IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-01774-NYW

ALFRED J. STURLA, JR.,

Plaintiff,

v.

NANCY A. BERRYHILL,[1]

Defendant.

MEMORANDUM OPINION AND ORDER

Magistrate Judge Nina Y. Wang

This civil action arises under Title XVI of the Social Security Act ("Act"), 42 U.S.C. §§ 1381-83(c) for review of the Commissioner of Social Security's ("Commissioner" or "Defendant") final decision denying Plaintiff Alfred J. Sturla, Jr.'s ("Plaintiff" or "Mr. Sturla") application for Supplemental Security Income ("SSI"). Pursuant to the Order of Reference dated May 8, 2017 [#32],[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 Plaintiff's Opening Brief [#25], Defendant's Response Brief [#28], and Plaintiff's

[1] This action was originally filed against the Social Security Administration. Because Plaintiff challenges the final decision of the Commissioner of the Social Security Administration, this court automatically substitutes Acting Commissioner Berryhill as Defendant in this matter pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

[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.

Reply [#29], the entire case file, the Administrative Record, and the applicable case law, this court respectfully **REVERSES** the Commissioner's decision and **REMANDS** for further proceedings consistent with this Memorandum Opinion and Order.

PROCEDURAL HISTORY

This case arises from Plaintiff's application for SSI protectively filed on February 6, 2013. *See* [#17-2 at 11; #17-3 at 91]. Mr. Sturla completed the ninth grade; he never received his General Education Diploma ("GED"). *See* [#17-2 at 40]. Plaintiff alleges that he became disabled on February 6, 2013,[3] due to depression, a herniated disc, heart problems, and a learning disability. *See* [#17-3 at 93; #17-7 at 275]. Mr. Sturla was thirty-seven at the date of onset of his claimed disability.

Plaintiff's application was denied administratively on July 11, 2013. *See* [#17-3 at 91]. Mr. Sturla timely filed a request for a hearing before an Administrative Law Judge ("ALJ") on February 24, 2015. *See* [#17-2 at 7]. ALJ Lowell Fortune (the "ALJ") held a hearing on June 27, 2014; however, the ALJ continued the hearing until November 26, 2014, to allow Plaintiff's attorney to submit current medical records and to allow the ALJ to obtain medical expert testimony. [#17-2 at 11, 36, 68].

June 2014 Hearing

At the June 2014 hearing, Mr. Sturla proceeded through counsel, and the ALJ received testimony from Plaintiff and Vocational Expert Martin Rauer (the "VE"). *See* [#17-2 at 11]. Plaintiff testified that he currently resides with his girlfriend, her two daughters, and his girlfriend's mother. [*Id.* at 40]; *but see* [#17-3 at 92 (reporting that Mr. Sturla is homeless); #25

[3] Originally, Plaintiff's application indicated that he became disabled on February 15, 2012; however, Mr. Sturla amended that date to February 6, 2013, the date he filed his SSI application. *See* [#17-2 at 38-39]. The Administrate Law Judge's decision incorrectly uses the date February 16, 2014, as the alleged onset date. *See* [#17-2 at 11].

at 2 (same)]. When asked if he had worked or sought work since his alleged onset date, Mr. Sturla responded that he cannot work because he cannot walk or move a lot due to pain, and that he mainly sits around and tries to watch movies because of his herniated disc and his use of a cane. [*Id.* at 40, 55-56]. Plaintiff also testified that he was a recovering alcoholic, having been sober since February 16, 2014, but that he did not attribute his current inability to work to his alcoholism. [*Id.* at 41].

Regarding his physical ailments, Plaintiff testified that he suffers from chronic lower back pain that radiates down his legs (left being worse than right), a herniated disc, heart failure, and migraines. [*Id.* at 46, 51]. As to his chest pains, Plaintiff testified that he suffered from 2-3 episodes of pain, lasting between 2-15 minutes per day, and that walking, sitting, standing, or lifting can exacerbate the pain in his chest. [*Id.* at 58]. Plaintiff testified that his average pain level in his lower back is between 7 and 8 out of 10, but that certain movements cause the pain to increase to a 9 or 10. [*Id.* at 52]. Relatedly, his left leg pain is between an 8 and 9 out of 10 while his right leg is between a 7 and 8 out of 10 [*Id.* at 52]. Plaintiff is prescribed several medications for his ailments. [*Id.* at 46].

