IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Judge

Civil Action No. 16-cv-02898-LTB

MARK H. LAWRENCE,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting Commissioner of Social Security,

Defendant.

ORDER

Plaintiff Mark H. Lawrence appeals Defendant's (the "Commissioner") final administrative decision denying his claim for supplemental security income under Title XVI of the Social Security Act (the "Act"). Jurisdiction in this appeal is proper pursuant to 42 U.S.C. § 405(g). Oral argument would not materially assist in the determination of this appeal. After consideration of the briefs and the record, I reverse the Commissioner's decision and remand the case for further proceedings.

I. Statement of the Case

Following a hearing before an ALJ, Plaintiff's disability claim was denied in a decision dated June 22, 2016. The Appeals Council denied Plaintiff's request for review thereby rendering the ALJ's June 22, 2016 decision the Commissioner's final decision for purposes of my review. Plaintiff timely filed this appeal seeking review of the Commissioner's final decision.

II. Statement of Facts

A. Plaintiff's Disability Hearing

At the May 19, 2016 hearing on his disability claim, Plaintiff testified that he could lift or carry about 50 pounds and stand for a couple of hours but not walk very far due to problems with his breathing. AR 62. Plaintiff further testified that he experienced daily asthma flare-ups; had difficulty concentrating and getting along with other people; and is frequently ill. AR 59 & 69. Plaintiff indicated that he spends a typical day looking for a job. AR 62.

The VE identified Plaintiff's past work as a courtesy clerk, a sorter/pricer, and a material handler. AR 71. The ALJ asked the VE if a person who could perform work at the medium exertional level with a maximum SVP of 2 but could not climb ladders and scaffolds, work at unprotected heights or with dangerous machinery, work in extreme heat or cold, be exposed to pulmonary irritants, or have any interaction with the public as part of his job duties could perform any of Plaintiff's past work. AR 71-2. The VE responded that such an individual could not perform Plaintiff's past work but could perform the medium exertional level jobs of buffet attendant and hand packager. AR 72. The ALJ declined the VE's offer to further identify light exertional level jobs that Plaintiff was capable of performing. *Id.*

B. The ALJ's Decision

In her June 22, 2016 decision, the ALJ applied the five-step sequential process outlined in 20 C.F.R. §§ 404.1520(a). At the first step of the sequential

process, the ALJ found that Plaintiff had not engaged in substantial gainful activity since the August 14, 2015 filing date of his application for supplemental security income. AR 35. At the second step, the ALJ found that Plaintiff had severe impairments of asthma, obesity, mood disorder/depression, and generalized anxiety disorder. *Id.* At the third step, the ALJ concluded that Plaintiff did not have an impairment or a combination of impairments that met or medically equaled one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. *Id.*

The ALJ next concluded that Plaintiff had the RFC to perform medium work as defined in 20 C.F.R. § 416.967(c) but was limited to simple, routine, repetitive work with a maximum SVP of 2. AR 37. The ALJ further determined that Plaintiff was unable to climb ladders and scaffolds; work at unprotected heights; work with dangerous machinery; work in extreme heat or cold; come in contact with pulmonary irritants; have more than occasional interactions with supervisors and coworkers; or have any interaction with the public as part of his job duties. *Id.* The ALJ then found that Plaintiff had no past relevant work but concluded that there were jobs existing in significant numbers in the national economy that Plaintiff could perform such as buffet attendant and hand packager. AR 41. Thus, the ALJ ultimately concluded that Plaintiff was not disabled within the meaning of the Act since the August 14, 2015 filing of his application for supplemental security income. AR 41.

III. Standard of Review

In reviewing the Commissioner's decision, I must determine whether

substantial evidence in the record as a whole supports the factual findings and whether the correct legal standards were applied. *Castellano v. Secretary of Health & Human Servs.,* 26 F.3d 1027, 1028 (10th Cir. 1992); *Hamilton v. Secretary of Health & Human Servs.,* 961 F.2d 1495, 1497-98 (10th Cir. 1992). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Hamilton, supra,* 961 F.2d at 1498. I "may neither reweigh the evidence nor substitute [my] discretion for that of the Administrative Law Judge." *Kelley v. Chater,* 62 F.3d 335, 337 (10th Cir. 1995).

IV. Analysis

On appeal, Plaintiff argues that the ALJ erred (1) by concluding that Plaintiff could perform the jobs of buffet attendant and hand packager; and (2) in her assessment of Plaintiff's RFC.

A. The Jobs Identified By the ALJ at Step 5

1. Plaintiff's Ability to Work as a Buffet Attendant

Plaintiff argues that the job of buffet attendant is inconsistent with the ALJ's finding in her RFC assessment that Plaintiff could have no interaction with the general public. This argument is premised on the following exchange between the VE and Plaintiff's attorney at Plaintiff's disability hearing:

> Q: With the buffet attendant, what are there just [sic] basic duties?
>
> A: The duties are to keep an eye on the buffet and simply reclean and re-fill items as they empty.

