

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division**

GEORGE FLORES,

Plaintiff,

v.

**NANCY A. BERRYHILL,
Acting Commissioner of Social Security,**

Defendant.¹

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Civil No. TMD 16-3430

**MEMORANDUM OPINION GRANTING PLAINTIFF’S
ALTERNATIVE MOTION FOR REMAND**

Plaintiff George Flores seeks judicial review under 42 U.S.C. §§ 405(g) and 1383(c)(3) of a final decision of the Commissioner of Social Security (“Defendant” or the “Commissioner”) denying his applications for disability insurance benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI of the Social Security Act. Before the Court are Plaintiff’s Motion for Summary Judgment and alternative motion for remand (ECF No. 15) and Defendant’s Motion for Summary Judgment (ECF No. 21).² Plaintiff contends that the administrative record does not contain substantial evidence to support the Commissioner’s

¹ On January 23, 2017, Nancy A. Berryhill became the Acting Commissioner of Social Security. She is, therefore, substituted as Defendant in this matter. *See* 42 U.S.C. § 405(g); Fed. R. Civ. P. 25(d).

² The Fourth Circuit has noted that, “in social security cases, we often use summary judgment as a procedural means to place the district court in position to fulfill its appellate function, not as a device to avoid nontriable issues under usual Federal Rule of Civil Procedure 56 standards.” *Walls v. Barnhart*, 296 F.3d 287, 289 n.2 (4th Cir. 2002). For example, “the denial of summary judgment accompanied by a remand to the Commissioner results in a judgment under sentence four of 42 U.S.C. § 405(g), which is immediately appealable.” *Id.*

decision that he is not disabled. No hearing is necessary. L.R. 105.6. For the reasons that follow, Plaintiff's alternative motion for remand (ECF No. 15) is **GRANTED**.

I

Background

Plaintiff previously worked as a cleaner. R. at 59, 61. Plaintiff protectively filed applications for DIB and for SSI on March 4, 2013, alleging disability beginning on October 15, 2011. R. at 10. The Commissioner denied Plaintiff's applications initially and again on reconsideration, so Plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). R. at 86-157, 163-76, 179-91. On January 28, 2015, ALJ Edgardo Rodríguez-Quilichini held a hearing in Orlando, Florida, at which Plaintiff and a vocational expert ("VE") testified. R. at 41-64. On March 6, 2015, the ALJ issued a decision finding Plaintiff not disabled from the alleged onset date of disability of October 15, 2011, through the date of the decision. R. at 7-40. Plaintiff sought review of this decision by the Appeals Council, which denied Plaintiff's request for review on August 10, 2016. R. at 1-6. The ALJ's decision thus became the final decision of the Commissioner. *See* 20 C.F.R. §§ 404.981, 416.1481; *see also Sims v. Apfel*, 530 U.S. 103, 106-07, 120 S. Ct. 2080, 2083 (2000).

On October 13, 2016, Plaintiff filed a complaint in this Court seeking review of the Commissioner's decision. After the parties consented, this case was transferred to a United States Magistrate Judge for final disposition and entry of judgment. The case then was reassigned to the undersigned. The parties have briefed the issues, and the matter is now fully submitted.

II

Summary of Evidence

A. Plaintiff's Testimony

The ALJ summarized Plaintiff's testimony in his decision:

At [the] hearing, [Plaintiff] testified that he resided in his car. He claimed he last worked last year for less than 2 months. He indicated he stopped because he had an accident on the job. He acknowledged working in 2012 and 2013 as well. At first, he stated his job in 2012 ended because he was not getting enough hours and then he alleged they terminated him because of his attitude and his behavior. He claimed his worst condition was his mental problems. He testified that he would hear and see thing[s] and he would not sleep. He indicated he last hallucinated 2 to 3 weeks earlier and he alleged his medications were not helping this problem. He reported he [was] treated at the clinic for his hallucinations and while he claimed he was given medication for this problem, he was not able to recall what medications he was taking on his own. He indicated he was depressed and felt hopeless. He also stated he suffered from neck and back pain and severe arthritis that was in his joints and bones. He alleged he had high blood pressure and cardiac issues and he would get chest pains and panic attacks. He reported he had had . . . three stents placed and he would [get] chest pains daily. He stated he used nitroglycerin for this problem and in the past he had had to take as much as 4-5 doses in one day. He also indicated he had difficulty breathing. He claimed he did not smoke and he had not used drugs in a year or longer. While he alleged in an average day he would spend most of his time in bed, as his medications made him drowsy, he also admitted he was able to drive. He indicated he did not watch television or read and he did not attend religious services. However, he conceded he was able to stand and sit for 2 to 3 hours at a time. He testified he had no friends and he would isolate himself and avoided people because he felt hopeless. Although he claimed he did not shop, he admitted he would go to Publix to get a sandwich.

