find the claimant is disabled. 20 C.F.R. § 404.1520(r)(v).

B. The Substantial Evidence Standard

The court reviews an ALJ's decision to determine whether the ALJ applied the correct legal standards, and whether the factual findings are supported by substantial evidence on the record as a whole. *Hensley v. Barnhart*, 352 F.3d 353, 355 (8th Cir. 2003); *Banks v. Massanari*, 258 F.3d 820, 823 (8th Cir. 2001) (citing *Lowe v. Apfel*, 226 F.3d 969, 971 (8th Cir. 2000)); *Berger v. Apfel*, 200 F.3d 1157, 1161 (8th Cir. 2000) (citing 42 U.S.C. § 405(g); *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971)). This review is deferential; the court must affirm the ALJ's factual findings if they are supported by substantial evidence on the record as a whole. *Id.* (citing *Estes v. Barnhart*, 275 F.3d 722, 724 (8th Cir. 2002); *Krogmeier v. Barnhart*, 294 F.3d 1019, 1022 (8th Cir. 2002) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000)); *Kelley v. Callahan*, 133 F.3d 583, 587 (8th Cir. 1998) (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . ."). Under this standard, "[s]ubstantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion." *Krogmeier, id.*; *Weiler v. Apfel*, 179 F.3d 1107, 1109 (8th Cir. 1999) (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); *accord Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993).

Moreover, substantial evidence "on the record as a whole" requires consideration of the record in its entirety, taking into account both "evidence that detracts from the Commissioner's decision as well as evidence that supports it." *Krogmeier*, 294 F.3d at 1022 (citing *Craig*, 212 F.3d at 436); *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir.

1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951)); *Gowell*, 242 F.3d at 796; *Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213); *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)). 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) (also citing *Cline*, *supra*).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Steadman v. S.E.C.*, 450 U.S. 91, 99, 101 S. Ct. 999, 1006, 67 L. Ed. 2d 69 (1981)). The court, however, does not "reweigh the evidence 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) (citing *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it "possible to draw two inconsistent positions from the evidence and one of those positions represents the agency's findings, [the court] must affirm the [Commissioner's] decision." *Id.* (quoting *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992), and citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); *accord Baldwin*, 349 F.3d at 555; *Young v. Apfel*, 221 F.3d 1065, 1068 (8th Cir. 2000). This is true even in cases where the court "might have weighed the evidence differently." *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)); *accord Krogmeier,* 294 F.3d at 1022 (citing *Woolf*, 3 F.3d at 1213). The court may not reverse the Commissioner's decision "merely because substantial evidence would have supported an opposite decision." *Baldwin*, 349 F.3d at 555 (citing *Grebenick v. Chater*, 121 F.3d

1193, 1198 (8th Cir. 1997)); *Young*, 221 F.3d at 1068; *see Pearsall*, 274 F.3d at 1217; *Gowell*, 242 F.3d at 796; *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997).

On the issue of an ALJ's determination that a claimant's subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ's credibility determinations are entitled to considerable weight. *See, e.g., Young v. Secretary of H.H.S.,* 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen,* 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v. Secretary of H.H.S.,* 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.,* 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not discredit a claimant's subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only discredit subjective complaints if they are inconsistent with the record as a whole. *See Hinchey v. Shalala,* 29 F.3d 428, 432 (8th Cir. 1994); *see also Bishop v. Sullivan,* 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler,* 739 F.2d 1320, 1322 (8th Cir. 1984)). As the court explained in *Polaski v. Heckler:*

> The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:
>
> 1) the claimant's daily activities;
> 2) the duration, frequency and intensity of the pain;
> 3) precipitating and aggravating factors;
> 4) dosage, effectiveness and side effects of medication;
> 5) functional restrictions.

Polaski, 739 F.2d 1320, 1322 (8th Cir. 1984). *Accord Ramirez v. Barnhart*, 292 F.3d 576, 580-81 (8th Cir. 2002).

IV. ANALYSIS OF THE ALJ'S DECISION

The ALJ found Mernka's work at Chris's Front Porch did not represent substantial gainful activity; however, the ALJ did not indicate any date on which Mernka last performed substantial gainful activity. She noted Mernka had worked sporadically for numerous employers with fluctuating earnings. (R. 18)

The ALJ found Mernka to have severe impairments consisting of Hepatitis C, arthritis, scleritis, and an affective disorder, but concluded these were "not severe enough" to meet the regulatory requirements for disability. (R. 14) In finding Mernka not to be disabled, the ALJ relied heavily on her assessment that Mernka's allegations of disability were not totally credible.