> Q: Okay. Would they also be expected to if someone needs a glass of water or cup of coffee or something like that to assist with those types of duties?
>
> A: You know, that's a different position.
>
> Q: Okay.
>
> A: I've seen it happen though. It's I think varies [sic] on the restaurants but they need to be polite and cordial to the customers so they might go out of their way and help with something like that.

AR 73-4.

I disagree that this exchange establishes that the position of buffet attendant necessarily encompasses some degree of interaction with the public. The VE first testified that the position of buffet attendant does not include responsibility for interacting with customers regarding drink requests. The VE then added that he had seen such interaction by buffet attendants and explained that "they might go out of their way" to assist in this manner. This latter testimony does not alter the VE's earlier testimony that interacting with customers is not part of a buffet attendant's job duties. I therefore conclude that the ALJ did not err in concluding that Plaintiff's assessed RFC would allow him to work as a buffet attendant.

2. Plaintiff's Ability to Work as a Hand Packager

Plaintiff argues that the job of hand packager is inconsistent with the ALJ's findings in her RFC assessment that Plaintiff cannot work in extreme heat and must avoid pulmonary irritants. In support of this argument, Plaintiff cites the DOT which provides that a hand packager must "frequently" deal with exposure to extreme heat and atmospheric conditions such as fumes, dusts, and noxious odors

that affect the respiratory system. *See* DOT job number 920.587-018; DOT, Appendix D, Environmental Conditions. I agree that the ALJ erred in concluding that Plaintiff could perform the job of hand packager based on the record before me.

The VE testified that his opinion about the jobs Plaintiff was able to perform was "not inconsistent with the DOT" because the DOT does not address issues such as pulmonary irritants and excessive heat or cold with any specificity. AR 72-3. The VE further testified that in addition to the DOT, he was relying on his work as a vocational rehabilitation counselor for over 30 years to support his opinions of Plaintiff's work capabilities. AR 73. In light of the DOT's identification of frequent exposure to extreme heat and atmospheric conditions which clearly encompass "pulmonary irritants" as characteristics of the job of hand packager, however, there is a clear inconsistency between the DOT and the VE's opinion that Plaintiff could perform in this capacity despite his assessed RFC which precludes all exposure to such conditions. Thus, the VE was not relying on his professional experience to merely supplement DOT's job description but rather to modify it.

Citing *Gibbons v. Barnhart,* 85 Fed. App'x 88 (10th Cir. 2003), the Commissioner argues that any unexplained inconsistency between the DOT's job description for hand packager and the VE's opinion that Plaintiff is capable of performing this job despite conflicting limitations in his assessed RFC does not constitute reversible error because Plaintiff's attorney failed to raise this issue at Plaintiff's disability hearing. This is an expansive reading of *Gibbons* which does not expressly impose any such obligation on counsel. In addition, the Plaintiff in

Gibbons failed to identify any discrepancies between the DOT and the VE's testimony that would have warranted further investigation in any event. *Id.* at 93. Here, the discrepancies are obvious.

By asserting that his testimony was "not inconsistent with the DOT, the VE effectively deprived both the ALJ and Plaintiff's attorney of an opportunity to obtain the requisite explanation for the inconsistency during Plaintiff's disability hearing. Failure to obtain such an explanation was error. *See* Social Security Ruling 00-4p, 2000 WL 1898704 at *4 ("If the VE's ... evidence appears to conflict with the DOT, the [ALJ] will obtain a reasonable explanation for the apparent conflict.").

The Commissioner argues that reversal and/or remand is nonetheless unnecessary because the 20,000 buffet attendant positions identified by the VE are alone sufficient to support the ALJ's determination at step 5 that there were sufficient jobs in the national economy available to Plaintiff. I disagree.

The Tenth Circuit has rejected a bright-line approach to the number of jobs that constitute a "significant number" and instead leaves this determination "to the [ALJ's] common sense in weighing the statutory language as applied to a particular claimant's factual situation." *Trimiar v. Sullivan,* 966 F.2d 1326, 1330 (10th Cir. 1992) (citation omitted). I must therefore remand this case so that the ALJ can consider whether the buffet attendant job, standing alone, exists in significant numbers in the national economy to support a finding that Plaintiff is not disabled. In making this determination, the ALJ must be mindful of the relevant factors that

go into this consideration including the level of Plaintiff's disability and the reliability of the VE's testimony, as well as the VE's testimony that a person coughing more than once or twice a day would not be able to maintain employment as a buffet attendant. *Id.* (citation omitted). *See also* AR 74.

On remand, the ALJ may also choose to develop the record further by addressing the conclict btween the DOT and the VE's testimony regarding the hand packager position and/or identifying any light level jobs that Plaintiff is capable of working. *See* AR 72 (ALJ responding "no" to VE's question "[w]ould you like me to continue with light positions?").

