IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

PAUL DOUGLAS BRASHER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil No. 16-cv-729-JPG-CJP
	)	
NANCY J. BERRYHILL,	)	
Acting Commissioner of Social Security,	)	
	)	
Defendant.[1]	)	

MEMORANDUM and ORDER

In accordance with 42 U.S.C. § 405(g), plaintiff Paul Douglas Brasher seeks judicial review of the final agency decision denying him Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) benefits pursuant to 42 U.S.C. § 423.

Procedural History

Plaintiff applied for benefits in June 2012, alleging disability beginning on February 4, 2011. After holding an evidentiary hearing, ALJ Victoria A. Ferrer denied the application for benefits in a decision dated December 31, 2014. (Tr. 16-26). The Appeals Council denied review, and the decision of the ALJ became the final agency decision. (Tr. 1). Administrative remedies have been exhausted and a timely complaint was filed in this Court.

Issues Raised by Plaintiff

Plaintiff raises the following points:

1. The ALJ erred in finding that plaintiff had acquired transferrable skills.

[1] Nancy A. Berryhill is now the Acting Commissioner of Social Security. See, *Casey v. Berryhill*, 853 F.3d 322 (7th Cir. 2017). She is automatically substituted as defendant in this case. See Fed. R. Civ. P. 25(d); 42 U.S.C. §405(g).

2. The ALJ erred in finding that plaintiff's mental impairments were nonsevere and in failing to include any mental limitations in her residual functional capacity assessment.

3. The ALJ erred in assessing the weight to be given to the opinion of treating physician Dr. James Alexander.

4. The ALJ erred in assessing plaintiff's credibility.

Applicable Legal Standards

To qualify for DIB or SSI, a claimant must be disabled within the meaning of the applicable statutes.[2] For these purposes, "disabled" means the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A).

A "physical or mental impairment" is an impairment resulting from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques. 42 U.S.C. § 423(d)(3). "Substantial gainful activity" is work activity that involves doing significant physical or mental activities, and that is done for pay or profit. 20 C.F.R. § 404.1572.

Social Security regulations set forth a sequential five-step inquiry to determine whether a claimant is disabled. 20 C.F.R. § 404.1520. Under this procedure, it must be determined: (1) whether the claimant is presently unemployed; (2) whether the claimant has an impairment or

[2] The statutes and regulations pertaining to Disability Insurance Benefits (DIB) are found at 42 U.S.C. § 423, et seq., and 20 C.F.R. pt. 404. The statutes and regulations pertaining to SSI are found at 42 U.S.C. §§ 1382 and 1382c, et seq., and 20 C.F.R. pt. 416. As is relevant to this case, the DIB and SSI statutes are identical. Furthermore, 20 C.F.R. § 416.925 detailing medical considerations relevant to an SSI claim, relies on 20 C.F.R. Pt. 404, Subpt. P, the DIB regulations. Most citations herein are to the DIB regulations out of convenience.

combination of impairments that is serious; (3) whether the impairments meet or equal one of the listed impairments acknowledged to be conclusively disabling; (4) whether the claimant can perform past relevant work; and (5) whether the claimant is capable of performing any work within the economy, given his or her age, education and work experience. *Simila v. Astrue*, 573 F.3d 503, 512-513 (7th Cir. 2009); *Schroeter v. Sullivan*, 977 F.2d 391, 393 (7th Cir. 1992).

The Seventh Circuit Court of Appeals has explained this process as follows:

> The first step considers whether the applicant is engaging in substantial gainful activity. The second step evaluates whether an alleged physical or mental impairment is severe, medically determinable, and meets a durational requirement. The third step compares the impairment to a list of impairments that are considered conclusively disabling. If the impairment meets or equals one of the listed impairments, then the applicant is considered disabled; if the impairment does not meet or equal a listed impairment, then the evaluation continues. The fourth step assesses an applicant's residual functional capacity (RFC) and ability to engage in past relevant work. If an applicant can engage in past relevant work, he is not disabled. The fifth step assesses the applicant's RFC, as well as his age, education, and work experience to determine whether the applicant can engage in other work. If the applicant can engage in other work, he is not disabled.

Weatherbee v. Astrue, 649 F.3d 565, 568-569 (7th Cir. 2011).

This Court reviews the Commissioner's decision to ensure that the decision is supported by substantial evidence and that no mistakes of law were made. It is important to recognize that the scope of review is limited. "The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . ." 42 U.S.C. § 405(g). Thus, this Court must determine not whether Mr. Brasher was, in fact, disabled at the relevant time, but whether the ALJ's findings were supported by substantial evidence and whether any errors of law were made. *See Books v. Chater*, 91 F.3d 972, 977-78 (7th Cir. 1996) (citing *Diaz v. Chater*, 55 F.3d 300, 306 (7th Cir. 1995)).

