

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

AARON FREEMAN FARNSWORTH,

Plaintiff,

Civil Action 2:13-cv-923

Magistrate Judge Elizabeth P. Deavers

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

OPINION AND ORDER

Plaintiff, Aaron Freeman Farnsworth, 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 application for supplemental security income.¹ This matter is before the Court for disposition based upon the parties’ full consent (ECF No. 12), and for consideration of Plaintiff’s Statement of Errors (ECF No. 14), the Commissioner’s Memorandum in Opposition (ECF No. 20), and the administrative record (ECF No. 11). For the reasons that follow, the Court **OVERRULES** Plaintiff’s Statement of Errors and **AFFIRMS** the Commissioner’s decision.

¹The Court notes that the administrative record only contains an application for disability insurance benefits. The ALJ and the Plaintiff only reviewed the claim under supplemental security income.

I. BACKGROUND

Plaintiff filed his application for benefits on March 21, 2010, alleging that he has been disabled since August 2, 2008, at age 23. (R. at 121-24.) Plaintiff alleges disability as a result of severe depression, anxiety, panic attacks, and paranoia. (R. at 146.) Plaintiff's application was denied initially and upon reconsideration. Plaintiff sought a *de novo* hearing before an administrative law judge. Administrative Law Judge H.J. Barkley III (the "ALJ") held a video hearing on January 3, 2012, at which Plaintiff, represented by counsel, testified. (R. at 37-46.) Vocational Expert Nancy Shapero (the "VE") also testified at the hearing. (R. at 47-53.) On January 23, 2012, the ALJ issued a decision finding that Plaintiff was not disabled within the meaning of the Social Security Act. (R. at 11-27.) On August 6, 2013, the Appeals Council denied Plaintiff's request for review and adopted the ALJ's decision as the Commissioner's final decision. (R. at 1-5.) Plaintiff then timely commenced the instant action.

II. HEARING TESTIMONY

A. Plaintiff's Testimony

Plaintiff testified that he is married and has never had a driver's license. (R at 37.) He testified that he never took the driver's test because he was in an accident while attempting to learn to drive. (R. at 38.) Plaintiff attended school until the ninth grade. (*Id.*) Plaintiff testified that he last worked in 2008 doing landscaping. He stated that the job lasted for a month and a half and "didn't end very good." (*Id.*) Plaintiff testified that he quit because his "nerves were shot, and [he] was going into anxiety attacks. . ." (R. at 39.) Plaintiff testified that his other work attempts were also unsuccessful, noting that he had trouble with anxiety and social interactions. (R. at 37-40.) He also testified that he had problems attending work. *Id.*

Plaintiff testified that he never received treatment at a mental health facility or had been hospitalized due to mental health problems. (R. at 40.) Plaintiff testified that he experiences a panic attack a “couple of times a day.” (*Id.*) He described these attacks as feeling like he is having a heart attack. (*Id.*)

Plaintiff testified that during a typical day, he eats and watches television. (R. at 42.) Plaintiff testified that he no longer does household chores because of problems with his back, and that he sleeps ten to twelve hours per night. (R. at 42-43.) Plaintiff also testified to having daily lower back pain that runs down his leg. (R. at 44.) Plaintiff estimated that he can sit for ten to fifteen minutes before he has to stand up and that he can stand or walk for ten minutes. (R. at 45.) He testified to being able to lift approximately ten pounds. (*Id.*) Plaintiff further testified that he goes to the grocery store with his wife and helps carry groceries. (R. at 45-46.)

B. Vocational Expert Testimony

The VE testified that Plaintiff has no past relevant work. (R. at 48.) The ALJ proposed a hypothetical to the VE regarding a hypothetical individual with Plaintiff’s age, education, work experience, and residual functional capacity as assessed by the ALJ. *Id.* The VE testified that the hypothetical individual was capable of performing representative occupations such as dishwasher, with 2,220 regional jobs and 350,000 jobs in the national economy; janitor, with 4,500 jobs in the regional economy and over 370,000 in the national economy; and a hand packer, with 2,100 jobs in the regional economy and 400,000 in the national economy. (R. at 49.) The VE testified that her testimony does not conflict with the Dictionary of Occupational Titles (“DOT”). (R. at 51-52.)

When examined by Plaintiff's counsel, the VE testified that if the hypothetical individual was markedly limited in dealing with the public and could only work in a very small setting, consisting of 2-3 additional workers, where he could not depend upon another employee and had no public contact, he could still perform the above-named jobs. (R. at 52-53.) The VE testified that if the hypothetical individual was off task more than 15-20% of the workday, he would not be able to sustain substantial gainful activity. (R. at 53.)

