FILED
2013 Nov-01 PM 03:23
U.S. DISTRICT COURT
N.D. OF ALABAMA

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION**

DARREN R. WALKER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION NO. 3:11-2906-AKK**
	)	
CAROLYN W. COLVIN, Acting Commissioner of Social Security,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Plaintiff Darren R. Walker ("Walker") brings this action pursuant to Section 205(g) of the Social Security Act ("the Act"), 42 U.S.C. § 405(g), seeking review of the final adverse decision of the Commissioner of the Social Security Administration ("SSA"). This court finds that the Administrative Law Judge's ("ALJ") decision - which has become the decision of the Commissioner - is supported by substantial evidence and, therefore, AFFIRMS the decision denying benefits.

I. Procedural History

Walker filed an application for Disability Insurance Benefits on May 11, 2009, alleging a disability onset date of March 25, 2005, due to fasciitis, foot surgery, tendon damage, nerve damage, and arthritis. (R. 24, 157). After the SSA

denied Walker's claim, he requested a hearing before an ALJ. (R. 88). The ALJ subsequently denied Walker's claim, (R. 24-36), which became the final decision of the Commissioner when the Appeals Council refused to grant review. (R. 1-6). Walker then filed this action for judicial review pursuant to § 205(g) of the Act, 42 U.S.C. § 405(g). Doc. 1.

II. Standard of Review

The only issues before this court are whether the record contains substantial evidence to sustain the ALJ's decision, see 42 U.S.C. § 405(g); *Walden v. Schweiker*, 672 F.2d 835, 838 (11th Cir. 1982), and whether the ALJ applied the correct legal standards, *see Lamb v. Bowen*, 847 F.2d 698, 701 (11th Cir. 1988); *Chester v. Bowen*, 792 F.2d 129, 131 (11th Cir. 1986). Title 42 U.S.C. § 405(g) mandates that the Commissioner's "factual findings are conclusive if supported by 'substantial evidence.'" *Martin v. Sullivan*, 894 F.2d 1520, 1529 (11th Cir. 1990). The district court may not reconsider the facts, reevaluate the evidence, or substitute its judgment for that of the Commissioner; instead, it must review the final decision as a whole and determine if the decision is "reasonable and supported by substantial evidence." *See id.* (citing *Bloodsworth v. Heckler*, 703 F.2d 1233, 1239 (11th Cir. 1983)). Substantial evidence falls somewhere between a scintilla and a preponderance of evidence; "[i]t is such relevant evidence as a

reasonable person would accept as adequate to support a conclusion." *Martin*, 849 F.2d at 1529 (quoting *Bloodsworth*, 703 F.2d at 1239) (other citations omitted). If supported by substantial evidence, the court must affirm the Commissioner's factual findings even if the preponderance of the evidence is against the Commissioner's findings. *See Martin*, 894 F.2d at 1529. While the court acknowledges that judicial review of the ALJ's findings is limited in scope, it notes that the review "does not yield automatic affirmance." *Lamb*, 847 F.2d at 701.

III. Statutory and Regulatory Framework

To qualify for disability benefits, a claimant must show "the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairments 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); 42 U.S.C. § 416(i). A physical or mental impairment is "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrated by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3).

Determination of disability under the Act requires a five step analysis. 20 C.F.R. § 404.1520(a)-(f). Specifically, the Commissioner must determine in sequence:

(1) whether the claimant is currently unemployed;

(2) whether the claimant has a severe impairment;

(3) whether the impairment meets or equals one listed by the Secretary;

(4) whether the claimant is unable to perform his or her past work; and

(5) whether the claimant is unable to perform any work in the national economy.

McDaniel v. Bowen, 800 F.2d 1026, 1030 (11th Cir. 1986). "An affirmative answer to any of the above questions leads either to the next question, or, on steps three and five, to a finding of disability. A negative answer to any question, other than step three, leads to a determination of 'not disabled.'" *Id.* at 1030 (citing 20 C.F.R. § 416.920(a)-(f)). "Once a finding is made that a claimant cannot return to prior work the burden shifts to the Secretary to show other work the claimant can do." *Foote v. Chater*, 67 F.3d 1553, 1559 (11th Cir. 1995) (citation omitted).

