UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RICKY CHARLES GREENE,	:	Case No. 1:14-cv-278
Plaintiff,	:	Judge Timothy S. Black
vs.	:	
COMMISSIONER OF SOCIAL SECURITY,	:	
Defendant.	:	

ORDER THAT: (1) THE ALJ'S NON-DISABILITY FINDING IS FOUND SUPPORTED BY SUBSTANTIAL EVIDENCE, AND AFFIRMED; AND (2) THIS CASE IS CLOSED

This is a Social Security disability benefits appeal. At issue is whether the administrative law judge ("ALJ") erred in finding the Plaintiff "not disabled" and therefore not entitled to disability insurance benefits ("DIB") or supplemental security income ("SSI"). (*See* Administrative Transcript ("PageID") (PageID 38-48) (ALJ's decision)).

I.

Plaintiff filed an application for DIB and SSI on January 19, 2011, alleging disability beginning February 1, 2004, due to a combination of physical and mental impairments including depressive disorder, anxiety disorder, personality disorder, and borderline intellectual functioning. (PageID 156). These claims were denied initially and upon reconsideration.

A hearing was held on June 27, 2012, where Plaintiff appeared *pro se* and testified. (PageID 38). Plaintiff's applications were denied by an ALJ on January 9, 2013. The ALJ found that Plaintiff retained the RFC[1] to perform medium work[2] with additional limitations. (PageID 42). Specifically, the ALJ found Plaintiff was capable of medium work except he is "limited to work involving only simple, routine, and repetitive tasks with no more than occasional interactions with coworkers, supervisors, or the public and no working in tandem with others where such working together is essential to the completion of work tasks." (*Id.*)

Based on testimony from the vocational expert ("VE"), the ALJ found that Plaintiff could not perform his past relevant work as a welder, cleaner, grocery stocker, sandwich maker, cook helper, and asphalt layer. (PageID 46). However, the ALJ also found that there were a significant number of jobs in the national economy that he would be able to perform, such as hotel cleaner, bench assembler, press operator, and polisher. (PageID 47, 239). Accordingly, the ALJ found that Plaintiff was not disabled within the meaning of the Social Security Act. (*Id.*) The ALJ's decision became the Commissioner's final decision when the Appeals Council denied Plaintiff's request for review. (PageID 27). The Court has jurisdiction pursuant to 42 U.S.C. § 1383(c)(3).

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[1] Residual Functioning Capacity ("RFC") is "the most you can still do despite your limitations." 20 C.F.R. § 404.1545(a)(1).

[2] "Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds." 20 C.F.R. § 404.1567(c).

Plaintiff was 49 years old at the time of the hearing on June 27, 2012. (PageID 59). Plaintiff has an eleventh grade education. (PageID 31).[3] Plaintiff's past relevant work experience[4] includes work as a handyman. (*Id.*)

The ALJ's "Findings," which represent the rationale of his decision, were as follows:

1. The claimant meets the insured status requirements of the Social Security Act through September 30, 2007.

2. The claimant has not engaged in substantial gainful activity since February 1, 2004, the alleged onset date (20 CFR 404.1571 *et seq*., and 416.971 *et seq.*).

3. The claimant has the following severe impairments: depressive disorder, NOS; anxiety disorder, NOS; personality disorder, NOS; history of cannabis and cocaine use; borderline intellectual functioning (20 CFR 404.1520(c) and 416.920(c)).

4. The claimant does not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and 416.926).

5. After careful consideration of the entire record, I find that the claimant has the residual functional capacity to perform medium work as defined in 20 CFR 404.1567(c) and 416.967(c) except the claimant is limited to work involving only simple, routine, and repetitive tasks with no more than occasional interactions with coworkers, supervisors, or the public and no working in tandem with others where such working together is essential to the completion of work tasks.

6. The claimant is unable to perform any past relevant work (20 CFR 404.1565

[3] When asked whether he was able to read and write, Plaintiff responded "Yes, sir. Not too good, though, but I'm able to read and write." (Tr. 28).

