

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Samuel L. Savage,)	C/A No. 5:16-1138-KDW
)	
Plaintiff,)	
)	
)	
vs.)	ORDER
)	
Nancy A. Berryhill, ¹ Acting Commissioner)	
of Social Security Administration,)	
)	
Defendant.)	
)	

This social security matter is before the court pursuant to 28 U.S.C. § 636(c) and Local Civil Rule 83.VII.02 (D.S.C.) for final adjudication, with the consent of the parties, of Plaintiff's petition for judicial review. Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) to obtain judicial review of a final decision the Commissioner of Social Security ("Commissioner"), denying his claim for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") pursuant to the Social Security Act ("the Act"). Having carefully considered the parties' submissions and the applicable law, the court *affirms* the Commissioner's decision, as discussed herein.

I. Relevant Background

A. Procedural History

Plaintiff applied for DIB and SSI on August 1, 2012, pursuant to Titles II and XVI of the Act, 42 U.S.C. § 401-403, and § 380-83, *et seq.*, alleging he became disabled on July 2, 2009. Tr. 193-202. His applications were denied initially, Tr. 90-91, and upon reconsideration, Tr. 123-24. Plaintiff requested a hearing before an Administrative Law Judge ("ALJ"), Tr. 141-42, which was

¹ Nancy A. Berryhill became the Acting Commissioner of Social Security on January 23, 2017. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the court substitutes Nancy A. Berryhill for Carolyn W. Colvin as Defendant in this action.

held on October 28, 2014, Tr. 32-64. In a decision dated January 7, 2015, the ALJ found that Plaintiff was not disabled within the meaning of the Act. Tr. 14-26. Plaintiff requested review by the Appeals Council, Tr. 10-11, and the Appeals Council denied Plaintiff's request for review on March 9, 2016, making the ALJ's decision the final decision for purposes of judicial review, Tr. 1-5. Plaintiff brought this action seeking judicial review of the Commissioner's decision in a Complaint filed on April 12, 2016. ECF No. 1.

B. Plaintiff's Background

Born in December 1957, Plaintiff was 51 years old on his alleged onset date of July 2, 2009; 54 years old as of his protected filing date of August 1, 2012; and 55 years old as of his date last insured of March 31, 2013. Tr. 218. In his Disability Report – Adult, Plaintiff indicated that he completed the 12th grade and had not completed any specialized job training. Tr. 234. Plaintiff listed his past relevant work ("PRW") as: heavy equipment operator, temporary worker, and truck driver. Tr. 235. Plaintiff indicated that he stopped working on July 2, 2009 because of the following medical conditions: lower back problems, numbness in back, right ankle pain, numbness in right side of back, complete numbness in right leg, pain and severe swelling around and in back of knees, and depression. Tr. 233. In a Disability Report – Appeal dated December 18, 2012, Plaintiff indicated that since September 5, 2012 he could "only stand or bend/stoop for a short period of time" and since November 3, 2012 he was having "much more pain in right leg and foot. Am now limping." Tr. 270. In another Disability Report – Appeal dated October 1, 2013, Plaintiff indicated that in May and September of 2013 his right foot and right ankle "gave out" causing him to fall. Tr. 294. Plaintiff noted that it was "difficult for [him] to hold a job not being able to stand very long." Tr. 298. He also indicated that since he last completed a disability report it had become "more difficult to stand or bend." Tr. 299.

C. The Administrative Proceedings

1. Plaintiff's Testimony

Plaintiff appeared with his counsel for an administrative hearing on October 28, 2014. Tr. 32. In response to questions from the ALJ, Plaintiff confirmed that he was 56 years old, graduated from the twelfth grade, and had not worked since July 2009 due to illness and injuries. Tr. 37-38. Plaintiff testified that he had problems with the nerves on his right side from his toe to his lower back. Tr. 38. Plaintiff testified that he is taking pain medication for the pain in his lower back that "helps a little bit." Tr. 39. Plaintiff stated that he has memory loss as a side effect of the medication. *Id.* Plaintiff stated his back and leg give him trouble. Tr. 39-40. Plaintiff testified that he is also taking medication for depression and Dr. Selph recently changed his medication from Trazadone to something else. Tr. 40. Plaintiff testified that he felt "groggy" and his leg felt "like pins are sticking in the bottom of my foot and leg all during the day, the whole time." *Id.* The ALJ noted that Plaintiff was using a cane and Plaintiff testified that Dr. Selph had prescribed the cane on his last visit. *Id.* Before being prescribed the cane Plaintiff stated he was "just holding onto anything [he] could get to." Tr. 41.

