

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

ERNEST LOCKETT,	:	Case No. 3:13-cv-303
	:	
Plaintiff,	:	Judge Timothy S. Black
	:	
vs.	:	
	:	
COMMISSIONER OF	:	
SOCIAL SECURITY,	:	
	:	
Defendant.	:	

**ORDER THAT: (1) THE ALJ'S NON-DISABILITY FINDING IS SUPPORTED  
BY SUBSTANTIAL EVIDENCE, AND AFFIRMED;  
AND (2) 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 supplemental security income (“SSI”). (*See* Administrative Transcript (“PageID”) (PageID 47-57) (ALJ’s decision)).

**I.**

On May 28, 2009, Plaintiff applied for SSI, alleging that he had been unable to work since January 1, 1996 due to bipolar disorder and attention deficit/hyperactivity disorder. (PageID 47, 223-25). Plaintiff’s applications were denied initially and upon reconsideration. (PageID 93-100). Plaintiff filed a timely request for a hearing. (PageID 101-115).

On February 28, 2012, a hearing was held in Dayton, Ohio before an ALJ. (PageID 68). Plaintiff attended the hearing via video. (PageID 68). Plaintiff was

represented by an attorney. (*Id.*) An impartial vocational expert also appeared and testified at the hearing. (PageID 68, 213).

In a written decision dated March 15, 2012, the ALJ denied Plaintiff's claim for benefits. (PageID 44-57). Following a timely filed request for review, the Appeals Council declined to review the ALJ's decision, making that decision the final administrative disposition of Plaintiff's claim. (PageID 33-43).

Plaintiff is 24 years old and obtained his GED. (PageID 49, 51, 55). Plaintiff does not have any past relevant work experience.<sup>1</sup> (PageID 55).

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

1. The claimant has not engaged in substantial gainful activity since May 28, 2009, the application date (20 CFR 416.971 *et seq.*).
2. The claimant has the following severe impairments: bipolar disorder NOS; alcohol dependence; a history of attention deficit/hyperactivity disorder; and malingering (20 CFR 416.920(c)).
3. 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 416.920(d), 416.925 and 416.926).
4. After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to perform a full range of work at all exertional levels, including heavy/very heavy work. Giving the claimant the full benefit of doubt with regard to his allegations and subjective complaints, it is found that he is limited to simple, routine and repetitive tasks. He is further limited to low stress work, which in this case is defined as a

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<sup>1</sup> 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).

relatively static work environment with only occasional changes in the work setting, which can be explained. He should not be expected to perform production rate or pace work. He is restricted to jobs that would require no more than occasional interaction with co-workers and the public.

5. The claimant has no past relevant work (20 CFR 416.965).
6. The claimant was born on November 30, 1988 and was 20 years old, which is defined as a younger individual age 18-49, on the date the application was filed (20 CFR 416.963).
7. The claimant has a high school education and is able to communicate in English (20 CFR 416.964).
8. Transferability of job skills is not an issue because the claimant does not have past relevant work (20 CFR 416.968).
9. 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 416.969 and 416.969(a)).
10. The claimant has not been under a disability, as defined in the Social Security Act since May 28, 2009, the date the application was filed (20 CFR 416.920(g)).

(PageID 50-56).

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. (PageID 57).

On appeal, Plaintiff argues that: (1) the ALJ failed to adequately consider the comprehensive evidence regarding his failed attempts at vocational training; (2) the ALJ erred in failing to request IQ testing and subsequently denying disability under Listing 12.05; and (3) the assigned RFC is not supported by substantial evidence in

that it omits several well evidenced limitations occasioned by his impairments. 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 did not graduate from high school (where he was in special education courses), but did obtain his GED. (PageID 51, 73). At the time of his administrative hearing, Plaintiff had been incarcerated for approximately one year due to an aggravated robbery conviction. (PageID 73). He was expected to be released in May 2014. (PageID 49).

Prior to his incarceration, Plaintiff was receiving job training through a disability assistance program hosted by Goodwill Easter Seals. (PageID 74). While in this training, Plaintiff's supervisor or job coach helped him keep track of the timing of his breaks. (PageID 78). Plaintiff made mistakes and his job coach helped him fix them, but sometimes this caused Plaintiff to "get into it" with the job coach because Plaintiff thought he was completing tasks properly. (PageID 79). Plaintiff got in trouble during meetings at Goodwill for saying inappropriate things. (*Id.*) Plaintiff was ultimately terminated from this program for not keeping a proper count of the parts he was assembling. (PageID 77-78).

