UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

BRIAN BULLMAN,	:	Case No. 3:13-cv-202
Plaintiff,	:	Judge Timothy S. Black
vs.	:	
COMMISSIONER OF SOCIAL SECURITY,	:	
Defendant.	:	

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

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 supplemental security income ("SSI") and disability insurance benefits ("DIB"). (*See* Administrative Transcript at Doc. 7 ("PageID") (PageID 47-61) (ALJ's decision)).

I.

Plaintiff filed an application for SSI and DIB on May 21, 2010. (PageID 244-53). Plaintiff alleged disability beginning in 1991 due to "fibromyalgia in feet and legs, clubbed feet, bipolar disorder, nerve damage in right arm and leg, and depression." (PageID 202, 209, 278). Plaintiff later amended his onset date to March 22, 2010, although he did not stop working until April 6, 2010. (PageID 241, 278).

A hearing was held on December 5, 2011 before an ALJ. (PageID 81). Plaintiff was represented at the hearing by an attorney. (*Id*.) Both a vocational expert and a medical expert appeared and testified by telephone. (*Id.*)

On March 20, 2012, the ALJ denied Plaintiff's claim for benefits. (PageID 44-66). Plaintiff's request for review was denied by the Appeals Council, making that decision the final administrative disposition of Plaintiff's claim. (PageID 34-43). Plaintiff then commenced this action in federal court for judicial review of the Commissioner's decision pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3).

Plaintiff was born on August 15, 1971 and was 38 years old at the time of his hearing before the ALJ. (PageID 59). Plaintiff graduated from high school. (*Id*.) Plaintiff's past relevant work[1] includes 14 years as a production assembler as well as shorter periods as an industrial sweeper/cleaner and a lawn mower. (PageID 97).[2]

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

1. The claimant meets the insured status requirements of the Social Security Act through September 30, 2015.

2. The claimant has not engaged in substantial gainful activity since March 22, 2010, the amended alleged onset date (20 CFR 404.1571 *et seq*.).

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

[2] Plaintiff worked at the same company from 1995 through March 2010, but was let go due to "inappropriate action." (PageID 431). Specifically, Plaintiff was suspended from work for using marijuana. (PageID 51).

3. The claimant has the following severe impairments: healed fractured right clavicle; migraine headaches, status post jaw fracture and splenectomy; cannabis abuse; diabetes mellitus; chronic pain; and bipolar disorder. (20 CFR 404.1520(c)).

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

5. The undersigned finds that the claimant has the residual functional capacity to perform sedentary work as defined in 20 CFR 404.1567(a) subject to: lifting and carrying 20 pounds occasionally and 10 pounds frequently; standing/walking for two hours in an eight-hour day and sitting for six hours in an eight-hour day; occasional climbing of ramps or stairs; no climbing of ladders, ropes, no scaffolds; frequent bending, stooping, crouching, and kneeling; occasional balancing; no overhead reaching on the right; no use of hand controls on the right; no foot controls; no fine manipulation on the right; occasional interaction with coworkers, supervisors, and the public; tasks that are simple, routine, and repetitive in nature; no fast paced production quotas; in a static low stress environment.

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

7. The claimant was born on August 15, 1971 and was 38 years old, which is defined as a younger individual age 18-44, on the amended disability onset date (20 CFR 404.1563).

8. The claimant has at least a high school education and is able to communicate in English (20 CFR 404.1564).

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 is "not disabled," whether or not the claimant has transferable job skills (*See* SSR 82-41 and 20 CFR Part 404, Subpart P, Appendix 2).

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

11. The claimant has not been under a disability, as defined in the Social Security Act, from April 1, 1991, through the date of this decision (20 CFR 404.1520(g)).

(PageID 49-60).

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. (PageID 60).

