

United States District Court,
N.D. Oklahoma.
Michael D. WALLACE, Plaintiff,

v.

Michael J. ASTRUE, Commissioner of the Social Security Administration, Defendant.
No. 11–CV–287–PJC.
Sept. 13, 2012.

[Richmond Jay Brownson](#), [Timothy Morris White](#), Aaa Disability Advocates PC, Tulsa, OK, for Plaintiff.

Social Security Administration, pro se.

[Cathryn Dawn McClanahan](#), United States Attorney's Office, Tulsa, OK, [Dianne Mullins Pryor](#), Social Security Administration, Dallas, TX, for Defendant.

OPINION AND ORDER

[PAUL J. CLEARY](#), United States Magistrate Judge.

*1 Claimant, Michael D. Wallace (“Wallace”), pursuant to [42 U.S.C. § 405\(g\)](#), requests judicial review of the decision of the Commissioner of the Social Security Administration (“Commissioner”) denying his applications for disability benefits under the Social Security Act. In accordance with [28 U.S.C. § 636\(c\)\(1\) and \(3\)](#), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Tenth Circuit Court of Appeals. Wallace appeals the decision of the Administrative Law Judge (“ALJ”) and asserts that the Commissioner erred because the ALJ incorrectly determined that he was not disabled. For the reasons discussed below, the Court AFFIRMS the Commissioner's decision.

Background

Wallace was 42 years old at the time of the hearing before the ALJ on May 22, 2009. (R. 29). Wallace had an eighth grade education and had no vocational training. (R. 30). Wallace had worked temporary jobs and for an egg packing company. (R. 30–31). He was fired from his last permanent job for missing work. (R. 31). Wallace had a history of drug abuse, including methamphetamine, but testified that he had been clean for a couple of years. (R. 32–33). Wallace testified that he was bipolar and schizophrenic, and when he began to work steadily at a job, he would start hearing voices and seeing things. (R. 31, 33).

Wallace testified that during a manic phase, he heard voices, didn't sleep for days, got angry, talked to people that weren't really there, and believed he was God or Jesus. (R. 33–34). He also described that during a manic phase, he had done odd things like taking all the light bulbs out of the house and dumping spices down the sink because he thought the devil was trapped inside him. (R. 36). Wallace testified that he would also self-mutilate or cut himself when manic. (R. 39).

Wallace also described hearing voices when he was in a depressed phase, particularly at night when it is quieter. (R. 34). Wallace testified that when he was depressed, he slept a lot, withdrew, and had thoughts of suicide. (R. 38). Wallace had tried to commit suicide by cutting himself with a chainsaw and injecting himself with battery acid. (R. 38). Wallace indicated he had been hospitalized seven or eight times for suicidal thoughts. (R. 38–39).

Wallace testified that he also had paranoid thoughts on a frequent basis, particularly when he would go out in public. (R. 39–40). He described always looking over his shoulder and being unable to concentrate at work due to his paranoia and checking to see if anyone was behind him. (R. 40). Regardless of whether he was in a manic or depressed phase, he described having difficulty with concentration and had “a million things racing through [his] mind at all times.” (R. 40–41). This caused him to have difficulty with comprehension while watching TV or reading. (R. 41).

Wallace had sought mental health treatment, including medication and therapy, from Grand Lake Mental Health and from his physician, Dr. Mease. (R. 34–35). Wallace testified that the medication helped some, but that it did not help with the voices. (R. 36). He also indicated that side effects of the medication included drowsiness, involuntary tongue and jaw movement, and headaches. (R. 37, 43–44). Wallace testified that he had headaches three to five times per month. *Id.* These headaches would last a day or two and [Tylenol](#) did not help. (R. 37–38).

*2 Wallace testified that on an average day, he spent most of his time in bed, and would get up at 5 p.m., eat, and go back to bed by 7 p.m. (R. 41–43). He testified that he would sleep anywhere from 14 to 18 hours a day. (R. 39, 43). He would try to mow the lawn or wash dishes, but could never finish. (R. 41, 44). Wallace testified that he left his home about once a week to visit family. (R. 44).

Wallace indicated that he did not really have any physical problems that would limit his ability to work. (R. 41). However, he did testify that he had a lung nodule that sometimes caused difficulty breathing and he had a “weak back from not working,” but opined it would probably improve with exercise. (R. 41–42). Wallace estimated that he could stand for about an hour and a half before needing to rest, walk for 30–40 minutes at a time and could sit for about an hour at a time. (R. 42). He also estimated that he could routinely lift around 50 pounds. (R. 44).

Wallace's wife, Karen Wallace,[FN1](#) also testified at the hearing before the ALJ. (R. 45–47). She testified regarding his hallucinations, his suicidal behavior, and her multiple attempts to get him involuntarily committed to a hospital for inpatient psychiatric treatment. *Id.* She also testified that she had to urge him to do things like get out of bed, bathe, take his medication, and leave the house. *Id.*

[FN1](#). The Court notes that at the hearing, Wallace's wife was identified as Karen Wallace, however, in all other parts of the record, his wife was identified as Carolyn Bemer. (R. 26–27, 45, 95, 97, 130, 147–54, 166, 176). There is no explanation for the discrepancy and Ms. Wallace testified that they had been married for three years and had been together for 19 years. (R. 45).

Wallace was hospitalized at Integris Grove General Hospital (“Integris”) from May 16, 2005 to May 18, 2005 for nausea, vomiting, and abdominal pain. (R. 266–304). A [chest CT](#) revealed a right lung nodule that was essentially unchanged from the previous year, indicating it was most likely benign. (R. 293). Wallace was ultimately diagnosed with [inflammatory bowel disease](#), [urosepsis](#), [FN2](#) and dehydration. (R. 266). [Crohn's disease FN3](#) was suspected and an outpatient [colonoscopy](#) was recommended. Id. The [colonoscopy](#) and a [polypectomy](#) were subsequently performed on July 12, 2005 (R. 305–22). It was ultimately concluded that Wallace had a [rectal polyp](#) of uncertain behavior. (R. 308).

[FN2](#). Urosepsis results from an “invasion from the urinary tract to the bloodstream by microorganisms or their products” and is “characterized by fever, chills, hypotension, and occasionally altered mental status.” Dorland's Illustrated Medical Dictionary 1920 (29th ed.2000).

