UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

ROBERT L. FOSTER,

Plaintiff,

v.

Case Number 09-11922-BC
Honorable Thomas L. Ludington

MICHAEL J. ASTRUE, Commissioner of Social Security,

Defendant.
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ORDER OVERRULING PLAINTIFF'S OBJECTION, ADOPTING JUDGE WHALEN'S REPORT AND RECOMMENDATION, DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND DISMISSING PLAINTIFF'S COMPLAINT WITH PREJUDICE

Magistrate Judge R. Steven Whalen issued a report and recommendation [Dkt. # 21] on May 5, 2010, recommending that the Court deny Plaintiff Robert L. Foster's motion for summary judgment [Dkt. # 16], grant Defendant Commissioner of Social Security's motion for summary judgment [Dkt. # 19], and dismiss Plaintiff's complaint [Dkt. # 1] with prejudice.

Any party may serve and file written objections to a report and recommendation "[w]ithin fourteen days after being served with a copy" of the report. 28 U.S.C. § 636(b)(1). Plaintiff filed objections on May 18, 2010 [Dkt. # 22] and Defendant filed a response on June 1, 2010 [Dkt. # 23]. The district court is to make a "de novo determination of those portions of the report . . . to which objection is made." *Id.* The Court is not obligated to further review the portions of the report to which no objection was made. *Thomas v. Arn*, 474 U.S. 140, 149–52 (1985).

As an initial matter, Plaintiff's "objections" to Judge Whalen's report and recommendation consist largely of a summary of the most salient points from his motion for summary judgment [Dkt. # 16] and his response to Defendant's motion for summary judgment [Dkt. # 20]. It is difficult to

characterize the objections as "specific," as the Federal Rules of Civil Procedure require. Fed. R. Civ. P. 72(b)(2) ("[A] party may serve and file *specific written objections* to the proposed findings and recommendations.") (emphasis added). Moreover, Plaintiff's objections focus on errors allegedly made by the ALJ, not Judge Whalen. Nevertheless, Plaintiff is entitled to "fresh consideration" of those portions of the record which are relevant to his objections. 12 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §3070.2 (2d ed. 1997 & supp. 2010). After considering Plaintiff's objections, the Court agrees with Judge Whalen's conclusion that the ALJ's determination was supported by "substantial evidence." 42 U.S.C. § 405(g). Accordingly, Plaintiff's complaint will be dismissed.

I

The Commissioner of Social Security determines whether a claimant is disabled in accordance with a five-step process. 20 C.F.R. § 404.1520(a)(4)(i)–(v). A claim is allowed when a claimant demonstrates that (1) she is not engaged in substantial gainful employment; (2) she suffers from a severe impairment; and (3) the impairment meets or is equal to a "listed impairment." If the claimant does not satisfy the third step, the claim is still allowed if the fourth and fifth steps are satisfied. In step four, the claimant must show that she does not retain the residual functional capacity to perform her relevant past work. 20 C.F.R. § 416.920(a)(4)(i)-(iv). At the fifth and final step, the Commissioner determines whether the claimant is able to perform any other gainful employment in light of the claimant's residual functional capacity ("RFC"), age, education, and work experience. 20 C.F.R. § 416.920(a)(4)(v).

The Court reviews the Commissioner's decision to determine whether the "factual findings . . . are supported by substantial evidence." *Tyra v. Sec'y of Health & Human Servs.*, 896 F.2d 1024,

1028 (6th Cir. 1990) (citing 28 U.S.C. § 405(g)). Substantial evidence "is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Even if the evidence could also support another conclusion, the decision of the ALJ must stand if the evidence could reasonably support the conclusion reached. *Her v. Comm'r of Soc. Sec.*, 203 F.3d 388, 389–90 (6th Cir. 1999). A district court does not resolve conflicts of evidence or issues of credibility. *Brainard v. Sec'y of Health & Human Servs.*, 889 F.2d 679, 681 (6th Cir. 1989).

II

Plaintiff contends that he was disabled on September 26, 1996 after suffering a back injury. Pl.'s Mot. at 2. At the time of onset, he was 31-years-old and a high school graduate. *Id.* He has not worked since the back injury. *Id.* Before the alleged onset date, he worked, most recently, as a custodian for the U.S. Postal Service from 1994 through 1996. *Id.* He also served in the Army and worked in the food service, warehousing, and security industries. *Id.* In addition to continuing back pain, he suffers from obesity and depression. R&R at 4, 10. He is five-feet-six-inches tall and weighs between 260 and 280 pounds. *Id.* at 4. The Veterans Administration ("VA") has determined Plaintiff is "70 percent" disabled, and he receives monthly payments of $1,135 as a result of that determination. *Id.*

