UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RONNIE BARBER,	:	Case No. 3:13-cv-110
Plaintiff,	:	Judge Timothy S. Black
vs.	:	
COMMISSIONER OF SOCIAL SECURITY,	:	
Defendant.	:	

ORDER THAT: (1) THE ALJ'S NON-DISABILITY FINDING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, AND IS REVERSED; (2) THIS MATTER IS REMANDED TO THE ALJ UNDER THE FOURTH SENTENCE OF 42 U.S.C. § 405(g); AND (3) THIS CASE IS CLOSED

This is a Social Security disability benefits appeal. At issue is whether the administrative law judge ("ALJ") erred in finding the Plaintiff "not disabled" and therefore not entitled to receive Supplemental Security Income ("SSI") and Disability Income Benefits ("DIB"). (*See* Administrative Transcript ("Tr.") (Tr. 16-39) (ALJ's decision)).

I.

Plaintiff filed applications for DIB and SSI on September 19, 2006, alleging disability beginning July 15, 2006. (Tr. 152-156, 615-618). Plaintiff maintains that he was disabled due to lung disease, Chronic Obstructive Pulmonary Disease (COPD), emphysema, degenerative back problems, vision problems, anxiety, depression, and carpal tunnel. (Tr. 242). Plaintiff met the requirements for a period of disability and DIB set forth in Section 216(i) of the Social Security Act and was insured through December

31, 2010. (Tr. 160). Plaintiff's applications were denied initially and upon reconsideration. (Tr. 41, 42, 619, 623).

Plaintiff filed a timely request for a hearing which was held before ALJ Thomas R. McNichols on September 21, 2009. (Tr. 80). William Braunig, a vocational expert, appeared and testified at the hearing. A supplemental hearing was held on December 15, 2009, at which Paul A. Boyce, M.D., appeared and testified as the medical expert and Charlotta J. Ewers appeared and testified as the vocational expert. (Tr. 96-107).

The ALJ issued a decision unfavorable to Plaintiff on January 12, 2010. (Tr. 43-65). Plaintiff subsequently filed new Title II and XVI applications on January 25, 2010, and the State Agency determined that he was disabled as of January 13, 2010 (the day after the ALJ's denial). (Tr. 629-640).

In addition to filing new applications, Plaintiff also appealed to the Appeals Council. (Tr. 109). On November 12, 2010, the Appeals Council issued a ruling affirming the State Agency's finding of disability as of January 13, 2010, but vacating the final hearing decision and remanding the case for further proceedings. (Tr. 127-129). The Appeals Council found that the record was unclear regarding the nature and severity of Plaintiff's breathing impairments prior to January 13, 2010. (Tr. 128). Specifically, the medical expert, Dr. Boyce, testified that the pulmonary function tests ("PFTs") were invalid based on incomplete testing conducted over the course of several years and that Plaintiff's breathing impairments did not meet or equal the criteria of a Listing. However, this statement appeared to be in "direct contrast with the invalid medical testing," and the Appeals Council acknowledged that "counsel for claimant referenced

other pieces of evidence in the contentions submitted with the request for review which she alleged were not considered in the decision" and the "information in question does not appear to be included in the electronic record." (*Id*.) The Appeals Council concluded that the expert testimony was unclear and the record was incomplete. (*Id*.)

A third hearing was held on August 25, 2011 in Dayton, Ohio to address the validity of the PFTs. (Tr. 137-149). Plaintiff appeared and testified. (*Id*.) Also appearing were Oscar Farmati, M.D., medical expert, and Charlotta Ewers, vocational expert. Dr. Farmati opined that Plaintiff had stage II-III COPD and experienced a significant reduction in his functional capabilities. (Tr. 748-49). The ALJ refused to consider a sedentary residual functional capacity ("RFC"). [1] (Tr. 754). A sedentary RFC would render Plaintiff disabled under the grid regulations as of July 31, 2006.[2] (*Id*.)

The ALJ issued an unfavorable decision on October 24, 2011 consisting essentially of the same findings as his January 2010 decision. (Tr. 16-32). His findings were as follows:

1. The claimant met the insured status requirements of the Social Security Act through December 31, 2010.

2. The claimant has not engaged in substantial gainful activity between July 15, 2006, the alleged disability onset date, and January 12, 2010 (20 C.F.R. § 404.1571 *et seq*., and 416.920 (c).))