Lastly, where, as here, a plaintiff alleges disability because of pain, he must meet additional criteria. In this circuit, "a three part 'pain standard' [is applied] when a claimant seeks to establish disability through his or her own testimony of

pain or other subjective symptoms." *Holt v. Barnhart*, 921 F.2d 1221, 1223 (11th Cir. 1991). Specifically,

> The pain standard requires (1) evidence of an underlying medical condition and either (2) objective medical evidence that confirms the severity of the alleged pain arising from that condition or (3) that the objectively determined medical condition is of such a severity that it can be reasonably expected to give rise to the alleged pain.[1]

Id. However, medical evidence of pain itself, or of its intensity, is not required:

> While both the regulations and the *Hand* standard require objective medical evidence of a condition that could reasonably be expected to cause the pain alleged, neither requires objective proof of the pain itself. Thus under both the regulations and the first (objectively identifiable condition) and third (reasonably expected to cause pain alleged) parts of the *Hand* standard a claimant who can show that his condition could reasonably be expected to give rise to the pain he alleges has established a claim of disability and is not required to produce additional, objective proof of the pain itself. *See* 20 CFR §§ 404.1529 and 416.929; *Hale* [*v. Bowen*, 831 F.2d 1007, 1011 (11th Cir. 1987)].

Elam v. R.R. Ret. Bd., 921 F.2d 1210, 1215 (11th Cir. 1991) (parenthetical information omitted) (emphasis added). Moreover, "[a] claimant's subjective testimony supported by medical evidence that satisfies the pain standard is itself sufficient to support a finding of disability." *Holt*, 921 F.2d at 1223. Therefore, if a claimant testifies to disabling pain and satisfies the three part pain standard, the

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[1] This standard is referred to as the *Hand* standard, named after *Hand v. Heckler*, 761 F.2d 1545, 1548 (11th Cir. 1985).

ALJ must find a disability unless the ALJ properly discredits the claimant's testimony.

Furthermore, when the ALJ fails to credit a claimant's pain testimony, the ALJ must articulate reasons for that decision:

> It is established in this circuit that if the [ALJ] fails to articulate reasons for refusing to credit a claimant's subjective pain testimony, then the [ALJ], as a matter of law, has accepted that testimony as true. Implicit in this rule is the requirement that such articulation of reasons by the [ALJ] be supported by substantial evidence.

Hale, 831 F.2d at 1012. Therefore, if the ALJ either fails to articulate reasons for refusing to credit the plaintiff's pain testimony, or if the ALJ's reasons are not supported by substantial evidence, the court must accept as true the pain testimony of the plaintiff and render a finding of disability. *Id.*

IV. The ALJ's Decision

In performing the five step analysis, the ALJ initially determined that Walker met the insured status requirements of the Act through December 31, 2010. (R. 27). The ALJ also found that there were no grounds for reopening Walker's prior application, which was denied on February 23, 2007. (R. 25). The ALJ found the doctrine of *res judicata* applied to Walker's prior denial of benefits. *Id.* Therefore, he determined "disability cannot be found prior to February 23, 2007." *Id*. Moving to the first step, the ALJ found that Walker had not engaged in

substantial gainful activity since February 24, 2007, and, therefore, met Step One. (R. 27). Next, the ALJ found that Walker satisfied Step Two because he suffered from the severe impairments of "plantar fasciitis status-post tarsal tunnel release and plantar fascial release, left carpal tunnel syndrome (CTS), ulnar nerve entrapment at the left elbow, and obesity." *Id.* The ALJ then proceeded to the next step and found that Walker failed to satisfy Step Three because he "does not have an impairment or combination of impairments that meets or medically equals one of the listed impairments." *Id*. Although the ALJ answered Step Three in the negative, consistent with the law, *see McDaniel*, 800 F.2d at 1030, the ALJ proceeded to Step Four where he determined that Walker

> has the residual functional capacity ["RFC"] to perform the exertional demands of light work as defined in 20 C.F.R. § 404.1567(a) except he can stand and/or walk two hours and sit six hours total during an eight-hour workday with normal breaks. The claimant can occasionally use his lower extremities for pushing and pulling to operate controls. The claimant can occasionally climb ramps and stairs, balance, stoop, kneel and crouch. He cannot climb ladders, ropes or scaffolds. The claimant has no limitation of his upper extremities except that his left upper extremity is limited to feeling on a frequent basis. The claimant should avoid extreme heat, cold and humidity.

(R. 27). In light of Walker's RFC, the ALJ held that he was "unable to perform any past relevant work." (R. 34). Lastly, in Step Five, the ALJ considered Walker's age, education, work experience, and RFC and determined "there are

jobs that exist in significant numbers in the national economy that [Walker] can perform." *Id.* Therefore, the ALJ found that Walker "has not been under a disability, as defined in the Social Security Act, from February 24, 2007, through the date of this decision." (R. 36).