Plaintiff's initial application for disability benefits, filed in October 1998, was denied based on the ALJ's finding that Plaintiff could perform a full range of sedentary work. R&R at 2. Plaintiff appealed and the district court remanded the case for further proceedings. *Id.* Those proceedings, before a different ALJ, also resulted in a conclusion that Plaintiff was not disabled. *Id.* After filing a complaint in district court, the Commissioner agreed to remand the case for further administrative

consideration. *Id.* On remand, a third ALJ determined that Plaintiff was not engaged in gainful employment and that he suffered from "severe impairments," including "degenerative disc disease of the cervical and lumbar spine, obesity, and an affective disorder." *Id.* at 14; 20 C.F.R. § 404.1520(a)(4)(i)–(ii). None of those impairments, however, qualified as a listed impairment. R&R at 14; 20 C.F.R. § 404.1520(a)(4)(iii). The ALJ further determined that although Plaintiff could no longer perform any of his past relevant work, he retained RFC to perform "medium" work as an industrial cleaner or kitchen helper that involves "simple" one or two step tasks and only occasional contact with other people. R&R at 14; 20 C.F.R. § 404.1520(a)(4)(iv)–(v). Judge Whalen concluded that the ALJ's decision was supported by "substantial evidence" and recommended that Plaintiff's complaint be dismissed. [Dkt. # 21].

III

Plaintiff first objects that Judge Whalen erred in determining that Dr. Lattore, a mental health provider, "was 'not qualified to render assessments regarding the functional effects of physical impairments.' " R&R at 18; (quoting Tr. at 498). Plaintiff correctly emphasizes that physical symptoms may be related to mental impairments. That does not mean, however, that the ALJ committed a reversible error when she discounted Dr. Lattore's testimony concerning the "functional effects" of Plaintiff's back injuries because Dr. Lattore is a psychologist whose expertise is unrelated to back injuries. An expert on spinal injuries, like the orthopedic surgeon Dr. Fernando, is more qualified to comment on the "functional effects" of Plaintiff's back problems than a psychologist. Tr. at 500–01. Moreover, the ALJ's comment that Dr. Lattore was "not qualified" to assess the "functional effects" of Plaintiff's back injury was made in passing and was not the primary reason that the ALJ chose to discount Dr. Lattore's opinion that Plaintiff was disabled. Rather, the ALJ

focused on the inconsistencies between Dr. Lattore's opinion that Plaintiff is disabled and the objective evidence in the record; a method the Sixth Circuit has endorsed. *See Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 544 (6th Cir. 2004) (citing 20 C.F.R. § 404.1527(d)(2)).

Plaintiff next objects that Judge Whalen and the ALJ improperly discounted Dr. Latorre's opinions about Plaintiff's mental illness based on Plaintiff's refusal to take prescribed "psychotropic" medications. R&R at 18. Plaintiff contends that the consideration was improper because a failure to take such a medication is often a symptom of the mental illness itself. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 610 (1999); *Pate-Fires v. Astrue*, 564 F.3d 935, 945–46 (8th Cir. 2009). The ALJ's discussion of Plaintiff's noncompliance with prescribed medications was included in the ALJ's discussion of the inconsistencies between Dr. Latorre's opinion and the objective evidence in the record. Tr. at 498. The ALJ noted:

> To wit, it is noted that while the claimant has been prescribed psychotropic agents, by his own admission, but [sic] he refused to take them. He has never been hospitalized on a psychiatric basis (or even on a medical basis), and there is no documentation of any significant outpatient psychological treatment. Progress notes chronicle that an attending psychiatrist could not in good conscience write a letter of disability for the claimant, prompting him to get angry and leave the room. Veterans Administration records specify that the claimant was fully oriented, spoke fluently, and had good comprehension and memory. Although the WAIS-III testing conducted by psychologist Friedman revealed low average intellectual functioning, it is noted that this condition is of life-long duration, and had never previously precluded the claimant from performing substantial gainful activity. Additionally, it is pointed out that the claimant never even purported any manner of mental impairment upon the filing of his initial disability application, nor in his reconsideration and hearing requests. Such circumstances render the psychologist Latorre's conclusion of an inability to work unworthy of any substantial probative weight.

Tr. at 498.

When the ALJ's discussion of Plaintiff's noncompliance with prescribed medications is considered in context, it becomes clear that the ALJ accorded Plaintiff's conduct appropriate weight.

First, unlike in *Pate-Fires*, there is no indication in this case that Plaintiff's refusal to take the medication was a result of the mental illness itself. Indeed, Plaintiff testified that he did not take the medications because of concerns about side effects. Tr. at 472–73. More importantly, the fact that Plaintiff did not take the medication was only one factor in a lengthy list of reasons cited by the ALJ for discounting the weight of Dr. Latorre's opinion. Tr. at 498. Those reasons are more than sufficient to justify the conclusion that Dr. Lattore's opinion about Plaintiff's continued ability to work was not "supported by the objective evidence of record." Tr. at 498; *see also Wilson*, 378 F.3d at 544.