Plaintiff then testified that his chronic lower back pain interferes with his ability to sit for longer than 5-10 minutes before he must move around or stretch. [*Id.* at 52]. Plaintiff indicated that he could not perform a job that required him to sit for more than 6 hours, as he could only sit for approximately a half-hour to an hour out of an 8-hour workday. [*Id.* at 54-55]. Similarly, Plaintiff testified that he could stand for only 5-10 minutes unless he is moving, and that he could walk for only "15 minutes or so," needing 2-3 rests while walking two blocks. [*Id.* at 53-54]. Plaintiff continued that he could not walk or stand for 2 hours out of an 8-hour workday, as he could stand or walk for only 15-30 minutes out of an 8-hour workday. [*Id.* at 55]. Plaintiff

reported that every 15-20 minutes he switches from sitting to standing throughout the day. [*Id.* at 56].

Plaintiff also testified that he suffers from depression and anxiety. [*Id.* at 46, 55, 57, 58]. Plaintiff indicated that his anxiety makes it difficult for him to be around 8-10 people at a time, and that his depression causes him to isolate himself from others, makes him irritable, and prohibits him from engaging in activities. [*Id.* at 59]. He takes two medications for his depression. [*Id.* at 59-60].

As to his daily activities, Plaintiff testified that he takes the bus to the library to use the computer and to rent movies, and that he goes to appointments twice a month. [*Id.* at 60]. However, he explained that he cannot perform any household chores, and only uses the microwave—his girlfriend's mother does all the cooking. [*Id.* at 61]. In addition, his girlfriend and her mother do all the grocery shopping. [*Id.*].

The VE also testified at the June 2014 hearing. The VE testified that Plaintiff's past work included: (1) a fast food worker, a specific vocational preparation ("SVP")[4] level 2 light exertion job; (2) a fast food manager, SVP level 5 light exertion job; (3) a telemarketer, SVP level 3 sedentary job; and (4) a flower deliverer, SVP 2 medium exertion job. *See* [#17-2 at 65-66]. The ALJ then suspended the hearing to allow more time for Plaintiff to submit current medical records and so the ALJ could secure the testimony of a Medical Expert. [*Id.* at 66-67].

[4] 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.

November 2014 Hearing

At the November 2014 hearing, the ALJ received testimony from Medical Expert Thomas Passo, M.D. (the "ME") an internist and noninvasive cardiologist. [#17-2 at 71]. The ME relayed that Plaintiff's impairments included: (1) back pain, lumbar disc disease; (2) alcoholism with related complications of transaminitis, fatty liver, and alcoholic cardiomyopathy; (3) nonischemic cardiomyopathy, i.e., heart failure; (4) anxiety and depression; and (5) gastritis with ulcers. [*Id.* at 72-74]. The ME continued, however, that all of Plaintiff's complaints were subjective except for his chronic back pain and his cardiomyopathy that had "significantly improved" with his sobriety. [*Id.* at 75]. The ME testified that none of Plaintiff's conditions met or medically equaled a listed impairment. [*Id.* at 76]. Further, the ME indicated that Plaintiff could perform light work with the ability to sit for prolonged periods; however, Plaintiff could not stand for prolonged periods, could not occasionally lift objects heavier than twenty pounds, could not frequently lift objects heavier than ten pounds, and could not perform repetitive bending or squatting. *See* [*id.* at 77-78].

Upon examination by Plaintiff's counsel, the ME testified that he could not quantify what he meant by prolonged periods because such knowledge was outside his expertise, but that he did not believe Plaintiff could stand or walk for more than an hour or two out of an 8-hour workday. [*Id.* at 79]. The ME also indicated that Plaintiff had no cardiac limitations, and that he would approve Plaintiff for back surgery. [*Id.*].

