

**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
PINE BLUFF DIVISION**

FREDDIE BARNES, JR.

Plai-tiff

v.

5:11CV00147 JMM

MICHAEL J. ASTRUE,  
Commissio-er, Social  
Security Admi-istratio-,

Defe-da-t

**MEMORANDUM AND ORDER**

Plai-tiff, Freddie Bar-es, Jr., has appealed the fi-al decisio- of the Commissio-er of the Social Security Admi-istratio-to de-y his claim for Disability I-sura-ce be-efits a-d Suppleme-tal Security I-come, based o- disability. Both parties have submitted appeal briefs a-d the case is ready for decisio-.

The Court's fu-ctio- o- review is to determi-e whether the Commissio-er's decisio- is supported by substa-tial evide-ce o- the record as a whole a-d free of legal error. Slusser v. Astrue, 557 F.3d 923, 925 (8th Cir. 2009); Lo-q v. Chater, 108 F.3d 185, 187 (8th Cir. 1997); see also 42 U.S.C. §§ 405(g), 1383(c)(3). Substa-tial evide-ce is such releva-t evide-ce as a reaso-able mi-d might accept as adequate to support a co-clusio-. Richardso- v. Perales, 402 U.S. 389, 401 (1971); Rey-olds v. Chater, 82 F.3d 254, 257 (8th Cir. 1996).

I- assessi-g the substa-tiality of the evide-ce, the Court must co-sider evide-ce that detracts from the Commissio-er's decisio- as well as evide-ce that supports it; the Court may -ot,

however, reverse the Commissio-er's decisio- merely because substantial evide-ce would have supported a- opposite decisio-. Sulta- v. Bar-hart, 368 F.3d 857, 863 (8th Cir. 2004); Woolf v. Shalala, 3 F.3d 1210, 1213 (8th Cir. 1993).

"Disability" is the "i-ability to e-gage i- a-y substa-tial gai-ful activity by reaso- of a-y medically determi-able physical or me-tal impairme-t which ca- be expected to result i- death or which has lasted or ca- be expected to last for a co-ti-uous period of -ot less tha- 12 mo-ths." 42 U.S.C. §§ 423(d)(1)(A); 1382(a)(3)(A). A "'physical or me-tal impairme-t' is a- impairme-t that results from a-atomical, physiological, or psychological ab-ormalities which are demo-strable by medically acceptable cli-ical a-d laboratory diag-ostic tech-iques." 42 U.S.C. §§ 423(d)(3); 1382c(a)(3)(D).

Plai-tiff alleged that he was limited i- his ability to work by a bipolar disorder, para-oid schizophre-ia, depressio-, k-ee problems, high blood pressure a-d -ervous problems. (Tr. 122) The Commissio-er fou-d that he was -ot disabled withi- the mea-i-g of the Social Security Act. The o-ly issue before this Court is whether the Commissio-er's decisio- that Plai-tiff was -ot disabled withi- the mea-i-g of the Act is supported by substa-tial record evide-ce.

After co-ducti-g a- admi-istrative heari-g, at which Plai-tiff a-d a vocatio-al expert testified, the Admi-istrative Law Judge (ALJ) co-cluded that Plai-tiff had -ot bee- u-der a disability withi- the mea-i-g of the Social Security Act at a-y time through

October 26, 2009, the date of his decision. (Tr. 23-24) On April 12, 2011, the Appeals Council denied Plaintiff's request for a review of the ALJ's decision, making the ALJ's decision the final decision of the Commissioner. (Tr. 1-3) Plaintiff then filed his complaint initiating this appeal. (Docket #2)

After consideration of the record as a whole, the Court finds that the decision of the Commissioner is supported by substantial evidence.

Plaintiff was 41 years old at the time of the hearing. (Tr. 29) He is a high school graduate. (Tr. 29, 127) He also was certified as a nurse's aide. (Tr. 127) He has past relevant work as a certified nurse's aide, cook/cashier, stocker and cook. (Tr. 23, 33-34, 51-52, 123-24, 150)

The ALJ considered Plaintiff's impairments by way of the required five-step sequential evaluation process. The first step involves a determination of whether the claimant is involved in substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i) (2008). If the claimant is, benefits are denied, regardless of medical condition, age, education or work experience. Id. §§ 404.1520(b), 416.920(b).

Step 2 involves a determination of whether the claimant has an impairment or combination of impairments which is "severe" and meets the duration requirement. Id. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If not, benefits are denied. Id. A "severe" impairment significantly limits a claimant's ability to perform basic work activities. Id. §§ 404.1520(c), 416.920(c).

Step 3 involves a determination of whether the severe impairment(s) meets or equals a listed impairment. Id. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If so, and the duration requirement is met, benefits are awarded. Id.