Plaintiff testified that he is a single parent and lived with his 16-year-old son in a ground-floor apartment. Tr. 41. Plaintiff stated that he had a driver's license and had driven himself to the hearing. *Id.* Plaintiff stated that it took him 15 minutes to get to the hearing and after sitting in the car his leg hurts and his thigh started to hurt. Tr. 42. Plaintiff testified that he was able to feed himself, but needed help getting out of the bath. He could put on his clothes if he could sit down and was capable of making himself a sandwich. *Id.* Plaintiff testified that he could make a bed and "sweep a little bit with one hand." Tr. 43. Plaintiff stated that he could stand for five minutes before needing to sit down and, if he took his time, he could walk "down the block and back" which he estimated could be five or ten minutes. *Id.* Plaintiff testified that he could sit for an hour

before his leg started to hurt, but if he got up and stretched for 15-to-20 minutes he could resume sitting. Tr. 44. Plaintiff stated that he did not lift anything because all his weight was on one leg. *Id.* Plaintiff testified that the heaviest thing he could lift would be “the forks and the spoons.” Tr. 45.

In response to a question from his counsel, Plaintiff testified that he lies down for “an hour or two” to relieve the pain from sitting or standing too long—he described too long as “about an hour.” Tr. 46.

The ALJ asked Plaintiff how he spent his days and Plaintiff testified that he goes to his mother’s house around 4:00 in the afternoon after she returns home from Pell Mental Health Center and stays with her until his sister gets home from work. Plaintiff then returns home. Tr. 46-47.

Plaintiff’s counsel resumed questioning and asked Plaintiff about the “pins and needles” feeling in his feet. Tr. 47. Plaintiff stated the feeling was constant and interfered with his ability to concentrate because it was “very annoying.” *Id.* Plaintiff stated he was “always moving” his foot to alleviate the sensation but that it did not help. *Id.* Plaintiff testified that he can do household tasks for “[t]en minutes at the most” before needing to take a break. Tr. 48. Plaintiff described an incident “a couple of years ago” when he put his right foot in a tub of hot water but it felt “ice-cold.” Tr. 49. When he attempted to put his left foot in the tub he “had to snatch it out before [he] sank a toe in.” *Id.* Plaintiff stated that he can put his right foot in “scalding-hot water and don’t even feel it.” *Id.* Plaintiff testified that his back pain is constant and is at a pain level of seven or eight on a ten-point scale, but a four or five when he takes his medicine. *Id.* However, Plaintiff stated that the pain level rises with activity. Tr. 50. Plaintiff stated that he did not have days that were worse than others, but that “all days are bad.” *Id.*

2. VE's Testimony

VE Stephen P. Davis also testified at the hearing. The VE asked for clarification regarding Plaintiff's listed job of heavy equipment operator. Tr. 51. Plaintiff stated that he was a forklift operator on a construction site using an industrial-sized forklift. Tr. 52. Plaintiff stated that he used his training from operating a forklift in a warehouse to using the forklift on a construction site. Tr. 53.

The VE characterized Plaintiff's past work as a tow truck driver as Dictionary of Occupational Titles ("DOT") number 919.63-026, semi-skilled with a specific vocational preparation ("SVP") of 3, classified at the medium level, and performed at light. The heavy equipment operator was DOT 859.683-010, skilled, SVP 6, classified as medium, and performed at light. The two truck-driver positions were DOT 905.663-014, SVP 4, both classified as medium, and both performed at light. The last job of production assembly line worker (described by the DOT as production assembler) was DOT 706.687-010, unskilled at SVP 2, classified as light, and performed at medium. Tr. 53-54.

The ALJ asked the VE to assume a hypothetical individual of Plaintiff's age, education, past relevant work experience, and impairments of "peripheral neuropathy, in particular severe peripheral neuropathy on the right lower extremity . . . with pain up into the lower back." Tr. 55. The ALJ asked the VE to consider the residual functional capacity ("RFC") assessment and limitations of the state agency physicians contained in the record at Exhibit 6A. *Id.* The VE testified that because of the limitations to the lower extremities none of Plaintiff's PRW would be available but there would be jobs at the unskilled level. The VE identified the following jobs at the medium level of unskilled work: hand packager, DOT 920.587-018, unskilled at SVP 2, medium, 525,000 nationally, and approximately 31,000 in South Carolina. Tr. 59. The VE stated that because of the physician's undefined limitations, he would apply 25% erosion to the job

availability numbers. *Id.* The second job identified by the VE was floor waxer, DOT 381.687-034, unskilled, SVP of 2, medium, 358,000 nationally, approximately 9,000 in South Carolina with those numbers eroded by 25%. Tr. 59-60. A third job would be a cleaner of laboratory equipment, DOT 381.687-022, unskilled at SVP 2, medium, 345,000 nationally, and approximately 41,000 in South Carolina with a 25% erosion. Tr. 61.