III. PLAINTIFF'S FUNCTION REPORT

Plaintiff's wife completed a function report on his behalf. (R. at 168.) When asked to describe what he does from the time he wakes up until going to bed, Plaintiff submitted: "I brush my teeth, brush my hair, get something to eat, watch tv. Sit outside, try to get chores done around the house." (R. at 162.) He indicated that he can no longer be around people. *Id.* He submitted that he does not need help with personal care, but needs reminders to take care of grooming such as shaving. (R. at 163.) He stated that he prepares his own meals (sandwiches or microwavable meals) each day and it usually takes him about ten minutes. *Id.* Plaintiff stated that he vacuums, does dishes, and mows grass. (R. at 164.) Plaintiff also stated that he sits outside to get fresh air and takes a walk when his nerves are bad. *Id.* He further submitted that he is able to pay bills, count change, handle a savings account, and use a checkbook/ money orders. (R. at 165.)

Plaintiff described his hobbies as watching tv, fishing, and playing basketball. *Id.* He stated that he does these activities often. *Id.* He submitted that he does not spend time with others and the only place he goes to on a regular basis is his doctor's office. *Id.* He also stated that he has trouble getting along with others because he gets nervous and has panic attacks. (R.

at 165-66.) Plaintiff estimated that he can walk for thirty minutes before needing a rest and stated that he can pay attention “pretty good,” but he does not finish what he starts. He also said he could follow written instructions and spoken instructions “good” and that he gets along “good” with authority figures. (R. at 166.)

IV. EDUCATIONAL AND RELEVANT MEDICAL RECORDS²

A. Marietta City Schools- Educational Records

Records from the Marietta City Schools show that Plaintiff attended special education classes and had an Individualized Education Program (“IEP”). At age 6, Plaintiff was administered the Stanford-Binet Intelligence Scale, which resulted in a composite score of 93. As a result of this evaluation, Plaintiff began receiving Learning Disabilities and Speech/Language services in second grade. (R. at 207.) He received services from the learning disabled program from second through fourth grade. (R. at 206.)

When Plaintiff was in fourth grade, at nine years and ten months old, he attained a Full Scale IQ of 69 as measured by the Wechsler Intelligence Scale for Children, 3rd Edition (“WISC-III”), with a Performance IQ of 66 and a Verbal IQ of 76. (R. at 207.) Plaintiff’s Devereux Behavior Rating Scale yielded a Depression scaled score of 16 and was rated as being very significant. *Id.* On the Vineland Adaptive Behavior Scales, Plaintiff scored 72 on both Communication and Daily Living and had a Socialization Score of 92 indicating a relative

²The ALJ determined that Plaintiff had a number of severe physical impairments, including degenerative disk disease at L3-4, L4-5 and L5-S1 and a small annular tear at L3-4 with lumbar pain and left lower extremity radicular pain. (R. at 16.) On appeal, however, Plaintiff’s arguments relate only to mental impairments. (*See* ECF No. 14). Consequently, this Opinion and Order considers only evidence and determinations relating to Plaintiff’s mental impairments.

strength. *Id.* Based on the preceding scores, it was determined that Plaintiff qualified for services from the developmentally handicapped program from fifth grade forward. (R. at 207.)

When Plaintiff was fifteen years old, in the ninth grade, his intervention team, which consisted of his mother, teacher, and school psychologists, completed a Multi-Factored Evaluation. (R. at 206-215.) On the evaluation, his teacher noted that Plaintiff's poor attendance and frequent tardiness interfered with his progress. (R. at 207.) She noted that he needs to develop better social skills and that he does not read orally although she felt his reading skills were a relative strength. (R. at 207.) At fifteen, Plaintiff was again administered the WISC-III I.Q. test. (R. at 209.) Results revealed a verbal IQ of 64, performance IQ of 57, and a full scale IQ of 56. *Id.* The examiner noted that during the evaluation, Plaintiff "was very relieved and excited when he did something well" and "his responses indicated that he was listening attentively." (*Id.*) The examiner noted that Plaintiff's test results indicated that he was functioning within the mildly mentally impaired range of intellectual functioning. *Id.*

The school also tested Plaintiff's "Broad Independence," which is a "measure of overall adaptive behavior based on an average of four different areas of adaptive functioning: motor skills, social interaction and communication skills, personal living skills, and community living skills." (R. at 211.) Testing revealed that Plaintiff's functional independence was significantly below average in all areas. *Id.* Plaintiff's behavior was also tested and it was determined that "[Plaintiff] exhibited a weakness in associating with other people, maintaining attention to the task at hand and cooperating. His teacher stated that he specifically has problems with short attention span on a daily basis, sometimes wanting sleep and intermittently refusing to do his work." *Id.* Plaintiff's General Maladaptive Index score was found to be moderately serious. *Id.*

Plaintiff was also administered a Street Survival Skills Questionnaire (“SSSQ”). (R. at 212.) Records indicate that the SSSQ is “a direct measure of adaptive behavior since the student is asked to answer questions and to perform certain skills. On the SSSQ, [Plaintiff’s] Survival Skills Quotient falls squarely within the average range. This was considerably higher than his measured ability.” *Id.* The examiner concluded that “the results of the adaptive behavior scale indicate that [Plaintiff] should have adequate skills to function independently at home, in his classroom, and in the community.” *Id.*

The records indicate that Plaintiff failed all of his Proficiency Exams and that he received mostly “Ds” and one “C” in his classes. (R. at 207.) The records also note that “[a]s of 4/10/00, Aaron has been absent 9 days and tardy 10 days since he returned to school from the Juvenile Center in January 2000. . . . truancy has been the main disciplinary issue.” *Id.*

The intervention team concluded that “with a Full Scale IQ of 56 and multiple adaptive behavior deficits, it appears that [Plaintiff] continues to qualify for services in the developmentally handicapped program.” (R. at 214.)