On appeal, Plaintiff argues that the ALJ erred by: (1) failing to acknowledge that Plaintiff has "virtually no use" of his right, dominant upper extremity; (2) failing to adequately establish the availability of other jobs through the vocational expert's testimony; (3) failing to incorporate migraine related limitations in the assigned RFC; (4) failing to properly weigh the record's treating and examining source evidence; and (5) failing to articulate a proper credibility finding. 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. Claimant's testimony and background

Plaintiff testified that he was in a serious motor vehicle accident in 1988 which fractured his neck, jaw, right hip, multiple bones in his left leg, his left clavicle, and his left elbow. (PageID 643-44). The crash also ripped his right arm out of its socket causing extensive nerve damage. (*Id*.) Plaintiff underwent numerous surgical procedures

to address these injuries and was placed in a halo. (*Id*.) He was only 16 years old at the time. (PageID 645).

Plaintiff is right handed, but alleges that he has no good strength or use of his right arm for performing tasks. (PaegID 646). Plaintiff claims that he cannot even open his right hand without assistance from his left. (PageID 646-47). While the right arm problems relate back to his car accident, they became significantly worse as he aged. (PageID 647). When Plaintiff was working, he had some strength in his arm and was able to use it to assist his left arm in performing work tasks, but that strength eroded and ultimately disappeared over time. (PageID 650). Plaintiff explained that his right arm could not assist because of his deteriorating condition. (PageID 676). Plaintiff's feet also bother him and make it difficult to stand or walk. (PageID 652-53). Plaintiff also suffers migraine headaches lasting an average of five hours two or three times each month. (PageID 654). When he is experiencing a migraine, he sits in one place and keeps his head down. (PageID 673).

In addition to his physical problems, Plaintiff also struggles with bipolar disorder. (PageID 671-72). He gets agitated and is not always successful in calming himself down before snapping at others. (*Id*.) He also has bad depression days a couple of times per month where he keeps to himself and generally stays in his bedroom. (PageID 672-73). He has tried different medications in the past to improve his mental health, but only the recent addition of Lithium led to improvement in his symptoms. (PageID 674).

Unfortunately, his medications also come with significant side effects including daily diarrhea. (PageID 674-75). He also generally naps after taking his medications. (*Id*.)

In terms of daily activities, Plaintiff watches television and naps. (PageID 655). Occasionally, he watches movies with his children. (PageID 658). He eats simple meals, like a bowl of cereal, a sandwich, or a can of soup. (PageID 655-56). He typically only leaves his home two or three times per month. (PageID 656). He is not able to do much to help around the house other than occasionally straightening up his room and sometimes doing his laundry. (PageID 656-57).

2. Medical evidence of record

At all relevant times since 2005, Plaintiff's primary care physician has been Dr. Kanomata. (PageID 341-420, 442-560, 611-18). Dr. Kanomata's notes largely reflect treatment for periodic illnesses and Plaintiff's bipolar disorder. (*Id*.) On January 18, 2005, Plaintiff began complaining to Dr. Kanomata of severe headaches. (PageID 370). These complaints persisted and remained a major focus of Dr. Kanomata care. (PageID 367, 370-73, 379). On March 8, 2005, Dr. Kanomata diagnosed Plaintiff with migraine headaches, noting that they have no definite triggers and were not alleviated by medication. (PageID 374). Plaintiff continued to report headaches to Dr. Kanomata from 2005 through his hearing in 2011. (PageID 348, 350, 371, 444, 466, 470, 612).

Plaintiff underwent a leg length study on February 25, 2005. (PageID 577). The study revealed that Plaintiff's left leg was shorter than his right. (*Id*.) This was attributed to marked medial compartment narrowing and overlap in Plaintiff's left knee. (*Id*.)

On March 12, 2005, Plaintiff consulted with a neurologist, Dr. Meltzer, regarding his headaches. (PageID 333-35). Plaintiff explained that he has headaches at least every three weeks and they last up to five hours. (*Id*.) He had no luck identifying any triggers for them. (*Id*.) Dr. Meltzer opined that Plaintiff's headaches are likely migraines and prescribed medication. (*Id*.)