The ALJ posed a second hypothetical using Plaintiff's testimony "considering it to be fully credible." Tr. 61. The hypothetical individual would be able to stand and/or walk for five-to-ten minutes at a time, sit for an hour at a time, lift nothing greater than the weight of a fork and spoon, and would need to lie down one-to-two hours every day during the eight-hour period. Tr. 61-62. The VE testified that this individual could not do Plaintiff's past work and no other jobs would be available. Tr. 62.

Plaintiff's counsel asked the VE if there would be jobs available if a person were off task one-third of the time and the VE stated there would be "no jobs." Tr. 62. Plaintiff's counsel clarified for the ALJ that off task meant the individual would be up for an hour and then would need to lie down for an hour—perhaps more, but a minimum of one-third of the time. Tr. 63. The VE stated that the "off-task limit is 15 percent. Anything above 15 percent precludes all work." *Id.*

D. The ALJ's Findings

In his January 7, 2015 decision, the ALJ made the following findings of fact and conclusions of law:

1. The claimant meets the insured status requirements of the Social Security Act through March 31, 2013.
2. The claimant has not engaged in substantial gainful activity since July 2, 2009, the alleged onset date (20 CFR 404.1571 *et seq.*, and 416.971 *et seq.*).
3. The claimant has the following severe impairments: peripheral neuropathy, degenerative disc disease, and depression (20 CFR 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 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and 416.926).
5. After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to perform medium work as defined in 20 CFR 404.1567(c) and 416.967(c) except the claimant can occasionally lift and/or carry 50 pounds and frequently lift and/or carry 25 pounds. The claimant can stand and/or walk for about 6 hours in an 8-hour workday, and sit for about 6 hours in an 8-hour workday. The claimant can occasionally push and/or pull with the right lower extremity. The claimant can frequently climb ramps or stairs and occasionally climb ladders, ropes, or scaffolds. The claimant can frequently balance, stoop, kneel, crouch, or crawl. The claimant should avoid concentrated exposure to extreme cold, extreme heat, wetness, and humidity. While the claimant may have difficulty with concentration over extended periods of time, he can perform simple, unskilled work. The claimant can accept supervision and interact with co-workers and the general public.
6. The claimant is unable to perform any past relevant work (20 CFR 404.1565 and 416.965).
7. The claimant was born on December 8, 1957 and was 51 years old, which is defined as an individual closely approaching advanced age, on the alleged disability onset date. The claimant subsequently changed age category to advanced age (20 CFR 404.1563 and 416.963).
8. The claimant has at least a high school education and is able to communicate in English (20 CFR 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 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, 404.1569(a), 416.969, and 416.969(a)).
11. The claimant has not been under a disability, as defined in the Social Security Act, from July 2, 2009, through the date of this decision (20 CFR 404.1520(g) and 416.920(g)).

Tr. 19-26.

II. Discussion

A. Legal Framework

1. The Commissioner's Determination-of-Disability Process

The Act provides that disability benefits shall be available to those persons insured for benefits, who are not of retirement age, who properly apply, and who are “under a disability,” defined as:

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months[.]

42 U.S.C. § 423(d)(1)(A); *see also* 42 U.S.C. § 1382c(a)(3)(A).

To facilitate a uniform and efficient processing of disability claims, regulations promulgated under the Act have reduced the statutory definition of disability to a series of five sequential questions. *See, e.g., Heckler v. Campbell*, 461 U.S. 458, 460 (1983) (discussing considerations and noting “need for efficiency” in considering disability claims). An examiner must consider the following: (1) whether the claimant is working; (2) whether the claimant has a severe impairment; (3) whether that impairment meets or equals an impairment included in the Listings; (4) whether such impairment prevents claimant from performing past relevant work (“PRW”); and (5) whether the impairment prevents the claimant from performing specific jobs that exist in significant numbers in the national economy. *See* 20 C.F.R. § 404.1520, § 416.920. These considerations are sometimes referred to as the “five steps” of the Commissioner’s disability analysis. If a decision regarding disability may be made at any step, no further inquiry is necessary. 20 C.F.R. § 404.1520(a)(4) and § 416.920(a)(4) (providing that if Commissioner can find claimant disabled or not disabled at a step, Commissioner makes determination and does not go on to the next step).

