

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

HENRY V. DETTY,

Plaintiff,

**Civil Action 2:13-cv-547
Magistrate Judge Elizabeth P. Deavers**

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

OPINION AND ORDER

Plaintiff, Henry V. Detty, brings this action under 42 U.S.C. §§ 405(g) and 1383(c)(3) for review of a final decision of the Commissioner of Social Security (“Commissioner”) denying his applications for social security disability insurance benefits and supplemental security income. This matter is before the Court for consideration of Plaintiff’s Statement of Errors (ECF No. 12), the Commissioner’s Memorandum in Opposition (ECF No. 21), and the administrative record (ECF No. 11). For the reasons that follow, the Commissioner’s non-disability finding is **REVERSED**, and this case is **REMANDED** to the Commissioner and the ALJ under Sentence Four of § 405(g) for further consideration consistent with this Opinion and Order.

I. BACKGROUND

Plaintiff filed his applications for benefits on August 30, 2010, alleging that he has been disabled since December 31, 2009, at age 41. (R. at 152-58, 159-62.) Plaintiff alleges disability as a result of high blood pressure, cholesterol, weight problems, and depression. (R. at 199, 279.) Plaintiff’s applications were denied initially and upon reconsideration. Plaintiff sought a

de novo hearing before an administrative law judge. Administrative Law Judge Paul Gaughen (“ALJ”) held a video hearing on June 19, 2012, at which Plaintiff appeared and testified without the assistance of counsel. (R. at 37-48.) Steven D. Bosch, a vocational expert, also appeared and testified at the hearing. (R. at 48-52.) On August 2, 2012, the ALJ issued a decision finding that Plaintiff was not disabled within the meaning of the Social Security Act. (R. at 15-29.) On April 16, 2013, the Appeals Council denied Plaintiff’s request for review and adopted the ALJ’s decision as the Commissioner’s final decision. (R. at 1-6.) Plaintiff then timely commenced the instant action.

II. HEARING TESTIMONY

A. Plaintiff’s Testimony

At the outset of the hearing, upon learning that Plaintiff was not represented by counsel, the ALJ asked Plaintiff whether he understood the information in the Notice of Hearing and whether he understood how the process worked. (R. at 37.) Plaintiff responded that he did “[n]ot exactly” understand. The ALJ then proceeded to explain the process, responded to Plaintiff’s inquiry regarding how to obtain counsel, advised Plaintiff that “many people do choose to get an attorney because they are [experts] at legal proceedings,” and concluded by asking Plaintiff how he would “like to handle it.” (R. at 37-39.) Plaintiff responded, “[w]ell, sir, would you want to go ahead and proceed?” (R. at 39.) The ALJ responded, “[v]ery well” and proceeded to ask Plaintiff questions.

Plaintiff testified that he lives with his mother and that she pays all of his bills. (*Id.*) He also stated that he drives with no restrictions. (R. at 44.) He indicated that he graduated from high school. (R. at 43.)

Plaintiff testified that for the past two years his weight has increased. (R. at 42.) He stated that he is on medication for his diabetes and has been on insulin for eight months. (R. at 43, 52.) He reported that he does not experience side effects from his medications. (R. at 43.) He testified that his legs throb and hurt “all the time” and that his legs swell. (R. at 44, 47.) He also indicated that he cannot walk “too far” and can only be on his feet for 15-20 minutes at a time. (R. at 45.) Plaintiff added that his right hand occasionally goes numb and that he feels dizzy and lightheaded when his blood pressure is high. (*Id.*)

When Plaintiff was next asked about limitations on his concentration, he responded that he sometimes has difficulty concentrating because he thinks about deaths in his family. (R. at 45.) Plaintiff testified that he spends most of his time sitting and watching television. (R. at 45-46.) He believes he could perform household chores for about 20 minutes before he would have to stop due to his feet hurting. (R. at 46.)

Plaintiff did not believe he could handle a desk job with little physical demands or stress due to his inability to concentrate for long enough periods of time. (R. at 47.)