[1] RFC is a measure of the most work a plaintiff can do despite their limitations. 20 C.F.R. § 416.945.

[2] The grid regulations are guidelines that say whether a person should be considered disabled based on their age, education, relevant work experience, and R.F.C. 20 C.F.R. PART 404 Subpt. P. App. 2.

3. Between July 15, 2006 and January 12, 2010, the claimant had the following severe impairments: degenerative disc disease of the lumbar spine, chronic obstructive pulmonary disease, depression, and anxiety (20 C.F.R. 404.1520(c) and 416.920(c)).

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

5. After careful consideration of the record, the undersigned finds that, between July 15, 2006 and January 12, 2010, the claimant had the residual functional capacity to perform light work as defined in 20 C.F.R. 404.1567(b) and 416.967(b) except that he could never perform repetitive bending or twisting at the waist and never climb ladders, ropes, or scaffolds. He could stoop and crouch no more than frequently, and he needed to alternate positions between sitting and standing at thirty-minute intervals throughout the workday. The claimant needed to avoid concentrated exposure to irritants and all exposure to hazards. He was limited to work involving no direct dealing with the general public and no more than low-stress tasks (defined as limited contact with supervisors and no teamwork), and he could maintain concentration on a single task for no longer than fifteen minutes at a time.

6. From July 15, 2006 to January 12, 2010 the claimant was unable to perform his past relevant work (20 C.F.R. 404.1565 and 416.965).

7. The claimant was born on July 31, 1956, and was 49 years old, which is defined as "younger individual age 18-49" on alleged disability onset date. The claimant subsequently changed age category to "closely approaching advanced age" (20 C.F.R. 404.1563 and 416.963).

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

9. Transferability of job skills is not material to the determination of disability because using the Medical-Vocational Rules as a framework supports a finding that the claimant was "not disabled" during the relevant time period, whether or not the claimant has transferable job skills. (See SSR 82-41 and 20 C.F.R. Part 404, Subpart P, Appendix 2).

10. Between July 15, 2006 and January 12, 2010, considering the claimant's age education, work experience, and residual functional capacity, there were jobs

that existed in significant numbers in the national economy that the claimant could have performed (20 C.F.R. 404.1569, 404.1569(a), 416.969, and 416.969(a)).

11. The claimant was not under a disability, as defined in the Social Security Act, from July 15, 2006 through January 12, 2010 (20 C.F.R. 404.1520(g) and 416.920(g)).

(Tr. 22-31).

In sum, the ALJ concluded that Plaintiff was not under a disability as defined by the Social Security Regulations and was therefore not entitled to SSI or DIB. (Tr. 32).

Plaintiff again requested review of the hearing decision by the Appeals Council on December 21, 2011. (Tr. 15). This request was denied on February 14, 2013, making the ALJ's decision the final decision of the Commissioner. (Tr. 11).

Plaintiff was forty nine years old at the time of his alleged onset date. (Tr. 201). Plaintiff attained age fifty on July 31, 2006, at which time he became a person closely approaching advanced age. 20 C.F.R. PART 404 Subpt. P. App. 2. Plaintiff has a ninth grade education, attended special education classes while in school, and has difficulty reading and writing. (Tr. 671, 700). Plaintiff had past relevant work experience as a tire changer.[3] (Tr. 30, 198).

On appeal, Plaintiff argues that the ALJ erred in: (1) finding that he did not meet or equal Listing 3.02; (2) finding that he can perform light work; (3) failing to properly

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

weigh the opinion of his treating physician, Dr. Hawkins; and (4) relying upon testimony from Dr. Boyce. The Court will address each error in turn.

II.

The Court's inquiry on appeal is to determine whether the ALJ's non-disability finding is supported by substantial evidence. 42 U.S.C. § 405(g). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). In performing this review, the Court considers the record as a whole. *Hephner v. Mathews*, 574 F.2d 359, 362 (6th Cir. 1978). If substantial evidence supports the ALJ's denial of benefits, that finding must be affirmed, even if substantial evidence also exists in the record upon which the ALJ could have found Plaintiff disabled. As the Sixth Circuit has explained:

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

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

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

A.

