IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-01220-NYW

BILLY ELIJAH JACKSON, JR.,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting Commissioner of Social Security,[1]

Defendant.

MEMORANDUM OPINION AND ORDER

Magistrate Judge Nina Y. Wang

This civil action comes before the court pursuant to 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 final decision denying the application for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") filed by Plaintiff Billy Elijah Jackson, Jr. ("Plaintiff" or "Mr. Jackson"). This civil action was referred to the Magistrate Judge for a decision on the merits pursuant to the Order of Reference dated October 12, 2016 [#19], and under 28 U.S.C. § 636(c), Fed. R. Civ. P. 73, and D.C.COLO.LCivR 72.2. The court has carefully considered the Complaint filed May 23, 2016 [#1], Plaintiff's Opening Brief filed August 31, 2016 [#15], Defendant's Response Brief filed September 21, 2016 [#16], the entire case file, the

[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.

administrative record, and applicable case law. For the following reasons, I respectfully **AFFIRM** the Commissioner's decision.

BACKGROUND

Mr. Jackson filed applications for DIB on January 2, 2013 and for SSI on March 1, 2013. *See* [#1 at 1].[2] He alleged in the applications that he has been disabled since August 3, 2012, at the age of thirty, as a result of lower and upper back arthritis and degenerative disc disease of the lumbar spine. [*Id.*] Administrative Law Judge William Musseman ("ALJ") denied Mr. Jackson's applications after an administrative hearing held August 14, 2014, at which Plaintiff was represented by counsel.

During the administrative hearing, Mr. Jackson's attorney questioned him about his complaints of pain and fatigue. *See* [#11-2 at 41]. Mr. Jackson described the pain as "[p]inching, numbing,…all in my lower back and my hips," and represented that, while he experiences the pain daily, some days are worse than others. [*Id.* at 42]. He rated the pain as an "8," on a scale of 1 through 10, on his worst days. [*Id.*] He testified that he takes medication to alleviate the pain, and he also lies down. He represented that he has "bad days" approximately three times a week, and during some bad days he lies down all day. During those days, he rises to use the restroom; he occasionally rises to eat, and otherwise his wife or son takes food to him. [*Id.* at 43]. Mr. Jackson testified that his wife and son generally help him. His wife helps him dress and she ties his shoes on some days; other days, approximately twice a week, he is able to

[2] For consistency and ease of reference, this Order uses the docket number assigned by the Electronic Court Filing ("ECF") system for its citations to the court file, e.g., [#___]. For citations to the Administrative Record, the court uses the ECF docket number and the page number associated with the Record, which is found at 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 by the ECF system, located in the tope right-hand corner of the page.

tie his own shoes. [*Id.* at 44]. The pain in Plaintiff's back also prevents him from lifting weight beyond twenty pounds. He testified that his daughter weighs approximately twenty pounds, and he is unable to pick her up off the floor. [*Id.*] In response to his attorney's questions, Mr. Jackson agreed with a doctor's assessment that he can stand for fifteen minutes at a time and for approximately two hours in an eight-hour day. [*Id.* at 45-46]. He also agreed with the assessment that he can sit for approximately twenty minutes at a time and for approximately two hours in an eight-hour day. [*Id.* at 46]. He testified that he lies down once for thirty minutes on a good day. Mr. Jackson told the ALJ that he believes his back pain prevents him from working a full-time job, and specifically limits his ability to bend, lift, and squat. [*Id.*] He also believes he is compromised due to the pain medication he requires. With respect to bending at the waist, he testified that "it's really hard" for him to bend over to pick up a piece of paper. [*Id.*] He further testified that he climbs stairs but the process takes him five to seven minutes and requires the assistance of a handrail. Mr. Jackson testified that his back pain radiates down his legs and up his back "[m]aybe…every 30 to 45 minutes." [*Id.* at 47-48]. He represented that these limitations on sitting, standing, and walking have remained the same since the onset date of disability. With respect to fatigue, Mr. Jackson testified that he sleeps approximately two hours during a bad day and feels drowsy and groggy during a good day, and that he generally lacks motivation on most days. [*Id.* at 48-49].