[FN3](#). Chron's disease is a chronic inflammatory disease involving any part of the gastrointestinal tract that frequently leads to intestinal obstruction and fistula and abscess formation. Dorland's at 514.

Wallace presented to Integris on September 2, 2006 and was treated for a [urinary tract infection](#) and urethritis.[FN4](#) (R. 323–32). On October 26, 2006, Wallace presented to Integris with complaints of weakness, dizziness, headaches and shaking. (R. 333–45). A [chest x-ray](#) again revealed the noncalcified nodule in his right lung, and it was noted that “[g]iven stability for this period of time, greater than 2 y[ears], this is certainly compatible with a benign nodule.” (R. 333). Wallace was discharged with a prescription for [Cipro](#),[FN5](#) advised to stop smoking, and a [CT scan](#) of his chest was recommended. (R. 339–40).

[FN4](#). Urethritis is “inflammation of the urethra.” Dorland's at 1916.

[FN5](#). Ciprofloxacin is an antibiotic. www.pdr.net.

Wallace was treated off-and-on at Grand Lake Mental Health Center (“GLMHC”) from approximately March 1999 through 2008. (R. 196–247). The record indicates Wallace received inpatient services at the GLMHC Stabilization Center from March 11, 1999 through March 15, 1999 and from February 2, 2003 through February 5, 2003 for [psychoses](#) and [polysubstance dependence](#). (R. 205, 238). The record also indicates Wallace received outpatient services at GLMHC from April 1999 through May 2001 and from February 2003 through December 2006. Id. However, with the exception of one medication management appointment, medical records for the inpatient treatment and for the outpatient treatment from these dates were not provided. Id.

*3 The first GLMHC record available was dated November 1, 2006, and Shirley Chesnut, D.O. noted that Wallace was “stable” and was “doing well on current medications. No complaint of voices or visions. No complaint of depression or suicidal/homicidal ideation.” (R. 204). Wallace's medications were listed as [Risperdal](#),[FN6](#) [Zoloft](#),[FN7](#) and [Clonidine](#).[FN8](#) Id.

[FN6](#). Risperdal is used for the treatment of schizophrenia and bipolar disorder. www.pdr.net.

[FN7](#). Zoloft is an anti-depressant. www.pdr.net.

[FN8](#). Clonidine is used to treat hypertension and may also be used to treat attention deficit hyperactivity disorder and as an adjunctive therapy to stimulant medications. www.pdr.net.

On January 10, 2007, Wallace was seen again at Integris for complaints of coughing, vomiting, congestion, and urinating blood. (R. 346–54). Wallace was diagnosed with [bronchitis](#) and a [urinary tract infection](#) and prescribed an antibiotic and inhaler. (R. 349–350, 354).

On January 11, 2007, Wallace was seen at GLMHC by Theresa Page–Bohannon, M.S., LPC for an assessment and to establish a treatment plan. (R. 220–21). Wallace presented with a “clearly nervous” affect. (R. 221). Wallace's identified problems were excessive mood swings with anger and depression, [psychoses](#), and hallucinations. (R. 220–21). Wallace indicated he was “glad to be back.” Id.

On February 28, 2007, Wallace presented to Integris and was treated for another [urinary tract infection](#). (R. 355–72). Later that same day, Wallace had a medication management appointment with Dr. Chesnut at GLMHC, who noted Wallace had been taken his medications as prescribed and that they were working well. (R. 203). Wallace reported no complaints of voices, visions, depression, or suicidal/homicidal ideation. Id. At a subsequent appointment with Dr. Chesnut on May 19, 2007, she again noted Wallace was “doing well” and that he had no complaints of voices, visions, depression, or suicidal/homicidal ideation. (R. 202).

On June 20, 2007, Wallace presented to Integris with complaints of vomiting, diarrhea, and abdominal cramps. (R. 378–81). He was prescribed [Levsin FN9](#) and [Phenergan FN10](#) and released. (R. 379, 381). Two months later, on August 14, 2007, Wallace presented to Integris again for abdominal pain, vomiting, diarrhea, and pain with urination. (R. 382–400). He was discharged with another prescription for [Phenergan](#). (R. 390, 392).

[FN9](#). Levsin is used to treat ulcers, irritable bowel syndrome, and neurogenic bladder and bowel disturbances. www.pdr.net.

[FN10](#). Phenergan may be used to prevent and control nausea and vomiting. www.pdr.net.

On August 22, 2007, Wallace was evaluated at GLMHC by Patient Service Representative, Rikki Lancaster, B.S. (R. 205–09, 215). At that time, Wallace reported problems with sleeping, depression, anxiety, and [psychosis](#). (R. 207). He indicated that he could “sometimes” work. Id. Wallace also reported that he had been out of his medications, which caused him to suffer from delusions and hallucinations. (R. 207, 215). Wallace reported his paranoia and mistrust of others interfered with his ability to make and keep friends and caused him to isolate and withdraw. (R. 207). Lancaster noted that Wallace's “mood was bizarre with [blunted affect](#).” (R. 215). Lancaster noted his diagnosis of [bipolar disorder](#), most recent episode hypomanic, and assessed his global assessment of functioning (“GAF”) [FN11](#) score at 43, with the highest level in the past year at 51. (R. 205). It was also noted that Wallace had a long history

of mood swings, uncontrolled anger with periodic assaults, and a history of [polysubstance abuse](#). Id. Lancaster also noted that Wallace's history of "compliance with treatment ha[d] been poor" and that his prognosis was "guarded ... due to his sporadic attendance in service and inconsistent compliance with medications." [FN12](#) (R. 207).

[FN11](#). The GAF score represents Axis V of a Multiaxial Assessment system. See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 32–36 (Text Revision 4th ed.2000) (hereinafter "DSM IV"). A GAF score is a subjective determination which represents the "clinician's judgment of the individual's overall level of functioning." Id. at 32. The GAF scale is from 1–100. A GAF score of 41–50 reflects "serious symptoms ... or any serious impairment in social, occupational, or school functioning." Id.