Plaintiff also consulted with a podiatrist, Dr. Joseph, on November 6, 2006. (Tr. 549). Dr. Joseph diagnosed Plaintiff with the residuals of his club foot deformity and an infection of his left large toenail. (*Id*.)

On April 21, 2010, Plaintiff underwent a psychological evaluation with Dr. Ramirez. (PageID 425-29). Plaintiff's speech was pressured, his psychomotor activity was hyperactive, and he demonstrated tangential thought associations and flight of ideas. (PageID 427). Dr. Ramirez diagnosed bipolar disorder and assigned a GAF score of 50.[3] (PageID 429).

On July 8, 2010, Plaintiff was examined by a state agency consultant, Dr. Onamusi. (PageID 431-37). Dr. Onamusi noted that Plaintiff walked with a mild, unsteady, and somewhat wide-based gait. (PageID 432). He had difficulty getting on and off the examination table due to his right arm. (*Id*.) Dr. Onamusi's examination of Plaintiff's upper extremities was notable for "considerable atrophy and weakness in the right upper extremity with diminished to absent reflexes." (*Id*.) Dr. Onamusi noted that

[3] The Global Assessment of Functioning ("GAF") is a numeric scale (0 through 100) used by mental health clinicians and physicians to rate subjectively the social, occupational, and psychological functioning of adults. A score of 41-50 indicates serious symptoms or any serious impairment in social, occupational, or school functioning.

Plaintiff had lost the extension functions in his hand and wrist. (*Id*.) He diagnosed Plaintiff with status post motor vehicle accident with multiple injuries and right upper extremity weakness from a brachial plexus injury as well as bilateral clubbed feet with deformities and gait disturbance. (PageID 433). Ultimately, Dr. Onamusi opined:

> Based on information obtained during this evaluation, it is my opinion that this patient should be able to engage in light physical demand activities. He however has virtually no use of the right upper extremity and therefore he would be able to engage only in one-handed light physical demand level work activities.

(*Id*.)

In late 2010, two other state agency consultants also reviewed Plaintiff's file and commented upon his limitations. (PageID 135-45, 147-57). These consultants concluded that Plaintiff was limited in his ability to use his right upper extremity for both gross and fine manipulation; however, the extent of this limitation was not quantified. (PageID 141, 153). The state agency physicians opined that Plaintiff can use his right upper extremity to push or pull objects for up to one third of each given workday. (*Id*.) They also concluded that despite Plaintiff's club foot deformities and the residuals of his serious accident, he had no significant limitations in his ability to stand or walk as a part of sustained work activity. (PageID 140, 152).

On October 18, 2010, Plaintiff's longtime treating physician, Dr. Kanomata, prepared a letter regarding Plaintiff's impairments and limitations. (PageID 445). Dr. Kanomata opined that Plaintiff's right hand "is now atrophic and useless for any meaningful occupation." (*Id*.) He further explained that Plaintiff's "inability of using the

right hand makes it difficult to find any occupation." (*Id*.) Dr. Kanomata ultimately concluded that Plaintiff is not able to maintain gainful employment. (*Id*.) In October 2010, Dr. Kanomata also completed a brief questionnaire for Social Security. (PageID 565-66). In the questionnaire, Dr. Kanomata indicated that Plaintiff was unable to do all activities due to his right arm injury because he is right-hand dominant. (*Id*.) Dr. Kanomata also opined that Plaintiff is unable to stand for greater than one hour secondary to his clubbed feet. (*Id*.)

A clinical psychologist, Dr. Kravitz, reviewed Plaintiff's file and testified regarding his mental impairments via telephone at the administrative hearing. (PageID 659-71). Dr. Kravitz limited his testimony to a discussion of Plaintiff's psychological impairments. (PageID 661). Dr. Kravitz explained that Plaintiff's mental health diagnoses include bipolar disorder and cannabis abuse in partial remission. (PageID 661-62). Dr. Kravitz opined that Plaintiff's daily activities are fairly limited, but that this is primarily due to his physical condition. (PageID 663). Ultimately, Dr. Kravitz concluded that Plaintiff has mild to moderate mental health related limitations and would be limited to simple, repetitive tasks in a work setting requiring only occasional superficial interactions with others and without frequent changes in the work routine. (PageID 664-65).