The ALJ reviewed Mernka's testimony regarding her daily activities and limitations. She noted that Dennis Mernka's testimony corroborated Mernka's testimony; however, the ALJ disregarded Dennis's testimony because he was not "an independent witness," and was "a lay person [who] can only report his observations of the claimant's behavior and limitations." (R. 18) However, as the ALJ noted, "it must be recognized that those who have a close relationship with a claimant are in the best position to observe the claimant's daily life." (*Id.*) The court finds the ALJ had no grounds to disregard Dennis Mernka's testimony.

The ALJ observed that although Mernka stated she could only sit for about twenty minutes at a time, she sat through the hour-long hearing without changing positions. (R. 19, citing *Smith v. Shalala*, 987 F.2d 1371, 1375 (8th Cir. 1993)). The court finds this factor weighs against Mernka's credibility.

The ALJ noted that on Mernka's Supplemental Disability Report, she "reported that she did not cook, stating her husband did the cooking. However, during [a] telephone contact of February 29, 2000, the claimant stated she cooked a few times a week." (*Id.*)

The court notes the Supplemental Disability Report was completed on October 20, 1999, some four months prior to the phone conversation in which Mernka stated she cooked occasionally. (*See* R. 109-11) In her hearing testimony, Mernka stated her energy level fluctuates frequently and widely, both from day to day and during a single day, and she has considerably more pain and limitations on some days than others. Given this fact and the time lapse between the two statements, the court does not find her statements to be inconsistent. Furthermore, in her hearing testimony, Mernka stated that her husband does most of the cooking, but she helps out when she can. They both agreed that often Mernka will start a household task but her husband has to finish it. (R. 366-68, 377)

The ALJ also found that "the record reflects questionable statements regarding disability issues." (R. 19) She noted Mernka had stated at her initial mental health evaluation that the Mayo Clinic doctors "had recommended she stop working" due to her scleritis, and that she had been told she might have to have a liver transplant due to Hepatitis C. (*Id.*) The ALJ found "no record of this in the medical evidence of record from Mayo Clinic," and noted Dr. Gross had indicated Mernka's liver infection was minimal and she "would have no significant risk of fibrosis over the next 10 to 15 years." (*Id.*) Although the medical records do not indicate what Mernka was told, that does not necessarily indicate Mernka was being untruthful when she stated doctors had told her she might have to have a liver transplant. Regarding Mernka's statements about why she quit working, the majority of the record evidence is consistent with Mernka's claim that she quit working in August 1998, due to her medical condition, but not necessarily on the recommendation of her Mayo Clinic doctors.

The ALJ noted Mernka "testified she had to lie down to relieve pain yet [she] never mentioned this to any doctor. If her alleged need to lie down was impairing her functioning to the degree alleged, it is reasonable to assume she would have informed her

physician." (R. 19, citing *Hajek v. Shalala*, 30 F.3d 89, 92 (8th Cir. 1994)). The record indicates Mernka did, in fact, complain to her physicians about chronic fatigue. In his written questionnaire, Dr. Dayton noted Mernka had complained of fatigue, and her fatigue would impact her ability to perform tasks on a sustained basis in a work setting. (R. 293-94) When Mernka saw Dr. Birkett on May 5, 1999, he noted that although her Hepatitis C was stable, Mernka suffered from chronic fatigue. (R. 209-10) In her hearing testimony, Mernka stated her arthritis pain and other physical problems caused her excessive fatigue, and she stated her doctors had told her she had to sleep so much due to her arthritis pain and Hepatitis C. (R. 358, 368-69) Mernka did not testify "she had to lie down to relieve pain"; rather, her testimony was that she becomes extremely fatigued upon exertion, and she has to lie down to rest. She testified further that lying down helps her pain. These allegations are consistent with the substantial evidence of record.

The ALJ also discounted Mernka's credibility because she alleged "she had migraine headaches because of scleritis in her eyes," and that "fluorescent lighting and sunlight cause her scleritis to flare up," but "Dr. Foreman in a narrative dated October 4, 2000, advised that the claimant's eye problems had resolved and were unrelated to headaches or light sensitivity." (R. 19) The ALJ is not reading the record carefully. Mernka complained of headaches relating to her scleritis from the time it was first diagnosed, and Dr. Moder opined that her headaches could be related to her scleritis. (*See* R. 147) Mernka also has complained consistently that bright light causes her discomfort. Dr. Foreman's narrative of October 4, 2000, described his treatment of Mernka for a specific incidence of acute bacterial dacryocycstitis and bacterial conjunctivitis beginning in August 2000, and resolving by October 2000. He indicated those conditions were unrelated to headaches and light sensitivity. He offered no opinion, nor was he asked to

offer one, as to whether Mernka's scleritis, when it flares up, can cause her to have headaches, or whether light sensitivity can cause a flare-up of her scleritis.