[FN12](#). In 2007, Wallace did not show up for scheduled appointments on May 14, June 18, July 13, July 20, August 10, August 29, and October 17. (R. 212, 214, 216–19, 227, 229, 233).

*4 On September 19, 2007, Wallace had a medication management appointment with Dr. Chesnut. (R. 200). She noted he had no complaints of voices, visions, depression, or homicidal or [suicidal ideations](#). Id. Wallace also attended a group session on that date regarding relaxation techniques. (R. 234). At that time, his mood was listed as withdrawn with a flat affect. Id. On November 28, 2007, Wallace attended another group session regarding how to practice coping skills to reduce symptoms of mental illness. (R. 232).

On February 8, 2008, Wallace had a [chest CT](#) performed to evaluate his right lung nodule. (R. 401). It was noted that the "lesion [was] completely stable since ... 5/16/05," indicating that it was "a benign process, possibly a [granuloma](#), or small [hamartoma](#)." Id. There was also an "incidental note" of multiple [gallstones](#)." Id.

Lancaster completed another assessment of Wallace on February 13, 2008. (R. 238–42, 247). She noted that Wallace's mood was agitated with a flat affect. (R. 247). Wallace reported that his medications were no longer working as well. Id. Wallace also reported problems with sleep disturbance, anger, nervousness, mood swings, aggression, delusions, and hallucinations. (R. 240–41). [Suicidal ideation](#) was also noted. (R. 240). Wallace reported he was unemployed, but could "sometimes" work, and was waiting on disability approval. Id. His diagnosis was still listed as [bipolar disorder](#), most recent episode hypomanic, and his GAF score was listed as 43. (R. 238). Lancaster continued to note that his prognosis was "guarded" and that his compliance with treatment remained poor.[FN13](#) (R. 240). Wallace also attended a group session on this date concerning negative thinking. (R. 231).

[FN13](#). In 2008, Wallace did not show up for scheduled appointments on February 27 and March 12. (R. 225, 246)

Wallace also had an appointment on February 13, 2008 with Dr. Chesnut for medication management. (R. 226). Wallace reported increased depression and anxiety, but contrary to what Lancaster had noted, Wallace did not report voices or visions to Dr. Chesnut. Id. Dr. Chesnut increased the dosage of Wallace's medication. Id.

Wallace presented to Integris on February 28, 2008 with complaints of acute abdominal pain. (R. 402–16). A CT of the abdomen and a CT of the pelvis revealed recurrent acute sigmoid [diverticulitis FN14](#) and incidental [cholelithiasis.FN15](#) Wallace was discharged with directions to avoid seeds and nuts and with prescriptions of [Phenergan](#), [Cipro](#), and [Vicodin](#) for pain. (R. 408–09).

[FN14](#). Sigmoid diverticulitis is an inflammation of a diverticulum, which is a pouch or sac in the colon. Dorland's at 537, 1638.

[FN15](#). Cholelithiasis is the presence or formation of gallstones. Dorland's at 341.

On September 5, 2008, Wallace presented to Darrell Mease, M.D., for prescription refills and as a follow-up of his [bipolar disorder](#). (R. 435–37). Wallace reported a mild degree of mania and a six-week episode of depression. (R. 435). Dr. Mease noted Wallace had frequent, almost daily, symptoms of “insomnia, decreased ability to concentrate, guilt, sadness, feelings of worthlessness and tendency towards indecisiveness.” Id. Other reported symptoms were apprehension and a feeling of impending doom. Id.

*5 On September 28, 2008, Wallace reported to Dr. Mease that three days earlier, he had fainted and was unconscious for approximately two minutes. (R. 429–33). Wallace reported that this occurred suddenly and that he experience blurred vision and nausea prior to the occurrence. (R. 430). Dr. Mease noted that Wallace appeared tired and had a disheveled appearance. (R. 431). He also noted that Wallace appeared anxious, agitated, and paranoid, displayed psychomotor agitation and had pressured speech. Id.

On March 18, 2009, Wallace underwent a [laparoscopic cholecystectomy FN16](#) for his [cholelithiasis](#) and chronic [cholecystitis.FN17](#) (R. 422–25). On April 7, 2009, it was noted that his recovery was going well. (R. 421).

[FN16](#). A cholecystectomy is the surgical removal of the gallbladder. Dorland's at 341.

[FN17](#). Chronic cholecystitis is “inflammation of the gallbladder with relatively mild symptoms persisting over a long period.” Dorland's at 340.

Nine days after the administrative hearing, Wallace was admitted to Integris for observation from May 31, 2009 to June 2, 2009 after experiencing radiating chest pain. (R. 444–50). Tests did not reveal any significant [coronary artery disease](#) and he had normal left heart pressures and normal left ventricular systolic function. (R. 447, 449–50). However, he did have “an anomalous takeoff of the nondominant right coronary artery from what appear[ed] to be the superior portion of the left main coronary artery.” (R. 447, 450). He also had elevated liver enzymes and tested positive for [Hepatitis C. FN18](#) (R. 447). Wallace was discharged with instructions to increase physical activity, maintain a cardiac diet, and cease smoking. Id.

[FN18](#). Hepatitis C is a viral disease, that may be acquired via transfusion of blood products or via drug abuse. Dorland's at 808.

On July 8, 2009, Wallace was admitted to Integris for exacerbation of his [diverticulitis](#). (R. 703–06). Wallace was discharged on July 10, 2009 after his pain was controlled and he was able to tolerate a regular diet. Id.

After the ALJ rendered his decision, [FN19](#) Wallace was admitted to Integris from April 13, 2010 to April 16, 2010 for a [bowel obstruction](#). (R. 452–91, 547–48). Another [chest x-ray](#) revealed that his right lung nodule remained unchanged. (R. 490). Upon discharge, it was noted that although he had a history of [bipolar disorder](#), Wallace was “doing quite well.” (R. 453).

[FN19](#). Although these records are outside the relevant time frame and were not available to the ALJ, this Court has included the new evidence in its consideration of whether substantial evidence supports the ALJ's decision. “[W]e must consider the entire record, including [the newly submitted] treatment records, in conducting our review for substantial evidence on the issues presented.” [Martinez v. Barnhart, 444 F.3d 1201, 1208 \(10th Cir.2006\)](#).