B. The ALJ's Assessment of Plaintiff's RFC

Plaintiff first argues that the ALJ's assessment of his RFC was deficient because the ALJ failed to cite specific pages in the record to support her discussion of Plaintiffs severe respiratory impairment. AR 38. While more specific citations to the record are unquestionably preferable, the ALJ's failure to provide them in this case does not in and of itself preclude a finding that there is substantial evidence to support the ALJ's conclusions about Plaintiff's respiratory impairment. First, the ALJ's wholesale citation to exhibits largely support general statements that Plaintiff does not dispute. By way of example, the ALJ cites four exhibits in support of her finding that Plaintiff has a history of asthma with episodes of wheezing, coughing, and shortness of breath prior to his application date and five exhibits in support of her finding that Plaintiff has been regularly treated by a pulmonologist and been treated periodically in the emergency room for

exacerbations of his condition since filing his application for disability benefits. *Id.*

Next, Plaintiff has only identified one instance where the medical records allegedly contradict the ALJ's conclusions regarding Plaintiff's severe asthma, and, in this instance, the ALJ cited specific pages of an exhibit to allow for meaningful review. Specifically, the ALJ stated that "[l]ongitudinal spirometry testing does not show that [Plainitff's] asthma is near listing level and he responds well to treatment." AR 38. Although Plaintiff objects to the ALJ's characterization of these pages as reflective of a "longitudinal" testing, they do show a comparison to testing done approximately 6 months prior. AR 1064. It is less clear how the cited pages support the ALJ's finding that Plaintiff responds well to treatment. The Commissioner, however, has provided other citations to the record that support this finding. *See* Response Brief, p. 13. *See also* AR 501, 660, 673, 739 & 897. It is therefore unnecessary to require the ALJ to review this finding and provide supporting citations to the record.

Plaintiff also argues that the ALJ erred in concluding that he was capable of working on a sustained basis and would not miss work more than once a month. In concluding that Plaintiff was physically able to perform medium work with some limitations, the ALJ relied primarily on the opinion of state agency physician Michael Canham, M.D., and Plaintiff's own testimony. AR 39-40. A review of the relevant record fails to support any inference that Dr. Canham's opinion, Plaintiff's testimony, or the ALJ's findings and conclusions did not reflect Plaintiff's physical capabilities on a sustained basis. AR 62-3 & 85-7. Clearly, Plaintiff has sought

treatment many times for his asthma but Plaintiff has also failed to complete recommended follow up care. AR 87, 430, 858 & 1064. It follows that the ALJ could reasonably conclude that Plaintiff would not miss work more than once a month for reasons related to his asthma if properly treated.

Next, Plaintiff seemingly asserts that the ALJ erred in not assessing him with additional limitations based on his mental impairments. *See* Opening Brief, p. 14. Because Plaintiff has failed to identify any appropriate limitations or to provide any supporting citations to the record, however, I decline to find any error by the ALJ in this regard. *See Keyes-Zachary v. Astrue,* 695 F.3d 1156, 1161 (10th Cir. 2012) ("We will consider and discuss only those ... contentions that have been adequately briefed for our review.").

Finally, Plaintiff argues that the ALJ erred in failing to find that he had a mentally determinable impairment of ADHD. While Plaintiff's medical records arguably support such a finding, I conclude that any error by the ALJ in this regard was harmless in light of the mental limitations that the ALJ took into account in assessing Plaintiff's RFC. *See Ray v. Colvin,* 657 Fed. App'x 733, 734 (10th Cir. 2016) (any error in failing to find an impairment medically determinable is "obviated if the ALJ considered the non-medically determinable impairment in assessing the RFC.").

Here, the ALJ noted that Plaintiff alleged that he suffered from ADHD and that he reported this alleged condition to Edward Johnson, Ph.D., who performed a psychological evaluation of Plaintiff on November 24, 2015. AR 35. The ALJ did

not include ADHD as one of Plaintiff's impairments, however, because she found that "[n]o objective evidence supports this diagnosis." *Id.* Indeed, despite diagnosing Plaintiff with ADHD, "Predominantly Inattentive Type," Dr. Johnson noted that Plaintiff "exhibited ... excellent attention and calculation skills" on the mental status examination he administered to him and rated Plaintiff's persistence and pace as "acceptable." AR 809. Dr. Johnson further opined that Plaintiff had no limitations in the areas of sustained concentration or persistence and pace. AR 810. While there are other diagnoses of ADHD in Plaintiff's medical records, related notes reflect that Plaintiff's ADHD responded to prescribed medications. AR 560, 629 & 640.

In any event, the ALJ addressed the limiting effects of Plaintiff's alleged ADHD in her consideration of those caused by Plaintiff's depression and anxiety. Specifically, the ALJ discussed Plaintiff's alleged concentration and attention difficulties and explained that she was discounting them based on test results and Plaintiff's activities of daily living. AR 39-40. The ALJ also discussed Plaintiff's social difficulties and incorporated related limitations into his RFC. *Id.* & AR 37. Any error by the ALJ in failing to find that Plaintiff had a medically determinable impairment of ADHD was therefore obviated by her consideration of the corresponding symptoms in assessing his RFC. *Ryan, supra.*

In sum then, I conclude that there is substantial evidence in the record to support the ALJ's assessment of Plaintiff's RFC.

V. Conclusion

For the reasons set forth above, IT IS HEREBY ORDERED that the Commissioner's decision is REVERSED, and the case is REMANDED for further proceedings consistent with this Order.

Dated: July 27, 2017 in Denver, Colorado.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, JUDGE