Plaintiff then testified that his situation had not changed much since the June 2014 hearing, and that his back pain remained in the 8-9 pain range, despite two recent injections. [*Id.* at 80]. Mr. Sturla also expressed that neither the ME nor any other surgeon would approve him for back surgery given his heart failure. [*Id.*]. Relatedly, Plaintiff testified that he had to seek

cardiologist approval before his dentist would perform a routine cleaning. [*Id.* at 81]. Plaintiff continued that he suffers from chest pain episodes of shortening breath, a tightening feel in his chest, and an elevated heart rate a couple times a month. [*Id.* at 81-82]. Plaintiff explained that he could not do any activities during a chest pain episode, and that they can occur even when he is not exerting himself. [*Id.* at 83]. Plaintiff finished his testimony be explaining that he cannot lift objects heavier than 5-10 pounds, that he suffers from severe migraines twice a month that last for approximately 15-20 minutes, and that his depression and anxiety make it difficult to be around others. [*Id.* at 85-86].

Vocational Expert Cyndee Burnett ("VE Burnett") also testified at the November 2014 hearing. VE Burnett testified that an individual of the same age and education as Mr. Sturla who could perform SVP level 3 jobs with the additional limitations of: (1) occasionally lifting 20 pounds and frequently lifting 10 pounds; (2) sitting and/or walking for 60-minute intervals for 4 hours per day; (3) sitting for 8 hours per day; (4) occasionally climbing ramps and stairs; (5) no climbing of ladders, scaffolds, or ropes; (6) no repetitive stooping or crouching; (7) no exposure to unprotected heights; and (8) no close interactions with supervisors or coworkers and only occasional interactions with the public, could not perform any of Mr. Sturla's four previous jobs. [*Id.* at 88]. VE Burnett did testify, however, that such an individual could perform the jobs of document preparer, addressing clerk, and printed circuit board assembler—each SVP level 2 sedentary jobs. [*Id.* at 88-89]. Lastly, VE Burnett testified that, if Plaintiff consistently experienced two cardiac episodes lasting 10-30 minutes per month, this would eliminate gainful employment and employers generally tolerate only one day per month of absenteeism. [*Id.* at 89-90].

On February 6, 2015, the ALJ issued an opinion that Mr. Sturla was not disabled under the Act. [#17-2 at 29]. Plaintiff 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 1-3]. Plaintiff sought judicial review of the Commissioner's final decision and filed his *pro se*[5] appeal in the United States District Court for the District of Colorado on July 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

[5] Because Plaintiff proceeds *pro se*, this court liberally construes his pleadings. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). However, the court cannot act as an advocate, even for a *pro se* litigant. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). This court applies the same procedural rules and substantive law to Mr. Sturla as to a represented party. *See Murray v. City of Tahlequah*, 312 F.3d 1196, 1199 n.2 (10th Cir.2008); *Dodson v. Bd. of Cty. Comm'rs*, 878 F. Supp. 2d 1227, 1236 (D. Colo. 2012).

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

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).

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.[6] *Neilson*, 992 F.2d at 1120. The Commissioner can meet her burden by

[6] "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. Sturla had not engaged in substantial gainful activity since his alleged onset date of February 16, 2014.[7] [#17-2 at 13]. At step two, the ALJ determined Mr. Sturla had the following severe impairments: lumbar spine disorder, non-ischemic cardiomyopathy, transaminitis, fatty liver, gastritis with ulcers, substance use disorder in remission since February 2014, anxiety disorder, and depressive disorder. [*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. §§ 416.920(d), 416.925, and 416.926). [*Id.* at 14-15]. The ALJ determined that Plaintiff had the residual functional capacity ("RFC") to perform a light work, but limited that work to SVP level 3 or less subject to exertional and non-exertional limitations [*id.* at 15], and, at step four, concluded that Mr. Sturla was unable to perform any of his past work, [*id.* at 27]. At step five, considering Plaintiff's age, education, work experience, and RFC, the ALJ concluded that Plaintiff could perform jobs that existed in significant numbers in the national economy. [*Id.* at 28-29]. Mr. Sturla appears to challenge the ALJ's RFC assessment on appeal. *Compare* [#25; #29] *with* [#28 at 7-9].