In summary, the ALJ found "[t]he medical opinions and notes throughout the record weigh heavily against the claimant's allegations of disability." (R. 19-20) The court finds the opposite to be true. The medical opinions and notes of Mernka's treatment demonstrate that her ongoing impairments significantly impact her daily life. The court finds that substantial evidence in the record corroborates Mernka's subjective allegations of disability.

In evaluating whether Mernka retained the residual functional capacity to return to her past relevant work, the ALJ acknowledged that two of Mernka's treating physicians opined she would have difficulty sustaining even sedentary work, she would have unpredictable and excessive absences from work, and she would need to change position and rest frequently. (R. 20-21) However, the ALJ discounted these opinions because they "were on questionnaires." (R. 21) The ALJ stated, "While these forms are admissible they are entitled to some weight and do not constitute substantial evidence on the record as a whole." (*Id.*) Interestingly, however, in assessing Mernka's residual functional capacity, the ALJ expressly relied on a form completed by a State agency medical consultant who never examined Mernka. (*See* R. 20) The ALJ also ignored the findings of Dr. Lonning, who performed a mental status evaluation at the request of DDS. Dr. Lonning opined Mernka would be "unable to carry out instructions, maintain attention, concentration, and pace due to her physical problems." (R. 220)

Regarding the ALJ's failure to credit the opinions of Mernka's treating physicians, the court notes that "[a] treating physician's opinion should not ordinarily be disregarded and is entitled to substantial weight. *Ghant v. Bowen*, 930 F.2d 633, 639 (8th Cir. 1991). By contrast, '[t]he opinion of a consulting physician who examines a claimant once or not

at all does not generally constitute substantial evidence.' *Kelley v. Callahan*, 133 F.3d 583, 589 (8th Cir. 1998)." *Jenkins v. Apfel*, 196 F.3d 922, 925 (8th Cir. 1999). When a treating physician's "opinion is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] record[,]" the "treating physician's opinion regarding an applicant's impairment will be granted 'controlling weight[.]'" *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000). In this case, the opinions of Mernka's treating physicians is both supported by medically-acceptable clinical and laboratory diagnostic techniques, and is consistent with other substantial evidence in the record.

Based on the opinions of Mernka's treating physicians, the medical evidence of record, and the credible testimony of Mernka and her husband, the court finds the ALJ erred in discounting the opinions of Mernka's treating physicians regarding the severity of her impairments and their likely effect on her ability to work. In addition, the court finds the ALJ erred in failing to give adequate reasons for discounting the opinions of Mernka's treating physicians and the opinion of Dr. Lonning.

V. COMMISSIONER'S MOTION FOR REMAND

The Commissioner has moved to remand this case for further evaluation pursuant to sentence four of 42 U.S.C. § 405(g). The Commissioner seeks to have the ALJ evaluate the medical evidence further, including making a determination of whether Mernka meets the Listing criteria. (*See* Doc. No. 7) In her brief, Mernka argues she clearly meets the criteria for Listing 14.09D, inflammatory arthritis. (*See* Doc. No. 6, pp. 12-16) Mernka notes, Listing 14.09D is confusing and evaluation pursuant to Listing 14.09D is daunting. (*Id.*, p. 13 & n.11) She nevertheless urges the court to evaluate her condition based on the record evidence, from which she contends the court can find "unequivocally" that she has

met the requirements of the Listings, and therefore can reverse and remand for calculation and payment of benefits. (*Id.*, p. 16)

The court finds the record lacks sufficient evidence to make such a definitive determination, and concludes it would be appropriate to remand the case to allow Mernka's treating physicians the opportunity to provide opinion evidence specifically directed to the requirements of the Listing. In addition, upon remand, the ALJ should be directed to give appropriate weight to the opinions of Mernka's treating physicians, and the ALJ's credibility findings should be reversed.

As a result, the court concludes the Commissioner's motion for sentence four remand should be granted.

VI. CONCLUSION

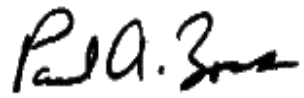
For the reasons discussed above, **IT IS RESPECTFULLY RECOMMENDED**, unless any party files objections[1] to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that this case be remanded pursuant to

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

sentence four of 42 U.S.C. § 405(g), for further consideration consistent with the above analysis, and that judgment be entered in favor of Menrka[2] and against the Commissioner.

IT IS SO ORDERED.

DATED this 2nd day of December, 2004.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[2]If final judgment is entered for the plaintiff, the plaintiff's counsel must comply with the requirements of Local Rule 54.2(b) in connection with any application for attorney fees.