[4] Past relevant work experience is defined as work that the claimant has "done within the last 15 years, [that] lasted long enough for [the claimant] to learn to do it, and was substantial gainful activity." 20 C.F.R. § 416.965(a).

and 416.965).

7. The claimant was born on September 30, 1962 and was 41 years old, which is defined as a younger individual age 18-49, on the alleged disability onset date. The claimant subsequently changed age category to closely approaching advanced age (20 CFR 404.1563 and 416.963).

8. The claimant has a limited education and is able to communicate in English (20 CFR 404.1564 and 416.964).

9. Transferability of job skills is not an issue in this case because the claimant's past relevant work is unskilled (20 CFR 404.1568 and 416.968).

10. Considering the claimant's age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy that the claimant can perform (20 CFR 404.1569, 404.1569(a), 416.969, and 416.969(a)).

11. The claimant has not been under a disability, as defined in the Social Security Act, from February 1, 2004, through the date of this decision (20 CFR 404.1520(g) and 416.920(g)).

(Tr. 12-19).

In sum, the ALJ concluded that Plaintiff was not under a disability as defined by the Social Security Regulations, and was therefore not entitled to DIB or SSI. (Tr. 19).

While Plaintiff's arguments are not entirely clear, he appears to allege that the ALJ erred in: (1) presenting a hypothetical to the vocational expert that was not supported by the evidence; and (2) failing to properly develop the record. The Court will address these errors in turn.

II.

The Court's inquiry on appeal is to determine whether the ALJ's non-disability finding is supported by substantial evidence. 42 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). In performing this review, the Court considers the record as a whole. *Hephner v. Mathews*, 574 F.2d 359, 362 (6th Cir. 1978). If substantial evidence supports the ALJ's denial of benefits, that finding must be affirmed, even if substantial evidence also exists in the record upon which the ALJ could have found plaintiff disabled. As the Sixth Circuit has explained:

> "The Commissioner's findings are not subject to reversal merely because substantial evidence exists in the record to support a different conclusion. The substantial evidence standard presupposes that there is a "zone of choice" within which the Commissioner may proceed without interference from the courts. If the Commissioner's decision is supported by substantial evidence, a reviewing court must affirm."

Felisky v. Bowen, 35 F.3d 1027, 1035 (6th Cir. 1994).

The claimant bears the ultimate burden to prove by sufficient evidence that he is entitled to disability benefits. 20 C.F.R. § 404.1512(a). That is, he must present sufficient evidence to show that, during the relevant time period, he suffered an impairment, or combination of impairments, expected to last at least twelve months, that left him unable to perform any job in the national economy. 42 U.S.C. § 423(d)(1)(A).

A.

The record reflects that:[5]

[5] Plaintiff did not recount the relevant facts. Accordingly, the Court incorporates the facts as presented by the Defendant.

1. Medical History

Plaintiff's medical history is sparse. The record shows multiple emergency room visits in June 2011, where Plaintiff presented with pain in his hand, and "right flank pain...pain in [his] neck and back." (PageID 253-259, 262, 272, 279). The diagnoses were cellulitis,[6] an infection in his hand, and a nonobstructing kidney stone. (*Id.*) All of these conditions were treated and resolved. (*Id.*)

On June 27, 2011, Plaintiff presented at Family Health Center for a new patient evaluation. (PageID 291). He reported the recent hospital visits for the pain and swelling in his hand and for a kidney stone. (*Id.*) Plaintiff complained of continued pain in his low back. (*Id.*) Naomi Blackburn, C.N.P., noted that Plaintiff had not had any care for 20 years, labs from his most recent hospital visit were positive for cocaine, and a recent CAT scan was positive for kidney stones. (*Id.*) Plaintiff also complained of "being frequently anxious. He denies any thoughts of suicide, suicidal ideation thoughts of hurting himself, or anyone else." (PageID 291). Ms. Blackburn prescribed Buspar to treat these anxiety symptoms. (*Id.*)[7] His physical exam was normal. (*Id.*) Plaintiff returned only once more, on July 12, 2011, with elevated blood pressure and complaining of kidney pain and nausea. (PageID 289). His physical exam was normal, and he was

[6] Cellulitis is a bacterial skin infection.