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;

[7] As before, the ALJ improperly noted the alleged onset date as February 16, 2014 [#17-2 at 13], when the onset date alleged by Plaintiff was February 6, 2013.

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's RFC analysis began with a review of Plaintiff's testimony at the June 2014 and November 2014 hearings. *See* [#17-2 at 16-18]. The ALJ proceeded with a lengthy credibility discussion wherein he concluded that Plaintiff was not fully credible, because his actual conduct was inconsistent with his testimony, his testimony was inconsistent with other evidence in the record, and his testimony "has either exaggerated the facts or has magnified [his] symptoms." [*Id.* at 18-20].[8] For example, Plaintiff's Function Report [#17-7 at 296] reflected minimal daily activities due to his pain; yet, treatment notes from March, April, May, and July 2014 indicated that Plaintiff visited the park and zoo, enjoyed watching movies and wrestling, met with friends and family, and went out to dinner. *See* [#17-2 at 18]. Relatedly, the ALJ concluded that Mr. Sturla provided inconsistent evidence as to the severity of his ailments,

[8] In doing so, the ALJ sporadically cites to exhibits in the record without any citation to a specific page within the exhibit. [#17-2 at 18-20]. For example, the ALJ cites frequently to exhibit 10F for support of his position that objective medical evidence contradicts Plaintiff's testimony; however, exhibit 10F contains 397 pages and spans seven (7) separate entries on this court's docket, [#17-15 through #17-21]. This court is wary that such a practice satisfies the ALJ's burden that his decision be supported by substantial evidence. *See Romo v. Colvin*, 83 F. Supp. 3d 1116, 1120 n.4 (D. Colo. 2015) ("Relatedly, I note that throughout his opinion, the ALJ cites to the record by way of global references to multi-page exhibits, without pinpoint citations to specific pages therein. This court is neither required nor inclined to scour the record in an attempt to divine the specific basis for an ALJ's opinion, and I thus repeatedly have found that such general citations do not substantiate the ALJ's disability decision." (collecting cases)); *Brown v. Colvin*, 82 F. Supp. 3d 1274, 1279 n.5 (D. Colo. 2015) (cautioning, "[t]he Commissioner should now have fair notice of this court's position that, in general, such global references will not constitute substantial evidence in support the ALJ's decision and thus will warrant remand").

because treatment notes indicated that he presented to his doctors in only mild distress, that he spent time with family, and that he inconsistently reported the presence of pain upon examination. *See* [*id.* at 19-20].

In considering the medical record, the ALJ stated that Plaintiff was hospitalized in 2013 after law enforcement found him inebriated at a bus stop. [*Id.* at 21]. Upon examination, Plaintiff reported heart congestion, but he moved all extremities well and exhibited 5/5 muscle strength. [*Id.*]. The ALJ continued that Plaintiff had been seen for chest pain previously with no reported back issues, and that a CT scan noted that Plaintiff breathed normally; however, upon injection of an IV contrast, Plaintiff went cyanotic and apneic, but his respiratory arrest improved with epinephrine and narcan. [*Id.*]. Further, an echocardiogram report "showed mild left ventricular enlargement with mildly decreased global left ventricular systolic function." [*Id.*]. As to Mr. Sturla's mental impairments, the ALJ reported that Plaintiff had a history of alcohol abuse, anxiety, and depression; however, many mental status exams noted "30/30 results and that claimant was doing well with his current medication regimen." [*Id.*]. For support, the ALJ globally cites exhibits 10F through 19F. [*Id.*].