At the hearing, Plaintiff explained that his depressed intellectual functioning had significantly impacted his independence. Despite being 23 years old, Plaintiff testified

that he has never had a driver's license. (PageID 73). He can read, but only a "little bit." (*Id.*) He relied on a caseworker to help him secure public benefits, get a phone, and set him up with Goodwill. (PageID 80). His caseworker also set up his utilities, secured him housing, and helps him pay his bills. (PageID 81). His mother or father takes him to the grocery store and helps him keep track of his money and pick what food to buy. (PageID 80-81). He has trouble counting change and relies upon the honesty of the cashier or help from his parents. (PageID 81). Plaintiff believes that without the help of his parents and caseworkers, he probably could not make it on his own and would "mess [things] up." (PageID 82).

## ***2. Non-medical evidence***

The record reflects that Plaintiff was a special education student in the Dayton Public Schools with an Individualized Education Program ("IEP"). (PageID 239-66, 287-94). Testing performed when Plaintiff was 14 revealed intelligence scores consistent with borderline ability. (PageID 242). Similarly, adaptive testing at that time revealed "severe delays in all areas." (PageID 243). Plaintiff had significant difficulty in academic and social functioning while at school. (PageID 243-52). Despite having the chronological age of an eighth or ninth grader, Plaintiff was ultimately determined to be functioning at a second to third grade level. (PageID 244). He was diagnosed with a cognitive delay. (PageID 256).

In April 2009, Plaintiff underwent job training related to his cognitive disabilities through Capabilities Inc.<sup>2</sup> (PageID 268). Plaintiff arrived over an hour and a half early to his second meeting with his job coach. (*Id.*) When it was time for his first actual workplace assessment, which involved stocking at Gabriel Brothers while being observed and instructed by his job coach, Plaintiff forgot the time he was supposed to arrive and needed to be reminded. (*Id.*) While at Gabriel Brothers, Plaintiff's job coach noted that Plaintiff was "quite slow" in placing price stickers on items and seemed not to realize that it made a difference how the sticker was oriented or placed. (PageID 269). Plaintiff was talkative, but "often hard to understand." (*Id.*) The job coach also noted that Plaintiff kept misplacing his box cutter. (*Id.*)

On the second day of job observation, Plaintiff was 14 minutes late and, shortly after he arrived, his job coach found him resting in the break room. (PageID 269). The job coach noted that Plaintiff continued to be difficult to understand, often speaking about random things unrelated to the present context. (*Id.*) The job coach also observed that Plaintiff "needs someone to tell him what time specifically he is to return [from breaks] as he has a hard time comprehending time." (*Id.*)

On the third day, Plaintiff continued to have trouble learning where to place pricing stickers on merchandise. (PageID 270). He had been moved to stocking shoes and found the job "too hard." (*Id.*) He began requesting additional breaks and

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<sup>2</sup> Capabilities is an organization that provides job training and placement services for Ohioans with disabilities.

reassignment. (*Id.*) The next business day, Plaintiff showed up at the job site even though he was not scheduled to work. (PageID 270-71). He went straight to the break room and slept there for two hours before being confronted by management. (*Id.*) The manager of the job site had to call Plaintiff's job coach to resolve the situation. (*Id.*) Following his April workplace observations, Plaintiff's job coach concluded that Plaintiff has weaknesses in the areas of work speed, understandable communication, motivation, attendance, punctuality, and remembering instructions. (*Id.*)

Plaintiff underwent a second round of job observation and training at Capabilities in May 2009. (PageID 272). Plaintiff arrived late to multiple appointments and did not attend others. (*Id.*) When present, Plaintiff's hair and dress were noted to be in disarray. (*Id.*) Plaintiff also failed to follow through with contacting Capabilities as instructed and services were ultimately terminated. (*Id.*)

On May 28, 2009, Plaintiff presented at a local Social Security office to file his Title XVI application. (PageID 274-77). The employee who assisted Plaintiff described him as follows:

[Claimant] looked somewhat disheveled. Clothes looked like they had been slept in. He had a horrible odor. His breath smelled as though he hadn't brushed his teeth. He mumbled and it was difficult getting an answer from him. He would ramble about things immaterial to his claim.

