IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-01096-NYW

DONALD JOSEPH RIGG,

Plaintiff,

v.

NANCY A. BERRYHILL,[1]

Defendant.

MEMORANDUM OPINION AND ORDER

Magistrate Judge Nina Y. Wang

This civil action arises under Titles II and XVI of the Social Security Act ("Act"), 42 U.S.C. §§ 401-33 and 1381-83(c) for review of the Commissioner of Social Security's ("Commissioner" or "Defendant") final decision denying Plaintiff Donald Rigg's ("Plaintiff" or "Mr. Rigg") application for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI"). Pursuant to the consent of the Parties and Order of Reference dated October 12, 2016 [#16],[2] this civil action was referred to this Magistrate Judge for a decision on the merits. *See* 28 U.S.C. § 636(c); Fed. R. Civ. P. 73; D.C.COLO.LCivR 72.2. After carefully considering

[1] This action was originally filed against Carolyn Colvin, as Commissioner of the Social Security Administration. Commissioner Berryhill succeeded Commissioner Colvin as Acting Commissioner of the Social Security Administration on January 23, 2017. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, this court automatically substitutes Acting Commissioner Berryhill as Defendant in this matter.

[2] For consistency and ease of reference, this Order utilizes the docket number assigned by the Electronic Court Filing ("ECF") system for its citations to the court file, using the convention [#___]. For the Administrative Record, the court refers to ECF docket number, but the page number associated with the Record, which is found in the bottom right-hand corner of the page. For documents outside of the Administrative Record, the court refers to the ECF docket number and the page number assigned in the top header by the ECF system.

Plaintiff's Opening Brief [#12] and Defendant's Response Brief [#13], the entire case file, the Administrative Record, and the applicable case law, this court respectfully **AFFIRMS** the Commissioner's decision.

PROCEDURAL HISTORY

This case arises from Plaintiff's applications for DIB and SSI protectively filed on or about April 6 and 26, 2012, respectively. *See* [#8-3 at 104-05, 131; #8-5 at 278, 285]. Mr. Rigg completed the twelfth grade in 1978; he did not attend college. *See* [#8-2 at 54-55, 84; #8-3 at 115, 126; #8-6 at 323; #8-8 at 556]. Plaintiff alleges that he became disabled on April 1, 2012, due to depression and "mental issues." *See* [#8-6 at 317, 322]. Mr. Rigg was fifty-two at the date of onset of his claimed disability.

The Colorado Department of Human Services denied Plaintiff's applications administratively on September 25, 2012. *See* [#8-3 at 104-105, 106-27]. Mr. Rigg timely filed a request for a hearing before an Administrative Law Judge ("ALJ") on November 19, 2012. *See* [#8-4 at 168-69]. ALJ William Musseman (the "ALJ") held a hearing on November 20, 2013 (the "2013 hearing"). [#8-2 at 51; #8-3 at 131].

The 2013 Hearing

At the 2013 hearing, Mr. Rigg proceeded through counsel, and the ALJ received testimony from Plaintiff and Vocation Expert Dr. Dennis Duffin (the "VE"). *See* [#8-3 at 131]. Plaintiff testified that he currently resides with his brother and sister in an apartment. [#8-2 at 56]. Plaintiff testified that, although his current living situation involves a lot of yelling and anger, he has to be there for his brother who suffered a severe head injury in an accident. [*Id.* at 63-64, 69].

When asked about any work he has done since his alleged onset on April 1, 2012, Plaintiff responded that he helped his neighbor "cut and rake her lawn," and that does work both

inside the house and outside (e.g., "doing gutters"). [*Id.* at 57]. However, his brother or his sister managed the bills. [*Id.* at 69-70]. Plaintiff continued that he previously worked as a laborer—pouring concrete, landscaping, building bridges, and using large machinery. [*Id.*]. As a laborer, Plaintiff had to carry and lift items that were 50 pounds or heavier. *See* [*id.*at 57-58]. Relatedly, when asked whether he could return to full-time employment mowing lawns, Plaintiff testified that he would like to return to mowing lawns, but that he physically cannot because of his "body letting go." [*Id.* at 64-65]. However, Plaintiff testified that he does not receive treatment for his physical ailments. [*Id.* at 65].

As to his mental ailments, Plaintiff first testified that he suffers from hallucinations that occur in his sleep, and that his new medication has helped decrease the frequency of daytime hallucinations. [*Id.* at 58-59]. However, because his medication makes him itchy, drowsy, dizzy, and causes blurry vision, Plaintiff testified that he naps for about 4 hours during the day. [*Id.* at 59]. Plaintiff also testified that, because of the daytime naps and nighttime hallucinations, he does not sleep much at night, and that this makes him angry. [*Id.* at 60-61, 66]. Plaintiff also worries incessantly about things on a daily basis, he has issues with concentration, and he suffers from migraine-like headaches that last approximately 3-4 days and occur frequently. [*Id.* at 70-71]. For his mental health issues (which may include schizophrenia, bipolar disorder, depression, and anxiety, *see* [*id.* at 72]), Plaintiff testified that he received treatment once every two weeks at Aspen Pointe. [*Id.* at 61-62, 72-73].

Plaintiff then testified about his social life. Plaintiff stated that he spends time with friends, and that "it seems like none of his [hallucinations] really bothers [him]." [*Id.* at 61]. Rather, his mental issues are worse when he is alone, trying to sleep, or when no one else is around. [*Id.*].

As to his daily activities, Plaintiff testified that he usually does the cooking and grocery shopping, he goes for walks, takes drives to his friends' houses, fishes and swims, does the laundry every few days, and has no issues with personal hygiene. [*Id.* at 66-67]. However, Plaintiff also testified that he responds poorly to mistreatment by supervisors. [*Id.* at 68-69].

The VE also testified at the 2013 hearing. Pursuant to the VE's written evaluation, Plaintiff's past work included a construction laborer, a specific vocational preparation ("SVP")[3] level 2 very heavy exertion job; a landscape laborer, SVP level 2 heavy exertion job; and machinery rebuilder, a SVP level 3 medium exertion job. *See* [#8-6 at 386].