R. at 18; *see* R. at 45-58.

B. VE Testimony

The VE testified that a hypothetical individual with the same age, education, and work experience as Plaintiff and with the residual functional capacity ("RFC") outlined below in Part

III could perform Plaintiff's past work as a cleaner. R. at 59-61. According to the VE, his testimony was consistent with the *Dictionary of Occupational Titles*.³ R. at 63.

III

Summary of ALJ's Decision

On March 6, 2015, the ALJ found that Plaintiff (1) had not engaged in substantial gainful activity since the alleged onset date of disability of October 15, 2011; and (2) had an impairment or a combination of impairments considered to be "severe" on the basis of the requirements in the Code of Federal Regulations; but (3) did not have an impairment or a combination of impairments meeting or equaling one of the impairments set forth in 20 C.F.R. pt. 404, subpt. P, app. 1; and (4) was able to perform his past relevant work as a cleaner. R. at 12-32. The ALJ thus found that he was not disabled from October 15, 2011, through the date of the decision. R. at 32.

In so finding, the ALJ found that Plaintiff had (1) mild restriction in activities of daily living; (2) moderate difficulties in social functioning; (3) moderate difficulties with regard to concentration, persistence, or pace; and (4) experienced no episodes of decompensation of extended duration. R. at 13-17. The ALJ found: "As [Plaintiff] is able to drive, has worked at numerous places since the alleged onset date and as his memory, concentration and attention appear to be adequate, despite his drug use, I find moderate limitations in this area" regarding concentration, persistence, or pace. R. at 16. The ALJ then found that Plaintiff had the RFC

³ "The Social Security Administration has taken administrative notice of the *Dictionary of Occupational Titles*, which is published by the Department of Labor and gives detailed physical requirements for a variety of jobs." *Massachi v. Astrue*, 486 F.3d 1149, 1152 n.8 (9th Cir. 2007); see *Pearson v. Colvin*, 810 F.3d 204, 205 n.1 (4th Cir. 2015); *DeLoatche v. Heckler*, 715 F.2d 148, 151 n.2 (4th Cir. 1983); 20 C.F.R. §§ 404.1566(d)(1), 416.966(d)(1). "Information contained in the [*Dictionary of Occupational Titles*] is not conclusive evidence of the existence of jobs in the national economy; however, it can be used to establish a rebuttable presumption." *English v. Shalala*, 10 F.3d 1080, 1085 (4th Cir. 1993).

to perform less than a full range of light work as defined in 20 CFR 404.1567(b) and 416.967(b). He can lift, carry, push and/or pull twenty (20) pounds occasionally and ten (10) pounds frequently. He can stand and walk for approximately six (6) hours and can sit for approximately six (6) hours in an 8-hour workday with normal breaks. He can climb stairs, stoop, kneel, crouch and crawl occasionally, but should never climb ladders or scaffolds. He must avoid moderate exposure to extreme heat, cold, wetness, humidity, and irritants such as fumes, odors, dust and gases. He must avoid exposure to vibration, unprotected heights and hazardous machinery. His work is limited to simple, routine, and repetitive tasks. This person should have no interaction with the general public unless it is merely superficial, and only occasional interaction with co-workers.

R. at 17-18.

IV

Disability Determinations and Burden of Proof

The Social Security Act defines a disability as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A); 20 C.F.R. §§ 404.1505, 416.905. A claimant has a disability when the claimant 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 significant numbers either in the region where such individual lives or in several regions of the country.” 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step sequential evaluation process outlined in the regulations. 20 C.F.R. §§ 404.1520, 416.920; *see Barnhart v. Thomas*, 540 U.S. 20, 24-25, 124 S. Ct. 376, 379-80 (2003). “If at any step a finding of disability or nondisability can be made, the [Commissioner] will not review the claim further.” *Thomas*, 540 U.S. at 24, 124 S. Ct. at

379; *see* 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). The claimant has the burden of production and proof at steps one through four. *See Bowen v. Yuckert*, 482 U.S. 137, 146 n.5, 107 S. Ct. 2287, 2294 n.5 (1987); *Radford v. Colvin*, 734 F.3d 288, 291 (4th Cir. 2013).