3. The vocational expert's testimony

A vocational expert, Suman Srinivasan, testified at Plaintiff's administrative hearing. (PageID 676-90). When posed a hypothetical mirroring the assigned residual

functional capacity, she testified that such a worker could not perform Plaintiff's past relevant work, but that there would be other jobs at the sedentary level which could be performed. (PageID 681-83). She later opined that if the hypothetical worker were off-task for greater than 3% of the workday, he would be unable to sustain any of the jobs she identified. (PageID 687-88). When asked a hypothetical involving "virtually no functional use" of the right upper extremity, Ms. Srinivasan testified that it would be "very difficult" for such a worker to perform "any competitive work." (PageID 689). Lastly, she opined that the level of absenteeism consistent with Plaintiff's migraine headaches would be work preclusive. (*Id*.)

4. The ALJ's decision

The ALJ found that Plaintiff has not engaged in substantial gainful activity since his alleged onset date. (PageID 49). The ALJ determined that Plaintiff suffers from the severe impairments of a healed fracture of his right clavicle, migraine headaches, status post jaw fracture and splenectomy, cannabis abuse, diabetes mellitus, chronic pain, and bipolar disorder. (PageID 49-54).

The ALJ's residual functional capacity ("RFC") [4] finding reads:

> The undersigned finds that the claimant has the residual functional capacity to perform sedentary work as defined in 20 CFR 404.1567(a) subject to: lifting and carrying 20 pounds occasionally and 10 pounds frequently; standing/walking for two hours in an eight hour day; occasional climbing of ramps or stairs; no climbing of ladders, ropes, or scaffolds; frequent bending, stooping, crouching, and kneeling; occasional balancing; no overhead reaching on the right; no use of

[4] "Residual functional capacity" is defined as the most a claimant can still do despite his or her limitations. 20 C.F.R. § 404.1545(a).

> hand controls on the right; no foot controls; no fine manipulation on the right; occasional interaction with coworkers, supervisors, and the public; tasks that are simple, routine, and repetitive in nature; no fast paced production quotas; in a static low stress environment.

(PageID 56).

The ALJ concluded that Plaintiff is incapable of returning to his past work. (PageID 59). However, based upon Ms. Srinivasan's testimony, there are a significant number of jobs in the national economy which he can perform. (PageID 59-60). As a result, the ALJ found that Plaintiff was not disabled under the Social Security Act. (PageID 60).

B.

First, Plaintiff claims that the vocational expert's ("VE") testimony fails to adequately establish the availability of other jobs. Specifically, Plaintiff argues that the ALJ's hypothetical questions to the VE were improper, because they did not include the full extent of his right arm limitations or his migraine headaches.

First, with regard to migraines, counsel asked the VE whether Plaintiff would be able to work if he was absent from work one to three times per month due to headaches. (PageID 689). However, no medical professional, including Plaintiff's own treating physician, said his migraines would result in any absences from work. Plaintiff's reports of migraines and even their diagnosis does not prove their severity, nor does it translate into any absences from work. *Young v. Sec'y of HHS*, 925 F.2d 146, 151 (6th Cir. 1990) (diagnosis of impairment does not indicate severity of impairment). Accordingly, the

ALJ was not required to include this limitation in the RFC. *Casey v. Sec'y of HHS*, 987 F.2d 1230, 1235 (6th Cir. 1993) ("It is well established that an ALJ may pose hypothetical questions to a vocational expert and is required to incorporate only those limitations accepted as credible by the finder of fact."). The ALJ properly incorporated Plaintiff's limitations into the hypothetical question. *Stanley v. Sec'y of HHS*, 39 F.3d 115, 118 (6th Cir. 2004) ("the ALJ is not obliged to incorporate unsubstantiated complaints into his hypotheticals").