[7] This is the only reference to any mental health treatment in the record.

ultimately assessed with hypertension and nephrolithiasis.[8] (*Id.*) Plaintiff was prescribed medications for these conditions and was advised to start a low sodium diet. (*Id.*)

There are no other medical records on file until November 2011, when Plaintiff established care at Kings Daughters Medical Care. (PageID 329). At Plaintiff's initial visit, John Gilbert, D.O. did not make any diagnosis, as Plaintiff was a "poor historian" and his physical exam was normal. (*Id.*) Between December 2011 and August 2012, Plaintiff continued to be seen by Dr. Gilbert for a variety of complaints, including headaches, flank pain, epigastric pain, pain in his legs, and pain and spasms in his right thoracic region. (PageID 312, 316, 319, 323, 326). Despite these complaints, an EKG preformed in June 2011 was benign, labs were consistently normal, and x-rays of the spine and legs were unremarkable. (PageID 317, 336, 336). The only diagnostic testing that revealed any abnormalities was a kidney study performed in January of 2012, which showed kidney stones. (PageID 340). Throughout these office visits, Dr. Gilbert repeatedly noted that Plaintiff had a "normal mood and affect" and that his behavior was "normal." (PageID 330).

The only comprehensive mental health exam in the record is a consultative evaluation performed by Albert E. Virgil, Ph.D. at the request of the state Disability Determination Services on October 5, 2011. (PageID 296). During this examination, Plaintiff presented as alert and responded to questions without apparent difficulty (PageID 299). Dr. Virgil noted Plaintiff described the nature of his disability as

[8] Nephrolithiasis is the diagnosis given for kidney stones.

"tendonitis in my feet…bad nerves. Broken hand." (PageID 297). Plaintiff did not report any other significant medical history, and stated that he was not taking any prescription medications. (*Id.*) When asked about his legal history, Plaintiff stated that he had been in "[p]rison…four times…robbery, drug case, assault…" (*Id.*) He admitted that he smoked marijuana every other day, in order to alleviate his "bad nerves." (*Id.*) He reported no history of mental health treatment nor any treatment for these alleged symptoms of anxiety. (PageID 298). Plaintiff described his activities of daily living as "helpin[g] people out" by "cleanin[g] their houses…[doing] home improve[ment], yard work, washin[g] cars, takin[g] out trash for [them]." (*Id.*) Plaintiff responded adequately to inquiries, established eye contact, and exhibited "anxiety and motor agitation." (*Id.*) His speech was understandable, his thought content was logical and coherent, and he "comprehended and carried out the interview instructions and tasks." (*Id.*)

Plaintiff reported a diminished appetite, periods of crying, and depression, which he stated he had been feeling for "[a] long time." (PageID 299). Plaintiff complained of anxiety symptoms, such as "shakes…my mind be goin[g] somewhere else…" and that he smoked a pack and a half of cigarettes a day to calm these symptoms. (*Id.*) He also stated that he could go to a public place "for a minute, then I [have] to leave…[I want to] be alone." (*Id.*) Plaintiff did not present with any hallucinatory or delusional symptoms, however he reported being suspicious of others. (*Id.*) At the conclusion of the exam, Dr. Virgil's primary diagnoses were anxiety and depression disorder, with cannabis dependence. (PageID 300). He secondarily diagnosed Plaintiff with Borderline

Intellectual Functioning and Personality Disorder NOS, Antisocial, Paranoid features. (*Id.*) Dr. Virgil assigned Plaintiff a Global Assessment of Functioning ("GAF") score of 61, indicating only mild symptoms and limitations.[9]

In a functional assessment completed at the end of his report, Dr. Virgil stated that Plaintiff was able to "understand and follow instructions during the session and appears capable of doing so in a work environment, commensurate with his ability level." (PageID 299). Dr. Virgil also opined that Plaintiff's attention and concentration skills to perform simple and multi-step tasks "appear to be consistent with his overall ability level." (PageID 301). He reported that while Plaintiff did "display paranoid ideation" which would impair his "amenability to supervision," he nonetheless, "appears capable" of handling supervision. (*Id.*) Dr. Virgil also opined that Plaintiff "appears capable of working parallel with coworkers in an acceptable manner." (*Id.*) Dr. Virgil noted that Plaintiff "appears mentally and emotionally capable of responding appropriately to work setting pressures." (*Id.*)

