IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-01460-MJW

JOSEPH CLAUDE BROWN,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting Commissioner of Social Security,

Defendant.

OPINION AND ORDER

MICHAEL J. WATANABE
United States Magistrate Judge

The government determined that Plaintiff is disabled under the Social Security Act. Plaintiff has asked this Court to review only the government's determination that the disability began on October 1, 2013 for purposes of receiving disability insurance benefits ("DIB"). The Court has jurisdiction under 42 U.S.C. § 405(g), and both parties have agreed to have this case decided by a U.S. Magistrate Judge under 28 U.S.C. § 636(c). (Docket No. 11). The Court AFFIRMS the government's determination.

Discussion

The Court reviews the administrative law judge's ("ALJ") decision to determine whether the factual findings are supported by substantial evidence and whether the correct legal standards were applied. *See Pisciotta v. Astrue,* 500 F.3d 1074, 1075 (10th Cir. 2007). "Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion. It requires more than a scintilla, but less

than a preponderance." *Raymond v. Astrue*, 621 F.3d 1269, 1271–72 (10th Cir. 2009) (internal quotation marks omitted). The Court "should, indeed must, exercise common sense" and "cannot insist on technical perfection." *Keyes-Zachary v. Astrue*, 695 F.3d 1156, 1166 (10th Cir. 2012). The Court cannot reweigh the evidence or its credibility. *Lax v. Astrue*, 489 F.3d 1080, 1084 (10th Cir. 2007).

I. Background

In December 2013, Plaintiff applied for DIB, claiming disability beginning on June 15, 2012 (AR[1] 18, 175-76). In a March 2014 initial determination, he was found disabled as of July 31, 2013, a date he had reported as the last date that he had worked (AR 83-95, 442). Plaintiff appealed that decision, arguing that his disability date should be earlier. (AR 36). Plaintiff and his counsel were present at the hearing and the ALJ informed them that based on the information before him, he could reach a different decision than was previously reached and Plaintiff "could end-up with an overpayment." (AR 36-37). In a January 2016 de novo decision, the ALJ found that Plaintiff was disabled beginning on October 1, 2013, but was not disabled earlier because he engaged in substantial gainful activity ("SGA") (AR 20-23, 29). Plaintiff's request for review of that decision was denied by the Appeals Council (AR 1-4), making the ALJ's decision the final decision of Defendant, the Acting Commissioner of Social Security. *See* 20 C.F.R. § 404.981.

[1] All references to "AR" refer to the sequentially numbered Administrative Record filed in this case. (Docket Nos. 8 through 8-16).

II. Analysis

Plaintiff argues that the salary he received in 2013 ($11,538.48) should be averaged over a 12-month period because he was a salaried employee, which would result in an average income of $961.54. That amount is below the $1040[2] amount of countable earnings that indicate SGA. (Docket No. 13 at 3). Plaintiff maintains that it was error for the ALJ to average the salary Plaintiff received in 2013 over the portion of 2013 when Plaintiff was found to not be disabled[3], which resulted in a monthly amount that exceeds $1040. Plaintiff maintains that he would not have been an employee through the end of 2013 if his wife was not the owner. (Docket No. 13 at 4). As a result, he argues that his 2013 income post-dating his injury is excludable under 20 C.F.R. §404.1573(c).

As Defendant argues, the law is clear that if Plaintiff engaged in SGA during the relevant period, "he could not be found disabled, regardless of the severity of his impairments." *See Fowler v. Bowen*, 876 F.2d 1451, 1453 (10th Cir. 1989); *see also* 20 C.F.R. § 404.1520(a)(4)(i) ("If you are doing substantial gainful activity, we will find that you are not disabled."); 20 C.F.R. § 404.1520(b) ("If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience."). The ALJ was required to "average [Plaintiff's] earnings over the entire period of work requiring

[2] 20 C.F.R. §§ 404.1574(b)(2), 404.1574a(a); *Substantial Gainful Activity*, Social Security Administration, https://www.socialsecurity.gov/oact/cola/sga.html (last visited Mar. 29, 2017).
[3] Defendant was found to be disabled as of October 1, 2013. The Court notes that regardless of whether the amount was averaged over nine months (through September) or ten months (through October), the resulting amount would exceed $1040.

evaluation to determine if [he has] done substantial gainful activity." 20 C.F.R. § 404.1574a. The Social Security Regulations make clear that: "when the individual worked for a continuous period of time but is no longer working, earnings are to be averaged over the actual period of work involved." SSR 83-35, 1983 WL 31257, at *3.