The ALJ concluded with a discussion of the multiple medical source opinions regarding Plaintiff's functional capacity. *See* [*id.* at 22-27]. The ALJ discredited the opinions of Plaintiff's treating sources, and, instead, relied on the opinions of State Agency Psychiatrist MaryAnn Wharry and the ME. *See* [*id.*].

Accordingly, the ALJ concluded that Plaintiff had the RFC to

> perform light work as defined in 20 CFR 416.967(b), and stated more specifically as follows. Physically, the claimant is able to lift 20 pounds occasionally and 10 pounds frequently. During an 8-hour workday, the claimant is able to stand and/or walk 60 minutes at a time for a total of 4 hours, and sit for 8 hours. The claimant is able to climb ramps and stairs occasionally. The claimant is unable to climb ladders, scaffolds, and ropes. The claimant should avoid unprotected

> heights. The claimant should not perform repetitive stooping and crouching. Mentally, the claimant is able to: use judgment in making work decisions; respond appropriately to supervision, coworkers, and work situations; and deal with changes in routine work setting. The claimant should not perform any work above the SVP level 3. The claimant should not interact with the public more than 1/3 of the workday. The claimant can have no close, prolonged, or frequent interaction with supervisors and coworkers.

[#17-2 at 15-16 (footnote omitted)].

In his Opening Brief and Reply, Plaintiff argues that his physical and mental ailments make it impossible for him to work, and that several doctors have opined that he is disabled and unable to work as evidenced by his updated Med-9 form. *See* [#25; #29]. In construing his *pro se* filings liberally, the court interprets Mr. Sturla's briefing as asserting that the ALJ improperly weighed the medical source opinions when formulating his RFC. For the following reasons, the court respectfully agrees.

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 he 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).

In weighing the several medical opinions, the ALJ indicated that treating source opinions are entitled to controlling weight when they are "consistent" with "other substantial evidence." *See* [#17-2 at 22]; *but see Garcia v. Colvin*, 219 F. Supp. 3d 1063, 1071 (D. Colo. 2016) (explaining that the Social Security Regulations afford controlling weight to treating physician opinions that are "not inconsistent with other substantial evidence;" noting, "The distinction between *not inconsistent* and *consistent* is significant. The treating source opinions should not be accorded controlling weight if they contradict other substantial evidence in the record, but they do not necessarily have to reach the exact same conclusions." (emphasis in original)). The ALJ found that the opinions of Plaintiff's treating sources were not consistent with the opinions of Dr. Wharry and the ME—both of whom opined that Mr. Sturla could perform substantial gainful activity despite his ailments—opinions the ALJ characterized "substantial evidence." *But cf. Hamlin v. Barnhart*, 365 F.3d 1208, 1215 (10th Cir. 2004) ("When a treating physician's opinion is inconsistent with other medical evidence, the ALJ's task is to examine the other physicians' reports to see if they outweigh the treating physician's report, not the other way

around." (internal brackets, quotations, and citation omitted)). Thus, according to the ALJ, the opinions of Plaintiff's treating sources were not entitled to controlling weight. [#17-2 at 22].

As relevant here, Dr. Wharry completed a Mental RFC for Plaintiff based on her review of the medical evidence contained in the record on July 11, 2013.[9] [#17-3 at 92-99, 101-03]. Dr. Wharry opined that, despite some moderate limitations in his ability to maintain concentration and attention for extended periods and his ability to interact with coworkers, supervisors, and the public, Mr. Sturla could follow simple instructions, sustain ordinary routines, and make simple work-related decisions. *See* [*id.* at 101-103].

Similarly, the ME opined that Plaintiff could perform light work with the ability to sit for prolonged periods; however, Plaintiff could not stand for prolonged periods, could not occasionally lift objects heavier than twenty pounds, could not frequently lift objects heavier than ten pounds, and could not perform repetitive bending or squatting. *See* [#17-2 at 77-78]. Further, the ME testified that he did not believe Plaintiff could stand or walk for more than an hour or two out of an 8-hour workday. [*Id.* at 79]. The ME also indicated that Plaintiff had no cardiac limitations. [*Id.*].