(PageID 276).

Plaintiff was similarly noted to be "disheveled and unkempt" by another Social Security employee at a face-to-face meeting on August 17, 2009. (PageID 304-06).



From June 2010 through June 2011, Plaintiff received vocational rehabilitation services through a Goodwill Easter Seals program. (PageID 330-59). Plaintiff's initial mental health services assessment for the program was performed on June 4, 2010. (PageID 355-59). During the assessment, Plaintiff was noted to hurry through testing, making many errors. (PageID 356). Reading testing placed Plaintiff at second grade level. (*Id.*) However, an examining neuropsychologist diagnosed Plaintiff with malingering. (PageID 55). In terms of life skills, Plaintiff reported needing assistance with transportation, handling money, meal planning, reading, writing, and maintaining relationships. (PageID 357). He explained that he cannot prepare a meal, use appliances in his home, write a check, pay his own bills, or buy groceries. (*Id.*) Plaintiff expressed an interest in finding a job, but the assessor believed he would need additional support and testing to realize that ambition. (PageID 357-58). More specifically, the assessor opined that Plaintiff would need a work evaluation to more specifically gauge his skills, life skills education, and possibly a job coach or other workplace accommodations. (*Id.*)

Following his initial evaluation, Plaintiff underwent 10 days of skills assessments at Goodwill Industries in late June of 2010. (PageID 352-54). Problems arose within the first week. Plaintiff was noted to work with "disregard for the [workplace] safety precautions." (PageID 352). His communications with his supervisors and coworkers were also confusing and difficult to understand, accentuated by "comments that did not make sense." (*Id.*) Additionally, Plaintiff displayed "inappropriate behavior"

during work group meetings during his first week of assessments. (PageID 353). During his second week of workplace assessments, he continued to struggle. (*Id.*) Plaintiff's attempts to communicate with other workers were confusing and he continued to be inappropriate and disruptive during meetings. (*Id.*) He also failed to follow instructions regarding appropriate workplace attire. (*Id.*)

Plaintiff continued to undergo work training and observation through Goodwill Easter Seals through his incarceration in May 2011. (PageID 348-51). At times, Plaintiff was observed to be disheveled, not shaven, and wearing dirty clothes. (PageID 346, 348-50). Plaintiff had difficulty following instructions with a tendency to work carelessly, requiring direct supervision and regular prompting. (PageID 348, 350). Plaintiff forgot instructions from one day to the next. (PageID 348). He was also tardy or late coming back from breaks on several occasions. (PageID 349-50). He missed appointments with his job coach without calling to reschedule. (PageID 345). When taken by his coach to job sites to file applications, Plaintiff had difficulty being professional in both his behaviors and attire. (PageID 343, 346).

### ***3. Medical evidence***

From 2004 through 2008, Plaintiff received mental health treatment from Dr. Mahajan. (PageID 465-526). Dr. Mahajan diagnosed Plaintiff with bipolar disorder and prescribed him medications. (PageID 505, 515, 526). Plaintiff was noted to exhibit problems with aggression and maintaining attention. (PageID 466, 489, 502-04, 507,

510, 513, 516-17, 522, 524). Plaintiff's behavior became so out of control that security was called to his school on at least one occasion. (PageID 523). He was noted to talk to himself, sometimes cursing. (PageID 520). His mood was also irregular. (PageID 473-74, 484, 486, 489, 91-92, 524). Dr. Mahajan's progress notes indicate that Plaintiff's compliance with his medications ranged from "low/noncompliant" to "partially compliant." (PageID 50). His GAF scores ranged from 65-70, indicative of only mild symptoms, mild impairment in functioning, or both.<sup>3</sup> (*Id.*)

On July 12, 2009, Plaintiff was psychologically examined by state agency consultant Dr. Flexman. (PageID 370). Plaintiff explained to Dr. Flexman that he was in learning disability classes as a child and had multiple suspensions for behavior problems. (PageID 371). Dr. Flexman observed that Plaintiff's facial expressions were consistent with anxiety. (*Id.*) He was fidgety and maintained eye contact only 20% of the time. (PageID 371-72). Dr. Flexman's diagnoses included ADHD, malingering, and borderline intellectual functioning. (PageID 373). Ultimately, Dr. Flexman opined that Plaintiff has at least moderate limitations in his ability to sustain attention, to interact appropriately with others, to respond to changes, and to respond appropriately to work pressures in a normal work setting. (PageID 373-74).