Kristen Haskins, Psy.D., relied on the above report from Dr. Virgil in assessing Plaintiff's mental limitations in the reconsideration of his disability application, dated October 7, 2011. (PageID 96). Dr. Haskins opined that Plaintiff was moderately limited in his ability to understand and remember detailed instructions, stating "emotional and personality problems limit claimant to simple and some multi-step tasks claimant is well

[9] The Global Assessment of Functioning ("GAF") is a numeric scale (1 through 100) used by mental health clinicians to rate subjectively the social, occupational, and psychological functioning of adults. A score of 61-70 indicates some mild symptoms or some difficulty in social, occupational, or school functioning, but generally functioning pretty well, has some meaningful interpersonal relationships.

motivated to complete." (*Id*.) Dr. Haskins also noted moderate limitations in Plaintiff's ability to sustain concentration and persistence. (*Id.*) She stated that Plaintiff was limited to a work setting "without need for close sustained focus/attention and [without] sustained fast pace where the claimant can work away from the distractions of others." (PageID 97). Dr. Haskins also specified social interaction and adaption limitations, stating that Plaintiff was moderately impaired in his ability to interact with the general public, respond appropriately to criticism from supervisors, and in his ability to respond appropriately to changes in the work setting. (PageID 97-98). Dr. Haskins concluded that as a result of these limitations, Plaintiff was limited to only occasional contact with the general public, and less frequent supervision. (*Id.*) She also noted that Plaintiff would be best able to complete tasks in a static setting that did not have stringent time or production requirements. (*Id.*)

2. Plaintiff's Testimony

At the hearing, Plaintiff testified that the reason he had not worked since 2004 was because he was "too old and too overqualified" and that he had started a handyman business which was ultimately unsuccessful. (PageID 60). Plaintiff claimed that he was "really slowing down." (Tr. 33). Plaintiff admitted that he continued to do odd jobs "when anybody…needs something" including painting, roofing, plumbing, cutting grass, and housecleaning, and that he did this work for regular clients. (*Id.*) Plaintiff then alleged that he was disabled because his age "caught up" with him, and he had recently began to experience physical problems, such as swelling in his hand, kidney problems,

pain in his back and side, and frequent headaches. (PageID 61-62). Plaintiff stated that he was taking Prilosec, Fioricet and Propranolol, and that he did not experience any side effects except for "a little drowsiness." (PageID 63). Although Plaintiff alleged bipolar disorder as his only disability in his application for benefits, he did not allege any mental impairments at the hearing.

Plaintiff testified that he did not have his driver's license, on account of a DUI charge, and was currently on probation from a drug-related charge. (PageID 63-64). Plaintiff claimed that he had stopped smoking marijuana "two years ago." (PageID 65). When asked how much he could lift, Plaintiff responded "about fifty." (*Id.*) He also testified that he could stand for "about seven hours" and sit for "five to ten minutes." (*Id.*) Plaintiff described his daily activities as consisting of errands and other work for friends, shopping for himself, cooking, helping out around the house he shares with his girlfriend, and caring for his three young daughters. (PageID 66). When asked if he had problems using his hands he replied "[o]h no, that's what keeps me going." (*Id.*) Plaintiff stated his desire to work as a welder, and his frustration that "there [are] no jobs [anywhere] like there used to be around here." (PageID 68). He finished with the statement "I went ahead and create[d] my own job and been working….and making ends meet ever since." (*Id.*)

B.

First, Plaintiff argues that the hypothetical presented to the vocational expert ("VE") was not supported by substantial evidence.[10] Specifically, Plaintiff argues that the hypothetical contained no limitations in concentration, persistence and pace. Plaintiff claims that this deficiency renders the VE's testimony unsupported by substantial evidence and therefore the ALJ could not properly base his decision upon it. Plaintiff also claims that the hypothetical was deficient, because it did not include all of the limitations imposed by Dr. Virgil, the examining psychologist, or by Dr. Haskins, the state consultant.