A claimant is not disabled within the meaning of the Act if he can return to PRW as it is customarily performed in the economy or as the claimant actually performed the work. *See* 20 C.F.R. Subpart P, § 404.1520(a), (b); § 416.920(a), (b); Social Security Ruling (“SSR”) 82–62 (1982). The claimant bears the burden of establishing his inability to work within the meaning of the Act. 42 U.S.C. § 423(d)(5).

Once an individual has made a *prima facie* showing of disability by establishing the inability to return to PRW, the burden shifts to the Commissioner to come forward with evidence that claimant can perform alternative work and that such work exists in the regional economy. To satisfy that burden, the Commissioner may obtain testimony from a VE demonstrating the existence of jobs available in the national economy that claimant can perform despite the existence of impairments that prevent the return to PRW. *Walls v. Barnhart*, 296 F.3d 287, 290 (4th Cir. 2002). If the Commissioner satisfies that burden, the claimant must then establish that he is unable to perform other work. *Hall v. Harris*, 658 F.2d 260, 264–65 (4th Cir. 1981); *see generally Bowen*, 482 U.S. at 146. n.5 (regarding burdens of proof).

2. The Court’s Standard of Review

The Act permits a claimant to obtain judicial review of “any final decision of the Commissioner made after a hearing to which he was a party.” 42 U.S.C. § 405(g). The scope of that federal court review is narrowly tailored to determine whether the findings of the Commissioner are supported by substantial evidence and whether the Commissioner applied the proper legal standard in evaluating the claimant’s case. *See id.*, *Richardson v. Perales*, 402 U.S. 389, 390 (1971); *Walls v. Barnhart*, 296 F.3d at 290 (citing *Hays v. Sullivan*, 907 F.2d 1453, 1456 (4th Cir. 1990)).

The court’s function is not to “try these cases *de novo* or resolve mere conflicts in the evidence.” *Vitek v. Finch*, 428 F.2d 1157, 1157–58 (4th Cir. 1971); *see Pyles v. Bowen*, 849 F.2d

846, 848 (4th Cir. 1988) (citing *Smith v. Schweiker*, 795 F.2d 343, 345 (4th Cir. 1986)). Rather, the court must uphold the Commissioner’s decision if it is supported by substantial evidence. “Substantial evidence” is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson*, 402 U.S. at 390, 401; *Johnson v. Barnhart*, 434 F.3d 650, 653 (4th Cir. 2005). Thus, the court must carefully scrutinize the entire record to assure there is a sound foundation for the Commissioner’s findings, and that her conclusion is rational. *See Vitek*, 428 F.2d at 1157–58; *see also Thomas v. Celebrezze*, 331 F.2d 541, 543 (4th Cir. 1964). If there is substantial evidence to support the decision of the Commissioner, that decision must be affirmed “even should the court disagree with such decision.” *Blalock v. Richardson*, 483 F.2d 773, 775 (4th Cir. 1972).

B. Analysis

Plaintiff’s allegations of error are (1) the ALJ failed to properly evaluate his credibility, and (2) the ALJ’s RFC assessment was defective. Pl.’s Br. 8, 13; ECF No. 17.

1. ALJ’s Credibility Determination

Plaintiff alleges that although the ALJ summarized the testimony regarding Plaintiff’s subjective symptoms the ALJ did not evaluate the testimony and considered only the objective medical evidence. Pl.’s Br. 9-10. Plaintiff argues that the “ALJ’s exclusive reliance upon medical evidence in his credibility evaluation violates the specific mandates of SSR 96-7p and constitutes reversible error.” *Id.* at 11. Plaintiff also asserts the ALJ erred by “ignoring significant objective clinical and laboratory findings which are entirely consistent with Plaintiff’s allegations of disabling pain and numbness in his leg and back” *Id.* at 12. The Commissioner argues that the ALJ properly considered Plaintiff’s credibility limitations in accordance with the regulations. Def.’s Br. 9, ECF No. 19.