This Court uses the Supreme Court's definition of substantial evidence, i.e., "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). In reviewing for "substantial evidence," the entire administrative record is taken into consideration, but this Court does not reweigh evidence, resolve conflicts, decide questions of credibility, or substitute its own judgment for that of the ALJ. *Brewer v. Chater*, 103 F.3d 1384, 1390 (7th Cir. 1997). However, while judicial review is deferential, it is not abject; this Court does not act as a rubber stamp for the Commissioner. *See Parker v. Astrue*, 597 F.3d 920, 921 (7th Cir. 2010), and cases cited therein.

The Decision of the ALJ

ALJ Ferrer followed the five-step analytical framework described above. She determined that plaintiff had not engaged in substantial gainful activity since the alleged onset of disability and that he was insured for DIB through June 30, 2016.[3]

The ALJ found that plaintiff had severe impairments of coronary artery disease, hypertension, degenerative disc disease of the lumbar spine, acute myocardial infarctions, chronic obstructive pulmonary disease, nicotine dependence, and hernias. She further determined that those impairments did not meet or equal a listed impairment.

The ALJ determined that plaintiff had the residual functional capacity (RFC) to perform work at the sedentary exertional level with a number of physical limitations. He was unable to do his past relevant work. Based on the testimony of a vocational expert, the ALJ found that plaintiff had some transferrable skills and was not disabled because he was able to do a job which exists in significant numbers in the local and national economies.

[3] The date last insured is relevant only to the claim for DIB.

The Evidentiary Record

The Court has reviewed and considered the entire evidentiary record in formulating this Memorandum and Order. The following summary of the record is directed to the points raised by plaintiff.

1. Agency Forms.

Plaintiff was born in 1953, and was 57 years old on the alleged onset date. (Tr. 243). He had an eighth grade education. (Tr. 248). He had worked as a seller/installer of water softener systems and as a car salesman. (Tr. 267). He described his duties as a car salesman as "Walked around car lot & sold cars. If sold, done [sic] paperwork for sale. Worked on cars as needed when Boss did not do it & car had to be ready for customer." (Tr. 273).

In July 2012, plaintiff reported that he could not stand for more than an hour and could not sit for very long. He had to move around every 15 to 20 minutes. He got in a hot shower at least twice a day and then had to lie down to relieve back pain, even though he took three Norco pills a day. (Tr. 278).

2. Evidentiary Hearing.

Mr. Brasher was represented by an attorney at the evidentiary hearing on July 16, 2014. (Tr. 34).

Plaintiff was injured on the job on February 4, 2011, and never returned to work. (Tr. 45, 48). Plaintiff took a number of pills every day, including Norco, heart medication, and nerve medication. (Tr. 49). The nerve medication was for "anger issues" and "another reason but I don't know what it is." (Tr. 51). He lived with his wife in a mobile home. His wife did all of the household chores. (Tr. 52).

Plaintiff smoked cigarettes. He had cut down from three packs a day to one pack. He had been advised to stop smoking. He said that he wished he was not still smoking, but it was hard for him to stop. (Tr. 54-55). Plaintiff got on Medicaid in January. Before that, he could not afford to see his cardiologist. (Tr. 56).

A vocational expert (VE) also testified. She categorized plaintiff's past work as a car salesman as light and skilled. The ALJ asked the VE a hypothetical question which corresponded to the ultimate RFC findings, i.e., a person of plaintiff's age and work experience who could do work at the sedentary exertional level, limited to no operation of foot controls; only occasional climbing of ramps and stairs; no climbing of ladders, ropes, or scaffolding; occasional balancing, stooping, and crouching; no kneeling or crawling; occasional exposure to extreme temperatures, vibration and loud noise; no concentrated exposure to pulmonary irritants; no work with hazardous machinery, in high exposed places, or sharp objects; and no driving. The VE testified that this person could not do plaintiff's past work because his past work was at the light exertional level.

The ALJ added that plaintiff had only an eighth grade educations and was 57 years old. The VE testified that he had transferrable skills from his work as a car salesman, consisting of "persuasive skills, customer service type skills." She testified that those skills would transfer and he would be able to do the job of telemarketer or internet car salesperson. This job would require "very little adaptation." The job required "very minimal basis computer skills." The VE testified that plaintiff should have learned computer skills as a car salesman "because all dealerships are computerized." (Tr. 61-64).