B. Ohio Department of Rehabilitation and Correction

At age twenty-two, while incarcerated, Plaintiff’s general mental ability was measured by the General Ability Measure for Adults (“GAMA”). (R. at 450.) Plaintiff earned a GAMA IQ score of 107, which falls in the average range of mental ability. His GAMA IQ score was in the 68th percentile. *Id.*

C. Gary Sarver, Ph.D.

On May 7, 2010, Plaintiff was examined by consulting psychologist, Dr. Sarver, on behalf of the Bureau of Disability Determination. (R. at 216-21.) Dr. Sarver reported that a

review of Plaintiff's early school history revealed that he did average academically, but was suspended from Learning Disabled academic classes. In high school, he did poorly academically and was suspended from school. Plaintiff reported that he quit school in the ninth grade because "[he] was in trouble all the time." (R. at 217.)

When discussing his work history, Plaintiff reported that he was fired from McDonald's after four months because "of not getting there on time." *Id.* He reported that his last job was landscaping. He reported that he worked the job for a month and then quit because "people made [him] nervous." *Id.* He was fired from another job "for not going there." (*Id.*) Plaintiff reported that he cannot work now because his "heart races, and people make [him] uncomfortable." *Id.* Dr. Sarver found that Plaintiff's independent living skills appeared to be adequate, but that his job history is poor. (R. at 220.)

On mental status examination, Dr. Sarver noted that Plaintiff appeared to be interested and motivated, with appropriate attentional pace and persistence. (R. at 218.) Plaintiff was noted to have a constricted affect, a somewhat tense and anxious mood, and to appear socially awkward. (*Id.*) Dr. Sarver found Plaintiff was cooperative and responded appropriately during the evaluation. On examination, Plaintiff's memory registration appeared to be functionally intact; short-term memory and attention appeared to be marginally intact; his long-term memory appeared to be functionally intact; reading and writing appeared to not be functional; abstract reasoning was within the low-average range; and common sense and judgment was in the low-average range. (R. at 219.) In addition, Dr. Sarver found Plaintiff's "insight to be poor with little understanding of his intrapsychic dynamics or the emotional complexities of interpersonal relationships." *Id.* He also found that Plaintiff has poorly developed ego skills and that he is

likely to have difficulty organizing, structuring, and working towards goals. *Id.* Dr. Sarver further noted that Plaintiff is “likely to have difficulty containing his anger, managing his frustration, and controlling his impulses. He is likely to depend upon other people and/or situations to structure life for him.” *Id.*

Dr. Sarver diagnosed Plaintiff with an adjustment disorder with depression and anxiety, alcohol abuse (in early sustained remission), and personality disorder NOS with avoidant features. (R. at 220-21.)

Dr. Sarver concluded that, in terms of his functioning, Plaintiff’s “borderline level of intellectual functioning in conjunction with his poorly developed ego skills, and social anxiety, places him within the moderately impaired range with a [Global Assessment of Functioning (“GAF”) Score] of 55.” (R. at 220.)

Dr. Sarver opined that Plaintiff’s ability to relate to others, including supervisors, was moderately impaired by his personality disorder, which is predictive of intense and unstable interpersonal relationships. (R. at 221.) Plaintiff’s ability to understand and follow simple one and two step job instructions was rated as mildly impaired secondary to his apparently borderline level of intellectual functioning. *Id.* Dr. Sarver opined that Plaintiff’s ability to withstand daily work stresses was moderately impaired secondary to personality disorder and concomitant poorly developed ego skills. *Id.* According to Dr. Sarver, Plaintiff would not be able to manage his benefits in his own best interest due to his past history of alcohol abuse. *Id.*

On June 21, 2010, Plaintiff was evaluated again by Dr. Sarver to determine his level of intellectual functioning. (R 223-24.) On the Wechsler Adult Intelligence Scale - Fourth Edition (WAIS-IV), Plaintiff achieved a Verbal Comprehension IQ of 74 (4th percentile), a Perceptual

Reasoning IQ of 67 (1st percentile), Working Memory IQ of 69 (2nd percentile), Processing Speed IQ of 62 (1st percentile), and a Full Scale IQ score of 63 (1st percentile). (R. at 223) Dr. Sarver concluded that the test results appeared to be valid. (R. at 223.) He found that Plaintiff's overall level of functioning was within the mentally retarded range. *Id.* Dr. Sarver further noted that Plaintiff's school age IQ testing results appeared to be valid and consistent with his placement in developmentally handicapped classes in school. (*Id.*)