With respect to the right arm impairments, the VE was aware that Plaintiff's right arm injury dated back to 1988, that Plaintiff was right handed, and that he had a 15 year working history subsequent to the injury. (PageID 643-645, 677). The VE clearly stated that she had read Plaintiff's file and listened to his testimony about these issues. (PageID 677). When the VE was asked a hypothetical question regarding Plaintiff's ability to work, including restrictions for "no overhead reaching on the right; no use of hand controls on the right;" and "no fine manipulation on the right" (PageID 55, 682), the VE testified that a significant number of regional jobs would be available. (PageID 683-685). However, the ALJ failed to address the fact that Plaintiff was restricted in his ability to perform gross manipulation. (PageID 141, 153).[5] Additionally, the assumption that the hypothetical worker's non-restricted hand would have necessarily taken over "the

[5] Every medical source, including the state agency reviewers, opined that Plaintiff was limited in his ability to use hand controls and perform both fine and gross manipulation. (*Id*.) No physician opined consistent with the ALJ's findings that Plaintiff's only right arm limitations involve hand controls, overhead reaching, and fine manipulation. Accordingly, failure to adopt such restrictions is not supported by the record.

functions of the dominant hand," was not based upon any vocational observation or occupational research, but instead on her own "little knowledge" of "the body." (*Id.*) This assumption undermines the reliability of the VE's testimony because the VE was plainly unqualified to offer this kind of quasi-medical opinion regarding the human body. *See* 20 C.F.R. § 404.1527(2) and § 404.1513.

Accordingly, the ALJ's reliance on the VE's testimony that there were a significant number of jobs for someone with Plaintiff's right hand/arm restrictions is not supported by substantial evidence.[6]

C.

Plaintiff also argues that the ALJ erred when he found migraines to be a severe impairment, but then failed to incorporate migraine related limitations in the assigned RFC.

The ALJ noted that an MRI of Plaintiff's head was normal, and in September 2011 Plaintiff reported that his migraines were under control with medication. (PageID 49, 51). No doctor ever rendered an opinion about any possible functional limitations Plaintiff might have from his alleged migraine headaches. *Ealy v. Comm'r of Soc. Sec.*, 594 F.3d 504, 514 (6th Cir. 2010) ("the physicians who treated Ealy for these things never recommended any ongoing significant restrictions."). Furthermore, no treating

[6] If the VE determines that Plaintiff's gross right hand manipulation limitations are work preclusive, the ALJ must determine the disability onset date, because it is nonsensical that Plaintiff was disabled due to his right hand/arm on March 22, 2010, yet he continued to work until April 6, 2010, when his job was terminated due to marijuana use.

source ever opined as to what Plaintiff could or could not do because of his headaches, and, therefore, the ALJ did not have an obligation to assign any weight to their treatment notes. *Bass v. McMahon*, 499 F.3d 506, 510 (6th Cir. 2007) ("Since Dr. Naum made no medical judgments, the ALJ had no duty to give such observations controlling weight or provide good reasons for not doing so.").

Moreover, many of the ALJ's restrictions accounted for Plaintiff's migraines. For example, Plaintiff was restricted to simple, routine, repetitive tasks in a "static low stress environment," which would account for any concentration or attention problems his migraines caused. (PageID 56). Additionally, a restriction to standing and walking only two hours a day would allow Plaintiff to sit for the majority of the day, which would account for the physical restrictions headaches may impose. (PageID 55).

Accordingly, the ALJ did not err when he failed to expressly incorporate migraine related limitations in the assigned RFC.

D.

Next, Plaintiff claims that the ALJ failed to properly weigh the record's treating and examining source evidence. In assessing the physicians, the Court will also address Plaintiff's argument that the ALJ erred by failing to acknowledge that he has "virtually no use" of his right, dominant upper extremity.