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<sup>3</sup> The Global Assessment of Functioning ("GAF") is a numeric scale (1 through 100) used by mental health clinicians and physicians to rate subjectively the social, occupational, and psychological functioning of adults. A GAF score of 61-70 indicates some mild symptoms or some difficulty in social, occupational, or school functioning, but generally functioning pretty well, has some meaningful interpersonal relationships.

On July, 20, 2009, another consultant, Dr. Williams, reviewed the evidence. (PageID 376-92). She diagnosed Plaintiff with borderline intellectual functioning and ADHD noting “moderate” limitations in all major functional areas. (PageID 381-90). Dr. Williams was of the opinion that Plaintiff’s educational and vocational difficulties were a product of “limited vocational motivation.” (PageID 378). Dr. Williams largely deferred to Dr. Flexman and concluded that Plaintiff retained the capacity for “simple work tasks, routines, social exchanges, and adjustments.” (*Id.*) Dr. Williams provided no more specific explanation as to Plaintiff’s limitations. (*Id.*)

On September 21, 2009, Plaintiff underwent a psychiatric evaluation at Day-Mont West. (PageID 398-406). Plaintiff reported that he had few friends and struggled with developmental issues as a child. (PageID 399). He reported that he tried to get jobs in the past, however, he was always ultimately fired. (PageID 400). Plaintiff explained that he felt very depressed and overwhelmed by emotion. (PageID 402). His mood was observed to be depressed and anxious. (PageID 406). Day-Mont West’s diagnoses included bipolar disorder, bereavement, and alcohol dependence. (PageID 405). He was assigned a GAF score of 50.<sup>4</sup> (Page 406).

Plaintiff underwent a similar evaluation at Samaritan Behavioral Health on October 2, 2009. (PageID 417-20). His mood was angry and he presented with limited judgment and insight. (*Id.*) He was diagnosed with bipolar disorder and ADHD. (*Id.*) He was again assigned a GAF score of 50. (PageID 412).

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<sup>4</sup> A GAF score of 41-50 indicates serious symptoms or any serious impairment in social, occupational, or school functioning.

On November 19, 2009, Plaintiff's file was reviewed by another state agency consultant, Dr. Dietz. (PageID 434-52). Dr. Dietz was not comfortable with Dr. Williams' analysis, so he drafted a new report rather than an affirmation. (PageID 434). His diagnoses included ADHD, borderline intellectual functioning, alcohol dependence, and bipolar disorder. (PageID 435-44). He concluded that plaintiff has moderate limitations in the areas of social functioning and maintaining concentration, persistence, or pace. (PageID 445). Ultimately, Dr. Dietz believed it was hard to determine Plaintiff's credibility. (PageID 452). He deferred to Dr. Flexman's opinion "in the absence of any other opinions." (*Id.*) Dr. Dietz believed that Plaintiff is capable of completing simple repetitive tasks without strict production standards or schedules in an environment involving no more than superficial interaction with others. (*Id.*)

On April 7, 2010, Plaintiff's counselors at the Bureau of Rehabilitation Services completed a questionnaire regarding his mental health limitations. (PageID 548). They noted that Plaintiff has difficulties relating to authorities and tends to become frustrated and anxious when under stress. (*Id.*) The counselors further explained that Plaintiff needs to work on managing stress and relating effectively to people supervising him. (*Id.*)

Following his evaluation in September of 2009, Plaintiff began receiving regular psychiatric care through Day-Mont West, which continued through his incarceration in 2011. (PageID 550-663). Plaintiff reported symptoms during treatment including paranoia, mood swings, persecutory delusions, feeling overwhelmed in response to daily

stressors, depression, and anger. (PageID 550, 554, 568, 587, 594, 596-99, 605-08, 611-15, 618). He was noted to exhibit tangential speech patterns requiring redirection. (PageID 572, 618). He was often observed to be agitated or intense during appointments, with other observations including rapid speech and/or avoidant eye contact. (PageID 594, 596-99, 605-08, 611-17). His diagnoses remained bipolar disorder, alcohol abuse, and ADHD. (PageID 603, 662). Notes from the Ohio Department of Rehabilitation and Correction reveal that Plaintiff continued to receive his medications while incarcerated. (PageID 664-702). His principal diagnosis at the prison was a schizoaffective disorder, bipolar type. (PageID 684).