D. State-Agency Evaluation

State agency psychologist Dr. Dietz reviewed the record on July 15, 2010, and completed a Mental Residual Functional Capacity Assessment. Dr. Dietz found that Plaintiff was markedly limited in his ability to interact appropriately with the general public. (R. at 227.) Dr. Dietz also found that Plaintiff was moderately limited in his abilities to carry out detailed instructions; to maintain attention and concentration for extended periods; to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances; to sustain an ordinary routine without special supervision; to work in coordination with or proximity to others without being distracted by them; to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods; to accept instructions and respond appropriately to criticism from supervisors; to get along with coworkers or peers without distracting them or exhibiting behavioral extremes; to maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness; to respond appropriately to changes in the work setting; to travel in unfamiliar places or use public transportation; and to set realistic goals and make plans independently of others. (R. at 226-27.)

Dr. Dietz concluded that the key question in this claim is “what is [Plaintiff’s] level of intellectual functioning.” (R. at 228.) He explained that “[w]hile there are scores suggestive of mental retardation[,] other information (adaptive functioning) suggest otherwise. It appears that his socialization difficulties may have impaired his willingness to participate in past testing. His level of day to day functioning appears to be consistent with the Borderline range of Intellectual Functioning.” *Id.* According to Dr. Dietz, Plaintiff’s allegations appear to be consistent and credible. Dr. Dietz concluded that Plaintiff appears to be capable of “completing 3 to 4 step tasks that do not have strict production standards or schedule and do not require more than superficial interactions with others and do not require him to read or write as part of the job duties.” (R. at 228-29.)

V. THE ADMINISTRATIVE DECISION

On January 23, 2012, the ALJ issued his decision. (R. at 11-27.) At step one of the sequential evaluation process,³ the ALJ found that Plaintiff had not engaged in substantially

³Social 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?

gainful activity since March 12, 2010. (R. at 16.) At step two, the ALJ found that Plaintiff has the severe impairments of degenerative disk disease at L3-4, L4-5, and L5-S1 and a small annular tear at L3-4 with lumbar pain and left lower extremity radicular pain; depression; anxiety with panic attacks and paranoia; and borderline intellectual functioning. (*Id.*) The ALJ also found that Plaintiff has non-severe impairments of mild median neuropathy; hypertension; constipation; gastroesophageal reflux disease (GERD); tachycardia; status post percutaneous correction of atrial septal defect (ASD) with no sequale; and alcohol abuse. (*Id.*)

At step three in the sequential process, the ALJ 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 17.)

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

After careful consideration of the entire record, the [ALJ] finds that the claimant has the residual functional capacity to perform medium work as defined in 20 CFR 416.967(C). He can sit for 2 hours and stand/walk 6 hours of an 8-hour workday. He may frequently climb ramps and stairs, balance, stoop, kneel, crouch and crawl, but may only occasionally climb ladders, and scaffolds. He may have only occasional exposure to hazards such as unprotected heights and moving machinery, extreme cold, extreme heat and vibration. He is further limited to simple, routine and repetitive tasks and is not able to perform at a production rate pace, but can perform goal oriented to work. He is limited simple to work-related decisions. He may have only occasional interaction with supervisors, coworkers and the public. He is limited to few if any changes in the workplace setting.

(R. at 19.) In reaching this determination, the ALJ gave significant weight to the opinion of consultative examiner, Dr. Sarver. (R. at 25.) The ALJ also gave significant weight to the

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).

opinion of state-agency psychologist, Dr. Dietz, finding his opinion well supported by the medical evidence of record as a whole. (*Id.*)

At step five, relying on the VE's testimony, the ALJ concluded that other jobs exist in significant numbers in the national economy that Plaintiff can perform. (R. at 26-27.) He therefore concluded that Plaintiff was not disabled under the Social Security Act. (R. at 27.)

VI. 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. at 2009) (quoting *Rogers v. Comm’r of Soc. Sec.*, 486 F.3d 234, 241 (6th Cir. at 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 & Human 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)).

VII. ANALYSIS

In his Statement of Errors, Plaintiff asserts that the ALJ erred in failing to find that he met the requirements of Listing 12.05(C). He also asserts that the ALJ improperly applied post-step three findings at step three of the sequential evaluation. (ECF No. 14.)

A. Listing 12.05(C)

A claimant's impairment must meet every element of a Listing before the Commissioner may conclude that he or she is disabled at step three of the sequential evaluation process. 20 C.F.R. § 404.1520; *Duncan v. Sec'y of Health & Hum. Servs.*, 801 F.2d 847, 855 (6th Cir. 1986). The claimant has the burden to prove that all of the elements are satisfied. *King v. Sec'y of Health & Hum. Servs.*, 742 F.2d 968, 974 (6th Cir. 1984). The regulations provide that in making a medical equivalence determination, the Social Security Administration will “consider the opinion given by one or more medical or psychological consultants designated by the Commissioner.” 20 C.F.R. § 404.1526(c). Nevertheless, “[t]he burden of providing a . . . record . . . complete and detailed enough to enable the Secretary to make a disability determination rests with the claimant.” *Landsaw v. Sec'y of Health & Hum. Servs.*, 803 F.2d 211, 214 (6th Cir.