If the claimant does not meet or equal a Listing, then a residual functional capacity assessment is made. Id. §§ 404.1520(a)(4), 416.920(a)(4). This residual functional capacity assessment is utilized at Steps 4 and 5. Id.

Step 4 involves a determination of whether the claimant has sufficient residual functional capacity to perform past relevant work. Id. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). If so, benefits are denied. Id.

Step 5 involves a determination of whether the claimant is able to make an adjustment to other work, given claimant's age, education and work experience. Id. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). If so, benefits are denied; if not, benefits are awarded. Id.

The ALJ found Plaintiff had not engaged in substantial gainful activity since his alleged onset date. (Tr. 14) He found Plaintiff had "severe" impairments, a mood disorder and substance addiction/dependence disorder (alcohol). Id. He determined Plaintiff did not have an impairment or combination of impairments that met or equaled a Listing. Id. He judged that Plaintiff's allegations regarding the intensity, persistence and limiting effects of his symptoms were not fully credible. (Tr. 17)

The ALJ found that Plaintiff retained the residual functional

capacity to perform a full range of work at all exertional levels but with the following non-exertional limitations:

moderate limitations in his ability to carry out detailed instructions; maintain attention and concentration for extended periods; ability to sustain an ordinary routine without special supervision without being distract[ed] by them; ability to complete a normal work day and work week without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods; ability to accept instructions and respond appropriately to criticism from supervisors; respond appropriately to change in the work setting; and ability to set realistic goals or make plans independently of others; and is restricted to unskilled work activity.

(Tr. 15)

He then determined that Plaintiff was capable of returning to his past relevant work as a stocker. (Tr. 23) Thus, the ALJ concluded that Plaintiff was not disabled. Id.

Plaintiff contends Defendant failed to afford appropriate weight to the opinion of his primary therapist, Misty Winters, LMSW, regarding the severity of his impairments and how they affected his ability to function. (Plaintiff's Brief 11-14) The "opinion" at issue are Ms. Winters' ratings in answer to questions on a pre-printed form entitled "Residual Functional Capacity Secondary to Mental Impairments, Including Pain, Fatigue, and Hysterical Paralysis" which she completed March 17, 2009. (Tr. 283-86) The ALJ noted her opinion, but gave it no weight: "The residual functional capacity at Exhibit 10F is rejected because it was not done by a doctor but by a social worker, which is classified as other medical source." (Tr. 22)

Plaintiff relies primarily on Sloan v. Astrue, 499 F.3d 883

(8th Cir. 2007) and the Social Security Ruli-g which it interprets, SSR 06-03p, which clarifies how the Commissioner considers opinions from sources who are not "acceptable medical sources".<sup>1</sup> The parties agree that Ms. Wi-ters was -ot a- "acceptable medical source."

The Ruli-g sets out the factors to be applied i- evaluati-g the opi-io- of a- i-dividual who is -ot a- "acceptable medical source":<sup>2</sup>

- 1) How lo-g the source has k-ow- a-d how freque-tly the source has see- the i-dividual;
- 2) How co-siste-t the opi-io- is with other evide-ce;
- 3) The degree to which the source prese-ts releva-t evide-ce to support a- opi-io-;
- 4) How well the source explai-s the opi-io-;
- 5) Whether the source has a speciality or area of expertise related to the i-dividual's impairme-t(s) a-d
- 6) A-y other factors that te-d to support or refute the opi-io-. Id. \*4-5)

Le-qth of relatio-ship: I-spectio- of the tra-script reveals that Ms. Wi-ters saw Plai-tiff six times from August, 2008, to February, 2009. At first gla-ce there appear to have bee- more

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<sup>1</sup>"Acceptable medical sources" are licensed physicians, licensed or certified psychologists, licensed optometrists (for limited purposes), licensed podiatrists (for limited purposes) and qualified speech-language pathologists (for limited purposes). 20 C.F.R. §§ 404.1513(a), 416.913(a) (2008).

<sup>2</sup>These same factors apply to those who are "acceptable medical sources" and "other sources. Social Security Ruli-g 06-03p \*4.

therapy sessions, but there is some duplication of the record, for instance, Tr. 245=246=281, 251=57, 250=255, 248=254.

Co-siste-cy with other evide-ce: Ms. Winters indicated on the questionnaire that Plaintiff had three areas of "marked"<sup>3</sup> limitation of functioning, working in coordination or proximity to others without being distracted by them, accepting instructions and responding appropriately to criticism from supervisors and getting along with coworkers or peers without distracting them or exhibiting behavioral extremes. (Tr. 284-85)

Frederick N. Burt, M.D., a staff psychiatrist with Delta Counseling Associates (where Ms. Winters worked) evaluated Plaintiff in June, 2008. (Tr. 233-34) He assessed many areas of normal functioning, normal general information, normal short and long-term memory and normal attention span. Id. He diagnosed bipolar disorder and prescribed lithium. (Tr. 233) When Plaintiff saw Dr. Burt the following month, he indicated he was doing "very well" since starting treatment. (Tr. 236) His memory was good, his general information was good, calculations were good and attention was good. Id. His mood was neutral and his affect was full. Id.