The ALJ then posited two hypotheticals to the VE. First, assuming a person of the same age, education, and vocational history as Mr. Rigg, could such an individual perform any of Mr. Rigg's prior work with the following non-exertional limitations: (1) no complex tasks, defined as SVP level 2 or less; (2) no dealing with the general public; and (3) only occasional dealing with co-workers. [#8-2 at 75]. The VE responded that such an individual could perform only half of the jobs in the three occupational groups identified as Mr. Rigg's previous work. [*Id.*]. These jobs included a farm worker II and a hand packager—both SVP level 2 medium exertion jobs. [*Id.* at 75-76]. Second, assuming the same individual as hypothetical one, but with additional marked limitations in the ability to maintain attention and concentration, perform activities within a schedule, and maintain regular attendance and punctuality within customary

[3] SVP refers to the "time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.'" *Vigil v. Colvin*, 805 F.3d 1199, 1201 n.2 (10th Cir. 2015) (citing Dictionary of Occupational Titles, App. C, Sec. II (4th ed., revised 1991); 1991 WL 688702 (G.P.O.). The higher the SVP level, the longer time is needed to acquire the skills necessary to perform the job. Jeffrey S. Wolfe and Lisa B. Proszek, SOCIAL SECURITY DISABILITY AND THE LEGAL PROFESSION 163 (Fig. 10-8) (2003). SVP level 3-4 is associated with semi-skilled work. https://www.ssa.gov/OP_Home/rulings/di/02/SSR2000-04-di-02.html.

tolerances, could such an individual perform any full-time work? [*Id.* at 76]. The VE testified that these additional limitations would eliminate all competitive work. [*Id.*].

Plaintiff's counsel posed an additional hypothetical to the VE that included a similar individual to the ALJ's first hypothetical, except this individual was limited to no interaction or contact with a supervisor, co-workers, or the public. [*Id.* at 77]. The VE testified that such an individual could not perform any competitive work. [*Id.*]. Plaintiff's counsel then asked if such an individual were limited to brief and superficial interaction with supervisors and co-workers, could that individual perform the jobs the VE identified, to which the VE responded yes. [*Id.*].

On November 29, 2013, the ALJ issued a decision finding Mr. Rigg not disabled under the Act. [#8-3 at 131]. Plaintiff requested Appeals Council review of the ALJ's decision, which the Appeals Council granted. [*Id.* at 148]. The Appeals Council then remanded Mr. Rigg's case back to the ALJ for further proceedings on a number of issues. [*Id.* at 148-150 (detailing the issues for the ALJ's consideration on remand)]. Accordingly, the ALJ held a second hearing on September 23, 2015 (the "2015 hearing"). *See* [#8-2 at 32, 80].

The 2015 Hearing

At the 2015 hearing, Mr. Rigg again proceeded through counsel, and the ALJ received testimony from Plaintiff and Vocation Expert Douglas Prutting ("VE Prutting"). Plaintiff testified that he stopped working in April 2012, because "it was like [he] lost [his] mind and couldn't think." [*Id.* at 85]. He continued that he "had an attitude against everybody," that he could not "trust nobody," and that he was hearing voices "all day and all night" despite his medications. [*Id.* at 85-86]. As to his auditory hallucinations, Plaintiff testified that they have become so bad he "can't deal with reality anymore," and that they keep him up at night. [*Id.* at 86, 90-91]. Plaintiff also reported that his auditory hallucinations make it impossible to work,

because he cannot take direction from a supervisor without "copping an attitude." [*Id.* at 92-93]. Plaintiff did testify that he has some friends that he visits approximately once a month, but that his auditory hallucinations make it difficult to focus on conversations with his friends, and he has cancelled camping trips because of his mental ailments. [*Id.* at 86-87]. Mr. Rigg stated that he tries to spend as much time alone as possible, but is generally "easy going" and polite when talking to neighbors. [*Id.* at 89, 94].

Plaintiff continued that his medication side effects diminish his appetite, cause constipation, and cause headaches that last 3-4 days. [*Id.* at 88]. Plaintiff testified that he takes two types of medications for his headaches, but his headaches can still last days. [*Id.*]. Plaintiff also stated that he reported to a Michigan emergency room in 2012, because the medication Haldol made him feel like a "zombie." [*Id.* at 91-92].

As to his daily activities, Plaintiff testified that he goes grocery shopping, but despite being polite and friendly to people, he gets frustrated and thinks bad thoughts about others in the grocery store. [*Id.* at 88-89]. However, Plaintiff stated that his auditory hallucinations have not caused him to leave the grocery store because they were bothering him, although they have prohibited from actually going to the grocery store. [*Id.* at 89].

When asked what has prohibited him from returning to full-time work since April 1, 2012, Plaintiff testified, "My body just won't put out no more." [*Id.* at 95]. In addition, he stated that his diabetes causes his hands and feet to go numb, and that he "can't do anything about it until [he] see[s] [his] primary doctor." [*Id.* at 95-96].

VE Prutting also testified at the 2015 hearing. In recounting Mr. Rigg's previous employment, VE Prutting testified that Plaintiff had jobs as a ditch digger in construction and laborer in construction—both SVP level 2 very heavy exertion jobs; a day laborer, a SVP level 3

heavy exertion job; a landscape laborer, SVP level 2 heavy exertion job; and a pump servicer, a SVP level 7 medium exertion job. [*Id.* at 99].

The ALJ then proposed two hypotheticals to VE Prutting. First, the ALJ inquired whether an individual with the same age, education, and work history as Mr. Rigg with the non-exertional limitations of: (1) no dealing with the general public; (2) occasional dealing with co-workers; (3) minimal supervision and no complex tasks, defined as SVP level 2 or less unskilled work, would be able to perform any of Plaintiff's past work. [*Id.*at 99]. VE Prutting responded that such an individual could perform Mr. Rigg's past work as a ditch digger and landscape laborer. [*Id.*]. In addition, VE Prutting testified that such an individual could perform the jobs of hand packager and floor waxer—both SVP level 2 medium exertion jobs. [*Id.*]. Second, the ALJ asked whether an individual similar to that in the first hypothetical, but with marked limitations in his ability to: (1) maintain concentration and attention for extended periods of time; (2) perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances; and (3) sustain ordinary routine without supervision, would be able to perform any competitive work. [*Id.* at 100]. VE Prutting responded, "No." [*Id.*].