First, the Commissioner will consider a claimant's work activity. If the claimant is engaged in substantial gainful activity, then the claimant is not disabled. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i).

Second, if the claimant is not engaged in substantial gainful activity, the Commissioner looks to see whether the claimant has a "severe" impairment, i.e., an impairment or combination of impairments that significantly limits the claimant's physical or mental ability to do basic work activities. *Pass v. Chater*, 65 F.3d 1200, 1203 (4th Cir. 1995); *see* 20 C.F.R. §§ 404.1520(c), 404.1521(a), 416.920(c), 416.921(a).⁴

Third, if the claimant has a severe impairment, then the Commissioner will consider the medical severity of the impairment. If the impairment meets or equals one of the presumptively disabling impairments listed in the regulations, then the claimant is considered disabled, regardless of age, education, and work experience. 20 C.F.R. §§ 404.1520(a)(4)(iii), 404.1520(d), 416.920(a)(4)(iii), 416.920(d); *see Radford*, 734 F.3d at 293.

Fourth, if the claimant's impairment is severe, but it does not meet or equal one of the presumptively disabling impairments, then the Commissioner will assess the claimant's RFC to determine the claimant's "ability to meet the physical, mental, sensory, and other requirements"

⁴ The ability to do basic work activities is defined as "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. §§ 404.1521(b), 416.921(b). These abilities and aptitudes include (1) physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; (2) capacities for seeing, hearing, and speaking; (3) understanding, carrying out, and remembering simple instructions; (4) use of judgment; (5) responding appropriately to supervision, co-workers, and usual work situations; and (6) dealing with changes in a routine work setting. *Id.* §§ 404.1521(b)(1)-(6), 416.921(b)(1)-(6); *see Yuckert*, 482 U.S. at 141, 107 S. Ct. at 2291.

of the claimant's past relevant work. 20 C.F.R. §§ 404.1520(a)(4)(iv), 404.1545(a)(4), 416.920(a)(4)(iv), 416.945(a)(4). RFC is a measurement of the most a claimant can do despite his or her limitations. *Hines v. Barnhart*, 453 F.3d 559, 562 (4th Cir. 2006); see 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1). The claimant is responsible for providing evidence the Commissioner will use to make a finding as to the claimant's RFC, but the Commissioner is responsible for developing the claimant's "complete medical history, including arranging for a consultative examination(s) if necessary, and making every reasonable effort to help [the claimant] get medical reports from [the claimant's] own medical sources." 20 C.F.R. §§ 404.1545(a)(3), 416.945(a)(3). The Commissioner also will consider certain non-medical evidence and other evidence listed in the regulations. See *id.* If a claimant retains the RFC to perform past relevant work, then the claimant is not disabled. *Id.* §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

Fifth, if the claimant's RFC as determined in step four will not allow the claimant to perform past relevant work, then the burden shifts to the Commissioner to prove that there is other work that the claimant can do, given the claimant's RFC as determined at step four, age, education, and work experience. See *Hancock v. Astrue*, 667 F.3d 470, 472-73 (4th Cir. 2012). The Commissioner must prove not only that the claimant's RFC will allow the claimant to make an adjustment to other work, but also that the other work exists in significant numbers in the national economy. See *Walls*, 296 F.3d at 290; 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). If the claimant can make an adjustment to other work that exists in significant numbers in the national economy, then the Commissioner will find that the claimant is not disabled. If the claimant cannot make an adjustment to other work, then the Commissioner will find that the claimant is disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

Substantial Evidence Standard

The Court reviews an ALJ's decision to determine whether the ALJ applied the correct legal standards and whether the factual findings are supported by substantial evidence. *See Craig v. Chater*, 76 F.3d 585, 589 (4th Cir. 1996). In other words, the issue before the Court "is not whether [Plaintiff] is disabled, but whether the ALJ's finding that [Plaintiff] is not disabled is supported by substantial evidence and was reached based upon a correct application of the relevant law." *Id.* The Court's review is deferential, as "[t]he 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). Under this standard, substantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion. *See Hancock*, 667 F.3d at 472; *see also Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427 (1971).