1986). It is not sufficient to come to close to meeting the conditions of a Listing. *See, e.g., Dorton v. Heckler*, 789 F.2d 363, 367 (6th Cir. 1989) (Commissioner’s decision affirmed where medical evidence “almost establishes a disability” under Listing).

Listing 12.05 covers impairments related to intellectual disability. Specifically, Listing 12.05 provides as follows:

Intellectual disability refers to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; *i.e.*, the evidence demonstrates or supports onset of the impairment before age 22.

The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied.

* * *

C. A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function

20 C.F.R. 404, Subpt. P, App. 1 § 12.05. Thus, in order to satisfy Listing 12.05(C), a claimant must demonstrate the following:

(1) he [or she] experiences “significantly subaverage general intellectual functioning with deficits in adaptive functioning that initially manifested during the developmental period” (*i.e.*, the diagnostic description); (2) he [or she] has a “valid verbal, performance, or full scale IQ of 60 through 70”; and (3) he [or she] suffers from “a physical or other mental impairment imposing an additional and significant work-related limitation of function.”

West v. Comm’r of Soc. Sec., 240 F. App’x 692, 697-98 (6th Cir. 2007) (quoting 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05(C)).

In the instant action, in his discussion of Listing 12.05(B) and 12.05(C), the ALJ found as follows:

As for the “paragraph B” criteria, they are not met because the [Plaintiff] does not have a valid verbal, performance, or full scale IQ of 59 or less. As discussed later in the body of this decision, at the chronological age of 15 years and 0 months, the [Plaintiff] attained performance IQ of 57 and full scale IQ of 56. However, it was noted that motivation and effort was somewhat lacking during this evaluation. Adaptive behavior was suggestive of high functioning (Exhibit 1F).

Finally, the “paragraph C” criteria of listing 12.05 are not met because the [Plaintiff] does not have a valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function. As discussed later in the body of this decision, Dr. Sarver evaluated the [Plaintiff] on June 21, 2010, and reported that the [Plaintiff] attained achieved full scale IQ score of 63, which placed the [Plaintiff’s] overall level of intellectual functioning in the mentally retarded range. However, although Dr. Sarver felt that the IQ score was valid, he also opined that the [Plaintiff’s] intellectual abilities were in the borderline range (Exhibits 2F and 3F). Furthermore, Listing 12.05 requires deficits in adaptive functioning before age 22, not just low IQ scores.

(R. at 19.) Thus, with regard to the diagnostic description, the ALJ found that Plaintiff’s intellectual abilities were in the borderline range and that he did not demonstrate deficits in adaptive functioning before age twenty-two. The ALJ further found that Plaintiff did not meet the criteria of paragraph C because Plaintiff does not have a valid IQ score of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related limitation or function. Plaintiff contends that that ALJ erred in finding that he does not meet Listing 12.05(C).

1. ALJ’s Evaluation of the Diagnostic Description

To meet listing 12.05(C), “it is not enough for a claimant to point to one IQ score below 71; the claimant must also satisfy the ‘diagnostic description’ of mental retardation in Listing 12.05.” *Cooper v. Comm’r of Soc. Sec.*, 217 F. App’x 450, 452 (6th Cir. 2007).

To satisfy the diagnostic description, a claimant must demonstrate three factors: “(1) subaverage intellectual functioning; (2) onset before age twenty-two; and (3) adaptive-skills limitations.”

Hayes v. Comm’r of Soc. Sec., 357 F. App’x 672, 675 (6th Cir. 2009).

“The adaptive skills prong evaluates a claimant’s effectiveness in areas such as social skills, communication skills, and daily-living skills.” *Hayes*, 357 F. App’x at 677. Although Listing 12.05 does not define “adaptive functioning,” another portion of the Listings defines “adaptive activities” as “cleaning, shopping, cooking, taking public transportation, paying bills, maintaining a residence, caring appropriately for your grooming and hygiene, using telephones and directories, and using a post office.” 20 C.F.R. Pt. 404, Subpt. P, App. 1 § 12.00(C)(1). Further, in considering Listing 12.05, the Sixth Circuit has noted that “[t]he American Psychiatric Association defines adaptive-skills limitations as ‘[c]oncurrent deficits or impairments . . . in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.’” *Id.* (quoting DSM-IV-TR at 49).