Mr. Rigg's counsel also posed hypotheticals to VE Prutting. First, Plaintiff's counsel asked whether an employer would tolerate an individual described in hypothetical one who missed at least two days a month—either because he left early or did not show up—because of his mental ailments. [*Id.* at 101]. VE Prutting responded, "No." [*Id.*]. Plaintiff's counsel also asked whether an employer would tolerate an individual similar to the ALJ's first hypothetical that could not act appropriately around co-workers and supervisors, to which VE Prutting again responded, "No." [*Id.*].

On November 5, 2015, the ALJ again issued an opinion that Mr. Rigg was not disabled under the Act. [#8-2 at 32]. Plaintiff again sought Appeals Council review of the ALJ's decisions; however, the Appeals Council denied Plaintiff's request, rendering the ALJ's decision the final decision of the Commissioner. [*Id.* at 1-4]. Plaintiff sought judicial review of the Commissioner's final decision in the United States District Court for the District of Colorado on May 12, 2016, invoking this court's jurisdiction to review the Commissioner's final decision under 42 U.S.C. § 1383(c)(3).

STANDARD OF REVIEW

In reviewing the Commissioner's final decision, the court is limited to determining whether the decision adheres to applicable legal standards and is supported by substantial evidence in the record as a whole. *Berna v. Chater*, 101 F.3d 631, 632 (10th Cir. 1996) (citation omitted); *accord Thompson v. Sullivan*, 987 F.2d 1482, 1487 (10th Cir. 1993) ("[I]f the ALJ failed to apply the correct legal test, there is a ground for reversal apart from a lack of substantial evidence." (internal citation omitted)). The court may not reverse an ALJ simply because she may have reached a different result based on the record; the question instead is whether there is substantial evidence showing that the ALJ was justified in her decision. *See Ellison v. Sullivan*, 929 F.2d 534, 536 (10th Cir. 1990). "Substantial evidence is more than a mere scintilla and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Flaherty v. Astrue*, 515 F.3d 1067, 1070 (10th Cir. 2007) (internal citation omitted). However, "[e]vidence is not substantial if it is overwhelmed by other evidence in the record or constitutes mere conclusion." *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992) (internal citation omitted). The court may not "reweigh the evidence or retry the case," but must "meticulously examine the record as a whole, including anything that may undercut or detract from the ALJ's

findings in order to determine if the substantiality test has been met." *Flaherty*, 515 F.3d at 1070 (internal citation omitted).

ANALYSIS

I. The ALJ's Decision

An individual is eligible for DIB benefits under the Act if he is insured, has not attained retirement age, has filed an application for DIB, and is under a disability as defined in the Act. 42 U.S.C. § 423(a)(1). Supplemental Security Income is available to an individual who is financially eligible, files an application for SSI, and is disabled as defined in the Act. 42 U.S.C. § 1382. An individual is determined to be under a disability 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 which exists in the national economy. . . ." 42 U.S.C. § 423(d)(2)(A). The disabling impairment must last, or be expected to last, for at least 12 consecutive months. *See Barnhart v. Walton*, 535 U.S. 212, 214-15 (2002). Additionally, the claimant must prove he was disabled prior to his date last insured. *Flaherty*, 515 F.3d at 1069.

The Commissioner has developed a five-step evaluation process for determining whether a claimant is disabled under the Act. 20 C.F.R. § 404.1520(a)(4)(v). *See also Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (describing the five steps in detail). "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." *Williams*, 844 F.2d at 750. Step one determines whether the claimant is engaged in substantial gainful activity; if so, disability benefits are denied. *Id.* Step two considers "whether the claimant has a medically severe impairment or combination of impairments," as governed by the Secretary's severity regulations. *Id.*; *see also* 20 C.F.R. § 404.1520(e). If the claimant is unable to show that his impairments would have

more than a minimal effect on his ability to do basic work activities, he is not eligible for disability benefits. If, however, the claimant presents medical evidence and makes the *de minimis* showing of medical severity, the decision maker proceeds to step three. *Williams*, 844 F.2d at 750. Step three "determines whether the impairment is equivalent to one of a number of listed impairments that the Secretary acknowledges are so severe as to preclude substantial gainful activity," pursuant to 20 C.F.R. § 404.1520(d). *Id.* At step four of the evaluation process, the ALJ must determine a claimant's Residual Functional Capacity ("RFC"), which defines what the claimant is still "functionally capable of doing on a regular and continuing basis, despite his impairments: the claimant's maximum sustained work capability." *Williams*, 844 F.2d at 751. The ALJ compares the RFC to the claimant's past relevant work to determine whether the claimant can resume such work. *See Barnes v. Colvin*, 614 F. App'x 940, 943 (10th Cir. 2015) (citation omitted). "The claimant bears the burden of proof through step four of the analysis." *Neilson v. Sullivan*, 992 F.2d 1118, 1120 (10th Cir. 1993).

At step five, the burden shifts to the Commissioner to show that a claimant can perform work that exists in the national economy, taking into account the claimant's RFC, age, education, and work experience.[4] *Neilson*, 992 F.2d at 1120. The Commissioner can meet her burden by

[4] "A claimant's RFC to do work is what the claimant is still functionally capable of doing on a regular and continuing basis, despite his impairments: the claimant's maximum sustained work capability. The decision maker first determines the type of work, based on physical exertion (strength) requirements, that the claimant has the RFC to perform. In this context, work existing in the economy is classified as sedentary, light, medium, heavy, and very heavy. To determine the claimant's 'RFC category,' the decision maker assesses a claimant's physical abilities and, consequently, takes into account the claimant's exertional limitations (i.e., limitations in meeting the strength requirements of work). *Williams*, 844 F.2d at 751-52. However, if a claimant suffers from both exertional and nonexertional limitations, the decision maker must also consider "all relevant facts to determine whether the claimant's work capability is further diminished in terms of jobs contraindicated by nonexertional limitations." *Id.*

the testimony of a vocational expert. *Tackett v. Apfel*, 180 F.3d 1094, 1098-99, 1101 (9th Cir. 1999).