B. Vocational Expert Testimony

Steven D. Bosch testified as the vocational expert (“VE”) at the administrative hearing. (R. at 48-52.) The VE testified that Plaintiff’s past relevant work included a janitor/cleaner, performed at the medium exertion, unskilled level; lumber yard laborer, performed at the heavy exertion, semi-skilled level; and tongue operator/lift-truck operator, performed at the medium exertion, semi-skilled level. (R. at 48-49.)

The ALJ proposed an hypothetical question to the VE involving an individual of Plaintiff’s age, education, and work history with the residual functional capacity for sedentary

exertional work with the following limitations and abilities: could lift and handle up to 20 pounds while seated; could only stand/walk for less than 60 minutes at one time; required work that is free of fast-paced production requirements and has a regular work schedule with no unusual work stressors; could not operate foot controls; could not work in a dangerous industrial setting; could not work on a ladder; could only perform work that does not require completely unimpaired vision; and required work that allows for the opportunity to alternate positions from sitting or standing on a less than frequent basis. Mentally, the hypothetical individual retains the ability to perform work that is limited to simple instructions with no more than four or five steps; could get along and cooperate with coworkers and bosses; and can interact with the retail public. (R. at 49-50.) Based on the above hypothetical, the VE testified that such an individual could not perform Plaintiff's past relevant work. (R. at 50.)

The VE further testified that the hypothetical individual would be capable of performing representative occupations such as a bench/production assembler, with 5,000 regional jobs and 200,000 jobs in the national economy; an electronics assembler such as a semiconductor bonder, with 2,000 jobs in the regional economy and 80,000 national; and optical final assembler, with local 800 jobs and 32,000 jobs in the national economy. (R. at 51.)

III. MEDICAL AND EDUCATION RECORDS

A. Physical Impairments

1. Donald A. Fouts, D.O., Family Practice Physician

Plaintiff began treatment with Dr. Fouts in October 2003. (R. at 325.) The treatment notes in the records reflect that Plaintiff saw Dr. Fouts in August 2010 for follow-up and treatment of his diabetes, hyperlipidemia, and hypertension, with the onset of depressive

symptoms, including anxiousness, poor concentration, crying, loss of joy, insomnia, social withdrawal, and feeling stressed. Plaintiff was prescribed Paxil for his depression. (R. at 318-20.)

On October 4, 2010, Dr. Fouts completed a questionnaire in which he listed Plaintiff's diagnosis as depression for the past 2-3 months, with the onset related to the death of his grandmother. Dr. Fouts further indicated that Plaintiff had suffered from hypertension, diabetes with renal complications, and hyperlipidemia for more than five years. Dr. Fouts reported that Plaintiff requires regular check-ups and needed a referral to a nephrologist for monitoring of his kidney function, and possibly also to a psychiatrist, depending on his response to treatment. Dr. Fouts noted that due to Plaintiff's learning disability, he requires some assistance with medication. (R. at 324-26.)

When seen in November 2010, Plaintiff complained of right foot pain, stiffness, and tenderness, which were aggravated by standing and walking. Dr. Fouts assessed diabetes, hyperlipidemia, depressive disorder, and hypertension. (R. at 338-41.) He noted that Plaintiff's diabetes remained stable, with blood sugars in the 100 to 150 range. Dr. Fouts further noted that Plaintiff's hyperlipidemia and depressive disorder remained stable. (R. at 338.)

2. Phillip Swedberg, M.D.

Consulting physician Dr. Swedberg examined Plaintiff in March 2011. (R. at 342-49.) Plaintiff's chief complaint was diabetes. (R. at 346.) Dr. Swedberg noted that Plaintiff previously had a prior open reduction internal fixation (ORIF) of his left ankle. Dr. Swedberg also noted that Plaintiff did not require insulin for his diabetes; his Hemoglobin A1C typically runs between 6 and 7, and his blood sugar typically runs between 100 and 105. (*Id.*) Plaintiff

reported that his diabetes has never required hospitalization for control, that he has no history of ketoacidosis, and that he experiences only occasional numbness in his hands and feet. (*Id.*)