Generally, the medical opinions of treating physicians are afforded greater deference than those of non-treating physicians. *Rogers v. Comm'r of Soc. Sec.*, 486 F.3d 234, 242 (6th Cir. 2007). "Because treating physicians are 'the medical professionals

most able to provide a detailed, longitudinal picture of [a claimant's] medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone,' their opinions are generally accorded more weight than those of non-treating physicians." *Id.* at 242 (quoting 20 C.F.R. § 416.927(d)(2)). A treating physician's opinion is given "controlling weight" if it is supported by "medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence in the case record." *Id.*

When a treating source opinion is not entitled to controlling weight, the regulations provide that the ALJ must consider several factors when determining what weight to give the opinion. 20 C.F.R. § 404.1527(d)(2), 416.927(d)(2). The factors include: the examining relationship, the treating relationship (its length, frequency of examination, and its nature and extent), the supportability by clinical and laboratory signs, consistency, specialization, and other enumerated criteria. 20 C.F.R. § 404.1527(d), 416.927(d).

With respect to Dr. Kanomata's opinion that Plaintiff was unemployable, the ALJ explained that this opinion was given no weight since the determination of whether a person is disabled requires application of law to fact, and is a matter "reserved to the Commissioner." SSR 96-5p ("Whether an individual is 'disabled' under the Act. The regulations provide that the final responsibility for deciding issues such as these is reserved to the Commissioner."). The ALJ gave only limited weight to the rest of Dr. Kanomata's opinion because it was not "well supported by medically acceptable clinical

and laboratory diagnostic techniques." (PageID 52). *Cutlip v. Sec'y of HHS*, 25 F.3d 284, 287 (6th Cir. 1994) (treating physician opinions are "only accorded great weight when they are supported by sufficient clinical findings and are consistent with the evidence").

Specifically, Defendant criticizes Dr. Kanomata for failing to explain how Plaintiff was able to maintain gainful employment from 1995 through 2010 despite his injury. However, the Defendant fails to consider that there is no factual dispute that Plaintiff's condition and capabilities deteriorated over time. Dr. Kanomata's opinion indicates that Plaintiff's right hand is "*now* atrophic and useless for any meaningful occupation [emphasis supplied]," explaining that Plaintiff's hand was not useless in the past, but had atrophied to that point by the date he drafted his opinion. (PageID 445). Therefore, the fact that Plaintiff was able to maintain gainful employment from 1995 through April 6, 2010 does not undermine Dr. Kanomata's October 18, 2010 opinion that Plaintiff's hand is not atrophic, it simply creates an issue of fact as to when (between April 6, 2010 and October 18, 2010) the hand atrophied to the point that it was "useless."

With respect to Dr. Onamusi, a one-time examining source, the ALJ determined that Dr. Onamusi did not adequately account for Plaintiff's walking and standing limitations. (PageID 50). Specifically, the ALJ discounted Dr. Onamusi's opinion that Plaintiff had "virtually no use of the right upper extremity and therefore he would be able to engage in only one-handed light physical demand work." (PageID 50, 433). The ALJ discounted the opinion because it was not consistent with Dr. Onamusi's notation that

Plaintiff was able to drive, do housework, do laundry, manage his grooming, and lift and carry up to 20 pounds. (PageID 431). However, there is no indication that Plaintiff performs any of these activities with his right arm and/or hand. Defendant also claims that Dr. Onamusi's opinion regarding Plaintiff's right arm was inconsistent with his findings that Plaintiff's "muscle power and tone were normal in all muscle group"; he had "full and summetric reflexes in the elbows and wrists"; and "sensation to light touch and pain was preserved in all extremities." (PageID 432). However, Dr. Onamusi also detailed that

> Examination of the extremities revealed considerable atrophy and weakness in the right upper extremity with diminished to absent reflexes in the right upper extremity. He has predominantly loss of extension functions in the hands and wrists and also weakness in the extensors in the elbow. He also did have subjective sensory loss both to pain and light touch and sensory discrimination in the right upper extremity.

(Tr. 432). Dr. Onamusi's notations regarding normal extremity findings were plainly not meant to apply to Plaintiff's right upper extremities. Accordingly, the Court does not find Dr. Onamusi's opinion inconsistent.