SR 96-7p² requires that, prior to considering Plaintiff's subjective complaints the ALJ must find there is an underlying impairment that has been established by objective medical evidence that would reasonably be expected to cause the subjective complaints of the severity and persistence alleged. Only then is the ALJ to move to the second step: consideration of the record as a whole, including both objective and subjective evidence, to assess the claimant's credibility regarding the severity of his subjective complaints, including pain. *See* SSR 96-7p, 1996 WL 374186, at *2; *see also* 20 C.F.R. § 404.1529(b); *Craig v. Chater*, 76 F.3d at 591-96. The requirement of considering a claimant's subjective complaints does not mean the Commissioner must accept those complaints on their face. The ALJ may consider the claimant's credibility in light of his testimony and the record as a whole. If the ALJ rejects a claimant's testimony about a claimant's pain or physical condition, the ALJ must explain the basis for such rejection to ensure that the decision is sufficiently supported by substantial evidence. *Hatcher v. Sec'y, Dep't of Health & Human Servs.*, 898 F.2d 21, 23 (4th Cir. 1989) (quoting *Smith v. Schweiker*, 719 F.2d 723, 725 n.2 (4th Cir. 1984)). The reasons given for the ALJ's credibility assessment "must be grounded in the evidence and articulated in the determination or decision." SSR 96-7p, 1996 WL 374186, at *4. "The determination or decision must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight." *Id.*; *see Mickles v. Shalala*, 29 F.3d at 927 ("Although a claimant's allegations about her pain may not be discredited solely because they are

² In March 2016 the Social Security Administration published SSR 16-3p, 2016 WL 1119029 (2016), which supersedes SSR 96-7p, eliminates use of the term "credibility," and clarifies that subjective symptom evaluation is not an examination of an individual's character. Because the ALJ decided this case prior to March 16, 2016, the effective date of SSR 16-3p, the court analyzes the ALJ's decision based on the provisions of SSR 96-7p, which required assessment of the claimant's credibility. Although SSR 16-3p eliminates the assessment of credibility, it requires assessment of most of the same factors to be considered under SSR 96-7p.

not substantiated by objective evidence of the pain itself or its severity, they need not be accepted to the extent they are inconsistent with the available evidence, including objective evidence of the underlying impairment, and the extent to which that impairment can reasonably be expected to cause the pain the claimant alleges she suffers”). The Ruling further requires “[a]ssessment of the credibility of an individual’s statements about pain or other symptoms and about the effect the symptoms have on his or her ability to function must be based on a consideration of all of the evidence in the case record.” 1996 WL 374186, at *5. This evidence includes statements “about the individual’s medical history, treatment and response, prior work record and efforts to work, daily activities, and other information concerning the individual’s symptoms and how the symptoms affect the individual’s ability to work.” *Id.* SSR 96-7p provides further guidance on how to evaluate a claimant’s credibility, indicating that “[o]ne strong indication of the credibility of an individual’s statements is their consistency, both internally and with other information in the case record.” SSR 96-7p, 1996 WL 374186, at *5.

Here, the ALJ outlined Plaintiff’s testimony regarding his subjective complaints and found, after “careful consideration of the evidence,” that Plaintiff’s “medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, [Plaintiff’s] statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely credible for the reasons explained in this decision.” Tr. 22-23. The ALJ found that Plaintiff’s “allegations are not fully credible as the medical evidence of record does not support the degree of impairment and the limitations alleged by the claimant.” Tr. 23. The ALJ then proceeded to discuss Plaintiff’s medical records from 2010 through 2014, along with the medical opinions. Tr. 23-24.

Social Security rules and regulations recognize that chronic pain may not necessarily be provable by objective diagnostic studies and that the subjective complaints of a claimant should be

given fair consideration in making a determination of disability. 20 C.F.R. § 404.1529, § 416.929; SSR 96-7p. When evaluating a claimant's complaints of chronic pain, the ALJ is directed to consider such factors as the claimant's daily activities, location, frequency and intensity of the claimant's pain symptoms, any precipitating or aggravating factors, the effectiveness of any pain medications, treatment received, and any measures used to relieve pain or other symptoms. 20 C.F.R. § 404.1529(c)(3)(i)-(vi), § 416.929(c)(3)(i)-(vi). A claimant's symptoms, including pain, are considered to diminish the capacity for work to the extent that alleged functional limitations are reasonably consistent with objective medical evidence and other evidence. 20 C.F.R. § 404.1529(c)(4), § 416.929(c)(4). “[A] formalistic factor-by-factor recitation of the evidence” is unnecessary as long as the ALJ “sets forth the specific evidence he relies on in evaluating the claimant's credibility.” *White v. Massanari*, 271 F.3d 1256, 1261 (10th Cir. 2001).