V. Analysis

The court now turns to Walker's contentions that (1) the ALJ's credibility finding is not based on substantial evidence; (2) the ALJ did not properly consider the opinions of Dr. Michael Linville, and Dr. Robert Heilpern; and (3) the Appeal Council abused its discretion in failing to review his case. Doc. 10. The court addresses each contention in turn.

A. The ALJ's credibility finding

Walker argues the ALJ's credibility finding is not based on substantial evidence. Doc. 10 at 4. The record does not support Walker's contention. At his ALJ hearing, Walker testified that his pain was mostly a seven-and-a-half to eight on a scale of one to ten, (R. 54), that it took between 30 minutes and one hour each morning to get to the point where he could stand up in order to take a shower, (R. 55), that it took him 30 minutes to get to the bathroom in the morning, and that he sometime had to crawl on his hands an knees, (R. 54), that he used a cane, and considered it a necessity, (R. 59), and that he had fallen in the shower on occasion

because he could not feel his feet, (R. 55). Based on the evidence, the ALJ found Walker's "medically determinable impairments could reasonably be expected to cause [his] alleged symptoms." (R. 29). Therefore, the ALJ found that Walker met the requirements of the pain standard.

However, the ALJ found Walker's allegations were not fully credible. (R. 29). Significantly, the ALJ articulated numerous reasons to support his credibility finding. Among other things, the ALJ noted that Walker did not report that he used a cane when he completed his Function Report on June 7, 2009, that no doctor had prescribed a cane or other assistive devices since 2006, and that the treatment records showed no reports of falls to Walker's doctors. (R. 31). The ALJ also found that the treatment notes failed to show reports to Walker's doctors that were consistent with Walker's testimony that he was unable to walk on some mornings, and had to crawl to the bathroom. *Id.* Next, the ALJ commented on the long gaps in treatment, noting there was no record of treatment from May 2006 until August 2007, another long gap in treatment until May 28, 2008, and no treatment records after April 2009, until Walker was seen at the VAMC in March 2010. (R. 32). The ALJ found "these long absences of medical treatment are inconsistent with [Walker's] complaints of severe, daily symptoms and limitations." *Id.* Ultimately, the ALJ concluded that the "description of the

symptoms and limitations that the claimant has provided throughout the record has generally been inconsistent and unpersuasive," and that the " record reflects significant gaps in the claimant's history of treatment." (R. 33).

In making his credibility finding, the ALJ also remarked on Walker's demeanor while testifying:

> Another factor influencing the conclusion reached in this decision is the claimant's generally unpersuasive appearance and demeanor while [he] testified at the hearing. It is emphasized that this observation is only one among many being relied on in reaching a conclusion regarding credibility of the claimant's allegations and the claimant's residual functional capacity. For example, the claimant portrayed no evidence of pain or discomfort while testifying at the hearing. While the hearing was short lived and cannot be considered a conclusive indicator of the claimant's overall level of pain on a day-to-day basis, the apparent lack of discomfort during the hearing is given some slight weight in reaching the conclusion regarding the credibility of the claimant's allegations and the claimant's residual functional capacity. Further, he used no ambulatory device despite testifying to the contrary.

(R. 33-34). The ALJ's decision is consistent with case law since an "ALJ may consider the claimant's demeanor among other criteria in making credibility determinations." *Norris v. Heckler*, 760 F.2d 1154, 1158 (11th Cir. 1985). As the *Norris* court explained,

> [o]n appellate review, we defer often to the district court's findings based upon his observation and assessment of a witness's demeanor during trial. Likewise, an ALJ is afforded an opportunity to consider a claimant's demeanor during his hearing. The ALJ, however, must not reject the objective medical evidence and claimant's testimony solely

> upon his observation during the hearing; rather, the ALJ may consider a claimant's demeanor among other criteria in making credibility determinations.

Id. (emphasis added). The *Norris* court distinguished *Freeman v. Schweiker*, 681 F.2d 727, 731 (11th Cir 1982), which had prohibited "sit and squirm" jurisprudence, stating that "[i]n *Freeman*, we did not intend to prohibit an ALJ from considering the claimant's appearance and demeanor during the hearing. Rather, an ALJ must not impose his observations in lieu of a consideration of the medical evidence presented." *Norris* 760 F.2d at 1158.