Mr. Sturla's treating sources also provided opinion evidence. First, Michelle Mang, M.D. opined that Plaintiff suffered from the mental impairments of high levels of anxiety, difficulties concentrating, focusing, limited coping skills, insomnia, unresolved grief, and strained familial relations. *See* [#17-13 at 621]. Dr. Mang opined that his prognosis was moderate. [*Id.*]. As to Mr. Sturla's physical impairments, Dr. Mang diagnosed Plaintiff with alcohol dependence, depression, anxiety, hypertension, transaminitis, non-ischemic cardiomyopathy with mildly

[9] State Agency Single Decision Maker Michelle Johnson also proffered an opinion as to Plaintiff's RFC; however, the ALJ gave Ms. Johnson's opinion no weight because she was an unacceptable medical source. *See* [#17-2 at 23, 27].

reduced left ventricular systolic function and mild global hypokinesis, gastroesophageal reflux disease ("GERD"), nonerosive gastritis, history of gastric ulcers, and essential tremor. [#17-14 at 628]. Her prognosis of these ailments was "only fair with continued alcohol abuse." [*Id.*]. Dr. Mang also indicated that she had examined Plaintiff only once on February 13, 2013, and that she was unable to assess any mental or physical functionality limitations. *See* [#17-13 at 623-26; #17-14 at 629-32]. However, Dr. Mang also signed a Med-9 Form for Plaintiff on November 13, 2013, indicating that Plaintiff has been or will be disabled for at least six (6) months due to his physical impairments. [#17-14 at 634]; *but see* 20 C.F.R. § 416.927(d)(1) ("A statement by a medical source that you are 'disabled' or 'unable to work' does not mean that we will determine that you are disabled.").[10]

Next, Mandy Loebach, LCSW, LAC provided three letters regarding Plaintiff's participation in the Substance Use Disorders Services Program at Denver Health's Outpatient Behavioral Health Services. *See* [#17-14 at 633, 636; #17-22 at 1097]. In March 2014, Ms. Loebach reported that Mr. Sturla engaged in weekly individual therapy, and that he "shows strong motivation to engage in treatment services and has a high prognosis of reaching his treatment goals." [#17-14 at 636]. In May 2014, Ms. Loebach stated that Mr. Sturla had reported continued abstinence from drugs or alcohol since entering treatment, and has shown improved daily functioning as to his mental health issues. [*Id.* at 633]. In November 2014, Ms. Loebach indicated that Mr. Sturla has been "consistently engaged and compliant with treatment since starting[,]" that he has had "high achievement of his treatment goals and continues to succeed in reaching his goals outside of treatment[,]" and that he has "maintained abstinence

[10] In his briefing, Plaintiff argues that it is enough to find him disabled based solely on completed Med-9 Forms. *See* [#25 at 1].

[from drugs or alcohol], improved his self esteem [sic], and brought some stability to his life." [#17-22 at 1097].

Dr. Charles Lundquist opined that Plaintiff had longstanding problems with lower back pain, that an MRI revealed L5-S1 nerve compression, and that medications were ineffective at controlling Mr. Sturla's pain. [#17-21 at 1038]. Dr. Lundquist continued that Plaintiff's pain is "severely limiting to quality of life and inhibits mobility[,]" and that Plaintiff relies on a cane for mobility. [*Id.*]. Dr. Lundquist also reported that Plaintiff suffers from cardiomyopathy, depression, and substance abuse with five (5) months of sobriety. [*Id.*]. On October 13, 2014, Dr. Lundquist completed a Med-9 Form for Plaintiff, indicating that Plaintiff's cardiovascular and musculoskeletal disorders rendered him disabled for at least twelve (12) months. *See* [#17-22 at 1093].

Lastly, Dr. Mark Jeong[11] stated that he treats Plaintiff for non-ischemic cardiomyopathy with mild systolic dysfunction, and that Plaintiff has a long history of alcohol dependence. [*Id.* at 1036]. Dr. Jeong indicated that, since the fall of 2013, Mr. Sturla "has done well by stopping the alcohol. He has been compliant with his medical therapy for his cardiomyopathy. Overall, he is doing well and I hope [he] will continue to make progress." [*Id.*].