On April 25, 2010, Wallace was readmitted to Integris for a [recurrent bowel obstruction](#) and discharged on May 3, 2010. (R. 494–602). During his stay, it was revealed that there were several loops of ileum [FN20](#) adhered to a perforation of his sigmoid colon, which ultimately required an [ileostomy](#), [FN21](#) performed by Douglas Ohlstrom, M.D. (R. 495, 591–93). Wallace was discharged with medication and home health nursing to assist with [dressing](#) changes and [ileostomy](#) care. (R. 495, 723).

[FN20](#). Ileum is the distal portion of the small intestine. Dorland's at 875.

[FN21](#). An ileostomy is the surgical creation of an opening into the ileum and abdominal wall. Dorland's at 875, 1703.

On May 16, 2010, Wallace presented to Integris with complaints of abdominal pain and blood in his [ileostomy](#). (R. 606–16). Dr. Ohlstrom was consulted and indicated there was nothing to worry about. (R. 616). Wallace presented to Integris again on three separate dates in July and August 2010 with complaints of abdominal pain and diarrhea. (R. 617–42). During these visits, there was no evidence of [bowel obstruction](#) and Wallace was discharged with diagnoses of [diverticulitis](#) and [colitis](#) and instructed to rest, continue taking his medication, and follow-up with his doctor as needed. Id.

*6 On July 21, 2010, Dr. Ohlstrom wrote a letter stating that as a result of Wallace's extensive surgery for [bowel obstruction](#) and his [ileostomy](#), he anticipated Wallace would “need multiple surgeries in the future before his complete recovery is to be obtained.” (R. 604).

On September 24, 2010, Wallace underwent a [colonoscopy](#) at Integris. (R. 649–67). Results revealed:

changes consistent with a defunctionalized colon; however, in the ascending colon and descending colon there was marked erythema, [[FN22](#)] although no actual [ulcerations](#) ... There were [multiple diverticula](#) and some narrowing of the sigmoid colon noted.

[FN22](#). Erythema is redness produced by congestion of the capillaries. Dorland's at 617.

(R. 651). Wallace subsequently presented to Integris on October 1, 2010 with complaints of abdominal pain since the [colonoscopy](#). (R. 668–77). Wallace was instructed to consume a clear liquid diet, use a heating pad, and continue his medication. (R. 672).

On October 10, 2010, Wallace was seen at Tahlequah City Hospital for complaints of abdominal pain. (R. 728–30). Tests revealed sigmoid [colitis](#) or [diverticulitis](#), but no obstruction. (R. 729–30).

Wallace did not have any agency consultative examinations. On November 11, 2007, non-examining agency consultant Sally Varghese, M .D., completed a Psychiatric Review Technique form and found insufficient evidence of a medically determinable impairment. (R. 182–94). Dr. Varghese noted that she was unable to assess the severity of Wallace's impairments because his medical source had not responded to a request for information and because Wallace had not shown up for two scheduled appointments for an agency mental status exam. (R. 194).

Non-examining agency consultant Burnard Pearce, Ph.D., completed a Psychiatric Review Technique form and Mental Residual Functional Capacity Assessment on June 10, 2008. (R. 248–65). Dr. Pearce marked that Wallace had an affective disorder, evidenced by both depressive and manic symptoms. (R. 248, 251). In the “Consultant's Notes” section, Dr. Pearce noted that Wallace had not shown up for another scheduled mental status exam and had not responded to a follow-up phone call or letter. (R. 260). Dr. Pearce briefly reviewed records from GLMHC, describing delusions, hallucinations, paranoia, and isolation. Id. Dr. Pearce also noted that Wallace had a history of substance abuse as well as non-compliance with treatment and medication. Id.

On the Mental Residual Functional Capacity Assessment form, Dr. Pearce found that Wallace was markedly limited in his ability to understand, remember, and carry out detailed instructions. (R. 262). Dr. Pearce also found that Wallace was markedly limited in his ability to interact appropriately with the general public. (R. 263). No other limitations were found. (R. 262–63). In summary, Dr. Pearce opined that Wallace could “perform simple tasks with routine supervision,” “relate to supervisors and peers on a superficial work basis,” “cannot relate to the general public,” and “can adapt to a work situation.” (R. 264).

Procedural History

*7 On June 21, 2007, Wallace filed applications for disability insurance benefits and for supplemental security income under Titles II and [XVI, 42 U.S.C. §§ 401 et seq.](#) (R. 11, 95–102). Wallace alleged the onset of his disability began June 20, 2007. (R. 95, 100). The applications were denied initially and on reconsideration. (R. 54–57). A hearing before ALJ Charles Headrick was held May 22, 2009 in Tulsa, Oklahoma. (R. 25–53). By decision dated July 16, 2009, the ALJ found that Wallace was not disabled. (R. 11–18). On March 17, 2011, the Appeals Council denied review of the ALJ's findings. (R. 1–5). Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. [20 C.F.R. §§ 404.981, 416.1481](#).

Social Security Law and Standard of Review

Disability under the Social Security Act is defined as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or [mental impairment](#).” [42 U.S.C. § 423\(d\)\(1\)\(A\)](#). A claimant is disabled under the Act only if his “physical or [mental impairment](#) or [impairments](#) are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy.” [42 U.S.C. § 423\(d\)\(2\)\(A\)](#). Social Security regulations implement a five-step sequential process to evaluate a disability claim. [20 C.F.R. § 404.1520.FN23](#) See also [Williams v. Bowen, 844 F.2d 748, 750 \(10th Cir.1988\)](#) (detailing steps). “If a determination can be made at any of the steps that a claimant is or is not disabled, evaluation under a subsequent step is not necessary .” Id.

[FN23](#). Step One requires the claimant to establish that he is not engaged in substantial gainful activity, as defined by [20 C.F.R. § 404.1510](#). Step Two requires that the claimant establish that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See [20 C.F.R. § 404.1520©](#). If the claimant is engaged in substantial gainful activity (Step One) or if the claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, the claimant's impairment is compared with certain impairments listed in [20 C.F.R. Pt. 404, Subpt. P, App. 1](#) (“Listings”). A claimant suffering from a listed impairment or impairments “medically equivalent” to a listed impairment is determined to be disabled without further inquiry. If not, the evaluation proceeds to Step Four, where the claimant must establish that he does not retain the residual functional capacity (“RFC”) to perform his past relevant work. If the claimant's Step Four burden is met, the burden shifts to the Commissioner to establish at Step Five that work exists in significant numbers in the national economy which the claimant, taking into account his age, education, work experience, and RFC, can perform. See [Dikeman v. Halter, 245 F.3d 1182, 1184 \(10th Cir.2001\)](#). Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work. [20 C.F.R. § 404.1520](#).