The plain language of Listing 12.05 does not identify how severe limitations must be to qualify as “deficits in adaptive functioning.” *Pendleton v. Comm’r of Soc. Sec.*, No. 1:10-cv-650, 2011 WL 7070519, at *11 (S.D. Ohio Dec. 23, 2011). Nevertheless, case law from the Sixth Circuit and other federal courts suggests that a claimant must have relatively significant deficits to satisfy the Listing. *See, e.g., West*, 240 F. App’x at 698–99 (suggesting that a claimant’s ability to understand and retain simple instructions; maintain concentration and attention for basic tasks; interact effectively with co-workers; and deal with work stress all supported a finding of no deficiencies in adaptive functioning); *Hayes*, 357 F. App’x at 677

(adaptive skills not deficient where claimant could care for self and husband, cook meals, do laundry, shop, manage finances, and take public transportation); *Harris v. Comm’r of Soc. Sec.*, 330 F. App’x 813, 815–16 (11th Cir. 2009) (claimant who did well in special education classes; was able to perform several jobs; and who had mild limitations in daily living activities, social functioning, and concentration did not have the type of deficits in adaptive functioning required for Listing 12.05(C)); *McMillan v. Comm’r of Soc. Sec.*, No. 1:10–cv–00308, 2012 WL 90264, at *6 (W.D. Mich Jan. 11, 2012) (holding that insignificant or trivial deficits were not sufficient to satisfy Listing 12.05 and ALJ’s finding of moderate restrictions in daily living did not require a finding of deficits in adaptive functioning).

The instant case presents a close call, as Plaintiff has presented substantial evidence that he experiences “significantly subaverage general intellectual functioning with deficits in adaptive functioning that initially manifested during the developmental period.” 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05(C). First, educational records demonstrate that he was in a learning disabled program from second through fourth grade. (R. at 206.) In fourth grade, at nine years old, after testing revealed that he had a full scale IQ of 69 and a Depression scaled score of 16 on the Devereux Behavior Rating Scale, Plaintiff was placed in the developmentally handicapped program. He remained in the developmentally handicapped program through ninth grade when he dropped out of school. *Id.*

Additionally, according to his Multi-Factored Evaluation Report, Plaintiff underwent more testing at age fifteen that demonstrates that he had subaverage intellectual functioning with adaptive deficits. For example, he scored a verbal IQ of 64, performance IQ of 57, and a full scale IQ of 56 on the WISC-III IQ test. (R. at 209.) Testing of Plaintiff’s Broad Independence,

which measures overall adaptive behavior, revealed that his functional independence was significantly below average in all areas. (R. at 211.) Further, Plaintiff's Maladaptive Behavior Index score was found to be moderately serious. *Id.* Notes from the testing indicate that Plaintiff has weaknesses in associating with other people, maintaining attention, and cooperating. *Id.* In the report, Plaintiff's teacher noted that he has a short attention span on a daily basis and intermittently refused to do work. *Id.* The report also indicates that Plaintiff failed all of his proficiency exams and received mostly "Ds" and one "C" in his classes. (R. at 207.) His records also show that he spent time in a juvenile center and had problems with truancy. *Id.* The evaluation team concluded that because of his low IQ score and "multiple adaptive behavior deficits," Plaintiff qualified for the developmentally handicapped program at his school. *Id.* Finally, Plaintiff dropped out of school in ninth grade and never obtained his GED. (R. at 38.)

Plaintiff has also submitted evidence demonstrating that he continues to exhibit subaverage general intellectual functioning with deficits in adaptive functioning. First, in May 2010, Dr. Sarver administered the WAIS-IV to Plaintiff, which revealed a Verbal IQ of 74, Perceptual Reasoning IQ of 67, Working Memory IQ of 69, Processing Speed IQ of 62, and a Full Scale IQ of 63. (R. at 223.) Dr. Sarver found the IQ scores to be valid and explained they indicate that Plaintiff's overall level of functioning was within the mentally retarded range. *Id.* Further, while Dr. Sarver ultimately concluded that Plaintiff had a borderline level of intellectual functioning, he also found that Plaintiff had poorly developed ego skills; would have difficulty organizing, structuring, and working towards goals; and would have difficulty containing anger, frustration, and impulses. (R. at 219.) He also found that Plaintiff's reading and writing skills were not functional. *Id.* He opined that Plaintiff's ability to relate to others was moderately

impaired; his ability to understand and follow simple one and two step instructions is mildly impaired; his ability to withstand work stress is moderately impaired; and that he would not be able to manage his benefits on his own due to past alcohol abuse. (R. at 221.)

Finally, the record contains evidence that Plaintiff has a poor work history and has never had a driver's license. The record indicates that he quit his last job after a month because he had trouble with anxiety and social interactions. (R. at 39, 220.) The record also suggests that Plaintiff had trouble attending work and was fired for that reason on at least one occasion. (R. at 37-40, 220.)

The Court concludes that Plaintiff presented substantial evidence to demonstrate that he suffers from significantly subaverage general intellectual functioning with deficits in adaptive functioning that initially manifested during the developmental period. 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)).

In his decision, the ALJ found that Plaintiff did not meet the Listing because he did not have a valid IQ score in the required range and because he did not demonstrate deficits in adaptive functioning before age twenty-two. The Court concludes that substantial evidence does not support the ALJ's finding that Plaintiff's IQ scores were not valid. While the ALJ found that Plaintiff's "motivation and effort was somewhat lacking" when he took the IQ test at age fifteen,

the evidence in the record suggests otherwise.⁴ (R. at 18-19.) Moreover, Dr. Sarver found the IQ scores to be valid. (R. at 223.) Under these circumstances, substantial evidence does not support the ALJ's decision to invalidate Plaintiff's IQ scores.

