

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

GREGORY CUNNINGHAM,

Plaintiff,

vs.

Case No. 12-1234-SAC

CAROLYN W. COLVIN,  
Acting Commissioner of  
Social Security,<sup>1</sup>

Defendant.

MEMORANDUM AND ORDER

This is an action reviewing the final decision of the Commissioner of Social Security denying the plaintiff supplemental security income payments. The matter has been fully briefed by the parties.

**I. General legal standards**

The court's standard of review is set forth in 42 U.S.C. § 405(g), which provides that "the findings of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." The court should review the Commissioner's decision to determine only whether the decision was supported by substantial evidence and whether the Commissioner applied the correct legal standards. Glenn v. Shalala, 21 F.3d 983, 984 (10th Cir. 1994). Substantial evidence requires more than a

---

<sup>1</sup> Carolyn W. Colvin became Acting Commissioner of Social Security on February 14, 2013, replacing Michael J. Astrue, the former Commissioner of Social Security.

scintilla, but less than a preponderance, and is satisfied by such evidence that a reasonable mind might accept to support the conclusion. The determination of whether substantial evidence supports the Commissioner's decision is not simply a quantitative exercise, for evidence is not substantial if it is overwhelmed by other evidence or if it really constitutes mere conclusion. Ray v. Bowen, 865 F.2d 222, 224 (10th Cir. 1989). Although the court is not to reweigh the evidence, the findings of the Commissioner will not be mechanically accepted. Nor will the findings be affirmed by isolating facts and labeling them substantial evidence, as the court must scrutinize the entire record in determining whether the Commissioner's conclusions are rational. Graham v. Sullivan, 794 F. Supp. 1045, 1047 (D. Kan. 1992). The court should examine the record as a whole, including whatever in the record fairly detracts from the weight of the Commissioner's decision and, on that basis, determine if the substantiality of the evidence test has been met. Glenn, 21 F.3d at 984.

The Social Security Act provides that an individual shall be determined to be under a disability only if the claimant can establish that they have a physical or mental impairment expected to result in death or last for a continuous period of twelve months which prevents the claimant from engaging in substantial gainful activity (SGA). The claimant's physical or

mental impairment or impairments must be of such severity that they are not only unable to perform their previous work but cannot, considering their 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).

The Commissioner has established a five-step sequential evaluation process to determine disability. If at any step a finding of disability or non-disability can be made, the Commissioner will not review the claim further. At step one, the agency will find non-disability unless the claimant can show that he or she is not working at a "substantial gainful activity." At step two, the agency will find non-disability unless the claimant shows that he or she has a "severe impairment," which is defined as any "impairment or combination of impairments which significantly limits [the claimant's] physical or mental ability to do basic work activities." At step three, the agency determines whether the impairment which enabled the claimant to survive step two is on the list of impairments presumed severe enough to render one disabled. If the claimant's impairment does not meet or equal a listed impairment, the inquiry proceeds to step four, at which the agency assesses whether the claimant can do his or her previous work; unless the claimant shows that he or she cannot perform their previous work, they are determined not to be disabled. If

the claimant survives step four, the fifth and final step requires the agency to consider vocational factors (the claimant's age, education, and past work experience) and to determine whether the claimant is capable of performing other jobs existing in significant numbers in the national economy. Barnhart v. Thomas, 124 S. Ct. 376, 379-380 (2003).

The claimant bears the burden of proof through step four of the analysis. Nielson v. Sullivan, 992 F.2d 1118, 1120 (10<sup>th</sup> Cir. 1993). At step five, the burden shifts to the Commissioner to show that the claimant can perform other work that exists in the national economy. Nielson, 992 F.2d at 1120; Thompson v. Sullivan, 987 F.2d 1482, 1487 (10<sup>th</sup> Cir. 1993). The Commissioner meets this burden if the decision is supported by substantial evidence. Thompson, 987 F.2d at 1487.

Before going from step three to step four, the agency will assess the claimant's residual functional capacity (RFC). This RFC assessment is used to evaluate the claim at both step four and step five. 20 C.F.R. §§ 404.1520(a)(4), 404.1520(e,f,g); 416.920(a)(4), 416.920(e,f,g).

## **II. History of case**

On April 15, 2011, administrative law judge (ALJ) James Harty issued his decision (R. at 10-19). Plaintiff alleges that he has been disabled since August 31, 2007 (R. at 10). At step one, the ALJ found that plaintiff has not engaged in substantial

gainful activity since plaintiff's application date of October 29, 2008 (R. at 12). At step two, the ALJ found that plaintiff has the following severe impairments: plantar fasciitis; lower extremity neuropathy; bipolar disorder; mood disorder not otherwise specified; anxiety disorder not otherwise specified; generalized anxiety disorder; antisocial personality disorder; and personality disorder not otherwise specified with antisocial traits (R. at 12). At step three, the ALJ determined that plaintiff's impairments do not meet or equal a listed impairment (R. at 12). After determining plaintiff's RFC (R. at 14), the ALJ determined at step four that plaintiff is unable to perform any past relevant work (R. at 18). At step five, the ALJ determined that plaintiff could perform other jobs that exist in significant numbers in the national economy (R. at 18-19). Therefore, the ALJ concluded that plaintiff was not disabled (R. at 19).