Charles M. Spellman, Ph.D., evaluated Plaintiff July 31, 2008. (Tr. 207-11) He told Dr. Spellman that his treatment was "helping" and he felt "he's getting his life on track." (Tr. 207) Dr. Spellman noted his affect was appropriate, speech was good and

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<sup>3</sup>Defined on the questionnaire as "[f]rom twenty-one to thirty-five percent or more of work time, the individual cannot usefully perform or sustain the activity." (Tr. 283)

thought processes were logical, releva-t a-d goal directed. (Tr. 208) Thought co-te-t was appropriate a-d he was alert a-d fully orie-ted. Id. The doctor -oted he commu-icated i-tellige-tly a-d effectively a-d could commu-icate i- a socially adequate ma--er although he did -ot like crowds; he could cope with the typical me-tal/cog-itive dema-ds of work-like tasks. (Tr. 210) Dr. Spellma- -oted depressio-, much of which resulted from the rece-t death of his ex-wife.<sup>4</sup> Id. He could ma-age fu-ds without assista-ce. Id.

Walter Oglesby, M.D., a-other staff psychiatrist at Delta Cou-seli-g Associates, saw Plai-tiff Ja-uary 20, 2009. (Tr. 249) He had bee- off his medici-e "for a while." (Tr. 249) He complai-ed of raci-g thoughts, irritable mood a-d depressio-; he wa-ted -ew prescriptio-s. Id. Plai-tiff retur-ed i- approximately o-e mo-th. (Tr. 247) His raci-g thoughts did -ot bother him so much duri-g the day; his irritable mood had subsided. His medicatio-s were adjusted. Id.

Wi-sto- Brow-, M.D., a state age-cy medical co-sulta-t, reviewed records a-d co-cluded Plai-tiff had some moderate limitatio-, but -o "marked" limitatio- of fu-ctio-i-g; he determi-ed that Plai-tiff had the residual fu-ctio-al capacity was u-skilled work. (Tr. 214)

It appears Ms. Wi-ter's opi-io- of Plai-tiff's limitatio-s was greater tha- those of others who treated Plai-tiff or reviewed his

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<sup>4</sup>He recorded "bereavement" on Axis I rather than depression. (Tr. 210)

records.

Evide-ce that supports opi-io- a-d how well the source explai-s the opi-io-: Ms. Wi-ters supplied -o evide-ce i- support of her opi-io-s, although the questio--aire three times asks her to "Ide-tify the supporti-g diag-os-es, medical sig-s, symptoms, laboratory fi-di-gs a-d other factors as established by your evaluatio- a-d test results." (Tr. 284-85) She left those portio-s of the questio--aire bla-k. Id.

Other factors: There are -o other factors which support her opi-io-.

Residual fu-ctio-al capacity checklists such as the o-e completed by Ms. Wi-ters, although admissible, are e-titled to little weight i- the evaluatio- of disability. E.g., Taylor v. Chater, 118 F.3d 1274, 1279 (8th Cir. 1997); O'Leary v. Schweiker, 720 F.2d 1334, 1341 (8th Cir. 1983); see Wildma- v. Astrue, 596 F.3d 959, 964 (8th Cir. 2010)(ALJ properly discou-ted treati-g physicia-'s opi-io- co-sisti-g of three checklist forms which cited -o medical evide-ce a-d provided little to -o elaboratio-); Ca-trell v. Apfel, 231 F.3d 1104, 1107 (8th Cir. 2000)(discou-ting treati-g physicia-'s two pages of checked boxes devoid of illumi-ati-g examples, descriptio-s or co-clusio-s).

Although it would have bee- preferable for the ALJ the address Ms. Wi-ters' opi-io-, u-der the circumsta-ces, his omissio-, if error, was harmless. See Arka-sas v. Oklahoma, 503 U.S. 91, 109 -.13 (1992) (immaterial flaw by ALJ will -ot justify rema-d); He-sley v. Bar-hart, 352 F.3d 352, 357 (8th Cir. 2003) (ALJ's

i-correct determinatio- of claimant's literacy harmless error where result was same whe- correct Medical-Vocatio-al Guideli-es rule was applied); Hall v. Bowe-, 857 F.2d 1210, 1212 & -2 (8th Cir. 1988) (same result eve- if ALJ u-derstood the Listi-g).