Plaintiff next objects to the consideration afforded the opinions of Dr. Nygaard and Dr. Husar by Judge Whalen and the ALJ. In his motion for summary judgment, Plaintiff argued that the ALJ improperly rejected Dr. Nygaard's and Dr. Husar's opinions that plaintiff was disabled. Plaintiff emphasized that even though the ultimate conclusion as to disability is reserved to the commissioner, the fact that the doctors reached such a conclusion does not justify disregarding the rest of their analysis. Pl's Mot. at 26. Plaintiff also argued that Dr. Nygaard and Dr. Husar should have been afforded greater consideration as treating physicians, even though they examined plaintiff only once, because they were part of a "treatment team" at the "VAMC" and had the benefit of a "longitudinal record." *See Benton ex rel. Benton v. Barnhart*, 331 F.3d 1030, 1035–39 (9th Cir. 2003).[1] Judge Whalen rejected this argument based on his conclusion that an opinion by a doctor

[1] Judge Whalen declined to address Plaintiff's "treatment team" argument. As Plaintiff has not specifically objected to his decision, it will not be addressed here **VI.** It is further **ORDERED** that a violation of this Order, including without limitation, unauthorized possession of an Electronic Device, use of an Electronic Device in an unauthorized space, possession of an Electronic Device in an audible mode, and failing to turn off an Electronic Device when required, **SHALL** result in immediate confiscation of the device. Any United States Marshal or Deputy Marshal or court security officer may confiscate such devices.

that a person is "disabled" does not necessarily mean that person is "disabled" within the meaning of the Regulations. R&R at 19; 20 C.F.R. § 416.927(e). Moreover, there is "substantial evidence" in the record to contradict Dr. Nygaard's and Dr. Husar's conclusions and to support the ALJ's determination that Plaintiff is not disabled. R&R at 19.

Specifically, Plaintiff objects to Judge Whalen's references to the ALJ's finding that "not a single physician explained how an individual" without symptoms of muscle weakness, decreased range of motion, impaired sensory responses, or the need for narcotic or prescription medications "is incapable of engaging in any work-related activities." R&R at 19; Tr. at 499; Pl.'s Objections at 3–4. As Plaintiff emphasizes, there is indeed *some* evidence in the extensive record before the Court of decreased motion (Tr. at 251, 306) and Plaintiff was, at various times, taking prescription medications. Still, the fact that the ALJ employed the hyperbolic phrase "not a single physician" in explaining her conclusion does not justify remanding the case or reversing the ALJ's decision. The relevant question here is whether the ALJ's decision was supported by substantial evidence, 42 U.S.C. § 405(g), not whether every sentence in the ALJ's opinion is completely correct.

The ALJ and Judge Whalen appropriately rejected Dr. Nygaard's and Dr. Husar's conclusory analysis. Disability decisions rest with the Commissioner, not doctors. Moreover, the doctors conclusions were inconsistent with their own objective findings as well as other evidence contained in the rest of the record. As Defendant emphasizes in the response to Plaintiff's objections, Dr. Nygaard concluded Plaintiff could not work because of pain even though Dr. Nygaard also concluded the pain could be managed with Topomax. Tr. at 739–40. Dr. Husar concluded Plaintiff

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either. It is worth noting, however, that Plaintiff's only support for the argument comes from a Ninth Circuit case is not binding precedent. *Benton ex rel. Benton*, 331 F.3d at 1035–39.

was "completely disabled" even though he found that Plaintiff exhibited a full range of motion and a steady gait. *Id.* at 387, 448.

Plaintiff next objects to Judge Whalen's conclusion that "Dr. Eshkenazi's opinion does not present grounds for reversal." R&R at 19. Judge Whalen based his conclusion on the fact that Dr. Eshkenazi was an examining physician as opposed to a treating physician, and as such, Dr. Eshkenazi's opinion is not entitled to any special deference. R&R at 19 (citing *Barker v. Shalala*, 40 F.3d 789, 794 (6th Cir. 1994)). Judge Whalen further concluded that the ALJ's finding of "moderate psychological impairment" was not necessarily precluded by Dr. Eshkenazi's finding of "markedly limited . . . ability to complete a normal workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods." Tr. at 628. Judge Whalen based his conclusion on the ALJ's finding that Plaintiff had not sought consistent treatment for his mental illness.