Substantial evidence does, however, support the ALJ's finding that Plaintiff did not demonstrate the deficits in adaptive functioning required under Listing 12.05(C). Accordingly, any error the ALJ may have made in evaluating Plaintiff's IQ scores is harmless. *See West*, 240 F. App'x at 698 (affirming ALJ's decision, even though he mistakenly implied that Listing 12.05(C) required a qualifying IQ score before the age of 22 because the claimant failed to produce evidence of deficiencies in adaptive functioning and medical evidence supported the ALJ's conclusion); *cf. Winters v. Comm'r of Soc. Sec.*, No. 98-1991, 2000 WL 712353, at *2 (6th Cir. May. 22, 2000) (rejecting claimant's request for a sentence six remand to consider results of a new IQ test, finding that she could not satisfy the materiality requirement because she had not shown that her mental impairment satisfied other essential elements of Listing 12.05(C)); *Sheeks v. Comm'r of Soc. Sec.*, 544 F. App'x 639, 642 (6th Cir. 2013) (remand not appropriate where the record evidence the claimant relied upon established "a mere toehold . . . on an

⁴The examiner noted the following observations regarding Plaintiff's test behavior:

Before the evaluation was begun, the examiner conversed with Aaron about his family, school, and interests. Aaron was affable and friendly but made self-deprecating remarks indicating that he expected to do poorly on the test. During the test, Aaron was relieved and excited when he did something well. He kept his head down throughout any part of the testing that did not require him to use his eyes. However, his responses indicated that he was listening attentively. He made conversation cheerfully confessing that he had been in a juvenile hall for 6 months but was going out to look for a job today. He seemed optimistic and contrite about his past truancy.

(R. at 209.)

essential element of [Listing 12.05(C)]” and did not otherwise address the remaining essential elements of the Listing); *Hayes*, 357 F. App’x at 675 (noting that a low IQ test “is not sufficient by itself to satisfy Listing 12.05”). Accordingly, while the ALJ erred, remand is improper because the ALJ properly found that Plaintiff did not demonstrate deficits in adaptive functioning.

A review of the record as a whole demonstrates that substantial evidence supports the ALJ’s finding that Plaintiff did not demonstrate deficits in adaptive functioning. With regard to his school records, the Court notes that they contain conflicting evidence regarding Plaintiff’s adaptive functioning. While Plaintiff’s “Broad Independence” was found to be significantly below average, his Survival Skills Quotient fell squarely within the average range.⁵ (R. at 212.) Given the results of the SSSQ, the examiner felt that “[Plaintiff] should have adequate skills to function independently at home, in his classroom, and in the community.” *Id.* Further, Plaintiff’s educational records noted that Plaintiff’s significantly high score on the Devereux Behavior Rating Scale and his chronic attendance problems likely had a significant impact on his learning. (R. at 214.) His teacher also noted that “[Plaintiff’s] poor attendance and frequent tardiness at school has interfered with his making progress as well as he might.” (R. at 207.)

⁵On the SSSQ, Plaintiff demonstrated understanding of words such as up, down, between, bottom, top, half, smaller, inside, middle, and front; could read all of the written and symbolic signs which were presented; could identify tools and their uses; could identify cleaning products and their uses; could find telephone numbers in a directory and dial them correctly; could tell time to the minute on a digital and analog clocks; could add and subtract time; could select the months of the year in the right order; could identify all coins and bills; could identify places where services can be obtained in the community (i.e. purchase stamps, borrow books, fill prescriptions). (R. at 212.)

These comments indicate that Plaintiff's behavioral issues and efforts may have affected his intellectual advancement.

In addition, on Plaintiff's Function Report, he indicated that he can follow written and spoken instructions "good." (R. at 166.) He also submitted that he is able to pay bills, count change, handle a savings account, and use a checkbook and money orders. (R. at 165.) Further, he is able to prepare simple meals and take care of his own grooming, although he needs reminders to shave. (R. at 163-164.) Plaintiff is also married and lives with his wife. (R. at 37.) Plaintiff used to complete household chores such as vacuuming, dishes, and mowing the grass, but no longer does so because of his back pain. (R. at 164, 42.)