Dr. Swedberg found normal strength throughout and full range of motion except for reduced range of motion in the dorsolumbar spine. (R. at 344.) Plaintiff exhibited a normal gait without the use of ambulatory aids, but had difficulty with forward bending. Dr. Swedberg also found that Plaintiff had normal sensation in his upper extremities and that he had normal manipulative ability bilaterally. Dr. Swedberg assessed morbid obesity, noninsulin dependent diabetes mellitus, and diminished visual acuity in both eyes. (R. at 348.) Dr. Swedberg noted that Plaintiff's obesity contributes to his symptoms and that weight reduction would diminish his complaints. (*Id.*) Dr. Swedberg concluded that Plaintiff appears capable of performing at least a mild to moderate amount of sitting, ambulating, standing, bending, kneeling, pushing, pulling, lifting, and carrying heavy objects. He opined that Plaintiff has no difficulty reaching, grasping, and handling objects and has no environmental or communication limitations. (*Id.*)

3. State-Agency Physicians

On November 4, 2010, state-agency physician Nick Albert, M.D., reviewed the record and opined that Plaintiff's physical impairments are not severe. (R. at 55-59, 64.) On reconsideration on March 22, 2011, state-agency physician W. Jerry McCloud, M.D., reviewed the record and assessed that Plaintiff could lift and/or carry fifty pounds occasionally and twenty five pounds frequently; stand and/or walk about six hours in a workday; and sit for about six hours in a workday. (R. at 85.) He also opined that Plaintiff is limited, primarily due to obesity, to frequently climbing ramps/stairs and stoop and never climbing ladders/ropes/scaffolds. (R. at 85-86.) According to Dr. McCloud, Plaintiff is limited in his left far acuity such that he should

not perform work that requires good vision in both eyes. (R. at 85.) In support of his opinion, Dr. McCloud noted that Plaintiff's diabetes remained stable. (R. at 86.)

B. Mental Impairments

1. Consulting psychologist, Sylvester Briggs, Ph.D.

On November 9, 2010, Dr. Briggs evaluated Plaintiff on behalf of the state agency. (R. at 328-37.) Plaintiff reported that he suffered from occasional numbness in his hands, light-headedness, diabetes with renal complications, hypertension, hypercholesterolemia, a painful right ankle that makes it difficult to walk, difficulty sleeping at night, frequent nightmares, a frequent feeling of being overwhelmed with anxiety, chronic depression, cognitive limitations, and avoidance of social interaction. (R. at 328.) Plaintiff reported that he is able to maintain his own self care and personal hygiene, including completing household chores such as vacuuming, feeding pets, laundry, washing dishes, preparing meals and grocery shopping. (R. at 333.) He reported stopping working in November 2009 to take care of his grandmother and also that he had "always gotten along very good with [his] co-workers and immediate supervisors." (R. at 330.)

Dr. Briggs indicated that Plaintiff "functions within the borderline range of measured intelligence," referencing a 1987 IQ test. (R. at 329.) Plaintiff reported having problems with expressive writing, reading, math, and spelling. He also reported problems with expressive and receptive comprehension, trouble concentrating, trouble focusing, and trouble remembering "day to day critical matters," like taking his medication. (*Id.*) He reported being in special education classes while in school.

Dr. Briggs noted that Plaintiff appeared to be anxious, depressed, pre-occupied, distressed, and apprehensive. (R. at 330.) Dr. Briggs described her impressions as follows: “Plaintiff is of borderline intellectual functioning; he is a psychologically down trodden and disenchanting man.” (R. at 331.) Dr. Briggs assessed Plaintiff’s insight and judgment to be moderately impaired. She opined that Plaintiff’s thought processes and content matter were influenced and shaped by him experiencing overwhelming persistent anxiety, from him having unresolved chronic medical problems, and from him being disappointed in himself for not having lived up to his own expectations.