The ALJ found that Mr. Rigg was insured for DIB through March 31, 2015. [#8-2 at 34]. Next, following the five-step evaluation process, the ALJ determined that Plaintiff had not engaged in substantial gainful activity since his alleged onset date of April 1, 2012. [*Id.*]. At step two, the ALJ determined Mr. Rigg had the following severe impairments: affective disorder, schizophrenia, and substance abuse. [*Id.* at 35]. The ALJ did not identify any physical impairment(s). [*Id.*]. At step three, the ALJ determined that Plaintiff did not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in Title 20, Chapter III, Part 404, Subpart P, Appendix 1 (20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526). [*Id.* at 36-37]. The ALJ determined that Plaintiff had the residual functional capacity ("RFC") to perform a full range of work at all exertional levels, but limited that work to SVP level 2 or less subject to non-exertional limitations [*id.* at 37-43], and, at step four, concluded that Mr. Rigg was able to perform his past work as a ditch digger, construction laborer, and landscape laborer, [*id.* at 43]. At step five, considering Plaintiff's age, education, work experience, and RFC reflecting his non-exertional limitations, the ALJ also concluded that Plaintiff could perform the jobs of hand packager and floor waxer—each of which existed in significant numbers in the national economy. [*Id.* at 44].

On appeal, Mr. Rigg raises three challenges to the Commissioner's final decision: (1) the ALJ improperly weighed the medical opinion evidence; (2) the ALJ improperly assessed the Plaintiff's credibility; and (3) the Appeals Council failed to adequately consider new medical evidence. [#12]. The court considers these challenges below.

II. The RFC Assessment

In formulating a RFC assessment, the ALJ must consider the combined effect of all of the claimant's medically determinable impairments, including the severe and non-severe. *See Wells v. Colvin*, 727 F.3d 1061, 1065 (10th Cir. 2013); 20 C.F.R. § 404.1529(a); SSR 96-9p. A claimant's RFC is the most work the claimant can perform, not the least. 20 C.F.R. § 404.1545; SSR 83-10. The ALJ's RFC assessment must be consistent with the record as a whole and supported by substantial evidence. *See generally Howard v. Barnhart*, 379 F.3d 945, 947 (10th Cir. 2004); SSR 96-08p. If it is, the court will not reverse the ALJ's decision even if it could have reached a different conclusion. *Ellison*, 929 F.2d at 536. Again, the reviewing court may not "reweigh or retry the case." *Flaherty*, 515 F.3d at 1070.

Here, the ALJ concluded that Plaintiff had the RFC to "perform a full range of work at all exertional levels but with the following non-exertional limitations: no complex tasks (specific vocational preparation (SVP) 2 or less), no dealing with the general public, and only occasional dealing with coworkers." [#8-2 at 37]. Plaintiff challenges the ALJ's decision on two grounds.

A. Weighing the Opinion Medical Evidence

In assessing a claimant's RFC, the ALJ must address medical source opinions. Generally, the opinion of a treating source is entitled to controlling weight so long as it is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence in [the] case record." 20 C.F.R. § 416.927(c)(2). *See also* 20 C.F.R. § 404.1527(b), (c); *Pacheco v. Colvin*, 83 F. Supp. 3d 1157, 1161 (D. Colo. 2015). The ALJ is required to apply the following factors when she declines to give the treating source's opinion controlling weight:

> (1) the length of the treatment relationship and the frequency of examination; (2) the nature and extent of the treatment relationship, including the treatment

> provided and the kind of examination or testing performed; (3) the degree to which the physician's opinion is supported by relevant evidence; (4) consistency between the opinion and the record as a whole; (5) whether or not the physician is a specialist in the area upon which an opinion is rendered; and (6) other factors brought to the ALJ's attention which tend to support or contradict the opinion.

Drapeau v. Massanari, 255 F.3d 1211, 1213 (10th Cir. 2001) (citing 20 C.F.R. § 416.927(c)(2)(i)-(ii), (c)(3)-(c)(6)). *See also* 20 C.F.R. § 404.1527(c). In all cases, an ALJ must "give good reasons in [the] notice of determination or decision" for the weight assigned to a treating physician's opinion. 20 C.F.R. § 404.1527(c)(2); 20 C.F.R. § 416.927(c)(2). *See also Watkins v. Barnhart*, 350 F.3d 1297, 1300 (10th Cir. 2003) (citing SSR 96–2p, 1996 WL 374188, at *5; *Doyal v. Barnhart*, 331 F.3d 758, 762 (10th Cir. 2003)). "[I]f the ALJ rejects the opinion completely, he must then give 'specific, legitimate reasons' for doing so." *Watkins*, 350 F.3d at 1300 (internal quotations and citations omitted).

i. Dr. Sorensen

On April 17, 2013, Dr. Sorensen co-signed a Psychiatric/Psychological Impairment Questionnaire on behalf of Mr. Rigg. [#8-7 at 512]. As relevant here, Dr. Sorensen indicated that his clinical findings included, *inter alia*, poor memory; oddities of thought, perception, speech or behavior; mood disturbance; time or place disorientation; social withdrawal or isolation; hostility and irritability; and difficulty thinking or concentrating. [*Id.* at 513]. Based on these findings, Dr. Sorensen opined that Plaintiff suffered from the following marked limitations in his ability to: (1) remember locations and work-like procedures; (2) understand and remember detailed instructions; (3) carry out detailed instructions; (4) maintain attention and concentration for extended periods; (5) perform activities within a schedule, maintain regular attendance, and be punctual with customary tolerance; (6) sustain ordinary routine without supervision; (7) complete a normal workweek without interruptions from psychologically based

symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods; (8) get along with co-workers or peers without distracting them or exhibiting behavioral extremes; and (9) respond appropriately to changes in the work setting. [*Id.* at 515-16]. Dr. Sorensen also opined that Mr. Rigg was incapable of even "low stress," including an extremely low tolerance for frustration and stress, and assigned Plaintiff a Global Assessment of Functioning ("GAF") score of 40.[5] [*Id.* at 512, 517].