The medical records also supply support for the ALJ's findings. Dr. Sarver concluded that Plaintiff had borderline intellectual functioning. (R. at 220.) While Dr. Sarver's conclusion "does not rule out the possibility of a finding of mental retardation" under Listing 12.05(C), *Sheeks*, 544 F. App'x at 641, it is a relevant consideration. *See, e.g., Cooper v. Comm'r of Soc. Sec.*, 217 F. App'x 450, 452 (6th Cir. 2007) (finding the absence of any mental retardation diagnosis to be a relevant consideration); *West*, 240 F. App'x at 698 (same). Further, on examination, Dr. Sarver noted that Plaintiff's memory registration appeared functionally intact, his short-term memory and attention was marginally intact, his long-term memory was functionally intact, and his abstract reasoning and common sense and judgment were in the low average range. (R. at 219.) He noted, however, that Plaintiff's ability to read and write was not functional. *Id.* Nonetheless, Plaintiff's speech and language was noted to be within normal limits and intelligibility was 100%. *Id.* Notably, Dr. Sarver did not find that Plaintiff had any marked limitations. (R. at 221.) Finally, a state-agency physician, Dr. Dietz, noted that "[w]hile

there are scores suggestive of mental retardation other information (adaptive functioning) suggests otherwise. It appears that [Plaintiff's] socialization difficulties may have impaired his willingness to participate in past testing. His level of day to day functioning appears to be consistent with the Borderline range of intellectual functioning.” (R. at 228.)

The Court also points out that the ALJ considered Plaintiff's activities of daily living, social functioning, and concentration, persistence or pace in determining whether Plaintiff met the paragraph D criteria of Listing 12.05. In considering these areas of functioning, the ALJ found that Plaintiff had mild restrictions in activities of daily living and moderate restrictions in social functioning and concentration, persistence, or pace. (R. at 17-18.) These findings support the ALJ's conclusion that Plaintiff did not experience deficiencies in adaptive functioning. *West v. Comm'r Soc. Sec. Admin.*, 240 F. App'x 692, 698 (6th Cir. 2007) (finding that substantial evidence supported the ALJ's finding that plaintiff did not experience deficiencies in adaptive functioning where plaintiff “did not exhibit “marked” limitations in his “daily living activities, social functioning, or ability to maintain attention and concentration,” and . . . did not demonstrate an “inability to function outside of a highly supportive living arrangement.”)

Further, as the ALJ noted, Plaintiff's poor work history does not appear to be a result of his intellectual or adaptive deficits. As the ALJ explained, “[Plaintiff] testified that he quit prior jobs due to difficulty being around others. He also admitted that he lost his job at McDonald's, in part, because he just ‘did not feel like coming in.’ Furthermore, he quit his job at Shoney's ‘because it was too hard on his body.’” (R. at 24.)

Given the foregoing, the Court concludes that substantial evidence supports the ALJ's finding that Plaintiff did not exhibit deficits in adaptive functioning before age twenty-two.

While the Court may have arrived at a different conclusion than the ALJ, his decision must be affirmed because it is supported by substantial evidence. *Lowery v. Comm’r of Soc. Sec.*, 886 F. Supp. 2d 700, 706 (S.D. Ohio 2012) (“If the Commissioner’s decision is supported by substantial evidence, it must be affirmed, even if the Court as a trier of fact would have arrived at a different conclusion.”) (citing *Elkins v. Sec. of Health and Hum. Serv.*, 658 F.2d 437, 439 (6th Cir. 1981)). Substantial evidence supports the ALJ’s conclusion that Plaintiff does not meet the diagnostic description and that Plaintiff does not meet Listing 12.05(C). Under these circumstances, it is unnecessary to consider the remaining criteria of Listing 12.05(C). Accordingly, Plaintiff’s contention of error is **OVERRULED**.

B. Step Three Findings

Plaintiff is correct that if a claimant satisfies a Listing criteria at step three, the evaluation must end without consideration of Plaintiff’s RFC. *See Reynolds v. Comm’r of Soc. Sec.*, 424 F. App’x 411, 416 (6th Cir. 2011). At step three, the ALJ is required to consider the medical severity of the claimant’s impairments. The Sixth Circuit has declined to require remand, however, when the ALJ provides minimal reasoning at step three. *See Forrest v. Comm’r of Soc. Sec.*, 591 F. App’x 359, 365 (6th Cir. 2014) (“we decline Forrest’s invitation to extend *Wilson* to require remand when the ALJ provides minimal reasoning at step three of the five-step inquiry. . . . Importantly, the regulations governing the five-step inquiry require only that the ALJ “consider all evidence in [the claimant’s] case record,” 20 C.F.R. § 404.1520(a)(3), and, at step three, “consider the medical severity of [the claimant’s] impairment(s)”).

In this case, the ALJ did not apply RFC findings or other post-step three findings in his step three determination. While the ALJ referenced his later discussion of certain evidence, he

did not improperly consider vocational factors or decide Plaintiff's RFC before making his findings at step three. As explained above, the ALJ was required to consider Plaintiff's adaptive functioning and intellectual abilities in order to determine whether Plaintiff met Listing 12.05(C). Thus, the ALJ's reasoning at step three, although minimal, did not violate the Regulations. Plaintiff's contention of error is therefore **OVERRULED**.

VIII. DISPOSITION

In sum, from a review of the record as a whole, the Court concludes that substantial evidence supports the ALJ's decision denying benefits. Accordingly, Plaintiff's Statement of Errors is **OVERRULED** and the Commissioner of Social Security's decision is **AFFIRMED**.

IT IS SO ORDERED.

Date: March 31, 2015

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