The ALJ gave more weight to the assessment of Drs. Bolz and McCloud, the state agency reviewing physicians, who concluded that despite Plaintiff's migraine headaches, history of club feet, and allegations of nerve damage in his right arm and leg, Plaintiff could still perform light exertional work. *Wisecup v. Astrue*, No. 3:10cv325, 2011 U.S. Dist. LEXIS 85455, at *19 (S.D. Ohio July 15, 2011) ("opinions of non-examining state agency medical consultants have some value and can, under some circumstances, be

given significant weight"). In November 2010, W. Jerry McCloud, M.D., completed a separate review of Plaintiff's medical record and affirmed Dr. Bolz's recommendations of light exertional work with some postural and right arm limitations. (PageID 152-154). The ALJ noted that Drs. Bolz and McCloud's conclusions that Plaintiff could perform light work were consistent with Dr. Onamusi's ultimate conclusion that Plaintiff was capable of light exertional demands. (PageID 52, 433). Still, the ALJ found Drs. Bolz and McCloud's "assessment to be too optimistic in light of the claimant's problems with his feet." (PageID 50-51). Therefore, the ALJ gave Plaintiff the benefit of the doubt and "restricted [him] to standing and walking only two hours in an eight-hour day for sedentary exertion." (PageID 51). It is the Commissioner's function to weigh the medical evidence and resolve any conflicts. *Hardaway v. Sec'y of HHS*, 823 F.2d 922, 928 (6th Cir. 1987).

The state agency reviewers also opined that Plaintiff was limited in his ability to use hand controls and to perform both fine and gross manipulation. (Tr. 141, 153). However, the ALJ only limits Plaintiff's use of hand controls and ability to perform fine manipulation. (Tr. 56). The ALJ did not limit Plaintiff's gross manipulation in either his RFC or his hypotheticals to the VE. (Tr. 56, 682). The ALJ's omission of gross manipulation limitations and Dr. Onamusi's "virtually no use" restriction is not harmless because Plaintiff established that he cannot perform his past relevant work (Tr. 59), and therefore it was the Commissioner's burden to show that other work would be available to Plaintiff despite his impairments. *Felisky v. Bowen*, 35 F.3d 1027, 1035 (6th Cir.

1994). That burden cannot be met here, where the hypotheticals used to elicit jobs from the vocational expert do not accurately reflect all of Plaintiff's limitations. *Ealy v. Comm'r*, 594 F.3d 504 (6th Cir. 2010). This is particularly true since the VE testified that Dr. Onamusi's restriction about hand manipulation would compromise a worker's ability to perform any competitive job. (Tr. 689). No physician opined consistent with the ALJ's findings that Plaintiff's only right arm limitations involve hand controls, overhead reaching, and fine manipulation.

Accordingly, the ALJ failed to properly weigh the medical opinion evidence to account for Plaintiff's right arm limitations.

E.

Finally, Plaintiff maintains that the ALJ's denial of benefits is not reasonably the product of a supported and articulated credibility finding.

This Court is to "accord the ALJ's determinations of credibility great weight and deference particularly since the ALJ has the opportunity, which we do not, of observing a witness's demeanor while testifying." *Jones v. Comm'r of Soc. Sec*., 336 F.3d 469, 476 (6th Cir. 2003). *See also* SSR 96-7p ("In instances where the individual attends an administrative proceeding conducted by the adjudicator, the adjudicator may also consider his or her own recorded observations of the individual as part of the overall evaluation of the credibility of the individual's statements.").