Judicial review of the Commissioner's determination is limited in scope by [42 U.S.C. § 405\(g\)](#). This Court's review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. [Hamlin v. Barnhart, 365 F.3d 1208, 1214 \(10th Cir.2004\)](#) (quotation omitted).

Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion. Id. The court's review is based on the record taken as a whole, and the court will “meticulously examine the record in order to determine if the evidence supporting the agency's decision is substantial, taking ‘into account whatever in the record fairly detracts from its weight .’ “ Id. (quoting [Washington v. Shalala, 37 F.3d 1437, 1439 \(10th Cir.1994\)](#)). The court “may neither reweigh the evidence nor substitute” its discretion for that of the [Commissioner. Hamlin, 365 F.3d at 1214](#) (quotation omitted).

Decision of the Administrative Law Judge

The ALJ found that Wallace met the insured status requirements through September 30, 2008. (R. 13). At Step One, the ALJ found that Wallace had not engaged in any substantial gainful activity since his alleged onset date of June 20, 2007. Id. At Step Two, the ALJ found

that Wallace had a severe impairment of [bipolar disorder](#). *Id.* At Step Three, the ALJ found that Wallace's impairments, or combination of impairments, did not meet a Listing. (R. 13–14).

*8 After reviewing the record, the ALJ determined Wallace had the RFC to perform a range of medium work, with the exception of his ability to “perform simple tasks with routine supervision, relate to supervisors and peers on a superficial work basis, cannot relate to the general public, and can adapt to a work situation.” (R. 14). At Step Four, the ALJ found that Wallace was capable of performing his past relevant work as an egg packer. (R. 17). In the alternative, the ALJ found that Wallace was not disabled at Step Five and identified other jobs in the national economy that Wallace could perform. (R. 17–18). Therefore, the ALJ found that Wallace was not disabled from June 21, 2007 through the date of his decision. (R. 18).

Review

Wallace asserts that the ALJ erred by failing to perform a proper determination at Steps Four and Five, and failing to perform a proper credibility determination. Regarding the issues raised by Wallace, the undersigned finds that the ALJ's decision is supported by substantial evidence and complies with legal requirements. Therefore, the ALJ's decision is affirmed.

Steps Four and Five

Wallace's argument regarding Steps Four and Five is his objection to the hypothetical given to the vocational expert (“VE”). Instead of actually stating out loud what physical and mental limitations he wanted to include in the hypothetical, the ALJ merely referred to the Mental Residual Functional Capacity Assessment of Dr. Pearce and asked the VE to assume that Wallace had the RFC “to perform a full range of medium work, that he ha[d] functional or mental limitations as set out in [Dr. Pearce's assessment].” (R. 49, 262–64). In general, this Court disapproves of this method of propounding a hypothetical to the VE:

A complete question paired with a complete answer in the transcript is highly desirable ... [The shortcut of using forms] too often leaves the reviewing court with difficulty in determining if the people sitting in the hearing room all were asking questions, giving testimony, and listening to testimony regarding the same hypothetical RFC.

[Sitsler v. Astrue, 410 Fed. Appx. 112, 120 n. 4 \(10th Cir.2011\)](#) (unpublished). Nevertheless, the use of forms as a way of propounding the hypothetical to the VE has not been ruled by the Tenth Circuit to be a per se fatal error by an ALJ, and this Court declines to proclaim such a rule. Moreover, Wallace does not give examples of any prejudice he suffered as a result of the ALJ's questioning of the VE.

As described earlier in this Opinion and Order, Dr. Pearce found that Wallace could “perform simple tasks with routine supervision,” could “relate to supervisors and peers on a superficial work basis,” could not “relate to the general public,” and could “adapt to a work situation.” (R. 264). The hypothetical, as it encompassed Dr. Pearce's assessment, is entirely consistent with the ALJ's ultimate RFC determination that Wallace had the RFC to perform medium work, with the exception of his ability to “perform simple tasks with routine supervision, relate to supervisors and peers on a superficial work basis, cannot relate to the general public, and can adapt to a work situation.” (R. 14).

*9 Wallace argues that the ALJ failed to give specific exertional abilities in his hypothetical to the VE. This argument has no merit, particularly where there is no evidence of any exertional limitations and Wallace specifically claimed he had no physical impairments that prevented him from working. (R. 41–43). The exertional requirements of medium work are defined at [20 C.F.R. §§ 404.1567\(c\)](#) and [416.967\(c\)](#) and the Tenth Circuit has affirmed cases where the ALJ used the defined exertional levels, rather than listing each component of the defined level, as part of the hypothetical asked of the VE. [Qualls v. Astrue, 428 Fed. Appx. 841, 850–51 \(10th Cir.2011\)](#) (unpublished); [FN24 Rutledge v. Apfel, 230 F.3d 1172, 1175 \(10th Cir.2000\)](#). The Court finds that it would be an unwarranted formality to require the ALJ to state all of the components that together are defined as medium work. See [Fischer–Ross v. Barnhart, 431 F.3d 729 \(10th Cir.2005\)](#); [Westbrook v. Massanari, 26 Fed. Appx. 897, 903 \(10th Cir.2002\)](#) (unpublished) (requirement of establishing demands of previous work at Step Four was not intended “to needlessly constrain ALJs by setting up numerous procedural hurdles that block the ultimate goal of determining disability”); [Wall v. Astrue, 561 F.3d 1048, 1068–69 \(10th Cir.2009\)](#) (remand when ALJ completed extensive analysis of medical evidence would result in “needlessly prolonging” proceedings). There was no error in the way the ALJ described the exertional abilities in the hypothetical to the VE.