The ALJ, however, afforded Dr. Sorensen's opinions that Mr. Rigg had (1) a marked limitation in each broad area of understanding and memory and (2) he was incapable of even "low stress," little weight. [#8-2 at 40]. This was because the "Aspen Pointe treatment and office notes d[id] not support these findings." [*Id.*]. Rather, those notes repeatedly reported that Plaintiff had good recent and remote memory; fair to good attention and concentration; an appropriate mood and affect; and calm and appropriate behavior. *See* [*id.*]. In addition, the ALJ concluded that the medical evidence indicated that Plaintiff's symptoms had improved with treatment. [*Id.* at 41].

Mr. Rigg challenges the ALJ's decision to give the opinion of Dr. Sorensen little weight. [#12 at 18]. Specifically, Plaintiff argues that the ALJ erred "by picking out some normal findings from the treatment records to conclude that Dr. Sorensen's opinions are inconsistent with the record as a whole[,]" as Dr. Sorensen's opinions were consistent with mental status examinations. [*Id.* at 18-20]. Further, substantial evidence does not support the ALJ's

[5] According to the Diagnostic and Statistical Manual of Mental Disorders 4th Edition ("DSM-IV"), a GAF score of 40 indicates some impairment in reality testing or communication, or major impairment in several areas such as work or school, family relations, judgment, thinking, or mood (e.g., is unable to work). *See* Global Assessment of Functioning (GAF) Scale, *available at* https://msu.edu/course/sw/840/stocks/pack/axisv.pdf (last visited July 17, 2017). However, the Diagnostic and Statistical Manual of Mental Disorders 5th Edition ("DSM-V") eliminated the use of a GAF score due to the questionable probative value of such scores. *See* DSM-V at 16.

conclusion that Plaintiff's symptoms improved to a degree such that Dr. Sorensen's opinion is unsupported by the record as a whole. [*Id.* at 20]. Additionally, even if Dr. Sorensen's opinion was not entitled to controlling weight, his opinion was entitled to deference and the ALJ failed to weigh his opinion "using all the factors provided in 20 CFR 404.1527 and 416.927." [*Id.* at 21-22]. Defendant responds that Plaintiff informed his treatment providers that his condition remained unchanged over the previous 10 years, and that the ALJ was justified in relying on Dr. Wanstrath's (the state consultative examiner) opinion that Plaintiff had less severe non-exertional limitations than those assessed by Dr. Sorensen. [#15 at 7-8]. Further, Dr. Sorensen's opinion was inconsistent with the record as whole and, thus, the ALJ appropriately weighed the conflicting medical evidence and accorded Dr. Sorensen's opinion little weight. [*Id.* at 6, 9].

Here, the court respectfully concludes that the ALJ did not err when affording Dr. Sorensen's opinion little weight. To start, the ALJ specifically considered the objective medical evidence that was inconsistent with Dr. Sorensen's marked limitations in each broad area of understanding and memory; concentration and persistence; social interactions; and adaptations. [#8-2 at 40]. Treatment notes from Aspen Pointe regularly reported that Plaintiff had good recent and remote memory, fair to good attention and concentration, appropriate mood and affect, and appropriate and calm behavior. *See, e.g.*, [#8-8 at 526, 531-32, 537, 538-39, 542-43, 549-50, 603-04, 608-09, 613-14, 618, 639-40, 644-45, 650-51, 656; #8-9 at 668-69, 714-15]. Other treatment records from different providers indicated similar findings. *See* [#8-7 at 439, 447, 450, 454, 478, 484, 486, 489, 493, 495; #8-8 at 566, 568, 571, 574, 577, 581, 584, 587]. While it is true that medical evidence exists that may corroborate Dr. Sorensen's opinion, *see generally* [#8-7 at 439, 469-70, 486; #8-8 at 526, 538; #8-9 at 669], at best, Plaintiff's argument highlights conflicts within the medical evidence. Contrary to Plaintiff's contentions, the ALJ did

not err in resolving such conflicts. *See Allman v. Colvin*, 813 F.3d 1326, 1333 (10th Cir. 2016). And, in doing so, the ALJ limited Plaintiff to SVP level 2 or less unskilled work to account for difficulties with memory and concentration, with no interactions with the general public and only occasional interactions with co-workers to account for Mr. Rigg's moderate limitation in social function, as reflected in consistent observations by health care providers of his tendency to get angry and irritable. [#8-2 at 37, 39].

Accordingly, the court finds no error in the ALJ's determination that Dr. Sorensen's opinion on Plaintiff's marked limitations (in the broad areas of understanding, memory, and social functioning) was inconsistent with the other substantial evidence in the record, *see Pisciotta v. Astrue*, 500 F.3d 1074, 1077 (10th Cir. 2007), as the ALJ gave "good reasons in the notice of determination or opinion for the weight" assigned to that opinion, *Doyal v. Barnhart*, 331 F.3d 758, 762 (10th Cir. 2003). Further, the ALJ properly identified evidence that both supported his conclusion as well as probative evidence that he rejected—nothing requires the ALJ to discuss "every piece of evidence," and this court will not now reweigh the evidence the ALJ considered. *See Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996).

Nor does this court conclude that the ALJ committed reversible error when rejecting Dr. Sorensen's opinion on the basis that Plaintiff's symptoms showed improvement. Though a closer call, the record demonstrates varying reports as to whether Plaintiff's symptoms were improving with treatment. *Compare* [#8-7 at 429, 453 (documenting improvement); #8-8 at 533, 537, 596, 627, 635, 650 (same)] *with* [#8-7 at 419, 427, 482-83, 486, 491 (documenting Plaintiff's subjective reports of no symptom improvement); #8-8 at 538, 596, 603, 614, 619, 640, 650 (same)]. Again, it is the ALJ's responsibility to resolve conflicts in the medical record, and this court will not reverse such a determination if supported by substantial evidence, even if this

court could have reached a different conclusion. *Allman*, 813 F.3d at 1333. In any case, as discussed above, the ALJ appears to have accounted for Mr. Rigg's limitations, without any expectation of improvement, through his determination of the RFC. [#8-2 at 39].