No one questioned plaintiff about whether he had any computer skills. Plaintiff's counsel did not ask the VE any questions about the transferability of skills.

3. Medical Treatment

Plaintiff went to the emergency room on the alleged date of onset, February 4, 2011, complaining of low back pain after an on-the job injury. X-rays showed no acute findings. He returned the next day complaining of continuing pain with radiation into the left thigh. His pain was relieved after administration of IV pain medication. The assessment was acute low back pain with DJD. (Tr. 384-389).

Plaintiff was treated at the Rockford Spine Center from February to June 2011. (Tr. 428-450). He said that he had a two year history of low back pain which had been exacerbated by a fall on February 4, 2011. He had a heart attack with cardiac stent placement in 2010. (Tr. 435). He was prescribed physical therapy but, in April 2011, the doctor noted that he was "not tolerating physical therapy." (Tr. 434). In June 2011, the doctor noted that a lumbar MRI was normal for his age. He recommended conservative treatment, including nonnarcotic pain medication. There was no "biomechanical restriction" on work, except as limited by his pain tolerance. (Tr. 433).

The next relevant medical treatment occurred in February 2012, when plaintiff had another heart attack. Cardiac catheterization was done and the right coronary artery was stented. He had not been taking Plavix following his prior heart attack because he could not afford it. (Tr. 487-490). He was treated following discharge by Dr. Son Phong Le and a physician's assistant at Prairie Cardiovascular Clinic. On February 17, 2012, the PA noted that he was generally doing well, but he requested a referral to Dr. Alexander as a primary care physician and to pain

management for his chronic back pain. He was to go to cardiac rehab for information but, as he had no insurance, he would not be able to afford rehab on an ongoing basis. The diagnoses were cardiovascular disease and arteriosclerotic cardiovascular disease. (Tr. 509-512). In March, the PA noted that plaintiff was smoking one pack a day, down from three. Coreg, a beta-blocker, was causing him trouble sleeping, so he was switched to another drug. He was to return in six months. (Tr. 513-516).

Plaintiff began seeing primary care physician James Alexander, M.D., in March 2012. His chief complaint was back pain. He denied anxiety and depression. The notes say he was working part-time. On exam, he had tenderness to palpation in the low back and muscle spasm. Dr. Alexander prescribed Decadron injections, Norco, and Flexeril. (Tr. 646-651). After two visits in March, the next visit was in July, 2012, when plaintiff requested that Dr. Alexander fill out forms for disability. Dr. Alexander wrote that he filled out the forms with the patient and his wife. (Tr., 657-658).

In August 2012, Dr. Alexander noted that he had been to the emergency room for anxiety. He had had some chest pain and his blood pressure and pulse had been running high. Dr. Alexander noted agitation and anger, and diagnosed generalized anxiety disorder. He prescribed alprazolam (Xanax). (Tr. 659-663). On the last visit, in November 2012, a nurse practitioner noted that he needed lab work "when he can afford it." He was in "chronic pain, but doing on 3 Norco per day." His anxiety was "much improved" with medication. Prescriptions for Norco and Ativan (an anti-anxiety medication) were refilled. (Tr. 664 -667).

4. Consultative Psychological Exam.

At the request of the agency, David Warshauer, Ph.D., performed a consultative psychological exam of plaintiff in March 2013. Dr. Warshauer concluded that plaintiff appeared somewhat depressed and somewhat anxious. He described plaintiff's affect as irritable and his mood as angry and depressed with some anxiety. He diagnosed adjustment disorder with mixed anxiety and depressed mood, as well as personality disorder. He assessed plaintiff's current GAF at 45. (Tr. 673-675).

Analysis

Plaintiff's first point, regarding transferability of skills, is well-taken. Plaintiff was 57 years old on the alleged date of onset and 61 years old on the date of the ALJ's decision. At 57, he was in the category of "advanced age" and, at 61, he was "closely approaching retirement age." 20 C.F.R. § 404.1568(d)(4). That section provides that a person of advanced age who is limited to sedentary work will be found to have transferrable skills "only if the sedentary work is so similar to your previous work that you would need to make very little, if any, vocational adjustment in terms of tools, work processes, work settings, or the industry." Claimants who are 55 or older and limited to sedentary work "cannot be expected to make a vocational adjustment to substantial changes in work simply because skilled or semiskilled jobs can be identified which have some degree of skill similarity with their PRW [past relevant work]. In order to establish transferability of skills for such individuals, the semiskilled or skilled job duties of their past work must be so closely related to other jobs which they can perform that they could be expected to perform these other identified jobs at a high degree of proficiency with a minimal amount of job orientation." SSR 82-41, 1982 WL 31389, *5.