The ALJ then questioned Mr. Jackson briefly about his medical record. Plaintiff confirmed that he had spoken with a physician about surgery to address back pain, but that the procedure had been postponed "because they're still worried about what it may do to me or how the outcome may come out." [#11-2 at 50]. Mr. Jackson also stated that he had recently changed providers in favor of a physician located closer to his home. [*Id.*]

Finally, the ALJ posed three hypothetical scenarios to the vocational expert, Nora Dunn, for her testimony on whether Plaintiff could perform jobs in the community. Ms. Dunn considered Mr. Jackson's eleventh grade education and his previous work experience as a fast food worker and an asphalt laborer. Ms. Dunn assigned both positions a skill level of two. [#11-2 at 51]. In the first hypothetical, the ALJ asked whether an individual of Plaintiff's age and education who is limited to an exertional level of "full range of sedentary," could perform Plaintiff's previous jobs under the following limitations: "occasional bend, squat, kneel, only occasional foot or leg controls, no ladders or scaffolds, no unprotected heights, and no moving machinery." [*Id.* at 52]. Ms. Dunn responded in the negative, but testified to the following types of work available to the hypothetical individual: document preparer, surveillance monitor, and telemarketer. [*Id.*] In the second hypothetical, the ALJ asked if jobs are available for the individual identified in the first hypothetical, who must also "be off task laying down all or part of each of [] three days [per week]." [*Id.* at 53]. Ms. Dunn answered in the negative. In the third hypothetical, the ALJ asked if jobs are available for the individual identified in the first hypothetical, who is limited to "doing work activity a maximum of four hours during a normal eight hour day." [*Id.*] Ms. Dunn answered in the negative.

The ALJ issued his written decision on September 22, 2014, concluding that Mr. Jackson was not disabled within the meaning of the Act from the alleged onset date, August 3, 2012, through the date of the written decision. [#11-2 at 20]. Plaintiff timely requested that the Appeals Council review the ALJ's determination. On April 15, 2016, the Appeals Council denied Plaintiff's request for reversal or remand. The decision of the ALJ then became the final decision of the Commissioner. 20 C.F.R. § 404.981; *Nielson v. Sullivan*, 992 F.2d 1118, 1119

(10th Cir. 1993) (citation omitted). Plaintiff filed this action on May 23, 2016. This court has jurisdiction to review the final decision of the Commissioner. 42 U.S.C. § 405(g).

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); *Pisciotta v. Astrue*, 500 F.3d 1074, 1075 (10th Cir. 2007). The court may not reverse an ALJ simply because he 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 his 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). Moreover, the court "may neither reweigh the evidence nor substitute [its] judgment for that of the agency." *White v. Massanari*, 271 F.3d 1256, 1260 (10th Cir. 2001), *as amended on denial of reh'g* (April 5, 2002). *See also Lax v. Astrue*, 489 F.3d 1080, 1084 (10th Cir. 2007) ("The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence.") (internal quotation marks and 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 will 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). Nevertheless, "if the ALJ failed to apply the correct legal test, there is a ground for reversal apart from a lack of substantial evidence." *Thompson v. Sullivan,* 987 F.2d 1482, 1487 (10th Cir. 1993) (internal citation omitted).

ANALYSIS

A. Mr. Jackson's Challenge to 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 twelve 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*, No. 14-1341, 2015 WL 3775669, at *2 (10th Cir. June 18, 2015) (internal quotation marks omitted) (citing *Winfrey v. Chater*, 92 F.3d 1017, 1023 (10th Cir. 1996) (noting that the step-four analysis includes three phases: (1) "evaluat[ing] a claimant's physical and mental [RFC]"; (2) "determin[ing] the physical and mental demands of the claimant's past relevant work"; and (3) assessing "whether the claimant has the ability to meet the job demands found in phase two despite the [RFC] found in phase one.")). "The claimant bears the burden of proof through step four of the analysis." *Neilson*, 992 F.2d at 1120.

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. *Neilson*, 992 F.2d at 1120.

> . . . 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). . . .
>
> If a conclusion of "not disabled" results, this means that a significant number of jobs exist in the national economy for which the claimant is still exertionally capable of performing. However, . . . [t]he decision maker must then consider all relevant facts to determine whether claimant's work capability is further diminished in terms of jobs contraindicated by nonexertional limitations.
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> …
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> Nonexertional limitations may include or stem from sensory impairments; epilepsy; mental impairments, such as the inability to understand, to carry out and remember instructions, and to respond appropriately in a work setting; postural and manipulative disabilities; psychiatric disorders; chronic alcoholism; drug dependence; dizziness; and pain….

Williams, 844 F.2d at 751-52. The Commissioner can meet his or her burden by the testimony of a vocational expert. *Tackett v. Apfel*, 180 F.3d 1094, 1098–1099, 1101 (9th Cir. 1999).