Similarly, the court respectfully concludes that the ALJ did not err by failing to explicitly address each enumerated factor under 20 C.F.R. § 404.1527(d). As discussed, "the ALJ's citation to contrary, well-supported medical evidence, satisfies the requirement that the ALJ's decision be sufficiently specific to make clear to any subsequent reviewers the weight the adjudicator gave to the treating source's medical opinion and the reasons for that weight." *Oldham v. Astrue*, 509 F.3d 1254, 1258 (10th Cir. 2007) (internal quotations and citation omitted). Further, there is no requirement that an ALJ explicitly consider each enumerated factor, as not every factor will apply in every case. *Id.* Accordingly, the court respectfully concludes that the ALJ did not err in affording Dr. Sorensen's opinion little weight.

ii. MA Miller

The court reaches a similar conclusion as to Medical Assistant ("MA") Miller. MA Miller also completed a Psychiatric/Psychological Impairment Questionnaire on Mr. Rigg's behalf. *See* [#8-8 at 627]. Like Dr. Sorensen, MA Miller's clinical findings also included poor memory; oddities of thought, perception, speech or behavior; mood disturbance; social withdrawal or isolation; delusions or hallucinations; and difficultly thinking or concentrating, among other things. *See* [*id.* at 628]. Accordingly, MA Miller opined that Plaintiff had the following marked limitations in his ability to: (1) understand and remember detailed instructions; (2) carry out detailed instructions; and (3) maintain attention and concentration for

extended periods.[6] Plaintiff argues that the ALJ improperly discounted MA Miller's opinion because, even though MA Miller is not an acceptable medical source, the ALJ was nevertheless required to evaluate MA Miller's opinion in accordance with the factors of 20 C.F.R. § 404.1527(d). [#12 at 22]. Specifically, the ALJ failed to account for the duration of MA Miller and Mr. Rigg's treatment relationship, or that MA Miller's opinion finds support in the same treatment notes the ALJ cited to refute that opinion. [*Id.*]. Respectfully, the court disagrees.

The ALJ assigned very little weight to MA Miller's opinion that Mr. Rigg had marked limitations in the broad areas of understanding and memory and sustained concentration and persistence. [#8-2 at 41]. First, the ALJ concluded that MA Miller, as a pre-doctoral intern and therapist, was not an acceptable medical source under Social Security Regulation ("SSR") 06-03p. [*Id.*]. Despite the fact that MA Miller is not an "acceptable medical source" under the regulations, opinions from these "medical sources are important and should be evaluated on key issues such as impairment severity and functional effects." *See Bowman v. Astrue*, 511 F. 3d 1270, 1274-75 (10th Cir. 2008). To that end, the ALJ explained that Aspen Pointe treatment notes did not support the marked limitations MA Miller identified. [*Id.* (citing treatment notes that reported Plaintiff had good memory, and fair to good attention and concentration)]. In addition, the ALJ explained that consultative examiner Dr. Brett Valette's opinion contradicted MA Miller's opinion. Namely, Dr. Valette opined that Mr. Rigg's cognitive functioning and overall understanding and memory remained intact, and that his attention and concentration was only moderately impaired—findings consistent with the medical record as a whole. [*Id.*].

[6] MA Miller also indicated that there was insufficient evidence to form an opinion in a number of areas regarding Plaintiff's sustained concentration and persistence, social interactions, and adaptation. *See* [#8-8 at 630-32].

Similarly, the ALJ accepted that Mr. Rigg has non-exertional mental limitations, albeit less broadly than those opined by MA Miller. The ALJ gave great weight to opinions that indicated that Mr. Rigg cannot follow complex instructions but rather must be limited to simple instructions and simple work-related decisions, and must have restrictions on public and peer contact. [#8-2 at 42-43].

This court respectfully concludes that the ALJ articulated "specific, legitimate reasons" for rejecting MA Miller's opinion. *See Hamlin v. Barnhart*, 365 F.3d 1208, 1215 (10th Cir. 2004) (internal quotations and citation omitted). "Given the nature and limits of our review, and given as well the detailed reasons offered by the ALJ for rejecting [MA Miller's] opinion, we do not second-guess his decision." *White v. Barnhart*, 287 F.3d 903, 909 (10th Cir. 2001); *see also Ward v. Berryhill*, No. 16-CV-00820-RBJ, 2017 WL 1324895, at *3 (D. Colo. Apr. 7, 2017).

B. Credibility

"'Credibility determinations are peculiarly the province of the finder of fact' and the Tenth Circuit will uphold such determinations, so long as they are supported by substantial evidence." *Ruh v. Colvin*, No. 13-CV-01255-PAB, 2015 WL 1517392, at *2 (D. Colo. Mar. 30, 2015) (quoting *Kepler v. Chater*, 68 F.3d 387, 391 (10th Cir. 1995)). "Credibility determinations should not be conclusory, but instead 'closely and affirmatively linked' to evidence in the record." *Oliva v. Colvin*, No. 13-CV-02495-PAB, 2015 WL 5719645, at *7 (D. Colo. Sept. 30, 2015) (quoting *Kepler*, 68 F.3d at 391)). In addition to considering the objective medical evidence, the ALJ must also consider several factors including, *inter alia*, the claimant's daily activities. *See* SSR 96-7p, 1996 WL 374186, at *3 (July 2, 1996); *accord Wilson v. Astrue*, 602 F.3d 1136, 1146 (10th Cir. 2010). However, the ability to perform daily activities on a sporadic basis does not equate to the claimant being able to engage in substantial gainful activity; nor may

an ALJ rely on minimal daily activities to find that the claimant does not suffer from disabling pain. *Proctor v. Astrue*, 665 F. Supp. 2d 1243, 1256 (D. Colo. 2009).

Mr. Rigg contends that the ALJ improperly evaluated his credibility, because his mental status exams are "far from 'benign,'" there is no evidence that he has improved with treatment, his ability to work in the past despite his symptoms does not mean he could have worked since April 1, 2012 when his condition deteriorated, and his ability to perform minimal daily activities does not equate to the ability to withstand the mental demands of gainful employment. [#12 at 24]. However, upon review of the ALJ's decision, this court respectfully concludes that the ALJ did not err in evaluating Plaintiff's credibility.