Here, the ALJ found that plaintiff had skills that would transfer from his past work as a car salesman to the job of telemarketer and telephone/computer car salesman, DOT 299.357-014. According to the VE, plaintiff had acquired transferrable skills of "persuasive skills, customer service type skills." She testified that the telemarketer and telephone/computer car salesman job would require "little adaptation," but would require "very minimal basic computer skills." (Tr. 62-64).

Pursuant to 20 C.F.R. § 404.1568(d)(4) and SSR 82-41, the ALJ could properly find that plaintiff has transferrable skills only if he could perform the telemarketer and telephone/computer car salesman job with very little, if any, vocational adjustment and with a minimal amount of job orientation. According to the VE, the job requires some computer skills. The Court agrees with plaintiff that there is no evidence that he actually acquired the computer skills required for that job. The VE testified that plaintiff "should have" acquired computer skills in his car salesman job because "all dealerships are computerized." (Tr. 64). However, even though the dealership where he worked may have been computerized, whatever that means, there is no evidence that plaintiff himself used a computer in his past work, or that he acquired the same computer skills that are required by the telemarketer and telephone/computer car salesman job. Plaintiff points out that he has an eighth grade education and the ALJ did not ask him about computer skills.

The Commissioner argues that the plaintiff's attorney did not ask the VE any questions about transferrable skills. This argument ignores the fact that the Commissioner bears the burden of proving at step five that there are other jobs which the plaintiff is capable of performing. *Ghiselli v. Colvin*, 837 F.3d 771, 776 (7th Cir. 2016). The Commissioner also cites to Tr. 273, a Work History Report submitted by plaintiff, but that report says nothing about computer usage.

In the absence of evidence that plaintiff had the required computer skills, the finding that plaintiff has transferrable skills is not supported by substantial evidence.

The Court also agrees that the ALJ's finding that plaintiff had no mental limitations was not supported by substantial evidence. In making this finding, the ALJ rejected Dr. Warshauer's opinion. Dr. Warshauer examined plaintiff at the request of the agency. As such, he was unlikely to exaggerate plaintiff's disability. *Garcia v. Colvin*, 741 F.3d 758, 761 (7th Cir. 2013). "An ALJ can reject an examining physician's opinion only for reasons supported by substantial evidence in the record; a contradictory opinion of a non-examining physician does not, by itself, suffice." *Gudgel v. Barnhart*, 345 F.3d 467, 470 (7th Cir. 2003).

The ALJ rejected Dr. Warshauer's opinion because plaintiff did not have "specialized mental health treatment" and because had not "consistently complained of psychiatric symptoms to his treating doctors." (Tr. 20). The first reason is not valid because it ignores the fact that plaintiff received mental health treatment from Dr. Alexander in the form of medication for anxiety. Further, the medical records established that plaintiff had no insurance and had to forego needed medical care because he could not afford it. See, e.g., Tr. 487-490, 509-512, 664-667. It was not until January 2014 that he got on Medicaid. (Tr. 56). The ALJ erred in failing to consider whether the lack of specialized mental health care was due to plaintiff's inability to afford treatment. *Garcia v. Colvin*, 741 F.3d 758, 761-762 (7th Cir. 2013). The meaning of the second reason is unclear; it is obvious that plaintiff complained of "psychiatric symptoms" to Dr. Alexander.

Lastly, in view of the addictiveness of cigarettes, the credibility determination was erroneous insofar as it relied on the fact that plaintiff continued to smoke. *Shramek v. Apfel*, 226

F.3d 809, 813 (7th Cir. 2000).

Because of the above errors, the Commissioner's decision must be reversed and remanded for further proceedings. The Court wishes to stress that this Memorandum and Order should not be construed as an indication that the Court believes that plaintiff is disabled or that he should be awarded benefits. On the contrary, the Court has not formed any opinions in that regard, and leaves those issues to be determined by the Commissioner after further proceedings.

Conclusion

The Commissioner's final decision denying Paul Douglas Brasher's application for social security disability benefits is **REVERSED and REMANDED** to the Commissioner for rehearing and reconsideration of the evidence, pursuant to sentence four of **42 U.S.C. §405(g).**

The Clerk of Court is directed to enter judgment in favor of plaintiff.

IT IS SO ORDERED.

DATE: 7/19/2017

s/J. Phil Gilbert
J. PHIL GILBERT
U.S. DISTRICT JUDGE