In evaluating the evidence in an appeal of a denial of benefits, the court does "not conduct a *de novo* review of the evidence," *Smith v. Schweiker*, 795 F.2d 343, 345 (4th Cir. 1986), or undertake to reweigh conflicting evidence, make credibility determinations, or substitute its judgment for that of the Commissioner. *Hancock*, 667 F.3d at 472. Rather, "[t]he duty to resolve conflicts in the evidence rests with the ALJ, not with a reviewing court." *Smith v. Chater*, 99 F.3d 635, 638 (4th Cir. 1996). When conflicting evidence allows reasonable minds to differ as to whether a claimant is disabled, the responsibility for that decision falls on the ALJ. *Johnson v. Barnhart*, 434 F.3d 650, 653 (4th Cir. 2005) (*per curiam*).

VI

Discussion

Among Plaintiff's arguments is his contention that the ALJ erroneously assessed his RFC. Pl.'s Mem. Supp. Mot. Summ. J. 3-8, ECF No. 15-1. In particular, Plaintiff maintains that, although the ALJ determined that he had moderate difficulties with regard to concentration persistence, or pace, the ALJ failed to include any limitation on concentration or task persistence in the RFC assessment, instead limiting him to the performance of simple, routine, and repetitive tasks. *Id.* at 6-7; *see R.* at 17-18. As discussed below, because inadequacy of the ALJ's analysis frustrates meaningful review, the Court remands this case for further proceedings.

Social Security Ruling⁵ 96-8p explains how adjudicators should assess RFC and instructs that the RFC

“assessment must first identify the individual's functional limitations or restrictions and assess his or her work-related abilities on a function-by-function basis, including the functions” listed in the regulations. “Only after that may [residual functional capacity] be expressed in terms of the exertional levels of work, sedentary, light, medium, heavy, and very heavy.” The Ruling further explains that the residual functional capacity “assessment must include a narrative discussion describing how the evidence supports each conclusion, citing specific medical facts (e.g., laboratory findings) and nonmedical evidence (e.g., daily activities, observations).”

Mascio v. Colvin, 780 F.3d 632, 636 (4th Cir. 2015) (alteration in original) (footnote omitted) (citations omitted). The Fourth Circuit has held, however, that a per se rule requiring remand when the ALJ does not perform an explicit function-by-function analysis “is inappropriate given

⁵ Social Security Rulings are “final opinions and orders and statements of policy and interpretations” that the Social Security Administration has adopted. 20 C.F.R. § 402.35(b)(1). Once published, these rulings are binding on all components of the Social Security Administration. *Heckler v. Edwards*, 465 U.S. 870, 873 n.3, 104 S. Ct. 1532, 1534 n.3 (1984); 20 C.F.R. § 402.35(b)(1). “While they do not have the force of law, they are entitled to deference unless they are clearly erroneous or inconsistent with the law.” *Pass*, 65 F.3d at 1204 n.3.

that remand would prove futile in cases where the ALJ does not discuss functions that are ‘irrelevant or uncontested.’” *Id.* (quoting *Cichocki v. Astrue*, 729 F.3d 172, 177 (2d Cir. 2013) (per curiam)). Rather, remand may be appropriate “where an ALJ fails to assess a claimant’s capacity to perform relevant functions, despite contradictory evidence in the record, or where other inadequacies in the ALJ’s analysis frustrate meaningful review.” *Id.* (quoting *Cichocki*, 729 F.3d at 177). The court in *Mascio* concluded that remand was appropriate because it was “left to guess about how the ALJ arrived at his conclusions on [the claimant’s] ability to perform relevant functions” because the ALJ had “said nothing about [the claimant’s] ability to perform them for a full workday,” despite conflicting evidence as to the claimant’s RFC that the ALJ did not address. *Id.* at 637; see *Monroe v. Colvin*, 826 F.3d 176, 187-88 (4th Cir. 2016) (remanding because ALJ erred in not determining claimant’s RFC using function-by-function analysis; ALJ erroneously expressed claimant’s RFC first and then concluded that limitations caused by claimant’s impairments were consistent with that RFC).