The ALJ discussed the fact that good reasons existed for questioning the reliability of Plaintiff's subjective complaints. (PageID 49-59). *Cruse v. Comm'r of Soc. Sec*., 502

F.3d 532, 543 (6th Cir. 2007) ("[T]he record is replete with medical evidence that Cruse's symptoms were not as severe as she suggested.").[7] For example, the ALJ documented that Plaintiff's medicine seemed to effectively control his mood and pain. (PageID 51). In December 2010, medication had stabilized Plaintiff's mood and he was "doing well." (*Id*.) In September 2011, Plaintiff reported that his migraines were under good control with medication. (*Id*.) The ALJ also mentioned that Plaintiff's treatment was conservative and that he had no hospitalizations for either physical or mental conditions. (PageID 52). *Moon v. Sullivan*, 923 F.2d 1175, 1183 (6th Cir. 1990) ("Simply stated, though Moon alleges fully disabling and debilitating symptomatology, the ALJ may distrust a claimant's allegations of disabling symptomatology if the subjective allegations, the ALJ's personal observations, and the objective medical evidence contradict each other.").

Additionally, the ALJ noted that Plaintiff had stopped working, not due to any physical or mental limitations, but because he was disciplined for using marijuana. (PageID 51). Furthermore, despite complaints of chronic pain, Plaintiff did not attend pain management or physical therapy which could address these issues. (PageID 58-59). *Strong v. Soc. Sec. Admin*., 88 F. App'x 841, 846 (6th Cir. 2004) ("In the ordinary course, when a claimant alleges pain so severe as to be disabling, there is a reasonable expectation that the claimant will seek examination or treatment. A failure to do so may

[7] *See also Chapman v. Astrue*, No. 1:10cv155, 2011 U.S. Dist. LEXIS 53373, at *17 (S.D. Ohio Mar. 10, 2011) ("[A]n ALJ is not required to accept a claimant's subjective complaints and may properly consider the credibility of a claimant when making a determination of disability.").

cast doubt on a claimant's assertions of disabling pain."). Additionally, Plaintiff had "no treatment for his feet in the record" despite his allegations of club feet which make it difficult for him to stand or walk. (*Id*.) SSR 96-7p ("the individual's statements may be less credible if the level or frequency of treatment is inconsistent with the level of complaints."). These inconsistencies negatively affect Plaintiff's credibility. SSR 96-7p ("One strong indication of the credibility of an individual's statements is their consistency, both internally and with other information in the case record").

The ALJ also considered the fact that Plaintiff injured his right arm in a car accident in 1988, yet earning records show substantial gainful activity from 1995 through 2010. (PageID 224). During this time, Plaintiff was able to walk and stand eight hours per day and carry metal trays and coil that weighed between 20-25 pounds. (PageID 284-285). Plaintiff also reported being able to do a wide variety of daily activities. *Meyer v. Comm'r of Soc. Sec.*, No. 1:09cv814, 2011 U.S. Dist. LEXIS 30490, at *32 (S.D. Ohio Feb. 11, 2011) ("as a matter of law, the ALJ may consider [the claimant's] household and social activities in evaluating her assertions of pain or limitations"). For example, despite his arm impairment, he noted that he was able to manage all of his self-care and personal hygiene and that his arm only prevented him from working above shoulder height. (PageID 297-298). Plaintiff was also able to do laundry, clean, drive a car, go to church, shop for food at the grocery store, count change, and use a checkbook. (PageID 299-300). He even retained the ability to lift and carry 20 pounds. (PageID 431). *Smith v. Comm'r of Soc. Sec.*, No. 1:09cv526, 2010 U.S. Dist. LEXIS 137391, at *17 (S.D. Ohio

Aug. 24, 2010) ("the ALJ also properly considered that plaintiff engaged in a variety of daily activities, and it was appropriate for him to consider this factor in making his credibility finding").

Accordingly the ALJ's credibility finding is supported by substantial evidence.

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 v. Sec'y of Health & Human Servs.*, 17 F.3d 171, 174 (6th Cir. 1994) (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." *Faucher*, 17 F.3d 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.

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

On remand, the ALJ shall: (1) pose hypothetical questions to the vocational expert which accurately portray the claimant's physical impairments – including, specifically, restrictions for no right hand gross manipulation; (2) determine whether work is available to Plaintiff despite his limitations; and (3) reassess Plaintiff's residual functional capacity.

The Clerk shall enter judgment accordingly.

Date: 9/23/14

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