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

BRUCE MILLER,

Plaintiff,

Civil Action 2:13-cv-705
Magistrate Judge Elizabeth P. Deavers

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

OPINION AND ORDER

Plaintiff, Bruce Miller, brings this action under 42 U.S.C. § 405(g) for review of a final decision of the Commissioner of Social Security ("Commissioner") denying his application for social security disability insurance benefits. This matter is before the Court for consideration of Plaintiff's Statement of Errors (ECF No. 15), the Commissioner's Memorandum in Opposition (ECF No. 21), and the administrative record (ECF No. 9). For the reasons that follow, the Court **REVERSES** the Commissioner of Social Security's nondisability finding and **REMANDS** this case to the Commissioner and the ALJ under Sentence Four of § 405(g).

I.

A. Procedural History

Plaintiff has filed applications for benefits on numerous occasions. (*See* R. at 17, 279–81.) He protectively filed his current application for benefits on March 25, 2010, alleging that he has been disabled since August 13, 2006,[1] at age 42. (R. at 222–28.) Plaintiff alleges disability as a result of severe depression, anxiety, diabetes (brittle diabetic), sciatic nerve

[1]Plaintiff amended his alleged disability onset date to September 25, 2009, based on the prior September 24, 2009 administrative decision. (R. at 84-106, 263).

problem, acid reflux, enlarged prostrate, allergies (asthma-like symptoms), arthritis, neuropathy, hypertension, GERD (gastroesophageal reflux disease), lower back problems, problems with his left knee, and vitamin D deficiency. (R. at 285.) Plaintiff's application was denied initially and upon reconsideration. Plaintiff sought a *de novo* hearing before an administrative law judge. Administrative Law Judge James Toschi ("ALJ Toschi") held a video hearing on March 2, 2012, at which Plaintiff, represented by counsel, appeared and testified. (R. at 49–54.) Judith Brendemuhl, M.D., a medical expert; David Blair, Ph.D., a psychological expert; and Karen White, a vocational expert ("VE"), also appeared and testified at the hearing. (R. at 42–48, 50, 54–61.) On March 14, 2012, ALJ Toschi issued a decision finding that Plaintiff was not disabled within the meaning of the Social Security Act at any time from September 25, 2009 (the amended alleged onset date) through December 31, 2009 (the date last insured). (R. at 14–38.) On May 16, 2013, the Appeals Council denied Plaintiff's request for review and adopted ALJ Toschi's decision as the Commissioner's final decision. (R. at 1–4.) Plaintiff then timely commenced the instant action.

In his Statement of Errors, Plaintiff asserts that ALJ Toschi failed to properly apply the doctrine of *res judicata* to a previous adjudication in accordance with *Drummond v. Comm'r of Social Security*, 126 F.3d 837 (6th Cir. 1997), and Acquiescence Ruling 98-46 ("AR 98-4(6)"). Plaintiff alternatively contends that ALJ Toschi erred in assessing his credibility, particularly in relation to his complaints of pain. In her Memorandum in Opposition, the Commissioner concedes that ALJ Toschi failed to comply with AR 98-4(6), but posits that the error was not harmful because the VE testified that an exemplary position she identified, as relevant here, was

typically performed at the sedentary level and could be performed with a sit-stand option. (Mem. in Opp. 2–5, ECF No. 21.)

The Court agrees with the parties that ALJ Toschi failed to comply with AR 98-4(6). But contrary to the Commissioner's assertion, the VE's testimony does not render the error harmless. This finding obviates the need for consideration of Plaintiff's alternative assignment of error. Accordingly, the Court limits its review of the evidence to those portions of the hearing testimony, decision, and record that are at issue.

B. Factual Background

On September 24, 2009, Administrative Law Judge William Paxton ("ALJ Paxton") issued a decision finding that Plaintiff was not disabled within the meaning of the Social Security Act based upon a prior application for benefits. The Appeals Council denied Plaintiff's request for review and adopted ALJ Paxton's decision as the Commissioner's final decision. Because Plaintiff did not further appeal, ALJ Paxton's September 24, 2009 decision is final. ALJ Paxton concluded that Plaintiff suffered from a number of severe, medically determinable impairments, including "diabetes mellitis, diabetic neuropathy and retinopathy, status post left tibial fracture, chondromalacia of the left patella, recurrent major depression and generalized anxiety disorder." (R. at 90.) ALJ Paxton further found that Plaintiff retained the following residual functional capacity ("RFC")[2] :

> [C]laimant has the residual functional capacity to perform *sedentary work* as defined in 20 CFR 404.1567(a) except that he is unable to crawl or climb ladders, ropes or scaffolds. He could occasionally claim ramps and stairs, balance, stoop, kneel and

[2]A claimant's "residual functional capacity" is an assessment of the most a claimant can do in a work setting despite his or her physical or mental limitations. 20 C.F.R. § 404.1545(a); *see Howard v. Comm'r of Soc. Sec.*, 276 F.3d 235, 239 (6th Cir. 2002).