The ALJ discussed Plaintiff's impairments of peripheral neuropathy, degenerative disc disease, and depression. Tr. 19-20. The ALJ also considered Plaintiff's statements that “nerve problems from his toes to his lower back keep him from working” along with Plaintiff's subjective complaint that “his leg feels like pins are in it all day long.” Tr. 22. The ALJ noted Plaintiff's statement that “he spends most of the time lying down” and “after 10 minutes of doing an activity he must take a break because of pain.”³ *Id.* The ALJ also noted Plaintiff's testimony regarding his

³ In his discussion of whether Plaintiff's combined impairments met Listing 12.04 the ALJ determined that Plaintiff had no restriction in his activities of daily living noting that he “cares for his personal needs, prepares meals for himself and his son, does household chores such as making beds, sweeping, and ironing, and shops (Exhibit 4E).” Tr. 21. The ALJ also noted that Plaintiff “visits with his mother daily, shops, and attends church (Exhibit 4E).” *Id.* Plaintiff argues this discussion occurred in the section of the decision regarding his depression-related assessment and not in the credibility assessment. Pl.'s Reply 2-3, ECF No. 22. The undersigned finds that is of no moment as the ALJ specifically stated in making his RFC and credibility determination that he considered the entire record and the evidence. *See Reid v. Commissioner of Social Security*, 769 F.3d 861, 865 (4th Cir. 2014) (absent evidence to the contrary, ALJ's statement that she had considered the entire record in reaching her decision was taken at her word); *Wall v. Astrue*, 561 F.3d 1048, 1070 (10th Cir. 2009) (noting well-established principle of taking ALJ at his word when he indicates he considered all of the evidence).

use of a cane, an inability to lift anything heavier than cutlery, and his perceived pain levels. *Id.* The ALJ discussed the objective medical evidence including Plaintiff's EMG and nerve conduction studies, MRIs of his spine,⁴ and reports of examinations showing normal or unremarkable gait and no leg weakness. *Id.* The ALJ also discussed the May 9, 2013 consultative examination performed by Dr. Thomas J. Motycka. Tr. 23.

When considering whether an ALJ's credibility determinations are supported by substantial evidence, a district court does not replace its own credibility assessments for those of the ALJ; rather, the court scrutinizes the evidence to determine if it is sufficient to support the ALJ's conclusions. In reviewing the record for substantial evidence, the court does not re-weigh conflicting evidence, reach independent determinations as to credibility, or substitute its own judgment for that of the Commissioner. *Hays*, 907 F.2d at 1456. Because the ALJ had the "opportunity to observe the demeanor and to determine the credibility of the claimant, the ALJ's observations concerning these questions are to be given great weight." *Shively v. Heckler*, 739 F.2d 987, 989 (4th Cir. 1984). The undersigned has considered Plaintiff's challenges and has reviewed the record. Based on this review and applicable law, the undersigned finds that the ALJ's decision reflects that he considered the relevant factors in weighing Plaintiff's credibility.⁵

⁴ Plaintiff notes that the ALJ did not reference his February 2014 lumbar MRI or July 2014 skin biopsies. Pl.'s Br. 11. An ALJ need not recite each piece of evidence in the record to prove that such analysis has occurred. *Craig*, 76 F.3d at 590 (citing *Gordon v. Schweiker*, 725 F.2d 231, 236 (4th Cir. 1984)). The undersigned notes, however, that the ALJ referenced the exhibit containing these reports and the physician's discussion of the same five times. *See* Tr. 23-24 (citing ex. 22F). Notably, no physician indicated as a result of these findings that Plaintiff had any limitations that would prevent him from working.

⁵ The undersigned agrees with Plaintiff that the ALJ failed to consider his long work history. "However, a failure to discuss a claimant's work record is not a controlling factor in assessing credibility, and an ALJ's failure to discuss it is considered harmless error where he cites valid additional factors to support his credibility determination." *Musgrove v. Colvin*, No. CV 1:15-2275-JMC-SVH, 2016 WL 3176610, at *18 (D.S.C. Mar. 22, 2016), *report and recommendation adopted*, No. 1:15-CV-02275-JMC, 2016 WL 3125491 (D.S.C. June 3, 2016) (citing *Glick v. Colvin*, No. 6:12-3294-RBH, 2014 WL 994591, at *18 (D.S.C. Mar. 13, 2014)).

Therefore, the undersigned recommends a finding that Plaintiff cannot demonstrate that the ALJ's credibility analysis as a whole is unsupported by substantial evidence or controlled by an error of law. *See Hines v. Barnhart*, 453 F.3d 559, 565 n.3 (4th Cir. 2006) (noting that a claimant's allegations "need not be accepted to the extent that they are inconsistent with available evidence"); *Hunter v. Sullivan*, 993 F.2d 31, 35 (4th Cir. 1993) (per curiam) (finding that the ALJ may properly consider inconsistencies between a plaintiff's testimony and the other evidence of record in evaluating the credibility of the plaintiff's subjective complaints).