The record reflects that:

1. Medical Evidence of Record[4]

In a Field Office Disability Report dated September 19, 2006, Plaintiff was observed to "have some marked difficulty with breathing and coughed frequently during the interview." (Tr. 203).

A PFT was completed on February 13, 2003 through Miami Valley Hospital Respiratory Care.[5] (Tr. 285). Plaintiff's FVC was 3.35 pre-bronchodilator (pre-bronch) and 4.15 postbronchodilator (post-bronch).[6] (*Id*.) FEV1 values were 1.49 pre-bronch and 1.71 post-bronch with a DLCO of 13.47, 30.99% of predicted value.[7] (*Id*.) The impression was severe obstructive impairment of ventilation with associated air trapping. (Tr. 286).

2. Initial Examining Physicians

At the request of the BDD, Plaintiff underwent a consultative evaluation performed by Dr. Danopulos on December 26, 2006. (Tr. 369-379). Plaintiff presented with complaints of effort-related shortness of breath, low back pain, and right arm pain

[4] Plaintiff was also treated for back pain and psychological problems, but he is not challenging the denial of disability benefits on those grounds, so the court declines to address them.

[5] A pulmonary function test ("PFT") is a medical test which measures the ability of the lungs to function. The results must indicate a certain FVC or FEV1 level to meet the listing for disability.

[6] Forced Vital Capacity ("FVC") is a measure of the maximum amount of air that the patient can force out of his or her lungs at once.

[7] FEV1 is the volume of air that the patient can push from his or her lungs in one second.

involving the right shoulder, right elbow, and right wrist. (Tr. 369). Physical examination of the lungs and chest revealed chest PA dimensions were normal; lungs revealed ronchi to the auscultation;[8] chest excursions were normal but expiration was prolonged; no use of accessory muscles during respiration; no intercostal retractions; no labored breathing existed; no cyanosis; no clubbing of fingers; and no chest wall deformity. (Tr. 371). A chest x-ray was completed with the impression of "emphysema." (Tr. 372, 379). The objective findings were: early emphysema, lumbar spine early arthritis, and right arm arthralgias in his right shoulder and right elbow. (Tr. 372).

Plaintiff also underwent a PFT on January 30, 2007 performed by Dr. Danopulos. (Tr. 362-368). FVC values were 3.426 pre-bronch and 3.971 post-bronch and FEV1 values were 1.800 pre-bronch and 1.887 post-bronch. (Tr. 363). The interpretation explained: "He did perform three times" and "he was very cooperative and tried his best." (Tr. 364). Dr. Danopulos diagnosed "[m]oderate degree obstructive and mild degree restrictive lung disease with positive BD [bronchodilator] effect." (*Id*.)

Plaintiff was treated at Miami Valley Medical Surgical Clinic in May 2007 for complaints of shortness of breath and coughing. (Tr. 299). The assessment was asthma vs. COPD and tobacco dependence. (*Id*.) In June 2007, Plaintiff was reported to have an "acute exacerbation of COPD" and was prescribed prednisone. (Tr. 400). He was advised to quit smoking. (*Id*.) In November 2007, Plaintiff was instructed to start

[8] Auscultation is the test of listening to the internal sounds of the body, and rochi are respiratory sounds caused by secretion in the bronchial airways.

prednisone oral taper. (Tr. 393). Plaintiff was again advised to quit smoking in January 2008. (Tr. 391). In May 2008, Plaintiff reported that he quit smoking approximately one month ago. (Tr. 440). In June 2008, Plaintiff's diagnosis was "moderate COPD; relatively controlled." (Tr. 437). However, Plaintiff started smoking again. (*Id.*)

A PFT was performed at Kettering Medical Center on July 12, 2007. (Tr. 347, 356). This study noted: "only able to obtain two DLCO trials to meet ATS after several attempts. Best efforts recorded." (Tr. 347). One trial shows the DLCO at 10.59, predicted 29.64, and percentage prediction of 36. (*Id.*) The other trial shows values of DLCO at 10.61, predicted 29.64, and percentage prediction 36. (Tr. 356).