Dr. Briggs diagnosed Plaintiff with dysthymic disorder, generalized anxiety disorder, and borderline intellectual functioning. (R. at 336.) Dr. Briggs opined that Plaintiff had a mild impairment of his ability to relate to others; a moderate impairment of his ability to understand and follow directions by his flawed cognitive capacity; moderate impairment in his ability to maintain attention, concentration, persistence, and pace for repetitive tasks. Dr. Briggs opined that Plaintiff “is not presently fully capable of focusing his thought processes to intentionally concentrate, to maintain attention, or to be persistent enough in attending to the initiating and completion of an assigned, simple task.” (R. at 336.) Dr. Briggs further opined that Plaintiff had a moderate impairment of his ability to withstand work-related stress; and is markedly impaired in his ability to manage his own funds. (R. at 337.)

2. State-Agency Evaluations

On December 3, 2010, after review of Plaintiff’s medical record, Mel Zwissler, Ph.D., a state-agency psychologist, assessed Plaintiff’s mental condition. (R. at 58-62.) Dr. Zwissler opined that Plaintiff had moderate restrictions in his activities of daily living; moderate

difficulties in maintaining social functioning; moderate difficulties in maintaining concentration, persistence, or pace; and no episodes of decompensation of an extended duration. (R. at 59.) He further determined that the evidence did not establish the presence of the “C” criteria. (*Id.*) Dr. Zwissler opined that Plaintiff can understand and recall simple, but not complex instructions and can carry out simple routine tasks to completion without strict time pressures. He added that Plaintiff overstates his ability to concentrate. (R. at 61.) Dr. Zwissler also noted that even though Plaintiff alleged that he handles stress well, he appeared anxious at the consultive examination. He therefore opined that Plaintiff is able to only adapt to minor changes in a setting with few occasional or infrequent changes and only when explained ahead of time. (R. at 62.)

Patricia Semmelman, Ph.D., reviewed Plaintiff’s medical record and concluded, upon reconsideration, that Plaintiff had only mild restrictions in his activities of daily living; moderate difficulties in maintaining social functioning; and moderate difficulties in maintaining concentration, persistence, or pace. (R. at 83-84.)

C. Exhibits Submitted to the Appeals Council

The medical records submitted to the Appeals Council show that Plaintiff treated with primary care physician Yadwinder Singh, M.D., from September 15, 2011, until at least February 21, 2013. (R. at 350-94.) When initially seen on September 15, 2011, Plaintiff reported his long-standing history of hypertension. Plaintiff also reported feeling nervous, anxious, “over the edge,” unable to control his worry, trouble relaxing, feeling restless, that he was easily annoyed, and that he had been feeling something awful might happen for over thirty

days. (R. at 388-94.) Dr. Singh updated Plaintiff's medication for hypertension and diabetes. (R. at 392.)

On October 26, 2011, Plaintiff reported that his blood sugar had been ranging from 120 to 180. (R. at 373.) Blood work reflected Plaintiff's Hemoglobin A1C was measured at 10.4 and his glucose was 135. (R. at 382-84.) In December 2011, Plaintiff's blood sugar had been running from 150 to 250. Dr. Singh prescribed Glucophage and Insulin. (R. at 366-72.) In February 2012, Plaintiff's blood sugar had been ranging from 120 to 180. (R. at 359.)

In May 2012, Plaintiff's blood sugar had been ranging from 110 to 200. Dr. Singh noted that Plaintiff had a "long-standing history of hypertension." Plaintiff reported feeling nervous, anxious, and easily annoyed. Plaintiff's medications included Prinzide, Celexa, Zocor, Glucophage, Novolin, and Glipizide. (R. at 351-58.)

D. Education Records

Records from Circleville City Schools show that Plaintiff was originally placed in a Learning Disabled Class as a third grader with an IQ listed at 81. (R. at 297.) Plaintiff underwent the Wechsler Intelligence Scale for Children-R (WISC-R) on September 15, 1983, when he was 14. He obtained a verbal IQ score of 74, a performance IQ score of 87, and a full-scale IQ score of 79. (R. at 299.) His records also contain a notation reflecting that IQ testing in September 1980 resulted in an IQ score of 69.

When tested in the 12th grade, at age 18, Plaintiff obtained a verbal IQ score of 73, a performance IQ score of 72, and a full-scale IQ score of 72. (R. at 297.)

The records document that Plaintiff completed the 12th grade in special education classes. (R. at 296-98.)