2. ALJ's Determination of Plaintiff's RFC

Plaintiff alleges that the "ALJ's decision contains no function-by-function assessment of Plaintiff's ability to perform work-related activities on a sustained basis, nor is there any discussion of the requirements of medium work, such as the standing, walking, and lifting requirements of such work." Pl.'s Br. 14. The Commissioner argues that substantial evidence supports that "no 'function-by-function' assessment could change the ALJ's finding that [Plaintiff] could work." Def.'s Br. 14.

An RFC assessment is a determination of an individual's ability to perform sustained work-related activities on a regular and continuing basis. SSR 96-8p, 1996 WL 374184 at *1. "RFC is not the *least* an individual can do despite his or her limitations or restrictions, but the *most*. *Id.* (emphasis in original). At the administrative hearing level the ALJ is responsible for assessing a claimant's RFC. 20 C.F.R. § 404.1546(c), § 416.946(c). An ALJ's RFC assessment should be based on all relevant evidence and will consider the claimant's ability to meet the physical, mental, sensory, and other requirements of work. 20 C.F.R. § 404.1545(a)(3) and (4), § 416.945(a)(3) and (4).

Here, the ALJ determined that Plaintiff has the RFC "to perform medium work as defined in 20 CFR 404.1567(c) and 416.967(c) except the claimant can occasionally lift and/or carry 50

pounds and frequently lift and/or carry 25 pounds.” Tr. 21. The ALJ’s RFC assessment also included the following limitations:

The claimant can stand and/or walk for about 6 hours in an 8-hour workday, and sit for about 6 hours in an 8-hour workday. The claimant can occasionally push and/or pull with the right lower extremity. The claimant can frequently climb ramps or stairs and occasionally climb ladders, ropes, or scaffolds. The claimant can frequently balance, stoop, kneel, crouch, or crawl. The claimant should avoid concentrated exposure to extreme cold, extreme heat, wetness, and humidity. While the claimant may have difficulty with concentration over extended periods of time, he can perform simple, unskilled work. The claimant can accept supervision and interact with co-workers and the general public.

Tr. 22-23. In making this determination the ALJ gave great weight to the opinion evidence of record which included the opinion of Dr. Motycka and the opinion of the State agency examiner.

Tr. 24.

a. Opinion Evidence

On May 9, 2013, Dr. Motycka completed a consultative examination of Plaintiff. Tr. 512-20. In his orthopedic examination Dr. Motycka noted the following:

The cervical spine, lumbar spine, shoulders, elbows, wrists, knees, hips, and ankles were all normal in terms of range of motion testing. Straight leg raising in the sitting was 90 degrees bilaterally and produced no discomfort. Straight leg raising in the supine was 40 degrees bilaterally and produced no discomfort. The hand exams were normal. They had no joint deformity, joint swelling, decreased range of motion, or tenderness. His grip strengths were +5/+5. The patient has the ability to do fine manipulation and gross manipulation with either hand. The patient did tandem walk, heel walk, and toe walk. The patient had a normal squat and rose without difficulty. There is no gait disturbance. The only possible assistive device used was a right ankle ACE wrap, but otherwise he did not use a cane or crutch or anything such as that. All muscle strength testing is +5/+5. Sensory loss was claimed in the right lower extremity, circumferentially. He denies sensory loss in the trunk, and in dermatome of T5, as records indicate was one of his chief complaints. There were no visible joint abnormalities. He resisted all reflex testing in the upper and lower extremities. He could not relax. There is no area of atrophy and indeed his musculature appears to be well toned. His musculature is symmetric, between right and left.

Tr. 516. Dr. Motycka concluded that “function-wise” Plaintiff appeared to be intact although he showed evidence of a sprained right ankle. Tr. 517.

State agency reviewer Dr. Darla Mullaney completed a physical RFC assessment of Plaintiff on May 15, 2013. Tr. 101-03. Dr. Mullaney opined that Plaintiff could lift and/or carry 50 pounds occasionally and 25 pounds frequently, could sit, stand, and/or walk for 6 hours in an 8-hour day with normal breaks, and was limited in his right lower extremity for pushing and pulling. Tr. 101. Dr. Mullaney based these exertional limitations on Plaintiff's low back pain, abnormal sensation in right lower extremity, and occasional right lower extremity foot pedals. *Id.* Dr. Mullaney noted Plaintiff could climb ramps/stairs frequently; climb ladders, ropes, scaffolds occasionally; frequently balance, stoop, kneel and crouch; and occasionally crawl. Tr. 101-02. Dr. Mullaney cited Plaintiff's low back pain as the basis for these postural limitations. Dr. Mullaney noted the following: “[Claimant] has low back pain and polyneuropathy that limits his ability to sustain work as a truck driver. He has full strength all muscle groups and full [range of motion]. At 7/31/12 neuro visit doc[tor] states there is evidence of a mild transverse myelitis. He declined further treatment at that time.” Tr. 102.