The ALJ first determined that Mr. Jackson was insured for disability through December 31, 2016. [#11-2 at 25]. Next, following the five-step evaluation process, the ALJ determined that Mr. Jackson: (1) had not engaged in substantial gainful activity since the alleged onset date of August 3, 2012; (2) had the severe impairment of "degenerative disc disease of the lumbar spine"; and (3) 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, 416.920(d), 416.925, and 416.926). [#11-2 at 26]. At step four, the ALJ found that Plaintiff had an RFC to perform

sedentary work as defined in 20 C.F.R. §§ 404.1567(a) and 416.967(a), with the following limitations:

- The claimant can lift and carry no more than a maximum of 10 pounds at a time.
- The claimant can walk or stand two hours of an eight-hour work day.
- The claimant can sit for at least six hours of an eight-hour work day.
- The claimant is able to use his hands and fingers.
- The claimant is able to do some stooping.
- The claimant is able to work in jobs where he is required to bend, squat and kneel on an occasional basis.
- The claimant is able to work in jobs where he is required to operate foot or leg controls on an occasional basis.
- The claimant is able to work in jobs where he is not required to climb ladders or scaffolds.
- The claimant is able to work in jobs where he is not required to work around unprotected heights and around moving machinery.

[*Id.* at 27]. The ALJ determined that Plaintiff was unable to perform any past relevant work, but found, in considering his age, education, work experience, and residual functional capacity ("RFC"), that "there are jobs that exist in significant numbers in the national economy," that Plaintiff can perform. [*Id.* at 31].

First, Mr. Jackson takes issue with the ALJ's assessment of his credibility with respect to his functional impairment. [#15 at 20-22]. Second, Mr. Jackson contends the ALJ's RFC findings are not based on substantial evidence. [*Id.* at 22-35]. Third, and lastly, Mr. Jackson argues that the ALJ failed to adequately address "the disabling effects" of his pain in assessing his RFC. [*Id.* at 25-26].

B. The RFC Assessment

Each of Mr. Jackson's three contentions implicates the ALJ's RFC determination. As discussed in detail below, this court finds that the ALJ's RFC determination is supported by substantial evidence and thus affirms his decision.

1. *The ALJ's Review of the Medical Evidence*

The ALJ considered the following testimony and evidence. In 2009, Mr. Jackson injured his back when he fell off the back of a pickup truck. *See* [#11-7 at 315]. The ALJ observed that Plaintiff "did not pursue much follow-up after that accident," and rather alleged that the pain attributable to his back had progressively worsened. [#11-2 at 28]. Plaintiff represents that in October 2012, he began to investigate surgery as an option, and providers at the Colorado Comprehensive Spine Institute subsequently recommended that he undergo back surgery. [#15 at 11 (citing #11-7 at 274)].

With respect to activities of daily living, Plaintiff testified at the Administrative Hearing that he requires help and that his wife performs all of the cooking, housework, and yard work. They have four young children. Plaintiff walks for ten to fifteen minutes each day and he does not drive. He accompanies his wife grocery shopping. He bathes and feeds himself and visits the restroom by himself, but he requires his wife's help to dress. He uses a cane to ambulate. *See* [#11-7 at 316].

Ronald Jendry, M.D., administered a consultative exam of Plaintiff on June 6, 2013. *See* [#11-7 at 313]. Dr. Jendry opined that Plaintiff could lift 50 pounds briefly but lift and carry only 20 pounds. He further opined that Plaintiff could sit for only 20 minutes at a time for a total of two hours during an eight-hour work day with many breaks, and could walk for 10 minutes and for a total of two hours during an eight-hour work day with many breaks. Dr. Jendry opined that bending was not possible for Plaintiff at that time, and that stooping, squatting, and crouching "would be feasible rarely." [#11-2 at 29; #11-7 at 319]. Dr. Jendry recommended that Plaintiff not engage in manipulative, visual or communicative activity, that he not drive, climb ladders, or operate heavy machinery, and that he not be exposed to unprotected heights. The

ALJ gave this opinion little weight, explaining that the assigned limitations "are not compatible with the claimant's objective x-rays and with the claimant's otherwise normal examination." [#11-2 at 29; #11-3 at 111-112]. In so finding, the ALJ considered the records generated by Dr. Jendry's office, such as the doctor's review of Plaintiff's lumber spine, during which Dr. Jendry noted a defect in the anterior portion of the L3 vertebral body involving the superior endplate and described what he suspected was a compression fracture. Dr. Jendry also noted that the other lumbar vertebral bodies were normal in height and that there was mild disc space narrowing at L3-4 and L4-5, and observed that Plaintiff showed no spondylolisthesis and no soft tissue abnormality. [*Id.* at 313, 318-319]. Dr. Jendry recorded in his notes that Plaintiff had no difficulty moving around the exam room, but that his gait was antalgic. [#11-7 at 317]. Dr. Jendry observed that Plaintiff did not use an assistive device. Mr. Jackson expressed discomfort with dorsolumbar flexion and extension, but showed no tenderness to palpation in the lumbar spine. He showed strength of 5/5 bilaterally in the upper and lower extremities. The ALJ concluded that the "totality of evidence does not support the level of deference Dr. Jendry gives to the claimant's subjective complaints." [#11-2 at 29]. The ALJ acknowledged Dr. Jendry's opinion that physical work would be almost impossible for Mr. Jackson, and did not disagree with the assessment. Rather, the ALJ observed that sedentary work is not physical in nature and should not pose a problem for Plaintiff. [*Id.*]