IV. THE ADMINISTRATIVE DECISION

On August 2, 2011, the ALJ issued his decision. (R. at 15-29.) The ALJ found that Plaintiff met the insured status requirements of the Social Security Act through March 31, 2014. (R. at 20.) At step one of the sequential evaluation process,¹ the ALJ found that Plaintiff had not engaged in substantially gainful activity since December 31, 2009. (*Id.*) The ALJ found that Plaintiff had the severe impairments of diabetes mellitus, obesity, status post right ankle open reduction internal fixation (“ORIF”), dysthymic disorder, generalized anxiety disorder (“GAD”), and borderline intellectual functioning (“BIF”). (*Id.*) The ALJ also found that Plaintiff’s reduced visual acuity in his left eye did not constitute a severe impairment because it caused no more than minimal limitations to Plaintiff’s ability to perform basic, work-related activities. (R. at 21.) He further found that Plaintiff did not have an impairment or combination of impairments that met or medically equaled one of the listed impairments described in 20 C.F.R. Part 404, Subpart P, Appendix 1. (R. at 21.)

¹ Social Security Regulations require ALJs to resolve a disability claim through a five-step sequential evaluation of the evidence. *See* 20 C.F.R. § 416.920(a)(4). Although a dispositive finding at any step terminates the ALJ’s review, *see Colvin v. Barnhart*, 475 F.3d 727, 730 (6th Cir. 2007), if fully considered, the sequential review considers and answers five questions:

1. Is the claimant engaged in substantial gainful activity?
2. Does the claimant suffer from one or more severe impairments?
3. Do the claimant’s severe impairments, alone or in combination, meet or equal the criteria of an impairment set forth in the Commissioner’s Listing of Impairments, 20 C.F.R. Subpart P, Appendix 1?
4. Considering the claimant’s residual functional capacity, can the claimant perform his or her past relevant work?
5. Considering the claimant’s age, education, past work experience, and residual functional capacity, can the claimant perform other work available in the national economy?

See 20 C.F.R. § 416.920(a)(4); *see also Henley v. Astrue*, 573 F.3d 263, 264 (6th Cir. 2009); *Foster v. Halter*, 279 F.3d 348, 354 (6th Cir. 2001).

At step four of the sequential process, the ALJ evaluated Plaintiff's residual functional capacity ("RFC"). The ALJ set forth Plaintiff's RFC as follows:

After careful consideration of the entire record, the [ALJ] finds that the claimant has the residual functional capacity to perform sedentary work as defined in 20 CFR 404.1567(a) and 416.967(a) except the claimant can lift and handle up to 20 pounds while seated and can stand/walk for less than 60 minutes at one time; is limited to work that is free of fast-paced production requirements and has a regular work schedule with no unusual work stressors; is unable to operate foot controls; is limited to work that is not in a dangerous industrial setting; is unable to work on a ladder; is limited to work that does not require completely unimpaired vision; and requires the opportunity to alternate positions from sitting or standing on a less than frequent basis. The claimant can only perform work that is limited to simple instructions with no more than four to five steps; can get along and cooperate with coworkers, bosses; and can interact with the retail public.

(R. at 22.) In reaching this determination, the ALJ gave weight to the assessments of consulting psychologist Dr. Briggs and consulting physician Dr. Swedberg, finding that their assessments were consistent with the record. (R. at 25-26.) The ALJ accorded weight to the opinions of the state-agency medical consultants, Drs. Albert, McCloud, Zwissler and Semmelman. (*Id.*) The ALJ also found that Plaintiff's medically determinable impairments could reasonably be expected to cause the symptoms he alleges, but that his statements concerning the intensity, persistence, and limiting effects of these symptoms were not credible to the extent they were inconsistent with his RFC. (R. at 23.)

Relying on the VE's testimony, the ALJ determined that even though Plaintiff is unable to perform his past relevant work, other jobs exist in the national economy that Plaintiff can perform. (R. at 27-28.) He therefore concluded that Plaintiff was not disabled under the Social Security Act. (R. at 28.)