> crouch. He must avoid concentrated exposure to extreme heat and extreme cold. He must avoid all exposure to hazards, such as machinery and heights. He is limited to performing unskilled, simple tasks in a low-stress work environment that does not involve dealing with the public. Also, he must avoid fast-paced work or jobs with production quotas.

(R. at 97 (emphasis added).)

In ALJ Toschi's March 4, 2012 decision, he found that through the date last insured, Plaintiff had the severe impairments of "diabetes mellitus with peripheral neuropathy, osteoarthritis of the left knee, pain of the low back, anxiety, schizotypal personality disorder, and avoidant personality disorder . . . ." (R. at 20.) ALJ Toschi further found that Plaintiff retained the following RFC:

> [C]laimant had the residual functional capacity to perform *light work* as defined in 20 CFR 404.1567(b) except this individual is limited to standing and/or walking on level ground for no more than two hours per day. *This individual must be provided a sit/stand option every hour*. He must avoid climbing ladders, ropes, or scaffolds; balancing; kneeling; and crawling. This individual can climb ramps and stairs and crouch less than occasionally. He can occasionally stoop. Also, this individual should avoid concentrated exposure to heat, cold, and vibrations. Further, he should avoid all exposure to hazards such as heights and machinery. In addition, this individual is limited to detailed instructions and tasks. He can have only occasional contact with the public and frequent contact with coworkers and supervisors. He should not work an environment with fast-paced work or strict quota requirements.

(R. at 26 (emphasis added).)

The emphasized language reflects that ALJ Toschi found that Plaintiff was capable of a higher exertional capacity than ALJ Paxton found and that he added the limitation of a sit/stand option every hour. Comparison of the two decisions and review of the record evidence also reflects that ALJ Toschi agreed with medical expert Dr. Brendemuhl's testimony that Plaintiff's low-back impairment was severe; ALJ Paxton, in contrast, found Plaintiff's complaints of low-back pain to represent a non-severe impairment.

At the hearing, ALJ Toschi asked the VE to assume a hypothetical individual of claimant's age, education, and work experience and with the RFC limitations he set forth in his decision. The VE testified that the hypothetical individual could not perform Plaintiff's past work, but that he could perform other jobs existing in significant numbers in the national and local economy, including the positions of gate guard, mail clerk, and office helper. The VE further testified that, based upon his experience, these jobs provided the sit/stand option contemplated in the RFC.

Plaintiff's counsel subsequently inquired whether the VE had also taken into account the RFC limitation of no standing or walking for more than two of the eight hours. The VE responded that he had taken that particular limitation into account. Plaintiff's counsel further pressed the VE about whether the mail clerk job would be consistent with a limitation of not standing or walking for more than two hours in an eight-hour work day: "The mail clerk job, doesn't that person have to go around in an office and deliver mail to people? Isn't that the primary thing they're doing?" (R. at 60.) The ALJ responded as follows: "No, the primary job thing would be opening mail, processing the mail in. Most places, they open, stamp in, that kind of thing, and that, that can all be done at sedentary." (R. at 61.)

ALJ Toschi relied upon the VE's testimony to conclude that significant jobs existed in the national economy that Plaintiff could have performed through his date last insured such that he was not disabled under the Act.

II.

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 (6th Cir. 2009) (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)).

III.

As discussed above, the central issue before the Court is whether ALJ Toschi's failure to properly apply the doctrine of *res judicata* in accordance with *Drummond* and AR 98-4(6) was

harmless. In *Drummond,* the United States Court of Appeals for the Sixth Circuit held that principles of *res judicata* apply to both claimants and the Commissioner in Social Security cases. 126 F.3d at 841–42. The *Drummond* Court specifically held that absent evidence of "changed circumstances" relating to a claimant's condition, "a subsequent ALJ is bound by the findings of a previous ALJ." *Id.* at 842. The Sixth Circuit further held that when an ALJ seeks to deviate from a prior ALJ's decision, "[t]he burden is on the Commissioner to prove changed circumstances and therefore escape the principles of *res judicata.*" *Id.* at 843. Applying this approach, the *Drummond* Court concluded that the ALJ was bound by a previous ALJ's determination that the claimant retained the RFC to perform sedentary work because evidence did not indicate that the claimant's condition had improved. *Id.* at 843.