#### ***4. The vocational expert's testimony***

Vocational expert Eric Pruitt testified that Plaintiff has no past relevant work for Social Security purposes. (PageID 83-84). When posed a hypothetical largely mirroring the assigned residual functional capacity, Mr. Pruitt testified that such a worker could perform substantial numbers of other jobs in the national economy. (PageID 84). The ALJ subsequently explored other limitations more specifically tailored to Plaintiff's capabilities as follows:

ALJ: I want you to consider this added limitation where the individual would require close supervision where an individual would check this individual's work at least once-an hour. So would that impact the jobs you identified or any other jobs?

VE: Well, initially through what I would call the initial training period I don't think it would be an issue, but if this behavior continued on a long-term basis I don't think that an employer would retain an employee that needed that much close supervision.

(PageID 85).

Mr. Pruit went on to explain that the supervision described in the ALJ's question above is actually less than that which would be typically provided by a job coach. (PageID 85). If a person required the services of a job coach, he "would not be capable of competitive employment." (PageID 86). Mr. Pruit also opined that only 6 to 12 absences per calendar year would be tolerated at the jobs he identified. (*Id.*) Further, even an employee working in a position with only occasional contact with others would be expected consistently to exhibit socially appropriate behavior. (PageID 87).

#### ***6. The ALJ's decision***

The ALJ determined that Plaintiff has not engaged in substantial, gainful activity since his application date.<sup>5</sup> (PageID 48). She found that Plaintiff suffers from the severe impairments of bipolar disorder, alcohol dependence, a history of ADHD, and malingering. (PageID 50-52). However, she held that none of these impairments, singly or in combination, meet or equal the severity of any of the Commissioner's listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. (PageID 52-53).

The ALJ's residual functional capacity ("RFC") finding reads:<sup>6</sup>

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<sup>5</sup> The ALJ's decision references the relevant period as beginning on Plaintiff's application date rather than the alleged onset date, because Social Security benefits under Title XVI only become payable upon the filing of an application and, as a result, specific medical evidence of an exact onset date need not generally be obtained prior to the application. (PageID 50).

<sup>6</sup> "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).

After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to perform a full range of work at all exertional levels, including heavy/very heavy work. Giving the claimant the full benefit of the doubt with regard to his allegations and subjective complaints, it is found that he is limited to simple, routine and repetitive tasks. He is further limited to low stress work, which in this case is defined as a relatively static work environment with only occasional changes in the work setting, which can be explained. He should not be expected to perform production rate or pace work. He is restricted to jobs that would require no more than occasional interaction with co-workers and the public.

(PageID 53).

In reaching this RFC finding, the ALJ denied Plaintiff's requests for IQ testing as "unnecessary."<sup>7</sup> (PageID 53). Additionally, she determined that Plaintiff's is "independent in [his] activities of daily living," performing a wide variety of activities on a regular basis. (PageID 54). The ALJ also surmised that the record's evidence makes it "clear" that Plaintiff "is attempting to appear more impaired than he actually is." (PageID 55). Ultimately, the ALJ determined that Plaintiff is capable of performing a significant number of jobs in the national economy. (PageID 55-56).

## **B.**

First, Plaintiff maintains that the ALJ failed to adequately consider the comprehensive evidence regarding his failed attempts at vocational training.

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<sup>7</sup> Plaintiff's representative requested that the ALJ refer Plaintiff to IQ testing both at the administrative hearing and in a memorandum submitted prior to the hearing. (PageID 60, 326-27).