**III. Did the ALJ err in the relative weight given to various medical opinions?**

On June 2, 2009, Dr. Stern prepared a state agency mental RFC assessment opining that plaintiff had moderate limitations in the ability to understand, remember and carry out detailed instructions, interact appropriately with the general public, and get along with coworkers or peers without distracting them or exhibiting behavioral extremes. Dr. Stern indicated that

plaintiff would be best suited to work that only requires that he remember and carry out simple instructions, and that he not require frequent interactions with the general public or coworkers (R. at 311-313). On January 16, 2010, Dr. Schulman affirmed this assessment (R. at 395).

A second state agency mental RFC assessment was prepared by Dr. Shwetz on March 9, 2010. Dr. Shwetz found plaintiff not only moderately limited in the above categories identified by Dr. Stern, but also found her moderately limited in these additional categories:

The ability to maintain attention and concentration for extended periods.

The ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances.

The ability to work in coordination with or proximity to others without being distracted by them.

The ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods.

The ability to accept instructions and respond appropriately to criticism from supervisors.

The ability to maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness.

The ability to respond appropriately to changes in the work setting.

The ability to set realistic goals or make plans independently of others.

(R. at 418-419). Dr. Shwetz indicated that plaintiff would be best working at simple routine tasks in a structured quiet setting with clear work performance expectations and little distraction. She further stated that plaintiff would have difficulty being reliably consistent in pace and persistence. Plaintiff would need to work with a patient and nonthreatening supervisor who can give timely and constructive feedback, and would need to work with minimal changes and decision-making (R. at 420). Dr. Shwetz provided a very detailed explanation for making findings which were more restrictive than those of Dr. Stern (R. at 417). These two opinions provide the only detailed assessments of plaintiff's mental limitations.

The ALJ found that the opinions of Dr. Stern/Dr. Schulman were "consistent with the overall record and are given some weight." The ALJ found that the opinion of Dr. Shwetz is "not consistent with the overall record and is given little weight" (R. at 17). In his RFC findings, the ALJ included the following mental limitations:

He is limited to simple, routine, repetitive tasks, not performed in a fast-paced production environment, involving only simple work-related decisions and in general few work place changes. He is limited to

occasional interaction with coworkers,  
supervisors, and the general public.

(R. at 14). Thus, the ALJ's RFC findings incorporate all of the limitations contained in the assessment by Dr. Stern, but only incorporate a few of the additional limitations found by Dr. Shwetz.

At the hearing, the vocational expert (VE) found that plaintiff, given the ALJ's RFC findings, could perform other work in the national economy (R. at 51-52). However, the VE further testified that a person with the limitations contained in the assessment by Dr. Shwetz would preclude competitive employment (R. at 52-54).

An ALJ must evaluate every medical opinion in the record. Hamlin v. Barnhart, 365 F.3d 1208, 1215 (10th Cir. 2004). The ALJ "will" evaluate every medical opinion that they receive, and will consider a number of factors in deciding the weight to give to any medical opinion. Hamlin, 365 F.3d at 1215; 20 C.F.R. §§ 404.1527(c), 416.927(c).

As noted above, the ALJ found that the assessment by Dr. Stern was consistent with the overall record, and was given some weight, while the assessment by Dr. Shwetz was not consistent with the overall record and was given little weight. The court finds that such a summary conclusion that the assessment was or was not consistent with the overall record is beyond meaningful



judicial review. In the absence of ALJ findings supported by specific weighing of the evidence, the court cannot assess whether relevant evidence supports the ALJ's conclusion that an assessment was or was not consistent with the overall record. See Clifton v. Chater, 79 F.3d 1007, 1009 (10<sup>th</sup> Cir. 1996). Boilerplate, conclusory statements must be linked to evidence in the record. See Hardman v. Barnhart, 362 F.3d 676, 679 (10<sup>th</sup> Cir. 2004). Conclusory statements do not provide justification for rejecting a medical source opinion; the Commissioner must give specific, legitimate reasons for rejecting the medical source opinion. Reyes v. Bowen, 845 F.2d 242, 245 (10<sup>th</sup> Cir. 1988). Other than making conclusory statements, the ALJ provided no explanation for why one assessment was consistent with the evidence, while the other assessment was not consistent with the evidence. Nothing in the ALJ's decision explains the basis for these conclusory statements by the ALJ. Therefore, this case shall be remanded in order for the ALJ to explain why greater weight was given to the assessment by Dr. Stern, and little weight was given to the assessment by Dr. Shwetz.

As noted above, and by defendant in her brief (Doc. 19 at 17), it appears that the ALJ included a few, but not many of the additional limitations opined by Dr. Shwetz. However, an ALJ should explain why he rejected some limitations contained in an assessment, but appeared to adopt other limitations contained in

the assessment. Haga v. Astrue, 482 F.3d 1205, 1208 (10<sup>th</sup> Cir. 2007). The ALJ offered no explanation for appearing to adopt some of the limitations set out by Dr. Shwetz, but rejecting others. On remand, the ALJ must comply with this requirement.

**IV. Did the ALJ err in his credibility analysis?**

Plaintiff also asserts error by the ALJ in his credibility findings. The court will not address this issue because it may be affected by the ALJ's resolution of the case on remand after providing a legally sufficient explanation for the weight accorded to the medical source opinions, particularly those of Dr. Stern and Dr. Shwetz. See Robinson v. Barnhart, 366 F.3d 1078, 1085 (10<sup>th</sup> Cir. 2004).

IT IS THEREFORE ORDERED that the judgment of the Commissioner is reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this memorandum and order.

Dated this 28th day of August 2013, Topeka, Kansas.

s/ Sam A. Crow  
Sam A. Crow, U.S. District Senior Judge