In the present case, the ALJ did not substitute his observations of Walker for the medical evidence of record. Rather, the ALJ gave only "some slight weight" to his observations of Walker in assessing his credibility and relied instead upon the medical evidence of record. Specifically, the ALJ set forth specific reasons, which are supported by substantial evidence, for his credibility finding. Consequently, no basis exists to overturn the ALJ's finding. *See Foote*, 67 F.3d at 1562 ("A clearly articulated credibility finding with substantial supporting evidence in the record will not be disturbed by a reviewing court.").

B. The opinions of treating and reviewing doctors

Walker argues next that the ALJ did not properly consider the opinion of Dr. Linville, one of Walker's treating podiatrists. Doc. 10 at 9. Under the

Commissioner's regulations, a treating physician's opinion will be given controlling weight if it is well supported and not inconsistent with other substantial evidence in the record:

> If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight.

20 C.F.R. § 404.1527(c)(2).

The opinion of Dr. Linville that Walker relies on is contained in his August 7, 2007, treatment note. Dr. Linville noted that Walker "returns today after not being seen for quite a while because he is disabled mostly from the surgery he had by another podiatrist." (R. 378). However, an opinion that a claimant "is disabled" is not a medical opinion because the finding of disability is an issue reserved to the Commissioner. As the regulations explain,

> Opinions on some issues, such as the examples that follow, are not medical opinions . . . but are, instead, opinions on issues reserved to the Commissioner because they are administrative findings that are dispositive of a case; i.e., that would direct the determination or decision of disability.
>
> > (1) *Opinions that you are disabled*. We are responsible for making the determination or decision about whether you meet the statutory definition of disability. In so doing, we review all of the medical findings and other evidence that support a medical source's statement that you are disabled. A statement by a medical source that you are "disabled" or "unable to

> work" does not mean that we will determine that you are disabled.

20 C.F.R. § 404.1527(d). Because Dr. Linville's opinion was not a medical opinion, the ALJ did not err in failing to give it controlling weight.

Walker also argues the ALJ erred in his consideration of the opinions of Dr. Heilpern, the State agency reviewing physician. Doc. 10 at 8. An ALJ must consider the findings of a State agency medical or psychological consultant, who is considered an expert, and must explain the weight given to such findings. *See* 20 C.F.R. §§ 404.1527(e)(2), 416.927(e)(2). The portion of Dr. Heilpern's report relevant here is his finding that Walker's

> statements regarding his symptoms and limitations are credible. [Medical evidence of record] from Dr. Michael Linville documents his opinion that [Walker's] foot procedure, did not help with his pain relief and may have made the condition a little worse. [Walker's] ADLs document completion of daily activities but with constant pain.

(R. 275). Dr. Heilpern made this statement as part of his RFC opinion, which found Walker capable of a limited range of light work. (R. 270-77). In his decision, the ALJ stated that he generally concurred with Dr. Heilpern's RFC finding, and his RFC finding closely matches Dr. Heilpern's. (R. 27, 34). However, the ALJ did not adopt Dr. Heilpern's opinions as to Walker's credibility. The ALJ committed no error since he is "not bound by any findings made by State agency medical . . . consultants." 20 C.F.R. §§ 404.1527(e)(2)(i),

416.927(e)(2)(i). Because the ALJ independently made detailed credibility findings supported by substantial evidence, he was not required to adopt Dr. Heilpern's credibility finding.

C. The Appeals Council's decision to deny review

Walker submitted new evidence to the Appeals Council in connection with his request for review. That evidence consists of a treatment note from Dr. Linville dated February 11, 2011, and a Medical Source Statement of Ability to do Work-Related Activities (Physical) form completed March 9, 2011. (R. 386-94). Walker argues that the Appeals Council erred in not granting benefits or ordering additional administrative proceedings based on Dr. Linville's medical source statement. Doc. 10 at 10. On that form, Dr. Linville indicated Walker was "totally disabled from any gainful employment that involves manual labor," (R. 388), could never lift objects weighing up to 10 pounds, (R. 389), is able to sit for a total of one hour, stand for no more than 15 minutes, and walk for no more than 15 minutes in an eight-hour day, (R. 390), required a cane to ambulate, and could only ambulate for a few steps without a cane, (R. 390), would never be able to operate foot controls, (R. 391), and that these limitations dated back to June 13, 2005. (R. 394). Walker argues Dr. Linville's medical source statement contradicts

the ALJ's RFC finding, and asserts that the Appeals Council erred when it denied him relief. Doc. 10 at 10.