3. Reviewing Physicians

BDD reviewer Leigh Thomas, M.D., reviewed the medical evidence on February 21, 2007. (Tr. 290-297). Dr. Thomas opined that Plaintiff was limited to lifting 20 pounds occasionally, 10 pounds frequently; standing and/or walking about 6 hours total in an 8 hour work day; sitting for a total of 6 hours in an 8 hour work day; and should avoid even moderate exposure to extreme cold, heat, fumes, odors, dust, gases, poor ventilation, etc. (Tr. 291-294). On June 15, 2007, BDD reviewer Gary Demuth, M.D. stated: "Need DLCO—COPD with FEV1 < 70%." (Tr. 327). On July 19, 2007, Dr. Demuth stated: "Consultant does not comment on validity of testing- states this is the best test—supposed to have 2 valid tests." (Tr. 328). Dr. Ronald Cantor, BDD Chief Medical Consultant requested additional clarification from Dr. Danopulos on July 24, 2007 regarding the number of trials present in the report. (Tr. 346). On August 15, 2007, Dr. Demuth concluded: "DLCO is not valid per BDD standards." (Tr. 329).

Dr. Demuth completed a physical residual functional capacity assessment on September 26, 2007. (Tr. 381-388). He found that Plaintiff could lift 20 pounds occasionally and 10 pounds frequently; stand and/or walk for a total of about 6 hours in an 8 hour work day; sit for a total of about 6 hours in an eight hour work day; frequently stoop and crouch; must avoid concentrated exposure to extreme cold and heat; must avoid even moderate exposure to fumes, odors, dusts, gases, poor ventilation, etc. (*Id*.)

4. Examining Physicians

A stress test was performed on September 11, 2007 by Dr. Danopulos. (Tr. 333-345). Physical examination of the Plaintiff showed resting dyspnea[9], which intensified by effort. (Tr. 333-334). Upon examination, Plaintiff's chest excursions were highly diminished and expiration was prolonged. (Tr. 334). The clinical impression was a severe degree of emphysema. (*Id*.)

A PFT was performed at Miami Valley Hospital on June 27, 2008. (Tr. 432-434). The impression was: severe air flow obstruction; no significant response to inhaled BD; lung volumes revealed evidence of air trapping; compared to prior study on 5-11-07, there was a significant decrease in FEV1 as well as FVC; the RV was significantly increased; the patient was coughing a lot and was noted to be very short of breath; a repeat study would be of value when the patient is more clinically stable. (Tr. 432). FVC was reported 1.87 pre-bronch and 2.04 post-bronch with FEV1 of 0.79 pre-bronch and

[9] Dyspnea, or shortness of breath, is a common symptom of chronic disorders of the respiratory system. C.F.R. PART 404 Subpt. P. App. 1. Under §3.00(A).

0.89 post-bronch. (Tr. 433). The comments noted: "Tried hard. Albuterol, Ban. Lot of Coughing, SOB. He couldn't do the DLCO." (Tr. 434).

5. Treating Physician

Plaintiff switched his primary care to Jennifer Hawkins, M.D., in September 2008. (Tr. 447- 461). Physical examination revealed no dyspnea; no rales/crackles; no rhonchi; diminished air movement; decreased breath sounds; and expiratory wheezing. (Tr. 458). In February 2009, physical examination revealed wheezing, diminished air movement, dry rales/crackles (bilateral lower lobes), and diminished respiratory excursion. (Tr. 451). A chest x-ray completed on February 16, 2009 revealed nonspecific perihilar and mid-to lower lung interstitial infiltrates, and an x-ray from March 20, 2009 revealed chronic interstitial changes without focal acute pulmonary disease process. (Tr. 462-3).

Plaintiff's treating physician, Dr. Hawkins, completed a medical report at the request of the BDD on April 28, 2010. (Tr. 578-580). She diagnosed severe COPD, depression, chronic pain, inguinal hernia, and mild hearing loss. (Tr. 579). Clinical findings included diffuse wheezing and diminished air exchange on lung examination. (Tr. 579, 582).

B.

Plaintiff alleges that the ALJ erred by finding that he did not meet or equal Listing 3.02.

Listing 3.02 requires either: (A) an FEV[1] level less than or equal to 1.45 for a person 68-69 inches tall; (B) an FVC level less than or equal to 1.65 for a person 68-69 inches tall; or (C) a single breath DLCO equal to less than forty percent of the predicted

normal value. 20 C.F.R. PART 404 Subpt. P. App. 1. Under §3.00(F)(1), the DLCO values must be measured by the single breath technique, the value used for adjudication must "represent the mean of at least two acceptable measurements…within ten percent of each other[,]" and the ability of the individual to perform the test properly, following directions should be included within the report along with appropriately labeled information. 20 C.F.R. PART 404 Subpt. P. App. 1.