[FN24](#). In *Qualls*, the VE did specifically testify that she was familiar with the exertional requirements of work activity. [428 Fed. Appx. at 850](#). That would be the better method, however, in the present case, the VE did at least show familiarity with the exertional requirements in her testimony in describing Wallace's past relevant work. (R. 49). See [id. at 850 n. 9](#).

Credibility

Credibility determinations by the trier of fact are given great deference. [Hamilton v. Secy. of Health & Human Servs., 961 F.2d 1495, 1499 \(10th Cir.1992\)](#).

The ALJ enjoys an institutional advantage in making [credibility determinations]. Not only does an ALJ see far more social security cases than do appellate judges, [the ALJ] is uniquely able to observe the demeanor and gauge the physical abilities of the claimant in a direct and unmediated fashion.

[White v. Barnhart, 287 F.3d 903, 910 \(10th Cir.2002\)](#). In evaluating credibility, an ALJ must give specific reasons that are closely linked to substantial evidence. See [Kepler v. Chater, 68 F.3d 387, 391 \(10th Cir.1995\)](#); Social Security Ruling 96–7p, [1996 WL 374186](#). Some of the factors the ALJ may consider in assessing the credibility of a claimant's complaints include “the levels of medication and their effectiveness, the extensiveness of the attempts ... to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, ... and the consistency or compatibility of nonmedical testimony with objective medical evidence.” [Kepler, 68 F.3d at 391](#) (quotation and citation omitted).

In his decision, the ALJ found that Wallace's “statements concerning the intensity, persistence and limiting effects of these symptoms are not credible to the extent they are

inconsistent with the above residual functional capacity assessment.” [FN25](#) (R. 17). While the ALJ's credibility assessment was minimal, the Court finds it adequate. [Cobb v. Astrue, 364 Fed. Appx. 445, 450 \(10th Cir.2010\)](#) (unpublished) (while ALJ's credibility assessment was summary, taking the decision as a whole, the ALJ's findings regarding the claimant's testimony were “clear enough” without violating rule against post hoc justification). Although the ALJ could have been more detailed in his credibility analysis, he did set forth sufficient and specific reasons for his finding that Wallace lacked credibility. In making his credibility determination, the ALJ summarized Wallace's testimony and the testimony of his wife, discussed the medical evidence, and gave specific reasons for finding Wallace not credible. (R. 15–17).

[FN25](#). Wallace faulted this language as meaningless boilerplate, but this sentence was merely a summary of the ALJ's analysis and was not harmful. See [Kruse v. Astrue, 436 Fed. Appx. 879, 887 \(10th Cir.2011\)](#) (unpublished) (“boilerplate language is insufficient to support a credibility determination only in the absence of a more thorough analysis”) (quotation omitted).

*10 The ALJ discussed Wallace's medical records, including the fact that he missed numerous appointments, and was evaluated by his treating psychiatrist as “stable” at the appointments he did attend. (R. 16). The ALJ's reliance upon the inconsistency between this medical evidence and Wallace's complaints is a specific reason for finding Wallace less than credible. (R. 17). See [20 C.F.R. § 404.1529\(c\)\(4\)](#) (“we will evaluate your statements in relation to the objective medical evidence”). A finding that the objective medical evidence is inconsistent with the claimant's allegations of disabling pain is a legitimate factor for an ALJ to consider in making a credibility assessment. [Kepler, 68 F.3d at 391](#) (“consistency or compatibility of nonmedical testimony with objective medical evidence” is one factor that an ALJ should consider in assessing credibility). The ALJ did not rely solely on a lack of corroborating objective medical evidence, but relied on other factors as well. See [Kruse, 436 Fed. Appx. at 886](#).

In addition to the legitimate reason of citing provisions of objective medical evidence that contrasted with Wallace's claims of disabling mental symptoms, the ALJ specifically examined the credibility factors set forth by SSR 96–7p, including activities of daily living, factors that precipitated and aggravated symptoms, medication taken to alleviate symptoms, and treatment obtained for relief, as well as his history of substance abuse. (R. 16–17).

Wallace lists several pieces of evidence that the ALJ “ignored.” A claimant made a similar argument in a Tenth Circuit case, listing “certain pieces of favorable evidence.” [Stokes v. Astrue, 274 Fed. Appx. 675, 685–86 \(10th Cir.2008\)](#) (unpublished). The Tenth Circuit said that the only question it needed to consider was whether the ALJ's adverse credibility assessment “was closely and affirmatively linked to evidence that a reasonable mind might accept as adequate to support that conclusion.” [Id. at 686](#). The Tenth Circuit found no reason to overturn the ALJ's credibility determination. [Id.](#) See also [Korum v. Astrue, 352 Fed. Appx. 250, 253–54 \(10th Cir.2009\)](#) (unpublished) (ALJ's opinion was thorough, and evidence not mentioned by the ALJ was not of such quality as to require discussion). This Court also finds that the ALJ's credibility assessment was closely and affirmatively linked to evidence that supported the conclusion that Wallace was not fully credible.

Wallace also criticizes the ALJ's credibility determination of his wife's testimony. The ALJ found that her “testimony [was] diminished substantially because of the spousal relationship and a desire to support the claimant. The claimant's lack of support for his mental status allegations also affects his wife's credibility.” (R. 17). This credibility determination is also entitled to deference when supported by substantial evidence. See [Adams v. Chater, 93 F.3d 712, 715 \(10th Cir.1996\)](#). First, it is worth noting that the Tenth Circuit does not require the ALJ to make a specific credibility determination of every witness, including a claimant's spouse. Id. (“We decline claimant's invitation to adopt a rule requiring an ALJ to make specific written findings of each witness's credibility, particularly where the written decision reflects that the ALJ considered the testimony.”). Nonetheless, the undersigned finds that substantial evidence supports the ALJ's credibility determination regarding Ms. Wallace's testimony. It was proper for the ALJ to consider the spousal relationship and the lack of corroborating evidence as factors in assessing her credibility. [Kepler, 68 F.3d at 391](#) (Relevant factors include “the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.”) (quotation omitted).