V. STANDARD OF REVIEW

When reviewing a case under the Social Security Act, the Court “must affirm the Commissioner’s decision if it ‘is supported by substantial evidence and was made pursuant to proper legal standards.’” *Rabbers v. Comm’r of Soc. Sec.*, 582 F.3d 647, 651 (6th Cir. 2009) (quoting *Rogers v. Comm’r of Soc. Sec.*, 486 F.3d 234, 241 (6th Cir. 2007)); *see also* 42 U.S.C. § 405(g) (“[t]he findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive . . .”). Under this standard, “substantial evidence is defined as ‘more than a scintilla of evidence but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Rogers*, 486 F.3d at 241 (quoting *Cutlip v. Sec’y of Health & Hum. Servs.*, 25 F.3d 284, 286 (6th Cir. 1994)).

Although the substantial evidence standard is deferential, it is not trivial. The Court must “take into account whatever in the record fairly detracts from [the] weight” of the Commissioner’s decision. *TNS, Inc. v. NLRB*, 296 F.3d 384, 395 (6th Cir. 2002) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951)). Nevertheless, “if substantial evidence supports the ALJ’s decision, this Court defers to that finding ‘even if there is substantial evidence in the record that would have supported an opposite conclusion.’” *Blakley v. Comm’r of Soc. Sec.*, 581 F.3d 399, 406 (quoting *Key v. Callahan*, 109 F.3d 270, 273 (6th Cir. 1997)). Finally, even if the ALJ’s decision meets the substantial evidence standard, “a decision of the Commissioner will not be upheld where the SSA fails to follow its own regulations and where that error prejudices a claimant on the merits or deprives the claimant of a substantial right.” *Rabbers*, 582 F.3d at 651 (quoting *Bowen v. Comm’r of Soc. Sec.*, 478 F.3d 742, 746 (6th Cir. 2007)).

VI. ANALYSIS

In his Statement of Errors, Plaintiff asserts that the ALJ erred in failing to develop the record and in failing to adequately accommodate his moderate limitations in social functioning in determining his mental RFC. Plaintiff alternatively seeks a remand under Sentence six of 42 U.S.C. § 405(g) for administrative consideration of the records his counsel submitted to the appeals council, which he maintains constitute new and material evidence. (ECF No. 12.)

The Court concludes that remand is warranted because the ALJ failed to fully develop the record. “Social security proceedings, unlike judicial ones, are inquisitorial, not adversarial.” *Wright–Hines v. Comm’r of Soc. Sec.*, 597 F.3d 392, 397 (6th Cir. 2010) (citing *Sims v. Apfel*, 530 U.S. 103, 110–11 (2000)). Generally, “[t]he burden of providing a complete record, defined as evidence complete and detailed enough to enable the Secretary to make a disability determination, rests with the claimant.” *Landsaw v. Sec’y Health & Human Servs.*, 803 F.2d 211, 214 (6th Cir. 1986) (citing 20 C.F.R. §§ 416.912, 416.913(d)). When, however, “special circumstances” exist, including “when a claimant is (1) without counsel, (2) incapable of presenting an effective case, and (3) unfamiliar with hearing procedures . . . an ALJ has a special heightened duty to develop the record.” *Wilson v. Comm’r Soc. Sec.*, 280 F. App’x 456, 459 (6th Cir. 2008) (citing *Lashley v. Sec’y Health & Human Servs.*, 708 F.2d 1048, 1051–52 (6th Cir. 1983)). When such a heightened duty exists, the ALJ “must scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts” and ensure that “favorable as well as unfavorable facts and circumstances are elicited.” *Lashley*, 708 F.2d at 1052 (internal citations and quotation marks omitted).

This case presents the special circumstances outlined in *Wilson*. Specifically, Plaintiff was not represented by counsel at the administrative hearing. Review of the transcript makes clear that he was unfamiliar with the hearing procedures and did not understand how to obtain an attorney to assist him. In addition, the record evidence appears to suggest that Plaintiff was not capable of presenting an effective case without representation. For example, Plaintiff's inarticulate answers reflect that he did not fully comprehend some of the ALJ's questions. Moreover, Plaintiff's school records, his IQ testing, Dr. Briggs' examination notes, and Dr. Fouts' treatment records establish that Plaintiff has intellectual deficits. (*See* R. at 294-305 and 329-37.) Accordingly, the Court finds that the ALJ had a heightened duty to fully and fairly develop the record.