The ALJ gave greater weight to the opinion of state agency physician consultant, James McElhinney, M.D., who opined, after reviewing Plaintiff's medical records on June 24, 2013, that Plaintiff could function "at the light exertional level and with postural limitations at the occasional level and with no work around hazardous machinery." [#11-2 at 28; #11-3 at 104, 109, 113, 123-127]. The ALJ gave this opinion substantial weight "because it takes into account

the claimant's symptoms and is consistent with the medical file." [#11-2 at 28]. However, the ALJ determined, "out of an abundance of caution," that the assignment of a sedentary exertional level was more appropriate. [*Id.*]

The ALJ also considered Mr. Jackson's appointments with Marsha Alger, M.D., at Peak Vista Community Health Center and the associated treatment records, which the ALJ observed were "mostly unchanged" and "essentially normal." [#11-2 at 29; #11-7 at 271-297]. He also noted that in September 2011, Plaintiff told Dr. Alger that he had applied for a desk job in Texas and was prepared to move to Texas if hired. [#11-7 at 294]. On March 5, 2012, Dr. Alger opined that Plaintiff had a normal lumbar spine examination, and she wrote, "calls out in pain with exam…[h]istrionic." [#11-7 at 283]. She observed that Plaintiff's bilateral extremity strength was normal and that he walked with a normal gait. [*Id.* at 282-284]. She also noted that Mr. Jackson was avoiding definitive treatment, which the ALJ considered could be a reference to the recommended back surgery. [#11-2 at 29; #11-7 at 302, 304]. Dr. Alger's notes from March 20, 2012 indicate that she believed Plaintiff could work within a 20-pound lifting restriction, and that she suspected Plaintiff of possibly malingering. The notes demonstrate that Mr. Jackson's wife was upset that Dr. Alger "would not give them something in writing stating that the claimant could do not [sic] work at all," and her intention to "find another provider who gets involved with disability cases." [#11-2 at 29; #11-7 at 279].

The ALJ then considered the March 12, 2012 notes authored by John Marta, M.D., which include observations that Mr. Jackson's wife had called him and was upset that Dr. Marta had written a letter stating that Plaintiff should not lift weight for two months. Mr. Jackson's wife preferred Dr. Marta to write that Plaintiff was unable to work for twelve months, and explained

that otherwise they would lose access to food stamps. Dr. Marta was unwilling to change his letter. [#11-2 at 29; #11-7 at 327].

Several months later, on December 5, 2012, Dr. Alger noted that Mr. Jackson's back problem was stable and that Plaintiff's surgeon recommended surgery, but Plaintiff was delaying surgery in light of his wife's pregnancy. [#11-7 at 271]. The ALJ considered the December 11, 2012 records from Colorado Comprehensive Spine Institute and Penrose Hospital that demonstrated Plaintiff's back condition had improved with epidural injections and his pain was better controlled. [#11-7 at 303, 306, 322]. Plaintiff's x-rays from November 20, 2012 were unchanged from the x-rays taken January 30, 2012. [#11-7 at 328-331]. *See also* [#11-7 at 348 (medical records from Colorado Comprehensive Spine Institute dated August 12, 2013 read, "NO change [in x-rays] compared to prior imaging…Disc degeneration is present at L4-5, L3-4A compression fracture is present at the L3 vertebrae…The fracture has a(n) chronic appearance")].

The ALJ then considered the treatment records regarding Mr. Jackson's complaints of fatigue. [#11-2 at 30]. Plaintiff was treated for a vitamin B12 deficiency in 2013, and notes from July 17, 2014 indicate that he had improved, was feeling well, and had no complaints. [#11-8 at 378, 382]. The notes also included an observation that Plaintiff has four young children, who accompanied him to one appointment and caused a disturbance, and who could be a "contributing factor to the claimant's fatigue." [#11-2 at 30; #11-8 at 381]. The ALJ considered Plaintiff's November 21, 2013 treatment notes from Colorado Comprehensive Spine Institute, which indicated that his medication was helping and that he was taking care of his children and had become more active. [#11-7 at 333]. The treatment notes from July 8, 2014 show that Plaintiff was engaged in yard work and was continuing to care for his children. [#11-7 at 359, 362, 365].