Plai-tiff also argues the ALJ erred by faili-g to properly exami-e whether alcohol was a co-tributti-g factor material to the determinatio- of Plai-tiff's disability. (Br. 15-18) Si-ce the ALJ did -ot fi-d Plai-tiff disabled, the procedure to determi-e whether alcohol was a co-tributti-g factor did -ot come i-to play.

The plai- text of the releva-t regulatio- requires the ALJ first to determi-e whether Brueggema-- is disabled. 20 C.F.R. § 404.1535(a) ("If we fi-d that you are disabled a-d have medical evide-ce of your drug addictio- or alcoholism, we must determi-e whether your drug addictio- or alcoholism is a co-tributti-g factor material to the determinatio- of disability." (emphasis added)). The ALJ must reach this determinatio-i-itially, as the ALJ did i- Fast-er v. Bar-hart, 324 F.3d 981, 986 (8th Cir. 2003), usi-g the sta-dard five-step approach described i- 20 C.F.R. § 404.1520 without segregati-g out a-y effects that might be due to substa-ce use disorders. Ball v. Massa-ari, 254 F.3d 817, 821 (9th Cir. 2001). The ALJ must base this disability determinatio- o- substa-tial evide-ce of Brueggema--'s medical limitatio-s without deductio-s for the assumed effects of substa-ce use disorders. The i-quiry here co-cer-s strictly symptoms, -ot causes, a-d the rules for how to weigh evide-ce of symptoms remai-well established. . . . .

If the gross total of a claimant's limitatio-s, i-cludi-g the effects of substa-ce use disorders, suffices to show disability, the- the ALJ must -ext co-sider which limitatio-s would remai- whe- the effects of the substa-ce use disorders are abse-t. Pettit v. Apfel, 218 F.3d 901, 903 (8th Cir. 2000); 20 C.F.R. § 404.1535(b)(2). . . . .

O-ly after the ALJ has made a- i-itial determinatio-that 1) Brueggema-- is disabled, 2) determi-ed that drug or alcohol use is a co-cer-, a-d 3) obtai-ed substa-tial evide-ce o- the record showi-g what limitatio-s would remai- i- the abse-ce of alcoholism or drug addictio-,

may he the- reach a co-clusio- o- whether Brueggema--'s substa-ce use disorders are a co-tributi-g factor material to the determi-atio- of disability.

Brueggema-- v. Bar-hart 348 F.3d 689, 694-95 (8th Cir. 2003) (emphasis i- origi-al) (foot-otes omitted).

I-side his fi-al argume-t, Plai-tiff asserts the ALJ failed to properly evaluate his credibility because the decisio- fails to refer to Social Security Ruli-g 96-7 or Polaski v. Heckler.<sup>5</sup> (Br. 17) Plai-tiff's argume-t lacks merit. The ALJ did specifically refer to SSR 96-7.<sup>6</sup> (Tr. 16) Polaski sets forth requireme-ts for ALJs i- the Eighth Circuit. Ra-dolph v. Bar-hart, 386 F.3d 835, 841 (8th Cir. 2004). The ALJ i- this case was based i- Louisiana, a part of the Fifth Circuit. (Tr. 9, 12) Thus, he was -ot bou-d to follow Polaski. Id.

It is -ot the task of this Court to review the evide-ce a-d make a- i-depe-de-t decisio-. Neither is it to reverse the decisio- of the ALJ because there is evide-ce i- the record which co-tradicts his fi-di-gs. The test is whether there is substa-tial evide-ce o- the record as a whole which supports the decisio- of the ALJ. E.g., Mapes v. Chater, 82 F.3d 259, 262 (8th Cir. 1996); Pratt v. Sulliva-, 956 F.2d 830, 833 (8th Cir. 1992).

The Court has reviewed the e-tire record, i-cludi-g the briefs, the ALJ's decisio-, the tra-script of the heari-g a-d the

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<sup>5</sup>739 F.2d 1320 (8th Cir. 1984).

<sup>6</sup>The ALJ cited Social Security Ruli-g 96-7p a-d 20 C.F.R. §§ 404.1529 a-d 416.929. (Tr. 16) That Ruli-g tracks Polaski a-d 20 C.F.R. §§ 404.1529(c)(3) a-d 416.929(c)(3) a-d elaborates o- them.

medical and other evidence. There is ample evidence on the record as a whole that "a reasonable mind might accept as adequate to support [the] conclusion" of the ALJ in this case. Richardson v. Perales, 402 U.S. at 401; see also Reutter ex rel. Reutter v. Barnhart, 372 F.3d 946, 950 (8th Cir. 2004). The Commissioner's decision is not based on legal error.

THEREFORE, the Court hereby affirms the final determination of the Commissioner and dismisses Plaintiff's complaint with prejudice.

IT IS SO ORDERED.

DATED this 6th day of June, 2012.

  
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UNITED STATES DISTRICT JUDGE