*11 Wallace's multiple arguments regarding the ALJ's credibility assessment constitute “an invitation to this court to engage in an impermissible reweighing of the evidence and to substitute our judgment for that of the Commissioner,” and the undersigned declines that invitation. [Hackett v. Barnhart, 395 F.3d 1168, 1173 \(10th Cir.2005\)](#); see also [Miller ex rel. Thompson v. Barnhart, 205 Fed. Appx. 677, 681 \(10th Cir.2006\)](#) (unpublished) (claimant disputed ALJ's view of evidence and relied on other evidence, but court declined to reweigh evidence). All of Wallace's arguments are essentially that Wallace would like for this Court to give more weight to the evidence that is in his favor and less weight to the evidence that disfavors his claim of disability.

The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. We may not displace the agency's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.

[Lax v. Astrue, 489 F.3d 1080, 1084 \(10th Cir.2007\)](#) (citations, quotations, and brackets omitted). The ALJ's credibility determination was supported by specific reasons linked to substantial evidence, and the undersigned therefore finds that it should be affirmed. [Mann v. Astrue, 284 Fed. Appx. 567, 571 \(10th Cir.2008\)](#) (unpublished) (finding credibility determination adequate when ALJ discussed three points).

Conclusion

The decision of the Commissioner is supported by substantial evidence and the correct legal standards were applied. The decision is AFFIRMED.

United States Court of Appeals,
Tenth Circuit.
Sylvester DAVIS, Plaintiff–Appellant,

v.

ARKANSAS VALLEY CORRECTIONAL FACILITY; Major Artley, Administrative head;
Rick Garcia; Crowley County Correctional Facility; Steve Hargett; Lea Martinez; Grace Nweke,
Defendants–Appellees.

No. 02–1486.

May 20, 2004.

Background: Inmate brought complaint under § 1983, seeking damages for alleged confiscation of legal materials, retaliatory transfer, and denial of reasonable medical care. The United States District Court for the District of Colorado dismissed complaint, and inmate appealed.

Holdings: The Court of Appeals, O'Brien, Circuit Judge, held that:

- (1) confiscation claim failed to state claim upon which relief could be based;
- (2) inmate failed to establish that either named defendant participated in or authorized destruction of his confiscated legal materials;
- (3) pre-deprivation process accorded prior to destruction was sufficient;
- (4) retaliatory transfer claim failed to state claim upon which relief could be based; and
- (5) claim alleging denial of reasonable medical care failed to state claim upon which relief could be based.

Appeal dismissed.

*840 Sylvester Davis, # 96327, Crowley County Correctional Facility, Olney Springs, CO, pro se.

Edward T. Farry, Farry and Rector, L.L.P., Colorado Springs, CO, Josh Adam Marks, Melanie Bailey Lewis, Hall & Evans, Denver, CO, for Defendants–Appellees.
Before SEYMOUR, LUCERO, and O'BRIEN, Circuit Judges.

ORDER AND JUDGMENT^{FN*}

^{FN*} This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

O'BRIEN, Circuit Judge.

**1 After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1.9(G). The case is therefore ordered submitted without oral argument.

Sylvester Davis, a state prisoner, appeals the district court's dismissal of his 42 U.S.C. § 1983 complaint FN1 for failure to state a claim upon which relief can be granted. See Fed.R.Civ.P. 12(b)(6). Exercising jurisdiction under 28 U.S.C. § 1291, we agree Davis fails to state a claim and DISMISS his appeal as frivolous.

FN1. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

42 U.S.C. § 1983. The operative pleading is Davis' "Final Amended Prisoner's Civil Rights Complaint." (R., Docket Entry 17.)

Davis was incarcerated at the Colorado Department of Corrections' Arkansas Valley Correctional Facility (AVCF) and later at its Crowley County Correctional Facility (Crowley). While incarcerated at AVCF, he ran into disciplinary problems. He alleges as follows. On August 16, 2000, he was typing a paper in the General Library. Officer J. Halpin requested to see the paper. Davis did not comply. Instead, he removed the paper from the typewriter and placed it in a pocket folder with other papers. Halpin confiscated the pocket folder and also a manila envelope.FN2 In the pocket folder, he found the sheet of paper on which Davis had been typing. It was legal work. The law librarian examined the pocket folder and manila envelope and found a handwritten sheet of paper with another inmate's name on it. At a hearing conducted on September 7, 2000, Davis was charged with disciplinary violations for disobeying a lawful order (found guilty) and possession of unauthorized legal documents (found not guilty).FN3 The *841 following day, Davis sought return of the confiscated legal materials on the basis he was found not guilty of possession of unauthorized legal documents. On September 13, Halpin informed Davis the seized papers were in the evidence locker in the Receiving/Discharge Department and he could contact that department concerning their retrieval. On October 5, in response to a Step I grievance Davis filed, Officer Steve Hartley informed him legal materials were not permitted in the General Library, and as a result his confiscated paperwork was considered contraband and would be treated as such. He further warned Davis that he had ten days to "mail the items out or have them destroyed." (R. Docket Entry 75, Ex. B.) On October 30, Officer Garcia, responding to a Step II grievance Davis filed, communicated essentially the same information: Davis' confiscated papers were subject to disposition as contraband because legal work was to be done in the Law Library and not in the General Library. Furthermore, the papers contained material concerning another inmate's case, which regulation prohibited. Davis did not elect to mail the items out of the facility or authorize their destruction. He claims Officers Hartley and Garcia authorized their destruction on October 30.FN4 In response to a Step III grievance, again seeking return of his materials, Davis was informed on December 29 that he was required to pursue his claim through an appeal of the disciplinary action that led to the confiscation of his materials, not through the grievance process.

FN2. Davis claims the confiscated papers were legal materials in aid of seeking post-conviction relief from his criminal conviction. Although the record is unclear as to the particulars of the materials, Davis complains specifically about two items: (1) a statement from one Tina King, and

(2) an IOU from him to his co-defendant.

FN3. Davis was found not guilty of the possession charge because the paper with the other inmate's name on it was legal notes rather than legal documentation. Davis was warned not to possess paperwork with another inmate's name on it.

FN4. The record is unclear whether the papers were intentionally destroyed, negligently destroyed or merely misplaced. We will assume, without finding, that the papers were intentionally destroyed as contraband pursuant to prison regulation.