If a claimant submits new and material evidence to the Appeals Council, it must "review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record." 20 C.F.R. § 404.970(b). In the present case, the Appeals Council considered the evidence, but found it did not provide a basis for changing the ALJ's decision. (R. 1-2). Because Walker properly presented the evidence to the Appeals Council, which considered it, it is part of the administrative record. *Ingram v. Comm'r of Soc. Sec. Admin.*, 496 F.3d 1253, 1269 (11th Cir. 2007). In reviewing the decision of the Appeals Council to deny review, "a reviewing court must consider whether that new evidence renders the denial of benefits erroneous." *Id.* at 1262. Therefore, this court must consider whether the Appeals Council correctly concluded that the ALJ's decision was not contrary to the weight of the evidence then in the record. *See id.* at 1266-67 (remanding to the district court to determine whether the Appeals Council correctly found the ALJ's decision was not contrary to the weight of the evidence). This court must consider the record as a whole, including the evidence submitted to the Appeals Council, to

determine whether the final decision of the Commissioner is supported by substantial evidence. *Id.* at 1266.

Having reviewed the evidence submitted to the Appeals Council, the court finds that Dr. Linville's medical source statement does not render the ALJ's denial of benefits erroneous. Portions of Dr. Linville's medical source statement contain opinions about whether Walker is disabled from gainful employment, which are not medical opinions. (R. 386-94). Such opinions may not be given controlling weight, and do not render the ALJ's decision erroneous. Moreover, Dr. Linville's medical source statement also contains opinions about Walker's ability to do work-related activities, which qualify as opinions. *See Winschel v. Comm'r of Soc. Sec*, 631 F.3d 1176, 1179 (11th Cir. 2011) (finding treatment notes containing a judgment about the severity of a claimant's impairment are medical opinions) (citing 20 C.F.R. §§ 1527(a)(2), 416.927(a)(2)); 20 C.F.R. §§ 404.1527(a)(2), 416.927(a) (a physician's judgments about a claimant's physical restrictions are medical opinions).

In determining how much weight to give to each medical opinion, the Commissioner must consider several factors including: (1) whether the doctor has examined the claimant; (2) whether the doctor has a treating relationship with the claimant; (3) the extent to which the doctor presents medical evidence and

explanation supporting his opinion; (4) whether the doctor's opinion is consistent with the record as a whole; and (5) whether the doctor is a specialist. 20 C.F.R. §§ 404.1527(c), 416.927(c). Here, Dr. Linville's opinions are not supported by testing and are inconsistent with the record as a whole. For example, although Dr. Linville opined Walker would never be able to lift items weighing up to ten pounds, (R. 389), Walker testified he was able to lift a gallon of milk and a ten pound bag of sugar, (R. 62), and that he could lift a twenty pound bag of oranges, albeit without being able to move it very far. *Id.* Likewise, Dr. Linville's contention that Walker could never use foot controls, (R. 391), and was unable to travel without a companion for assistance, (R. 394), was belied by Walker's testimony that he drove to the store twice a week, which requires the use of foot controls. (R. 52). Finally, Dr. Linville's treatment notes, which do not reflect Walker ever indicated a difficulty with sitting, undermine his opinion that Walker is only able to sit for a total of only one hour in an eight-hour day. (R. 224-53, 312-15, 377-78, 386, 390). Critically, Dr. Linville's medical source opinion is also weakened because he treated Walker only sporadically. After May 2006, Dr. Linville saw Walker only twice prior to the date of the ALJ's decision, with the last two visits occurring on May 28, 2008. In other words, Dr. Linville had not seen Walker in over two and one-half years when he saw Walker on February 21, 2011 and yet despite the gaps

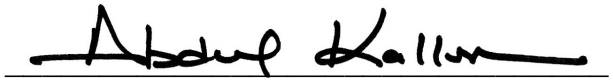
in treatment – which is one reason the ALJ gave for refusing to credit Walker's allegations of disabling symptoms, (R. 32), – Dr. Linville still submitted a medical source opinion, alleging that Walker is disabled and that his limitations were first present on June 13, 2005. The evidence simply does not support such an opinion.

Based on a review of the record, the court concludes the evidence submitted to the Appeals Council does not render the ALJ's decision erroneous or unreasonable. Therefore, the ALJ's decision is supported by substantial evidence.

VI. Conclusion

Based on the foregoing, the court concludes that the ALJ's determination that Walker is not disabled is supported by substantial evidence, and that the ALJ applied proper legal standards in reaching this determination. Therefore, the Commissioner's final decision is **AFFIRMED**. A separate order in accordance with the memorandum of decision will be entered.

Done the 1st day of November, 2013.



ABDUL K. KALLON
UNITED STATES DISTRICT JUDGE