2. *Subjective Contentions*

The ALJ considered this evidence against Mr. Jackson's testimony that he experiences pain in his lower and middle back and his right leg and knee that "is ongoing and lasts 30 to 45 minutes per episode," that he cannot sit or stand for more than two hours at a time, and cannot lift more than eight pounds. The ALJ concluded that Plaintiff's medically determinable impairments could reasonably be expected to cause the alleged symptoms, but that his statements "concerning the intensity, persistence and limiting effects of these symptoms are not entirely credible." [#11-2 at 28]. Of particular significance to the ALJ were Mr. Jackson's assertions to Dr. Alger that the surgeon had told him he would be paralyzed in two years' time if he did not undergo surgery, [#11-7 at 272], and yet, after two years, Plaintiff had not scheduled surgery. [#11-2 at 30]. The ALJ also found that the treatment records "do not verify such a tragic outcome as paralysis." The ALJ noted there was "an indication" that Mr. Jackson and his family sought "disability letters from the treating physicians as a means to obtain benefits," and that they had engaged in exaggerating Plaintiff's symptoms. [*Id.*] Finally, the ALJ found that Plaintiff had exaggerated his inability to perform his activities of daily living, and that the treatment records show that Plaintiff is active, including his participation in yard work and care for his young children. The ALJ thus concluded that the objective medical evidence was more credible than Plaintiff's subjective complaints, and that the evidence demonstrated Plaintiff is capable of work at the light exertional level and certainly at the sedentary level. [*Id.*]

Mr. Jackson's first and third contentions implicate the ALJ's assessment of his credibility and the veracity of his complaints of pain with respect to his back issues. The court addresses the arguments together, as did Defendant, because they each challenge the ALJ's consideration of Plaintiff's subjective reports.

a. *Applicable Law*

"Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence. However, findings as to credibility should be closely and affirmatively linked to substantial evidence and not just a conclusion in the guise of findings." *Newbold v. Colvin*, 718 F.3d 1257, 1267 (10th Cir. 2013) (internal quotation marks omitted). An ALJ cannot mischaracterize or downplay evidence to support his findings. *See Talbot v. Heckler*, 814 F.2d 1456, 1463-64 (10th Cir. 1987). And, although an ALJ need not "discuss every piece of evidence," he "must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects." *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996).

With respect to Mr. Jackson's allegations of pain, the ALJ was required to consider all the relevant objective and subjective evidence and "decide whether he believe[d] the claimant's assertions of severe pain." *Luna v. Bowen*, 834 F.2d 161, 163 (10th Cir. 1987). In evaluating complaints of pain, the ALJ must consider and determine:

> (1) whether the claimant established a pain-producing impairment by objective medical evidence; (2) if so, whether the impairment is reasonably expected to produce some pain of the sort alleged (what we term a "loose nexus"); and (3) if so, whether, considering all the evidence, both objective and subjective, the claimant's pain was in fact disabling.

Brownrigg v. Berryhill, --- F. App'x ----, 2017 WL 2179113, at *2 (10th Cir. Apr. 19, 2017) (quoting *Keyes-Zachary v. Astrue*, 695 F.3d 1156, 1166-67 (10th Cir. 2012)). Ancillary to this analysis is the consideration of factors such as "a claimant's persistent attempts to find [pain relief] and [her] willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor…and the claimant's daily activities, and the dosage, effectiveness, and side effects of medication." *Id.* (quoting *Keyes-Zachary*, 695 F.3d at

1167). *See also* SSR 16-3P, 2016 WL 1119029, at *7 (Mar. 16, 2016) (listing similar factors to consider in evaluating intensity, persistence, and limiting effects of a claimant's symptoms). The "ALJ need not consider these factors in a formalistic way, but the substance must be there." *Id.*