In concluding that Plaintiff's statements concerning the intensity, persistence, and limiting effects of his symptoms were not entirely credible, the ALJ first concluded that the record did not support the *degree* of limitations Plaintiff alleged regarding his mental ailments, not the *existence* of the ailments. [#8-2 at 38]. Specifically, the ALJ found that "[c]ontrary to [Mr. Rigg's] testimony that he is unable to work because of depression, multiple psychiatric evaluations[7] showed rather benign findings, including an appropriate mood and affect." [*Id.* (citing treatment notes)]. The ALJ also found it significant that Plaintiff reported his first mood disorder/depression episode occurred in 1995, but he kept working for approximately seven years. [*Id.*].

Next, the ALJ concluded that treatment notes and psychiatric evaluations reported Plaintiff had good memory, fair to good attention and concentration, and reported signs of improvement, which weighed against his allegations of disabling symptoms associated with

[7] The court notes, however, that when the ALJ refers to "psychiatric evaluations" he does not always refer to formal evaluations; rather, some of these evaluations refer to Plaintiff's observed mood and affect at appointments for other medical or non-medical issues, such as requesting a Med-9 Form. *See, e.g.*, [#8-7 at 494-95].

schizophrenia. [*Id.*]. As to his substance abuse, the ALJ concluded that Plaintiff testified that he quit using illicit drugs over ten years prior, and that the record demonstrated some improvement despite Plaintiff's allegations that his hallucinations persisted after he quit using illicit drugs. [*Id.*]. The ALJ continued by discussing the medical opinion evidence, and properly supported his conclusions with substantial evidence that Plaintiff suffered from only moderate non-exertional limitations. *See* [*id.* at 39-42].

Lastly, the ALJ considered Mr. Rigg's daily activities. [*Id.* at 42]. The ALJ found that Mr. Rigg had lived and worked with his mental condition for many years, and that Plaintiff goes grocery shopping by himself without any difficulty. [*Id.*]. Relatedly, the ALJ found that Plaintiff's allegations that he naps each day were not entirely consistent with his admitted daily activities and the treatment he received. [*Id.*]. In addition, the ALJ concluded that Plaintiff's allegation that he prefers to be alone at all times was exaggerated, given his testimony that he saw friends monthly and his reporting that he was around others daily. [*Id.*]. The ALJ also noted that since the alleged onset date, Mr. Rigg had engaged in a relationship which was supported by his subjective reports to medical providers over the years. [#8-2 at 40; #8-7 at 7].

Based on the foregoing, the court concludes that the ALJ properly evaluated Plaintiff's credibility. To start, the court agrees with Defendant that the ALJ did not label Plaintiff's mental status exams "benign" but, rather, explained that several exams contained benign findings that weighed against the credibility of Plaintiff's allegations of disabling symptoms. *See Branum v. Barnhart*, 385 F.3d 1268, 1274 (10th Cir. 2004) (noting that "the consistency or compatibility of nonmedical testimony with objective medical evidence" is a relevant factor in assessing a claimant's credibility); *accord* SSR 96–7p, 1996 WL 374186 at *5 ("One strong indication of the credibility of an individual's statements is their consistency, both internally and with other

information in the case record.").[8] Similarly, the court does not find error in the ALJ's reliance on Plaintiff's ability to work for several years despite his symptoms, as the ALJ affirmatively linked his determination that Plaintiff could perform gainful employment since his alleged onset of April 1, 2012, to substantial evidence in the record. *See Hackett v. Barnhart*, 395 F.3d 1168, 1173 (10th Cir. 2005). Plaintiff's argument to the contrary essentially invites the court to reweigh the evidence that the ALJ relied on in reaching this conclusion, but this court will not substitute its judgment for the ALJ's. *See Qualls v. Apfel*, 206 F.3d 1368, 1371 (10th Cir. 2000). Next, as discussed *supra*, the record contains varying reports as to whether Plaintiff saw improvement of his symptoms with treatment, and the ALJ was entitled to resolve such conflicts. *See Allman*, 813 F.3d at 1333.

Finally, to the extent the ALJ improperly equated minimal daily activities with the ability to sustain full-time employment, the court respectfully concludes that any error in doing so is harmless, given that the ALJ affirmatively linked his credibility determination to substantial evidence. *Cf. Allen v. Barnhart*, 357 F.3d 1140, 1145 (10th Cir. 2004) (approving harmless-error analysis when "based on material the ALJ did at least consider (just not properly), we could confidently say that no reasonable administrative factfinder, following the correct analysis, could have resolved the factual matter in any other way."). "[S]o long as the ALJ sets forth the specific evidence he relies on in evaluating the claimant's credibility, he need not make a formalistic factor-by-factor recitation of the evidence…. [C]ommon sense, not technical perfection, is [the court's] guide." *Keyes-Zachary v. Astrue*, 695 F.3d 1156, 1167 (10th Cir. 2012) (internal

[8] On March 28, 2016, SSR 16-3p took effect and superseded SSR 96-7p, "eliminating the use of the term 'credibility.'" *See* TITLES II AND XVI: EVALUATION OF SYMPTOMS IN DISABILITY CLAIMS, *available at* https://www.ssa.gov/OP_Home/rulings/di/01/SSR2016-03-di-01.html. Because the ALJ issued his decision in November 2015, the court analyzes her credibility determination under SSR 96-7p.

quotations and citations omitted). Moreover, as indicated above, the ALJ accounted for moderate non-exertional limitations to Plaintiff's ability to perform work, including an SVP level 2 or less, no complex tasks, no dealing with the general public, and only occasional dealing with coworkers.