Following *Drummond*, the Social Security Administration issued AR 98-4(6), which provides, in pertinent part, as follows:

> [W]hen adjudicating a subsequent disability claim with an unadjudicated period arising under the same title of the Act as the prior claim, adjudicators must adopt such a finding from the final decision by an ALJ or the Appeals Council on the prior claim in determining whether the claimant is disabled with respect to the unadjudicated period unless there is new and material evidence relating to such a finding or there has been a change in the law, regulations or rulings affecting the finding or the method for arriving at the finding.

AR 98–4(6), 1998 WL 283902, at *3 (June 1, 1998).

In this case, it is undisputed that ALJ Toschi violated *Drummond* and AR 98-4(6) when he found Plaintiff capable of a higher exertional level of work (light work instead of sedentary work) without any finding of improvement. Nor is it disputed that ALJ Toschi cannot rely upon the positions of gate guard and office helper that the VE identified to find that significant jobs exist that Plaintiff can perform given that both of those positions are classified as being

performed at the light exertional level. Instead, Plaintiff argues that even eliminating these positions, the VE's testimony that "in 'most places,' the job [of mail clerk] was performed at the sedentary exertional level," amounts to substantial evidence that significant jobs exist that Plaintiff can perform given the VE testimony that 206,750 and 16,000 such positions exist in the national and regional economies, respectively. (Mem. in Opp. 4–5, ECF No. 21 (quoting R. at 60–61).)

The Court finds this argument unavailing. Certainly, ALJ's Toschi's error would be harmless if the VE had, as the Commissioner suggests, testified that the DOT has incorrectly characterized the mail clerk position as light work and that the position is actually performed at the sedentary level. But she did not. Read in the context of the questions presented at the hearing, the VE testified that the mail clerk position does not require a person to stand and/or walk "to go around an office and deliver mail" for more than two out of eight hours, but instead, in "[m]ost places," the primary duties could be performed at the sedentary level. (R. at 60–61.) The differences between light and sedentary work, however, consist of more than just how long a person must be on his or her feet; it also involves the amount and frequency of lifting. *See* 20 C.F.R. § 404.1567. More specifically, sedentary work contemplates lifting no more than ten pounds at a time and occasional lifting. Light work, on the other hand, could involve lifting up to twenty pounds at a time with frequent lifting or carrying of objects weighing up to ten pounds. *Id*. Given the lack of testimony concerning whether the lifting demands of a mail clerk are consistent with sedentary work, the Court cannot conclude that ALJ Toschi's error was harmless. *Cf. Wilson v. Colvin*, No. EDCV 13-1409, 2014 WL 360078, at *5 (C.D. Cal. Jan. 31, 2014) (remanding where the ALJ failed to sufficiently resolve whether the claimant could engage in

more than occasional lifting and the VE had testified that the claimant could not perform the representative job of mail clerk if he could only occasionally engage in the act of lifting); *Saucedo v. Astrue*, No. 1:09-cv-114, 2010 WL 3835243, at *4 (N.D. Tex. Sept. 28, 2010) (VE testified that claimant who was limited to lifting/carrying no more than ten pounds with her left hand could not perform her past work as mail clerk because that job involved use of both arms and lifting).

Finally, as Plaintiff points out and the Commissioner does not dispute, ALJ Toschi cannot rely on the sedentary jobs identified in ALJ Paxton's earlier decision because ALJ Toschi imposed an additional sit/stand restriction based upon his finding of the additional severe impairment of "pain of the low back." (R. at 20.) Accordingly, the Court cannot conclude that substantial evidence supports ALJ Toschi's finding that jobs existed in significant numbers in the national economy that Plaintiff could have performed prior to his date last insured.

IV.

In sum, due to the errors outlined above, 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). Accordingly, the Commissioner of Social Security's nondisability finding is **REVERSED** and the Court **REMANDS** this case to the Commissioner and the ALJ under Sentence Four of § 405(g).

Date: August 29, 2014

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