The ALJ took into account the opinions of Drs. Virgil and Haskins, and explicitly stated that he was giving these psychologists "great weight" as they are the only two doctors on record discussing Plaintiff's mental impairments. (PageID 45). Specifically, the ALJ gave great weight to Dr. Virgil's finding that Plaintiff "had some cognitive, effective, and personality disorders" but nonetheless retained the ability "to follow simple instructions, with an adequate ability to relate to others in the workplace." (PageID 45, 300-301). The ALJ also stated that great weight was given to Dr. Haskins' opinion that Plaintiff was "capable of simple and some multi step tasks, without the distraction of others, and with only occasional superficial contact with coworkers, supervisors and the public." (PageID 45, 96-98).

[10] Plaintiff only challenges the ALJ's hypothetical question to the VE in regard to his mental limitations. Plaintiff does not contest the ALJ's findings regarding his physical impairments nor the ALJ's finding that Plaintiff did not credibly relate his symptoms and limitations. Accordingly, these arguments have been waived. *Hollon v. Comm'r of Soc. Sec.*, 447 F.3d 477, 491 (6th Cir. 2006).

Plaintiff cites to *Ealy v. Comm'r of Soc. Sec.*, 594 F.3d 504 (6th Cir. 2010), arguing that "the ALJ must include all limitations in a state examiner's opinion that he adopts. However, in *Ealy*, the ALJ relied upon a report that specifically stated that the claimant could not sustain an 8 hour workday without breaks every 2 hours and could only work in an environment where speed was not critical. *Id.* at 516. The ALJ in *Ealy* did not incorporate these limitations adequately in his hypothetical concerning a claimant who was limited to simple, repetitive tasks and instructions in non-public work settings, because it did not take into consideration the specific limitations in speed and concentration that the examiner noted in the report that the ALJ relied upon.

However, the facts in this case are distinguishable from those in *Ealy*. The ALJ's hypothetical in this case took into account the capabilities Plaintiff exhibited in concentration, persistence, and pace at the consultative exam performed by Dr. Virgil, as well as the social difficulties Drs. Virgil and Haskins noted in their opinions. In his hypothetical interrogatory to the VE, the ALJ stated that Plaintiff was capable of work "limited to simple, routine, repetitive tasks" mirroring Dr. Haskins' assessment that Plaintiff was limited to "simple and some multi-step tasks." (PageID 42, 96, 238). Dr. Virgil found that Plaintiff's attention and concentration skills "appear to be consistent with his overall ability level" – which appears to refer to Plaintiff's borderline intelligence. (PageID 300). Both Dr. Virgil and Dr. Haskins noted limitations in Plaintiff's ability to interact with others, and the ALJ incorporated these opinions by further limiting Plaintiff to work environments "with no more than occasional

interactions with coworkers, supervisors, and the public [and] no working in tandem with others where working together is essential to completing job tasks." (PageID 42, 238). Unlike *Ealy*, these are very specific limitations supported by the medical opinions.

The ALJ gave great weight to both Drs. Virgil and Haskins, as their reports were the only evidence on record related to Plaintiff's mental health. However, it is within the ALJ's discretion to consider all of the evidence and come to his own conclusion about the RFC. *Collins v. Comm'r of Soc. Sec.*, 357 F. App'x 663, 668 (6th Cir. 2009) ("Discretion is vested in the ALJ to weigh all the evidence."). The ALJ had the discretion to consider both Drs. Virgil and Haskins' opinions and include only the functional limitations best supported by the evidence in Plaintiff's RFC assessment. *Chapo v. Astrue*, 682 F.3d 285, 1288 (10th Cir. 2012) ("[T]here is no requirement in the regulations for a direct correspondence between an RFC finding and a specific medical opinion on the functional capacity in question.").