Specifically, Plaintiff argues that the ALJ failed to consider the observations of staff regarding his behavior during vocational training. (PageID 268-73).<sup>8</sup> However, Plaintiff does not explain how these observations support his claim. Instead, he only cited to his attorney's assertion at the hearing that the inappropriate jokes, rushed work, and lack of attention the staff documented reflect disabling cognitive problems and not—as the state-agency doctors concluded—a lack of motivation to work. (PageID 70-71).

An ALJ does not need to address every piece of evidence in the written decision. *Kornecky v. Comm'r of Soc. Sec.*, 167 F. App'x 496, 508 (6th Cir. 2006). Here, the ALJ reasonably declined to address the specific notes from the vocational staff because the ALJ relied on the state-agency doctors, who both opined without contradiction, that the staff's observations showed that Plaintiff retained the capability to work. (PageID 53, 378, 451). Specifically, in July 2009, state-agency psychologist Dr. Williams acknowledged that the vocational evidence showed Plaintiff's capabilities to do simple repetitive tasks despite limited learning and social skills. (PageID 378). In November 2009, state agency psychologist Dr. Dietz concluded that the notes showed that Plaintiff's problems with work speed, remembering instructions, and speaking, did not preclude "higher capabilities" when he applied himself. (PageID 451). In fact, the notes indicate that from April through May 2009, a staff member observed Plaintiff handle a task well

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<sup>8</sup> The Court notes that at Plaintiff's BVR Comprehensive Assessment, the examiner found that Plaintiff "demonstrated a number of strengths." (PageID 546). Among other things "[h]e was alert and oriented with intact recent, remote, and immediate memory skills. He presented as pleasant, friendly, cooperative, and eager to please . . . He demonstrated the willingness to attempt all assigned tasks. He appeared attentive and was able to remain on task and follow multiple directions." (*Id.*)

and increase speed (PageID 269-70), and concluded that Plaintiff could stay on task, be courteous and patient, get to work, and refrain from distracting others. (PageID 271).<sup>9</sup> Although the staff member noted difficulty with remembering instructions, he or she also noted that Plaintiff “lacks motivation to work.” (*Id.*)

In June 2011, staff members reported that Plaintiff’s participation in the program was disrupted because he stole objects and failed to follow time-keeping policies. (PageID 330). Otherwise, their notes mostly revealed Plaintiff’s capabilities to complete tasks and interact appropriately with coworkers. For example, in April 2011 a supervisor reported that Plaintiff “was doing well,” had limited his buffoonery, and was “focused” on a job at an outlet center (PageID 334); in February 2011 Plaintiff demonstrated good teamwork (PageID 340); in October 2010 he demonstrated improvements following instructions (PageID 349); in September 2010 he had a productive day (PageID 351); and in July 2010 he applied instructions and demonstrated a clear understanding of his duties. (PageID 352-53).

Overall, the ALJ reasonably concluded that the vocational notes did not contradict consultative psychological examiner Dr. Jerry Flexman’s July 2009 suggestion that Plaintiff’s propensity to malingering and exert poor effort most hindered his ability to work. (PageID 54, 373).

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<sup>9</sup> Plaintiff argues that the vast majority of vocational evidence post-dates the reviews of Drs. Williams and Deitz. Nonetheless, upon review of the entirety of the vocational experts, this Court finds that the opinions of Drs. Williams and Deitz are still supported by substantial evidence.

### C.

Next, Plaintiff argues that the ALJ erred in failing to request IQ testing and subsequently denying disability under Listing 12.05.<sup>10</sup>

Plaintiff relies on the fact that a teacher asserted that he functioned at a second-grade level when he was 14 and that school psychologist Elizabeth Walthour concluded that Plaintiff's general intelligence was below 60% of his peers. However, the fact that Plaintiff's general intelligence was below 60% of his peers is not persuasive. In fact, if anything, it demonstrates that Plaintiff's intelligence was only slightly below average.