b. *Application*

First, with respect to credibility, the ALJ did not discount Mr. Jackson's allegations of daily activity *in toto*; rather, he found Mr. Jackson's credibility "diminished in some respects." [#11-2 at 30]. Indeed, the ALJ incorporated into the RFC Plaintiff's assertion that he can lift and carry no more than ten pounds at a time and he cannot walk or stand more than two hours in an eight-hour workday. Second, the ALJ based the credibility determination on a summary of the records and examinations of Plaintiff's back, as described above. Plaintiff does not cite the court to probative evidence that the ALJ failed to consider or identify inconsistencies in the ALJ's reasoning. Indeed, the court's independent review of the record reveals that the ALJ considered the relevant medical evidence with respect to Plaintiff's back problems. The medical records that include the most severe description of Plaintiff's back problems were generated in November 2012 by the surgical consultant at Colorado Comprehensive Spine Institute as a basis for surgery. *See* [#11-7 at 300-302 ("Mr. Jackson is a 30 y/o M that has severe degenerative changes at L3/4, and L4/5 with a chronic compression fracture of L3 anterior column. He has failed extensive non surgical interventions for his back pain and lumbar radiculopathy over the last 2 ½ yrs and is now ready to consider his surgical options which includes a L3-5 TLIF vs ALIF.")]. Yet, by the date of the Administrative Hearing in August 2014, Plaintiff had not undergone surgery, despite his wife giving birth in March 2013. And Plaintiff does not contend in his Opening Brief that the ALJ failed to consider the opinions formed by the providers at the

Colorado Comprehensive Spine Institute. This court concludes that the credibility determination is substantiated by the record. *See Poppa v. Astrue*, 569 F.3d 1167, 1171 (10th Cir. 2009) (concluding that an ALJ's credibility analysis is sufficient so long as it "sets forth the specific evidence he relies on in evaluating the claimant's credibility"); *Wilson v. Astrue*, 602 F.3d 1136, 1146 (10th Cir. 2010) (ALJ reasonably found a claimant's description of her daily activities did not indicate significant limitations, where the claimant could care for herself, her home, and her children, and also drive, shop, handle finances, garden, visit friends, and go out to eat).

With respect to pain, the ALJ found that Mr. Jackson's back problems could reasonably be expected to cause the alleged symptoms, but that his statements regarding the "intensity, persistence and limiting effects" of the symptoms were not entirely credible. [#11-2 at 28]. In explaining this finding, the ALJ wrote only one sentence about Plaintiff's pain, noting that the December 11, 2012 treatment records from Colorado Comprehensive Spine Institute and Penrose Hospital show that Plaintiff "was much better with epidural injections and his pain under better control." [*Id.* at 30]. However, I find that the ALJ's consideration of the ancillary factors identified above is implicit in his opinion. For instance, the ALJ acknowledged the recommendation from the Colorado Comprehensive Spine Institute that Plaintiff undergo surgery for disc degeneration and compression fracture. *See* [#11-2 at 29-30; #11-7 at 348]. He noted that, despite the recommendation, Plaintiff had postponed surgery due to his wife's pregnancy, [#11-7 at 271], and had not scheduled or undergone surgery over one year later, after the birth of their daughter. The ALJ also noted that he could find no evidence of a medical provider telling Plaintiff he risked paralysis. This court concludes that ALJ's discussion of this evidence pertains directly to Plaintiff's demonstrated efforts to find pain relief and willingness to try suggested treatments, and to whether he exaggerated the intensity and persistence of his symptoms of pain.

Plaintiff argues that surgery was postponed as a result of his providers, *see* [#15 at 20-21], but the medical evidence Plaintiff cites fails to support this argument. *See* [#11-7 at 271, 340].[3]

The ALJ also noted examples of Plaintiff walking around the exam room at times without an assistive device and at other times with a normal gait, [#11-2 at 28-29]; and the ALJ took into consideration Plaintiff's reports that medicine helped the pain. *See* [#11-7 at 333, 353, 359, 365, 368]. *See also White v. Barnhart*, 287 F.3d 903, 909-10 (10th Cir. 2002) (affirming credibility determination based on ALJ's review of the medical evidence combined with his own observations of claimant during hearing and claimant's "admission that medication relieved some of her pain"). Furthermore, the record includes observations of Plaintiff lifting his children during office visits, and reports from staff of seeing Plaintiff roller skating with his children and working as a bouncer at a local bar. *See* [#11-7 at 279]. *See also White*, 287 F.3d at 909 ("So long as the ALJ sets forth the specific evidence he relies on in evaluating the claimant's credibility, the dictates of *Kepler* are satisfied.") (citation omitted). *See also* 20 C.F.R. § 404.1529(c)(4) (stating an ALJ must consider inconsistencies in the evidence when determining the extent to which symptoms, such as pain, affect capacity to perform basic work activities). I find that the ALJ sufficiently considered Plaintiff's allegations of pain.

3. *Opinion Evidence*

With respect to his second contention, Plaintiff argues that the objective opinion evidence does not support the ALJ's finding that he could sit for at least six hours during an eight-hour work day. [#15 at 20]. Specifically, Plaintiff contends that the ALJ erred in contributing little weight to Dr. Jendry's opinion that he could sit for only twenty minutes at a time and no longer

[3] The report from Dr. Alger on December 5, 2012 notes that "Pt has had a visit with surgeon last week they do want to go ahead with surgery…[d]ate not set…Pt reports he's delaying surgery until after his wife delivers…" [#11-7 at 271].

than two hours during standard work day. Defendant asserts that the ALJ supplied sufficient reasons, supported by the record, for the amount of weight he attributed to Dr. Jendry's opinion. [#16 at 15].