As mentioned, the ALJ gave "less weight" to the opinions of Plaintiff's treating sources, and "more weight" to Dr. Wharry's opinion with the "most weight" afforded to the ME's opinion. [#17-2 at 24, 25]. In affording greater weight to Dr. Wharry and the ME, the ALJ explained that these sources were "experts in evaluating SSA disability claims," and, as such, each "ha[s] an enhanced understanding of SSA disability programs and their evidentiary requirements." [*Id.* at 25]. Relatedly, the ALJ explained that these sources were "specialists in

[11] The ALJ incorrectly refers to Dr. Jeong as "Dr. Joong" throughout his decision.

the fields of the claimant's particular impairments," and that the ME considered all of the medical records. [*Id.*]. Conversely, the ALJ explained that Plaintiff's treating sources were not experts in evaluating SSA disability claims, and nothing indicated that any of them reviewed anything other than their own medical records; thus, these opinions were entitled to less weight. [*Id.* at 26]. While the ALJ's assertions may be true, this court is hesitant to hold that such conclusory assertions satisfy the ALJ's burden when weighing the medical opinion evidence. *See Dugwyler v. Colvin*, No. 15-CV-00116-CMA, 2015 WL 13215658, at *11 (D. Colo. Oct. 30, 2015) (rejecting the ALJ's verbatim conclusory assertions) (citing *Frey v. Bowen*, 816 F.2d 508, 513 (10th Cir. 1987) (explaining, "the reports of physicians who have treated a patient over a period of time or who are consulted for purposes of treatment are given greater weight than are reports of physicians employed and paid by the government for the purpose of defending against a disability claim."); *Robinson v. Barnhart*, 366 F.3d 1078, 1084 (10th Cir. 2004) (stating, "the opinion of an agency physician who has never seen the claimant is entitled to the least weight of all.")). And, to the extent the ALJ afforded less weight to the opinions of Plaintiff's treating sources because those opinions conflicted with Dr. Wharry and the ME's opinions, such a reason "provides no basis *per se* for crediting one over the other," as the appearance of a conflict "is what gives rise to the need for the ALJ to weigh the opinions in the first instance." *See Romo*, 83 F. Supp. 3d at 1121.

Nevertheless, two distinct errors necessitate remand. First, the ALJ concluded the opinions of Plaintiff's treating sources were "less consistent with the longitudinal record[,]" and that the "relevant evidence does not support these opinions to the same degree as it supports the medical opinions cited earlier [i.e., Dr. Wharry and the ME]." [#17-2 at 26]. Noticeably absent from the ALJ's discussion is any reference to what medical evidence contradicted these sources.

Nor does the ALJ identify what evidence in the record supports the opinions of Dr. Wharry and the ME; rather, the ALJ offers a conclusion that the medical evidence supports Dr. Wharry and the ME's opinions—presumably because each reviewed the medical record. *See Clifton v. Chater*, 79 F.3d 1007, 1009 (10th Cir. 1996) (deeming an ALJ's "bare conclusion" beyond meaningful judicial review); *cf. Hardman v. Barnhart*, 362 F.3d 676, 678-79 (10th Cir. 2004) (cautioning against the ALJ's use of conclusions "in the guise of findings"). Further, although the ALJ provided a narrative of some of the medical evidence that contradicted Plaintiff's testimony, his citations to the record were sporadic and were global cites to exhibits consisting of hundreds of pages of medical records. *See, e.g.*, [#17-2 at 18-20]. In addition, the ALJ's statements with respect to the treating physicians' respective opinions are often too generalized and not specific to a particular provider. While "[i]t may be possible to assemble support for this conclusion from parts of the record cited elsewhere in the ALJ's decision, [] that is best left for the ALJ himself to do in the proceedings on remand." *Krauser v. Astrue*, 638 F.3d 1324, 1331 (10th Cir. 2011). Ultimately, the ALJ's failure to identify what record evidence contradicted the opinions of Plaintiff's treating sources precludes this court from conducting a meaningful review of the ALJ's decision.[12] *See Watkins v. Barnhart*, 350 F.3d 1297, 1301 (10th Cir. 2003) (remanding to the ALJ because the court could not meaningfully review the ALJ's decision as to the weighing of opinion evidence, and the court would not presume the ALJ applied the correct legal standard).