The ALJ has discretion to determine whether to supplement the record. *Ferguson v. Comm'r of Soc. Sec.*, 628 F.3d 269, 275 (6th Cir. 2010). Plaintiff can overcome that deference if he had introduced objective evidence establishing a need to further develop the record. *Osburn v. Apfel*, No. 98-1784, 1999 U.S. App. LEXIS 16220, at \*7-8 (6th Cir. 1999). Here, however, all of the medical evaluators concluded that Plaintiff has borderline intelligence. (PageID 51, 53). Dr. Walthour reported that Plaintiff's June 2003 IQ test, taken when he was 14, confirmed a 1998 exam showing that Plaintiff had borderline intelligence. (PageID 53, 242-43). Similarly, Dr. Flexman's testing revealed

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<sup>10</sup> "12.05 Intellectual disability: intellectual disability refers to significantly sub-average 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 of 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 60-70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function..."

borderline intellection. (PageID 373). Additionally, Plaintiff's most recent school records, from September 2005, show that he read at a seventh-grade level. (PageID 51, 287, 294). Accordingly, it was reasonable for the ALJ to refuse further testing.<sup>11</sup>

#### D.

Finally, Plaintiff alleges that the assigned RFC is not supported by substantial evidence because it omits several well evidenced limitations occasioned by his impairments.

Specifically, Plaintiff alleges that the ALJ erred in failing to include restrictions regarding his ability to interact with supervisors. However, there is not significant evidence that Plaintiff had issues with supervisors. Dr. Flexman noted that Plaintiff's work history showed only moderate problems interacting with supervisors. (PageID 373-74). The opinions of state-agency Drs. Williams and Dietz did not include specific restrictions regarding interactions with supervisors, they simply checked boxes suggesting problems interacting with supervisors in the assessment's "Summary Conclusions" section, which constitutes a worksheet and not a medical opinion. (PageID

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<sup>11</sup> Moreover, in order to satisfy Section 12.05(c), in addition to a valid IQ score, Plaintiff would also need to show significant deficits in adaptive functioning. Deficits in adaptive functioning are "manifested by difficulties in performing activities of daily living, maintaining social relationships, or maintaining concentration, persistence, or pace." 20 C.F.R. Pt. 404, Subpt. P., App. 1 Section 12.00(c)(4). Here, Plaintiff told Dr. Flexman that he could handle his own daily activities; use public transportation; clean his home; prepare food; cut the grass; play pool, video games, and basketball; dance and date; do models; interact with friends, parents, siblings, and relatives; baby-sit his cousins; and handle his own finances. (PageID 371). Accordingly, regardless of Plaintiff's IQ score, the record evidence does not support a finding that Plaintiff has significant deficits in adaptive functioning. *See, e.g., Hayes v. Comm'r of Soc. Sec.*, 357 F. App'x 672, 675 (6th Cir. 2009) (claimant does not show deficits in adaptive functioning because she cooks, does laundry and shops, manages her finances, and takes public transportation).

376-78, 449-51). While there was some negative feedback from the vocational training staff, they also noted positive feedback from supervisors and expressly commented on Plaintiff's ability to work well with others. (PageID 340, 349, 351, 352-53).

Moreover, there is evidence of malingering. In 2009, Plaintiff reported that his mother had recently died in an accident and he had to identify her body. (PageID 55). However, in a letter dated August 1, 2011, Plaintiff's attorney reported having recently spoken with his mother. (*Id.*) The evidence supports a finding that Plaintiff was attempting to appear more impaired than he actually is, a sentiment also expressed by Dr. Flexman. (PageID 373)

The Court's duty on appeal is not to re-weigh the evidence, but to determine whether the decision below is supported by substantial evidence. *Raisor v. Schweiker*, 540 F. Supp. 686 (S.D. Ohio 1982). Substantial evidence supports the ALJ's finding that Plaintiff could perform a full-range of work with limitations as noted. (*See* PageID 53). The issue is not whether the record could support a finding of disability, but rather whether the ALJ's decision is supported by substantial evidence. *Casey v. Sec'y of Health & Human Servs.*, 987 F.2d 1230, 1233 (6th Cir. 1993).

### **III.**

For the foregoing reasons, Plaintiff's assignments of error are unavailing. The ALJ's decision is supported by substantial evidence and is affirmed.

**IT IS THEREFORE ORDERED THAT** the decision of the Commissioner, that Ernest Lockett was not entitled to supplemental security income is found **SUPPORTED**

**BY SUBSTANTIAL EVIDENCE**, and **AFFIRMED**. The Clerk shall enter judgment accordingly, whereupon this case is **CLOSED** in this Court.

Date: 11/5/14

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