III. New and Material Evidence

Pursuant to sentence six of 42 U.S.C. § 405(g), the court may order the Commissioner to review additional evidence, "but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." *See Threet v. Barnhart*, 353 F.3d 1185, 1191 (10th Cir. 2003) (holding, pursuant to 20 C.F.R. § 404.970(b), "that...the Appeals Council [must] consider evidence submitted with a request for review if the additional evidence is (a) new, (b) material, and (c) related to the period on or before the date of the ALJ's decision.") (internal quotations, citations, and alterations omitted). Evidence is material and a remand is appropriate "when a reviewing court concludes that 'the [Commissioner's] decision might reasonably have been different had that (new) evidence been before him when his decision was rendered." *Velasquez v. Astrue*, No. 11-cv-03083-WYD, 2013 WL 1191239, at *9 (D. Colo. Mar. 21, 2013) (citing *Cagle v. Califano*, 638 F.2d 219, 221 (10th Cir. 1981)). *See, e.g., Lately v. Colvin*, 560 F. App'x 751, 753 (10th Cir. 2014) (agreeing that evidence was properly not considered because it post-dated the ALJ's decision). If the Appeals Council rejects a plaintiff's additional evidence, the court must determine whether such evidence is new, material, and chronologically pertinent. *Krauser v. Astrue*, 638 F.3d 1324, 1328 (10th Cir. 2011).

Here, Plaintiff submitted to the Appeals Council new medical evidence from Dr. Jeff Harazin—a December 28, 2015 consultative examination report and a January 6, 2016 Mental

Impairment Questionnaire. *See* [#8-2 at 8, 22]. Pursuant to the consultative exam, Dr. Harazin diagnosed Plaintiff with schizoaffective disorder, bipolar type, reported that psychological stressors were severe, assigned Plaintiff a GAF score of 45, and concluded that Mr. Rigg is severely mentally ill. [*Id.* at 24-25]. He further indicated that Mr. Rigg had marked limitations in the ability to: (1) understand and remember detailed instructions; (2) carry out detailed instructions; (3) maintain attention and concentration for extended periods; (4) perform activities within a schedule and consistently be punctual; (5) sustain ordinary routine without supervision; (6) complete a workday without interruptions from psychological symptoms; (7) perform at a consistent pace without rest periods of unreasonable length or frequency; (8) get along with co-workers or peers without distracting them; (9) maintain socially appropriate behavior; (10) travel to unfamiliar places or use public transportation; (11) set realistic goals; and (12) make plans independently. [*Id.* at 11]. When asked whether these symptoms and limitations were present since April 1, 2012, Dr. Harazin answered affirmatively. [#23 at 25-26; #8-2 at 12]. The Appeals Council rejected this new evidence, stating that the evidence related to a time after the ALJ issued his decision in this matter; "[t]herefore, it does not affect the decision about whether you were disabled beginning on or before November 2, 2015." [#8-2 at 2]. *See also Cdebaca v. Colvin*, No. 15-CV-02040-RBJ, 2016 WL 6212522, at *3 (D. Colo. Oct. 17, 2016) (holding that similar language constituted a rejection of the plaintiff's newly submitted evidence).

Plaintiff argues that the new evidence is material, "as it addressed Mr. Rigg's mental functioning during the period at issue," and that the Appeals Council mistakenly refused to consider it based on its belief that it was not chronologically relevant. [#12 at 26]. Upon review, Defendant conceded that the Appeals Council should have considered Dr. Hazarin's opinion as temporally relevant. [#15 at 2]. But Defendant contends that Plaintiff has failed to

establish harmful error, as Dr. Harazin's opinion would not change the ALJ's decision because it was predicated on the same medical evidence that the ALJ reviewed in rendering his decision. [#15 at 13].[9] Further, Dr. Harazin did not explain and/or support his opinion that these diagnoses reached back to April 1, 2012, he was not a treating physician, and his opinion is inconsistent with the record as a whole; thus, Plaintiff has not demonstrated that the new evidence would have changed the Appeals Council or ALJ's decision had it been before them. [*Id.* at 13-14]. The court respectfully agrees.

While Dr. Harazin's opinion relates back to the period on or before the date of the ALJ's decision, *see* [#8-2 at 12; #12 at 25-26; #15 at 12], he failed to explain the basis for the conclusion that the limitations that he identifies as "marked" were present since the alleged onset date of April 1, 2012. The consultative exam occurred after the ALJ's November 2, 2015 decision, and nothing in that report explains how Dr. Harazin could independently diagnose Plaintiff's conditions as existing in the period preceding or leading up to the ALJ's decision. *See Krauser*, 638 F.3d at 1329. The form indicates that Dr. Hazarin saw Mr. Rigg on a single occasion, on December 28, 2015, and that he was not a treating physician. [#8-2 at 8].

Most notably, Dr. Harazin's opinion regarding Mr. Rigg's marked (rather than moderate) limitations mirrors those of Dr. Sorensen and MA Miller—opinions the ALJ assigned little weight to because of inconsistencies with the record as a whole (evidence Dr. Harazin also reviewed in formulating his opinion). Additionally, Dr. Hazarin disagrees with the diagnoses of Mr. Rigg's prior health care providers, rejecting the prior diagnosis of schizophrenia. [#8-2 at 10]. In doing so, Dr. Hazarin observed that Mr. Rigg's cognition is "too clear" to be

[9] *But see* [#15 at 12 ("Specifically, Plaintiff has shown that the Appeals Council would have found the opinion sufficient to change the ALJ's decision.")]. The court concludes that this sentence omitted the word "not" preceding "shown" based on Defendant's subsequent arguments.

schizophrenic. [*Id.*]. But neither Dr. Hazarin nor Mr. Rigg explains how the level of cognition observed by Dr. Hazarin reconciles with his determinations regarding memory, concentration, or persistence. Dr. Hazarin also bases his determination that Plaintiff cannot work on Plaintiff's work history, rather than correlating that conclusion with particular limitations. [*Id.*]. Mr. Rigg also provides no additional reasons as to why this opinion could reasonably change the Appeals Council or the ALJ's decision, particularly in light of the limitations already built into the RFC. *See Wilson*, 602 F.3d at 1148. Accordingly, the court declines to remand this action to the Appeals Council for further review of the new medical evidence.

CONCLUSION

For the reasons stated herein, the court hereby **AFFIRMS** the Commissioner's final decision, and this civil action is **DISMISSED**, with each party to bear his and her own fees and costs. A separate judgment will enter in favor of Defendant Nancy A. Berryhill, Acting Commissioner of Social Security.

DATED: July 25, 2017

BY THE COURT:

s/Nina Y. Wang
Nina Y. Wang
United States Magistrate Judge