Equally as troublesome is the ALJ's decision to afford Plaintiff's treating sources less weight because they "simply accepted [Plaintiff's subjective statements and symptoms] at face

[12] In holding so, this court expresses no opinion as to how much weight Plaintiff's treating sources are entitled to; rather, this court holds that, based on the ALJ's decision, it is unclear what (if any) objective medical evidence the ALJ relied on when he concluded that the opinions of Plaintiff's treating sources were not consistent with the longitudinal record.

value" without any type of validity testing. [#17-2 at 26]. The ALJ therefore concluded that, because he had already found Plaintiff not entirely credible, his treating source's opinions were equally less credible given that they were based on Plaintiff's subjective complaints. *See* [*Id.* at 26-27]. This line of reasoning is flawed for several reasons.

To start, "a provider's reliance on a patient's subjective reports is not, in itself, a sufficient basis for discrediting her opinion." *Osland v. Colvin*, No. 14-CV-002244-RBJ, 2015 WL 1433281, at *3 (D. Colo. Mar. 26, 2015). Similarly, the absence of objective medical evidence of disabling pain does not constitute contradictory medical evidence. *See Gatson v. Bowen*, 838 F.2d 442, 447 (10th Cir. 1988) (explaining, "objective medical evidence of disabling pain need not consist of concrete physiological data alone but can consist of a medical doctor's clinical assessment"). Lastly, "[i]n choosing to reject the treating physician's assessment, an ALJ may not make speculative inferences from medical reports and may reject a treating physician's opinion outright only on the basis of contradictory medical evidence and *not due to his or her own credibility judgments, speculation or lay opinion*." *McGoffin v. Barnhart*, 288 F.3d 1248, 1252 (10th Cir. 2002) (emphasis in original) (internal quotations and citation omitted). In his decision, the ALJ stated, "I have found…that the claimant's allegations are not fully credible.… [A]n essential element underpinning the opinions and conclusions of [Plaintiff's treating sources] is the full credibility of the self-reports made by the patient. In this case, that essential element of the treating source assessments has been undermined." [#17-2 at 27]. But the decision does not provide adequate support for such a proposition. Essentially, as written, it appears that the ALJ first determined whether Plaintiff was believable and "then let that perception drive the outcome of the matter[;]" however, "[s]uch a situation undermines public confidence in the fairness and predictability of the [administrative review] process." *Williams v.*

Colvin, No. 13-CV-1423-MSK, 2015 WL 4237593, at *6 (D. Colo. July 14, 2015). Moreover, Mr. Sturla's credibility is pertinent only as to statements about his symptoms and their intensity and persistence—the ALJ may not use Plaintiff's credibility in assessing the medical evidence. *See Dugwyler*, 2015 WL 13215658, at *9. In addition, "an ALJ may not substitute his lay opinion for a medical opinion," *see Valdez v. Barnhart*, 62 F. App'x 838, 842 (10th Cir. 2003), and the decision as written suggests that the ALJ impermissibly substituted his opinions for that of Plaintiff's treating sources based on his determination that Plaintiff was not fully credible.

CONCLUSION

For the reasons stated herein, the court hereby **REVERSES** the Commissioner's final decision and **REMANDS** this matter to the ALJ. On Remand, the ALJ should re-evaluate the opinions of Mr. Sturla's treating physicians, and, in doing so, shall explicitly identify what (if any) objective medical evidence the ALJ deems inconsistent with these opinions.

DATED: July 28, 2017

BY THE COURT:

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