**2 In February 2000, Davis was transferred to Crowley. According to his complaint, the medical staff at Crowley discontinued pain medication previously prescribed for him free of charge at AVCF.FN5 He claims he was required to purchase the medication over-the-counter at the Crowley canteen at a cost he could not afford. He also complains that his \$3.00 co-pay for medical visits should cover the cost of his pain medication.

FN5. The pain medication prescribed by AVCF was for treatment of an allergy-related sinus condition. The medical staff at Crowley prescribed Chlor-Trimeton and directed Davis to obtain pain medication from the canteen.

In his complaint, Davis alleges Hartley and Garcia violated his Fourteenth Amendment right to due process by confiscating and destroying his legal materials and by transferring him to Crowley in retaliation for challenging the confiscation. He also claims they violated the First Amendment by interfering with his right of access to the courts.FN6 Additionally he alleges Steve Hargett, Warden of Crowley, *842 violated his Eighth Amendment right to reasonable medical care. He seeks \$100,000.00 in damages.

FN6. Although Davis variously characterizes his claims against Hartley and Garcia as violations of the Fifth Amendment (destruction of legal property, deprivation of access to court, retaliatory transfer), Fourteenth Amendment (confiscation and destruction of legal materials), and First and Sixth Amendments (deprivation of access to court), we construe his deprivation of access to court claim to be an alleged violation of the First and Fourteenth Amendments, and all of his remaining allegations to be subsumed in his Fourteenth Amendment claim. See *Hudson v. Palmer*, 468 U.S. 517, 523, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) (right of access to courts grounded in First Amendment); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429–30, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) (due process clause protects right of access to courts).

We review de novo the district court's dismissal of a complaint under Fed.R.Civ.P. 12(b)(6) for failure to state a claim. *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir.1999).

“[A]ll well-pleaded factual allegations in the ... complaint are accepted as true and viewed in the light most favorable to the nonmoving party.FN7 A 12(b)(6) motion should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

FN7. Exhibits attached to a pleading are considered a part thereof. Fed.R.Civ.P. 10(c).

Id. (quotations and citation omitted). Although we construe pro se pleadings liberally, *Ledbetter v. City of Topeka, Kan.*, 318 F.3d 1183, 1187 (10th Cir.2003), “[we] will not supply additional factual allegations to round out a plaintiff’s complaint or construct a legal theory on a plaintiff’s behalf.” *Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir.1997). Nor are we “bound by conclusory allegations, unwarranted inferences, or legal conclusions.” *Hackford v. Babbitt*, 14 F.3d 1457, 1465 (10th Cir.1994).

As to Davis’ claims against Hartley and Garcia, Davis has failed altogether to allege either of them was involved in the confiscation of his legal materials. Therefore, the confiscation portion of his claim fails. As to the destruction portion of his claim, he only alleges in conclusory fashion that either Hartley or Garcia was involved in the destruction of his materials. This is insufficient. The mere fact each may have signed a grievance response indicating the confiscated materials were subject to disposal as contraband hardly suffices to establish that either participated in or authorized the destruction of the materials. For this reason, the destruction portion of his claim fails. Even if Davis adequately alleged that Hartley and Garcia intentionally destroyed or authorized the destruction of his legal materials pursuant to prison regulation (see n. 4), an act which concededly requires a pre-deprivation hearing in order to comply with due process, *Gillihan v. Shillinger*, 872 F.2d 935, 939–40 (10th Cir.1989), we conclude the pre-deprivation due process accorded to Davis was sufficient. He was informed through the grievance process he could preserve the confiscated materials by sending them out of the facility; otherwise, they would be destroyed. In failing to arrange to send the materials out of the facility, he acceded to their destruction. Furthermore, he was informed he must appeal the underlying disciplinary action in order to contest the confiscation. The record is devoid of any evidence he pursued an appeal.FN8 Under these circumstances, due process is satisfied.

FN8. See *Logan*, 455 U.S. at 434 n. 7, 102 S.Ct. 1148 (due process not violated where claimant does not avail himself of hearing procedure).

**3 Davis’ claim that Hartley and Garcia retaliated against him by transferring him to Crowley is, like the confiscation claim, devoid of specific factual allegations connecting either of them to his transfer. Consequently, Davis’ retaliation claim fails as well. Finally, while Davis enjoys the fundamental right of access to the courts, *Lewis v. Casey*, 518 U.S. 343, 346, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996), to state a claim for deprivation of this right he must demonstrate an actual injury that “hindered his efforts to pursue a legal claim.” Id. at 351. He failed to *843 demonstrate to the district court how the destruction of his legal materials hindered him in the petitioning for post-conviction relief.

Turning to Davis’ claim against Hargett, while it is true that “[a] prison official’s deliberate indifference to a substantial risk of serious harm to an inmate violates the Eighth Amendment[,]” *Farmer v. Brennan*, 511 U.S. 825, 828, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (quotation omitted), it is also true that “a supervisor is not liable under § 1983 for the actions of a subordinate unless an affirmative link exists between the constitutional deprivation and either the supervisor’s personal participation or his failure to supervise....” *Grimsley v. MacKay*, 93 F.3d 676, 679 (10th Cir.1996) (quotation omitted). Davis has failed to demonstrate this link. Copying

Hargett with correspondence outlining his complaints about medical care, without more, does not sufficiently implicate the warden under § 1983.

We conclude Davis' appeal is frivolous under 28 U.S.C. § 1915(e)(2)(B)(i) and DISMISS it.FN9 We also deny leave to appeal in forma pauperis and remind Davis of his obligation to pay in full the filing and docketing fees.

FN9. Dismissal of Davis' appeal as frivolous counts as a strike against him. 28 U.S.C. § 1915(g). Dismissal by the district court for failure to state a claim also counts as a strike. *Id.* Therefore, he accumulates two strikes as a result of this litigation. See *Jennings v. Natrona County Det. Ctr. Med. Facility*, 175 F.3d 775, 780 (10th Cir.1999) (“If we dismiss as frivolous the appeal of an action the district court dismissed under 28 U.S.C. § 1915(e)(2)(B), both dismissals count as strikes.”).

C.A.10 (Colo.),2004.

Davis v. Arkansas Valley Correctional Facility
99 Fed.Appx. 838, 2004 WL 1119941 (C.A.10 (Colo.))