The governing regulations require the ALJ to consider all medical opinions in the record. *See* 20 C.F.R. §§ 404.1527(c), 416.927(c). He must also discuss the weight he assigns to the opinions. *See id.* §§ 404.1527(e)(2)(ii), 416.927(e)(2)(ii) ("[T]he administrative law judge must explain in the decision the weight given to the opinions of a State agency medical or psychological consultant or other program physician, psychologist, or other medical specialist, as the administrative law judge must do for any opinions from treating sources, nontreating sources, and other nonexamining sources who do not work for us."). *See also Quintero v. Colvin*, 567 F. App'x 616, 619-620 (10th Cir. 2014).

This court finds no error in how ALJ treated the expert opinions. The ALJ explained that he gave the opinion of consulting physician Dr. Jendry little weight because the limits Dr. Jendry assigned to Plaintiff "are not compatible with the claimant's objective x-rays and with the claimant's otherwise normal examination." [#11-2 at 29]. The ALJ further explained that the "totality of the evidence does not support the level of deference Dr. Jendry gives to the claimant's subjective complaints." [*Id.*] In contrast, the ALJ found that Dr. McElhinney's opinion, which concluded that Plaintiff could work with postural limitations and if protected from hazardous machinery, accounted for Plaintiff's symptoms and was consistent with the medical file.[4] Additionally, the ALJ appears to have accepted Dr. Jendry's opinion that Plaintiff

[4] This court is not persuaded by Plaintiff's argument that Dr. McElhinney's opinion is flawed because Dr. McElhinney reviewed only records through July 2013. *See* [#15 at 23]. Plaintiff does not cite the court to medical evidence dated after July 2013 that would have altered the ALJ's conclusion that Plaintiff can perform sedentary work. Additionally, as Defendant notes, the medical record indicates that Plaintiff became more functional after July 2013, when he

could not perform physical work, which is consistent with the ALJ's decision to assign a sedentary level to Plaintiff rather than the light exertional level that Dr. McElhinney had assigned. *See* [*id.* at 28, 29]. The ALJ also considered the opinions of Dr. Alger and Dr. Marta, each of which supports his assessment of credibility with respect to Plaintiff's subjective complaints.

I find that substantial evidence supports the ALJ's decision with respect to his treatment of the medical record and the expert opinions. Plaintiff is correct that the medical opinion of an examining physician generally receives more weight than the opinion of a physician who has not examined the claimant, *see* 20 C.F.R. §§404.1527(c)(1), which supports assigning more weight to Dr. Jendry's opinion. *See Kellams v. Berryhill*, --- F. App'x ----, 2017 WL 2874506 at *7 (10th Cir. June 23, 2017) ("In weighing a medical source opinion, the ALJ must evaluate 'all of the [relevant] factors set out in [20 C.F.R. §§ 404.1527(c), 416.927(c)],' mindful that an examining source opinion 'is presumptively entitled to more weight than a doctor's opinion derived from a review of the medical record.") (quoting *Chapo v. Astrue*, 682 F.3d 1285, 1291 (10th Cir. 2012)). However, the same guidelines note that consistency with the medical record is an equal factor in determining the appropriate amount of weight to assign to an opinion, *see* 20 C.F.R. § 404.1527(c)(4); and the ALJ explained that he found that Dr. Jendry's opinion as to sitting limitations was not consistent with the medical evidence of record. [#11-2 at 29]. Plaintiff asserts that the "x-rays before Dr. Jendry, and, in fact, all the objective imaging results in the record, show spinal defects, chronic compression fracture, and disc space narrowing, in the area that is under stress when sitting." [#15 at 24]. But Mr. Jackson fails to point the court to a single medical record that documents any limitation to sitting, and after

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reported to his pain management providers that he had increased his activity and was happy with pain management regimen. *See* [#11-7 at 333, 336, 342, 353, 357, 359, 362, 365].