Although the Plaintiff correctly asserts that "it is a questionable practice to chastise one with a mental impairment for the exercise of poor judgment in seeking rehabilitation," that is not what the ALJ or Judge Whalen did in this case. Pl.'s Objection at 4; *see Blankenship v. Bowen*, 874 F.2d 1116, 1124 (6th Cir. 1989). Rather, the ALJ and Judge Whalen merely noted that Plaintiff's symptoms were largely moderate or mild, and that they have gone largely untreated since they became apparent, which, incidentally, occurred after Plaintiff's onset date in 1996. Indeed, Dr. Eshkenazi emphasized in the report that Plaintiff, "with proper treatment, would be able to be gainfully employed in the future . . . ." Tr. at 633. The ALJ's limited reliance on Plaintiff's failure to seek treatment for his mental impairment does not, on its own, merit reversal or remand.

Plaintiff next objects that Judge Whalen and the ALJ did not give appropriate consideration

to the VA's determination that Plaintiff is seventy percent disabled. Pl.'s Objection at 5. The ALJ acknowledged the VA's determination and correctly noted that the Social Security Administration, a separate federal agency, is not bound by the decision. Tr. at 501. Although the Ninth Circuit has afforded substantial weight to a VA determination of eighty percent disability, *see McCartey v. Massanari*, 298 F.3d 1072, 1075–75 (9th Cir. 2002), there is no similar case law in this Circuit. *Cf. Stewart v. Heckler*, 730 F.2d 1065, 1068 (6th Cir. 1984) (affording some weight to a one-hundred percent disability determination by the VA); *Green v. Comm'r of Soc. Sec.*, No. 1:07-cv-654, 2008 WL 3978476, at *4 (W.D. Mich. Aug. 22, 2008) (suggesting that ALJ need not even consider VA's decision unless the VA concludes the disability is total). Although it may be prudent to consider the VA's conclusions, as the ALJ did in this case, the ALJ did not err in rejecting those conclusions.

Plaintiff next objects that the ALJ and Judge Whalen did not give appropriate consideration to Plaintiff's obesity. The record indicates that Plaintiff is obese and that his weight may contribute to his back pain. Tr. at 128. The ALJ carefully considered Plaintiff's contention that his obesity was a disabling condition and rejected it. Tr. at 500–01. The ALJ concluded that Plaintiff's obesity was not the cause of his back pain based, in part, on the analysis of orthopedic surgeon Dr. Fernando, who concluded that Plaintiff has no physical limitations. *Id.* Again, the ALJ's statement that "[n]o medical source" connected Plaintiff's obesity to his back ailment may not be completely accurate. It was not, however, reversible error. Substantial evidence supports the ALJ's conclusion that Plaintiff's obesity was not a disabling condition.

Plaintiff also purports to "renew" his arguments concerning the ALJ's reliance on the vocational expert's testimony and the ALJ's assessment of Plaintiff's credibility. Objections to a magistrate judge's report and recommendation must be "specific." Fed. R. Civ. P. 72(b)(2).

Plaintiff does not identify any "specific" flaw in Judge Whalen's analysis. Rather, he asks the Court to conduct a de novo review of his entire argument on the two points. Still, the Court has reviewed the hypothetical question posed to the vocational expert by the ALJ and it is consistent with the ALJ's conclusions as to Plaintiff's physical and mental limitations. Similarly, the ALJ's credibility determination, which was based on the objective medical evidence in the record, is entitled to deference. *See Casey v. Sec. of Health and Human Servs.*, 987 F.2d 1230, 1234 (6th Cir. 1993). Accordingly, there was no error in the ALJ's analysis as to either point.

IV

As of the alleged onset date, Plaintiff was only 31-years-old. He is a high school graduate and an Army veteran. While he has some physical and mental limitations, there is still a range of jobs he could successfully perform. Accordingly, the ALJ's determination that Plaintiff is not disabled and retains the RFC to perform simple "medium" work is supported by "substantial evidence." 42 U.S.C. § 405(g).

Accordingly, it is **ORDERED** that Plaintiff's objection to Judge Whalen's report and recommendation [Dkt. # 22] is **OVERRULED**.

It is further **ORDERED** that the Judge Whalen's report and recommendation [Dkt. # 21] is **ADOPTED**.

It is further **ORDERED** that Plaintiff's motion for summary judgment [Dkt. # 16] is **DENIED**.

It is further **ORDERED** that Defendant's motion for summary judgment [Dkt. # 19] is **GRANTED**.

It is further **ORDERED** that the findings of the Commissioner are **AFFIRMED** and Plaintiff's complaint [Dkt. # 1] is **DISMISSED WITH PREJUDICE**.

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

Dated: August 30, 2010

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on August 30, 2010.

s/Tracy A. Jacobs
TRACY A. JACOBS