In Dr. Farmati's post-hearing interrogatories, he stated that the Plaintiff equaled listing 3.02A during the relevant time period. (Tr. 613). Dr. Farmati opined that Plaintiff's July 2007 PFT contained a DLCO score at listing level and that the FVC/FEV1 scores place Plaintiff at "stage 3 as severe COPD." (*Id.*) He concluded that "with the extra pulmonary finding in combination/ mentioned at the hearing/ the COPD equals the listing of 3.02A subject to your adjudication." (*Id.*)

The ALJ found that Dr. Farmati's testimony and his responses to the interrogatories were "inconsistent and confusing at best." (Tr. 24). The ALJ rejected Dr. Farmati's opinion and instead gave "greater weight to the well-considered opinion of Dr. Boyce," finding that the preponderance of testing and examination findings did not support a conclusion that the severity of Plaintiff's respiratory condition met or equaled any listed impairment. (*Id.*) Specifically, it is unclear whether there were two valid DLCO measurements taken on July 12, 2007 as required by § 3.00(F)(1).

The cover sheet to the DLCO evidence dated July 24, 2007 contains a note from Dr. Cantor, the Chief Medical Consultant, which states: "It looks as though only one DLCO trial was reported. At least I only saw the tracings for one trial. It was reported as

the 'best.' Where is the second best? Was effort judged to be good, fair, or poor?" (Tr. 346). Dr. Boyce also testified that only one DLCO trial was performed on July 12, 2007. (Tr. 638-84). Even Dr. Farmati fails to clarify whether there were two trials. (Tr. 613). Without the July 2007 results, Dr. Farmati concluded that the Plaintiff did not meet listing levels. (Tr. 748-9). Thus, whether the Listing was met hinges on whether the testing was valid.

When there is conflicting evidence, the essential factual issues have not been resolved. *See Faucher v. Sec'y of HHS*, 17 F.3d 171, 176 (6th Cir. 1994). Here, there is conflicting evidence regarding the validity of the July 2007 testing. It is not within the Court's purview to interpret evidence *de novo*. *LeMasters v. Comm'r of Soc. Sec.*, No. 3:07cv224, 2008 WL 4426900, at *2 (S.D. Ohio Sept. 25, 2008). The court may not interpret medical evidence or determine the credibility of witnesses. *Brainard v. Sec. of Health & Human Servs.*, 889 F.2d 679, 681 (6th Cir. 1989). Accordingly, the contradictory evidence requires remand. Specifically, Dr. Farmati must evidence at least two valid DLCO measurements, or the test must be redone.

C.

Next, Plaintiff alleges that the ALJ erred by finding that he is limited to light work. The ALJ relied on Dr. Boyce's testimony in finding that Plaintiff was capable of light work instead of the testimony from specialist, Dr. Farmati, and treating physician, Dr. Hawkins. (Tr. 26, 56).

Dr. Farmati testified that Plaintiff was limited to lifting no more than ten pounds at a time, was able to sit for up to 2 hours at a time, stand or walk for about forty five

minutes, and could sit for six hours in an eight hour workday and stand or walk for one hour.[10] (Tr. 751). Plaintiff alleges that Dr. Farmati's testimony supports a finding that he is limited to sedentary work. (Doc. 10 at PageID 82). He argues that Dr. Farmati should be given greater weight than Dr. Boyce because Dr. Farmati is a specialist and gave comprehensive explanations for his testimony. (Tr. 106, 147-8, 682-90, 745-56).