In this case, the ALJ questioned Plaintiff and his employer's owner (who is also his wife) about his work and the company. Joanie Brown, the company's owner and Plaintiff's wife, testified on July 9, 2015 that the company "stopped operating in October of 2013." (AR 61). At a November 5, 2015 hearing, Plaintiff testified that he was paid his full salary for 2013 "three months before the year ended" because he and his wife paid themselves only when the company had month to pay out. (AR 76). The ALJ then questioned Plaintiff about whether the company stopped operating in October 2013. Plaintiff answered: "I believe it was somewhere around there. We didn't stop operation. Matter of fact, we still have the company but we don't do any business out of it." (AR 77). Plaintiff further testified that he "didn't work the rest of that year . . ." (AR 77). The ALJ allowed Plaintiff to further brief the issue and, ultimately, found the additional documents submitted on which Plaintiff relies to argue that he was an employee of the company through the end of 2013 to be unpersuasive with regard to determining the period of time in which Plaintiff was working. (AR 23).

As noted above, the Court reviews the ALJ's decision to determine whether the factual findings are supported by substantial evidence and whether the correct legal standards were applied. *See Pisciotta,* 500 F.3d at 1075. The Court cannot reweigh the evidence or its credibility. *Lax*, 489 F.3d at 1084. In this case, the ALJ thoroughly

discussed the evidence regarding the relevant period in which Plaintiff engaged in SGA and its persuasiveness. (AR 21-24). The Court will not waste the parties' time by attempting to rephrase the ALJ's thorough analysis. The key here is that the ALJ considered the evidence, weighed it, and reached a conclusion that was consistent with the Social Security Regulations which required the ALJ to "average [Plaintiff's] earnings *over the entire period of work* requiring evaluation to determine if [he had engaged in] substantial gainful activity." 20 C.F.R. § 404.1574a (emphasis added); *see also Anderson v. Heckler*, 726 F.2d 455, 457 (8th Cir. 1984) (holding that monthly earnings are calculated by averaging earnings over months actually worked instead of averaging earnings over the entire year). Most notably, Plaintiff's testimony and his wage records show that he was paid only in the first, second, and third quarters of 2013. (AR 77, 191).

With regard to Plaintiff's argument that his work was performed under special conditions pursuant to 20 C.F.R. § 404.1573(c)(6) (Docket No. 21 at 2, citing AR 67), the record does not bear this out. Plaintiff does not point to any evidence to support the idea that he performed work "under special conditions that take into account your impairment, such as work done in a sheltered workshop or as a patient in a hospital." Instead, he simply argues that the fact that he is married to the owner of his employer is a special circumstance that allowed him to have a job at all. While the statute allows for a finding that an individual is working under a special condition if they are "given the opportunity to work despite [an] impairment because of family relationship, past association with [their] employer, or [the] employer's concern for [the individual's] welfare," the record in this case makes clear that Plaintiff was not working at all in late

2013. Further, if Plaintiff is attempting to argue that the work he performed in 2013 prior to his injury in August 2013 qualifies as work performed under special conditions, the record makes clear that this is not the case. The record contains evidence that Plaintiff continued to act as a manager of the company, a site supervisor, and iron worker until August 2013 (AR 21-23, 25-26, 46-48, 64-67, 478, 492, 569). Ms. Brown's testimony that she would not have kept Plaintiff on as an employee if he was not her husband (AR 67) is contradicted by the rest of the record. For example, as Defendant notes, Plaintiff injured his back while working on a roof at a jobsite in August 2013. (Docket No. 16 at 10 citing AR 569, 597).

Based on the above, the Court finds that the ALJ's conclusion that Plaintiff performed SGA through his disability onset date is supported by substantial evidence and free of reversible legal error.

Conclusion

For the reasons set forth above, the Commissioner's decision is AFFIRMED.

Dated this 3rd day of April, 2017.

BY THE COURT:

/s/ Michael J. Watanabe
MICHAEL J. WATANABE
United States Magistrate Judge