The Court agrees with Plaintiff, that in failing to request updated medical records, the ALJ failed to satisfy this duty. When the ALJ rendered his decision in August 2012, despite being on notice of Plaintiff's ongoing, regular medical care and his duty to "develop a complete medical history of at least the preceding twelve months for any case in which a determination is made that the individual is not under a disability," 42 U.S.C. § 423(d)(5)(B), the most recent medical records in Plaintiff's file were from November 2010. (*See* R. at 307, 311, 350-94.) The issue, then, is whether the ALJ's failure to satisfy his duty to develop the record was harmless. On this point, the Commissioner posits that any error "was, at worst, harmless, and does not necessitate remand" because the record presented sufficient evidence to allow the ALJ to reach a decision. (Comm'r Mem. in Opp. 4, ECF No. 21.)

The Commissioner's argument is unavailing. During the hearing, Plaintiff endorsed both mental and physical limitations that the ALJ did not incorporate into Plaintiff's RFC. The ALJ

explained that he did not find Plaintiff's allegations concerning these symptoms and limitations credible due to the lack of objective evidence. In support of this credibility determination, the ALJ repeatedly emphasized that Plaintiff's treatment records reflected that both his physical and mental conditions were controlled and stable. (*See* R. at 24 ("His conditions have been well controlled with medication [P]laintiff's diabetes mellitus was stable His diabetes, high cholesterol, and high blood pressure remained stable."); *see also* R. at 25 (noting that the records reflecting that medication had improved Plaintiff's mental health symptoms and that Dr. Fouts indicated that Plaintiff's depressive disorder was stable).) The ALJ further pointed out that the consultative examiner had diagnosed Plaintiff with "noninsulin dependent diabetes mellitus." In contrast, the treatment records from Dr. Singh that the ALJ failed to obtain and consider reflect that Plaintiff required treatment for his diabetes with insulin and other medications and that even with this treatment, his diabetes and blood sugar were not stable. (*See* R. at 350-94.) The records further reflect that Plaintiff's mental impairments were not stable and required additional medication. (*Id.*)

Because the records the ALJ failed to obtain and consider undermine the very reason the ALJ advanced for discounting Plaintiff's credibility, the Court cannot conclude that the ALJ's error was harmless. This is especially so given that the RFC the ALJ set forth for Plaintiff limited him to performing an eroded base of sedentary work such that any additional limitations may be work preclusive. Ultimately, "the ALJ, and not the reviewing court, [must] evaluate the credibility . . . of the claimant." *Rogers*, 486 F.3d. at 247. Remand is therefore proper.²

²This finding obviates the need for in-depth analysis of Plaintiff's remaining assignments of error. Thus, the Court need not, and does not, resolve the alternative bases Plaintiff asserts support reversal and remand.

VII. DISPOSITION

Due to the ALJ's failure to sufficiently develop the record, Plaintiff is entitled to an order remanding this case to the Social Security Administration pursuant to Sentence Four of 42 U.S.C. § 405(g). *See Buckner v. Apfel*, 213 F.3d 1006, 1011 (8th Cir. 2000) (where the remand directs the ALJ "to cure some specific defect in the administrative proceeding, such as the ALJ's failure to develop the record or properly evaluate the evidence . . . the district court should [] remand[] the case pursuant to sentence four, rather than sentence six, of 42 U.S.C. § 405(g)"). Accordingly, the Commissioner of Social Security's non-disability finding is **REVERSED**, and this case is **REMANDED** to the Commissioner and the ALJ under Sentence Four of § 405(g) for further consideration consistent with this Opinion and Order.

IT IS SO ORDERED.

Date: November 7, 2014

/s/ Elizabeth A. Preston Deavers
Elizabeth A. Preston Deavers
United States Magistrate Judge