independent review of the record, this court could find no other notes reflecting that physicians drew the same conclusion with respect to sitting restrictions And, to the extent sitting could exacerbate Plaintiff's back problems, there is no medical evidence to corroborate the opinion that the exacerbation would be so severe as to limit Plaintiff to sitting for only two hours in an eight-hour time period and for only twenty minutes at a time.[5] There is no getting around the fact that Plaintiff asks the court to reweigh the results of Dr. Jendry's June 2013 examination; and asks specifically that the court attribute greater significance to the findings of an antalgic gait, reduced range of motion in the dorsolumbar area, positive straight leg tests, and reduced reflexes, and less significance to the normal findings of the examination, than did the ALJ. *See* [#15 at 24; #11-7 at 317-318]. This the court cannot do. *Branum v. Barnhart*, 385 F.3d 1268, 1270 (10th Cir. 2004) ("In reviewing the ALJ's decision, we neither reweigh the evidence nor substitute our judgment for that of the agency.").[6] It is certainly possible that another factfinder could have reached a different conclusion regarding Dr. Jendry's opinion versus Dr. McElhinney's opinion, but the ALJ provided explanations for the weight he assigned to each and those explanations are supported in the record. This is sufficient. *See Lax*, 489 F.3d at 1084. *See Tarpley v. Colvin*, 601 F. App'x 641, 644 (10th Cir. 2015).

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[5] Indeed, the court notes that with the exception of Dr. Jendry's opinion, the record is silent as to Plaintiff's alleged sitting limitations.

[6] The court pauses here to consider the recent unpublished opinion of *Kellams v. Berryhill*, 2017 WL 2874506. At first blush, the issues presented in *Kellams* appear very similar to the issues presented here. *See generally id.* However, unlike in *Kellams*, Mr. Jackson did not cite to, and the court did not find, probative evidence that the ALJ simply failed to consider. Additionally, the record in *Kellams* did not involve observations of the claimant's activities that were squarely inconsistent with his alleged limitations. In fact, Mr. Kellams's treating physician assistant authored an opinion that corroborated much of Mr. Kellams's allegations regarding his limitations. Here, the only opinion present in the record during the ALJ's review that supports Mr. Jackson's sitting limitation is that of Dr. Jendry, a consulting examiner. I do not find that *Kellams* is instructive in this instance.

With respect to Plaintiff's general reference to a provider whose opinion corroborated that of Dr. Jendry, Defendant argues that the ALJ did not have an opportunity to consider the opinion, and, moreover, the opinion is inconsistent with the medical evidence as summarized by the ALJ. *See* [#16 at 17]. The record demonstrates that nurse practitioner Fran Gorman completed a "Medical Source Statement of Ability to Do Work-Related Activities (Physical)" ("Physical") on June 19, 2015. [#11-8 at 427-432]. Defendant is correct that the ALJ could not have considered the Physical, which was created nine months after he issued his written decision. *See* [#11-2 at 20-37]. As to whether the case should be remanded for consideration of Nurse Gorman's opinion, I note that she opined without explanation that Plaintiff could sit for only one hour in an eight-hour work day. [#11-8 at 428]. Support for this limitation is not found anywhere else in the record, and Nurse Gorman cites no medical evidence for the basis of the limitation. She mentions only "physical exam finding," without specific tests or results. *See* [*id.* at 428, 430, 431]. *See also* 20 C.F.R. § 416.913(c)(4) ("Generally, the more consistent a medical opinion is with the record as a whole, the more weight we will give to that medical opinion").[7] I thus do not find that Nurse Gorman's opinion would "require a change in the outcome" of this case. *O'Dell v. Shalala*, 44 F.3d 855, 858-59 (10th Cir. 1994). Additionally, Plaintiff did not file a reply and thus did not address Defendant's arguments as to why the court need not remand the matter for the ALJ to consider Nurse Gorman's opinion.

[7] The court notes that under the regulations, nurse practitioners are categorized as "other sources" and not "acceptable medical sources." *Nichols v. Astrue*, 341 F. App'x 450, 453 (10th Cir. 2009); 20 C.F.R. § 416.913(d)(1). *See also Crowder v. Colvin*, 561 F. App'x 740, 744 (10th Cir. 2014) (quoting Soc. Sec. Rul. 06–03p, 2006 WL 2329939 at *3 (Aug. 9, 2006). The Tenth Circuit has nonetheless assumed, "without deciding," that the § 416.927(d) factors should be considered in evaluating a nurse practitioner's opinion. *See Nichols*, 341 F. App'x at 453.

CONCLUSION

The court is satisfied that the ALJ considered all relevant facts and that the record contains substantial evidence from which the Commissioner could properly conclude under the law and regulations that Mr. Jackson was not disabled within the meaning of Titles II and XVI of the Social Security Act and therefore not eligible to receive Disability Insurance Benefits or Supplemental Security Income benefits. Accordingly, **IT IS SO ORDERED** that the Commissioner's final decision is **AFFIRMED** 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 28, 2017

BY THE COURT:

s/ Nina Y. Wang
United States Magistrate Judge