If an ALJ chooses to give greater weight to a physician who is not normally entitled to greater weight, that ALJ must support this decision with "good reasons." *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 544 (6th Cir. 2004). Although a specialist is normally given greater weight than a non-specialist, an ALJ may choose to weigh the experts differently if he or she provides a sufficiently specific explanation for why the different weight was given. *Coldiron v. Comm'r of Soc. Sec.*, 391 F. App'x 435, 439-40 (6th Cir. 2010) (citing SSR 96–2p, 1996 WL 374188, at *5 (S.S.A. July 2, 1996)). Specifically, the ALJ found that: (1) Dr. Farmati's testimony was inconsistent, initially finding that the July 2007 test was not correctly done, and then testifying that he had not seen that test; (2) Dr. Farmati failed to address Dr. Boyce's finding that the July 2007 test was invalid; and (3) Dr. Farmati failed to identify which findings he relied upon. (Tr. 24, 28-9).

The Court cannot determine whether the ALJ stated good reasons for giving greater weight to Dr. Boyce's testimony until the validity of the DLCO test which was conducted in July of 2007 is determined. This material issue of fact must be resolved

[10] It is unclear whether the standing and walking limitations described how much Plaintiff could stand at one time or during the entire workday.

before the Court can decide whether the denial of benefits, based on this testimony, was appropriate.

D.

Plaintiff also argues that the ALJ's decision to grant little weight to Dr. Hawkins, the treating physician, was improper. "An ALJ must give the opinion of a treating source controlling weight if he finds the opinion 'well-supported by medically acceptable clinical and laboratory diagnostic techniques' and 'not inconsistent with the other substantial evidence in [the] case record.'" *Wilson*, 378 F.3d at 544 (quoting 20 C.F.R. § 404.1527(d)(2)). When these conditions are not met, there is a good reason for the ALJ to give weight to a non-treating physician. (*Id*.)

Plaintiff argues that Dr. Hawkins's testimony is consistent with the substantial evidence in the record and that his limitations were based on physical examinations medical tests. In addition to the medical assessment conducted by Dr. Hawkins, Plaintiff points to the consistency between the findings of Drs. Hawkins, Danopulos, and Farmati.

Dr. Hawkins opined that Plaintiff was classified at Stage IV (very severe COPD) as of September 2008. (Tr. 610-611). Dr. Hawkins opined that Plaintiff was limited to lifting no more than 5 pounds, standing no more than 15 minutes at time, and sitting no more than 4 hours at a time. (Tr. 610-11). Dr. Hawkins stated that Plaintiff was not capable of much work because he suffers from Stage IV (severe) COPD. (Tr. 610-11). These conclusions are based, at least in part, on the July 2007 testing. (*Id*.) As this Court explained *supra*, the validity of the July 2007 testing is unclear. (*Id*.) Thus, this Court cannot determine whether Dr. Hawkins's opinion was "well-supported by medically

acceptable clinical and laboratory diagnostic techniques[.]" *Wilson*, 378 F.3d at 544 (quoting 20 C.F.R. § 404.1527(d)(2)). Remand is required to make the determination.

III.

A sentence four remand provides the required relief in cases where there is insufficient evidence in the record to support the Commissioner's conclusions and further fact-finding is necessary. *See Faucher*, 17 F3d. at 174 (citations omitted). In a sentence four remand, the Court makes a final judgment on the Commissioner's decision and "may order the Secretary to consider evidence on remand to remedy a defect in the original proceedings, a defect which caused the Secretary's misapplication of the regulations in the first place." *Id*. at 175. "It is well established that the party seeking remand bears the burden of showing that a remand is proper under Section 405." *Culbertson v. Barnhart*, 214 F. Supp. 2d 788, 795 (N.D. Ohio 2002) (*quoting Willis v. Sec'y of Health & Human Servs.*, 727 F.2d 551 (6th Cir. 1984)).

IV.

The Court concludes that remand is appropriate in this matter because there is insufficient evidence to support the ALJ's decision. In fact, the Commissioner moved for voluntary remand. (Doc. 14).

IT IS THEREFORE ORDERED that the decision of the Commissioner to deny Ronnie L. Barber benefits is **REVERSED**, and this matter is **REMANDED** under sentence four of 42 U.S.C. § 405(g).

On remand, the ALJ shall: (1) clarify the July 2007 test with Dr. Farmati; (2) employ a medical expert to review the July 2007 test and determine whether there are

at least two acceptable measurements; (3) reweigh the opinions of Dr. Farmati, Dr. Hawkins, and Dr. Boyce in light of the July 2007 testing; and (4) reconsider whether the Plaintiff meets or equals Listing 3.02.

IT IS SO ORDERED.

Date: 9/22/14

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