The ALJ gave more weight to Dr. Virgil in choosing not to include a limitation related to Plaintiff's ability to concentrate, because Dr. Virgil was the only psychologist who actually examined Plaintiff. Generally, an examining physician is given more weight that one who has never met the claimant. 20 C.F.R. § 404.1527 ("generally, we give more weight to the opinion of a source who has examined you than to the opinion of a source who has not examined you."). The specific limitations Dr. Virgil assigned to Plaintiff were related to his ability to interact with supervisors. (PageID 300-301). Dr. Virgil stated, after a consultative exam, that Plaintiff could "understand and follow

instructions" and that Plaintiff's concentration and attention skills "appeared to be consistent with his overall ability level." (*Id.*) Subsequently, Dr. Haskins based her entire assessment on Dr. Virgil's conclusions, adding only that plaintiff was limited to settings "without need for close sustained focus/attention" and that Plaintiff "would do best with occasional superficial contact with [the] general public." (PageID 97).

In determining which aspects of these opinions to adopt into Plaintiff's RFC, the ALJ properly chose to incorporate parts of both Dr. Virgil and Dr. Haskins' conclusions. 20 C.F.R. §§ 404.1527(e)(2), 416.927(e)(2) ("Although we consider opinions from treating and examining sources on issues such as…your residual functional capacity…the final responsibility for deciding these issues is reserved to the Secretary"). The ALJ reasonably gave more weight to the limitations in these reports that were sufficiently consistent with each other and the record as a whole, including Plaintiff's testimony that he continued to work on home improvement projects, plumbing, and other similar odd jobs on a regular basis that would have required significant concentration. (PageID 60). Therefore, in terms of a limitation in concentration, Dr. Virgil was given more consideration due to the fact that he personally interviewed Plaintiff and his conclusions comported more closely with Plaintiff's own report regarding his abilities.

The ALJ also incorporated into the RFC the more restrictive limitations in Plaintiff's ability to interact with the public, which were articulated by Dr. Haskins. (PageID 97). The ALJ ultimately limited Plaintiff to a setting with "no more than occasional interactions with coworkers, supervisors, or the public and no working in

tandem with others where such working together is essential to the completion of work tasks." (PageID 42, 238). This restriction accounts for Dr. Haskins' opinion that Plaintiff was limited to "occasional superficial contact with the general public and would do best with less frequent supervision" as well as Dr. Virgil's finding that Plaintiff's paranoid ideation would "detrimentally affect his amenability to supervision." (PageID 97, 301). In fact, the ALJ even included Dr. Haskins' more restrictive limitations despite his ultimate conclusion that Plaintiff "appears capable of working parallel with coworkers in an acceptable manner…[and] appears mentally and emotionally capable of responding appropriately to work setting pressures." (PageID 300).

Moreover, it is important to note that there was simply a lack of medical evidence to support Plaintiff's mental health claims. *See* SSR 96-7p ("the individual's statements may be less credible if the level or frequency of treatment is inconsistent with the level of complaints."). Accordingly, the ALJ properly used his discretion to reconcile Drs. Virgil and Haskins reports.

C.

Next, Plaintiff argues that the ALJ did not properly develop the record. Specifically, Plaintiff argues that because he was unrepresented by counsel at the hearing, the ALJ had a higher duty to probe into the facts and failed to do so, citing the fact that the hearing lasted only twenty-two minutes.

The ALJ does not have any heightened duty to develop the record when, as here, Plaintiff has retained an attorney to help him present his case. *Hawkins v. Chater*, 113

F.3d 1162, 1167 (10th Cir. 1997) ("[T]he ALJ should ordinarily be entitled to rely on the claimant's counsel to structure and present claimant's case in a way that the claimant's claims are adequately explored"). Despite more than two years elapsing since the ALJ's decision, Plaintiff's counsel has not sought to supplement the record. Accordingly, Plaintiff has failed to evidence that anything is missing from the record, nor can he show that there was any additional evidence that could have supported his claim. *See, e.g.*, *Lance v. Comm'r of Soc. Sec.*, No. 95-1461, 1995 U.S. App. LEXIS 37019, at *1 (6th Cir. Dec. 6, 1995) ("Moreover, [Plaintiff] did not point to any evidence she would have submitted in support of her claim…").