b. Function-by-Function Analysis

The Administration's policy interpretation on assessing an individual's RFC emphasizes that the “RFC assessment must first identify the individual's functional limitations or restrictions and assess his or her work-related abilities on a function-by-function basis, including the functions in paragraphs (b), (c), and (d) of 20 CFR 404.1545 and 416.945. Only after that may RFC be expressed in terms of the exertional levels of work, sedentary, light, medium, heavy, and very heavy.” SSR 96-8p, 1996 WL 374184, at *1. The functions identified in the cited regulation include: physical abilities, mental abilities, and other abilities affected by impairments. 20 C.F.R. § 404.1545(b)-(d), § 416.945(b)-(d). In *Mascio v. Colvin*, 780 F.3d 632, 636-37 (4th Cir. 2015), the Fourth Circuit addressed whether an ALJ's failure to perform a function-by-function assessment necessitates remand. The court held that “a per se rule [requiring remand] is

inappropriate given that remand would prove futile in cases where the ALJ does not discuss functions that are ‘irrelevant or uncontested.’” *Id.* at 636. However, the court “agree[d] with the Second Circuit that ‘[r]emand may be appropriate . . . where an ALJ fails to assess a claimant’s capacity to perform relevant functions, despite contradictory evidence in the record, or where other inadequacies in the ALJ’s analysis frustrate meaningful review.’” *Id.*

The undersigned finds that remand is not required here because in his decision the ALJ discussed the functional limitations alleged by Plaintiff. Furthermore, although the ALJ did not perform an explicit function-by-function analysis, his discussion is sufficient to enable meaningful review. The ALJ assessed Plaintiff with the RFC to do medium level work and identified additional restrictions. Tr. 21-22. Plaintiff cites to his testimony “that he could not stand more than ten minutes without having to sit down, could not walk more than a block or two at a slow pace, could engage in no significant lifts, and spent most of the day reclining; he is able to perform light household tasks but has to take rest breaks after about ten minutes.” Pl.’s Br. 13. Plaintiff claims there is “nothing in the record regarding his ‘reported activities’ that is *remotely* consistent with an RFC to perform *any* range of medium work . . .” *Id.* at 13-14 (emphasis in Pl’s Brief). The ALJ specifically discussed Plaintiff’s complaints regarding his limitations that he found were “not fully credible” and treatment notes from the relevant period that supported Plaintiff’s ability to perform a range of medium work including reports that his gait was unremarkable, he had no leg weakness, his strength was preserved in his lower extremities, and he had normal coordinated movements and normal gait. Tr. 23. Moreover, the ALJ noted earlier in his decision Plaintiff’s self-report that he was able to take care of his personal needs, prepare meals for himself and his son, do household chores, shop, visit his mother daily, and attend church. Tr. 21. The ALJ gave great weight to the examining consultant Dr. Motycka’s opinion that “function-wise the claimant appears to be intact.” Tr. 24. The ALJ also gave great weight to the State agency consultant

opinion that he found to be “consistent with the findings of consultative examiner Dr. Motycka and the other medical evidence of record including office treatment notes from University Specialty Clinics and The South Carolina Neurological Clinic (Exhibits 6F, 8F, 15F, 17F, 22F).” *Id. See Schlossnagle v. Colvin*, C.A. No. 15-935, 2016 WL 4077672, at *8 (D. Md. Aug. 1, 2016) (recognizing that ALJ may satisfy function-by-function analysis by referencing analysis of state agency physician) (citing *Herren v. Colvin*, C.A. No. 1:15-CV-00002-MOC, 2015 WL 5725903, at *5 (W.D.N.C. Sept. 30, 2015)). There is no contrary evidence in the record supporting a finding that Plaintiff is incapable of performing a range of medium work. Accordingly, the ALJ’s failure to perform a function-by-function assessment does not require remand.

III. Conclusion

The court’s function is not to substitute its own judgment for that of the ALJ, but to determine whether the ALJ’s decision is supported as a matter of fact and law. Based on the foregoing, the court finds that Plaintiff has not shown that the Commissioner’s decision was unsupported by substantial evidence or reached through application of an incorrect legal standard. *See Craig*, 76 F.3d at 589; *see also* 42 U.S.C. § 405(g). Therefore, it is hereby ORDERED that the Commissioner’s decision be affirmed.

IT IS SO ORDERED.



July 24, 2017
Florence, South Carolina

Kaymani D. West
United States Magistrate Judge