The Fourth Circuit further held in *Mascio* that “an ALJ does not account ‘for a claimant’s limitations in concentration, persistence, and pace by restricting the hypothetical question to simple, routine tasks or unskilled work.’” *Mascio*, 780 F.3d at 638 (quoting *Winschel v. Comm’r of Soc. Sec.*, 631 F.3d 1176, 1180 (11th Cir. 2011)). “[T]he ability to perform simple tasks differs from the ability to stay on task. Only the latter limitation would account for a claimant’s limitation in concentration, persistence, or pace.” *Id.* The court in *Mascio* remanded the case for the ALJ to explain why the claimant’s moderate limitation in concentration, persistence, or pace at step three did not translate into a limitation in the claimant’s RFC. *Id.* In other words, “[p]ursuant to *Mascio*, once an ALJ has made a step three finding that a claimant suffers from moderate difficulties in concentration, persistence, or pace, the ALJ must either include a

corresponding limitation in her RFC assessment, or explain why no such limitation is necessary.” *Talmo v. Comm’r, Soc. Sec.*, Civil Case No. ELH-14-2214, 2015 WL 2395108, at *3 (D. Md. May 19, 2015), *report and recommendation adopted* (D. Md. June 5, 2015).

Here, the ALJ’s RFC assessment limiting Plaintiff to performing “simple, routine, and repetitive tasks,” with “no interaction with the general public unless it is merely superficial” and “only occasional interaction with co-workers” (R. at 18; *see* R. at 60) does not account for Plaintiff’s moderate difficulties in maintaining concentration, persistence, or pace. *See Mascio*, 780 F.3d at 638; *Stewart v. Astrue*, 561 F.3d 679, 684-85 (7th Cir. 2009) (*per curiam*) (rejecting contention that “the ALJ accounted for [the claimant’s] limitations of concentration, persistence, and pace by restricting the inquiry to simple, routine tasks that do not require constant interactions with coworkers or the general public”); 20 C.F.R. pt. 404, subpt. P, app. 1 § 12.00(C)(2). *But see Hillard v. Colvin*, Civil Action No. ADC-15-1442, 2016 WL 3042954, at *6 (D. Md. May 26, 2016) (“The ALJ additionally accounted for Plaintiff’s limitation in concentration and persistence by restricting him to work ‘without frequent interaction with co-workers or the public.’”); *Linares v. Colvin*, No. 5:14-CV-00120, 2015 WL 4389533, at *4 (W.D.N.C. July 17, 2015) (“The ALJ accounted for Plaintiff’s limitation in pace by restricting her to ‘nonproduction pace,’ and he accounted for her limitation in concentration and persistence by restricting her to a stable work environment with only occasional public contact.”). “[T]he issue in this case is not whether the record contains evidence that might support the ALJ’s conclusions; it is whether the ALJ explained the apparent discrepancy between [his] step three finding and [his] RFC assessment.” *Talmo*, 2015 WL 2395108, at *3. In short, the ALJ’s RFC assessment does not address Plaintiff’s ability to stay on task, and the Court is left to guess how the ALJ accounted for this ability despite finding that Plaintiff has moderate difficulties in

maintaining concentration, persistence, or pace. The ALJ, moreover, failed to explain why no such limitation was necessary in the RFC assessment. R. at 15-31. Absent an accurate and logical bridge from the evidence to the ALJ's conclusion, the Court cannot say that substantial evidence supports the ALJ's decision. *See Monroe*, 826 F.3d at 189. Because the inadequacy of the ALJ's analysis frustrates meaningful review, remand under the fourth sentence of 42 U.S.C. § 405(g) is appropriate, *see Mascio*, 780 F.3d at 636, and the Court need not address Plaintiff's remaining arguments.

VII

Conclusion

For the foregoing reasons, Defendant's Motion for Summary Judgment (ECF No. 21) is **DENIED**. Plaintiff's Motion for Summary Judgment (ECF No. 15) is **DENIED**. Plaintiff's alternative motion for remand (ECF No. 15) is **GRANTED**. Defendant's final decision is **REVERSED** under the fourth sentence of 42 U.S.C. § 405(g). This matter is **REMANDED** for further proceedings consistent with this opinion. A separate order will issue.

Date: March 15, 2018

/s/
Thomas M. DiGirolamo
United States Magistrate Judge