The medical record in this case contains very little evidence relating to Plaintiff's mental impairments. While the ALJ considered Plaintiff's borderline intellectual functioning, no IQ testing was every completed. The ALJ also considered Plaintiff's conflicting testimony regarding his lack of symptoms from mental health issues and the amount of work he continues to do on a daily basis, such as home repairs, cutting grass, roofing, cleaning, and plumbing for various clients throughout the week. (PageID 60). *Warner v. Comm'r of Soc. Sec.*, 375 F.3d 387, 392 (6th Cir. 2004) ("The administrative law judge justifiably considered Warner's ability to conduct daily life activities in the face of his claim of disabling pain."). After considering Plaintiff's testimony and the record evidence, the ALJ reasonably determined that Plaintiff did not credibly relate his limitations and symptoms.

Accordingly, the ALJ's finding that Plaintiff was not disabled is supported by substantial evidence and affirmed.

D.

Finally, Plaintiff filed a motion for a sentence six remand due to newly discovered evidence. (Doc. 14). 42 U.S.C. Section 405(g) provides that: "[t]he Court may…at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." In other words, a sentence-six remand may only be ordered "where new, material evidence is adduced that was for good cause not presented before the agency." *Shalala v. Shaefer*, 509 U.S. 292, 297 (1993).

Plaintiff did not present any new or material evidence or ask for a remand in his statement of errors. Therefore, Plaintiff waived his argument by raising it for the first time in his reply brief. *Rice v. Comm'r of Soc. Sec.*, 169 F. App'x 452, 454 (6th Cir. 2006) (a plaintiff's failure to develop an argument in a statement of errors challenging an ALJ's non-disability determination amounts to a waiver of that argument). Additionally, Plaintiff has also waived his argument for remand because he failed to develop it, either factually of legally. *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a

possible argument in the most skeletal way, leaving the court to…put flesh on its bones.").

Even if the Plaintiff has not waived remand under sentence six, he failed to carry his burden of showing that remand is warranted here. *Allen v. Comm'r of Soc. Sec.*, 561 F.3d 646, 653 (6th Cir. 2009) ("It is Allen's burden to make this showing under Section 405(g)."). The good cause requirement is satisfied only if there is a "valid reason" for the failure to submit evidence at a prior time. *Oliver v. Sec'y of Health & Human Services*, 804 F.2d 964, 966 (6th Cir. 1986). Plaintiff has failed to offer any explanation for his late submission of evidence. Notably, all of the "new" evidence is from 2013 and the Appeals Council did not deny Plaintiff's request for review until February 7, 2014. (PageID 29-31). Plaintiff does not explain why he could not have submitted this evidence to the Appeals Council prior to its denial so that it could have considered this evidence. *Hollon ex rel. Hollon v. Comm'r of Soc. Sec.*, 447 F.3d 477, 485 (6th Cir. 2006) (claimant who fails to identify obstacles to timely submission of evidence fails to demonstrate good cause).

Additionally, Plaintiff has also failed to show that any of the evidence is material. To satisfy the materiality requirement, the party seeking sentence six remand must show that there is a "reasonable probability" that the Commissioner would have reached a different conclusion on the issue of disability had she been presented with the additional evidence. *Sizemore v. Sec'y of Health & Human Services*, 865 F.2d 709, 711 (6th Cir. 1988). The medical records largely show unremarkable examinations. Without any

change in Plaintiff's overall health, the "new" evidence is cumulative and not material. *Allen*, 561 F.3d at 654 ("The ALJ properly rejected this evidence as cumulative and [therefore] not material.").

Accordingly, Plaintiff's motion for a sentence six remand (Doc. 14) is **DENIED**.

III.

For the foregoing reasons, Plaintiff's assignments of error are unavailing. The ALJ's decision is supported by substantial evidence and is affirmed.

IT IS THEREFORE ORDERED THAT the decision of the Commissioner, that Ricky Charles Greene was not entitled to disability insurance benefits and supplemental security income, is found **SUPPORTED BY SUBSTANTIAL EVIDENCE**, and **AFFIRMED.**

The Clerk shall enter judgment accordingly, whereupon, as no further matters remain pending for the Court's review, this case is **CLOSED** in this Court.

Date: 2/3/15

s/ Timothy S. Black
Timothy S. Black
United States District Judge