

spine, arthritis, depression, and post traumatic stress disorder (PTSD). The applications were denied initially and upon reconsideration. At plaintiff's request, an administrative law judge (ALJ) held a hearing on June 3, 2002, at which both plaintiff and his counsel were present. On June 28, 2002, the ALJ rendered a decision denying all benefits, on the basis that plaintiff was not under a "disability" as defined by the Act. Plaintiff requested review by the Appeals Council, but his request for review was denied. Thus, the ALJ's decision is the final decision of defendant.

II. Standard of Review

Judicial review under 42 U.S.C. § 405(g) is limited to whether defendant's decision is supported by substantial evidence in the record as a whole and whether defendant applied the correct legal standards.¹ The Tenth Circuit has defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."² In the course of its review, the court may not reweigh the evidence or substitute its judgment for that of defendant.³

III. Relevant Framework for Analyzing Claim of Disability and the ALJ's Findings

"Disability" is defined in the Act as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" ⁴ The Act further provides that an individual "shall be determined to be under a disability only if his physical or mental impairment

¹See *White v. Massanari*, 271 F.3d 1256, 1257 (10th Cir. 2001) (citing *Castellano v. Sec'y of Health & Human Servs.*, 26 F.3d 1027, 1029 (10th Cir. 1994)).

²*Id.* (quoting *Castellano*, 26 F.3d at 1028).

³*Id.*

⁴*Williams v. Bowen*, 844 F.2d 748, 750 (10th Cir. 1988) (quoting 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A) (1982)).

or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy”⁵

The Social Security Administration has established a five-step sequential evaluation process for determining whether a claimant is disabled,⁶ and the ALJ in this case followed the five-step process. If a determination can be made at any of the steps that a claimant is or is not disabled, evaluation under a subsequent step is not necessary.⁷ Step one determines whether the claimant is presently engaged in substantial gainful activity.⁸ If he is, disability benefits are denied.⁹ If he is not, the ALJ must proceed to the second step.¹⁰ Here, the ALJ determined that plaintiff was not engaged in substantial gainful activity and, thus, properly proceeded to the second step.

The second step of the evaluation process involves a determination of whether “the claimant has a medically severe impairment or combination of impairments.”¹¹ This determination is governed by certain “severity regulations,” is based on medical factors alone, and consequently, does not include consideration of such vocational factors as age, education, and work experience.¹² Pursuant to the

⁵*Id.* (quoting 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B) (1982 & Supp. III 1985)).

⁶*See id.* (citing 20 C.F.R. §§ 404.1520, 416.920 (1986)).

⁷*Id.*

⁸*Id.*

⁹*Id.*

¹⁰*Id.*

¹¹*Id.* (quoting *Bowen v. Yuckert*, 482 U.S. 137, 140-41 (1987)).

¹²*Id.* (citing 20 C.F.R. §§ 404.1520(c), 416.920(c) (1986)).

severity regulations, the claimant must make a threshold showing that his medically determinable impairment or combination of impairments significantly limits his ability to do basic work activities.¹³ If the claimant is unable to show that his impairments would have more than a minimal effect on his ability to do basic work activities, he is not eligible for disability benefits.¹⁴ If, on the other hand, the claimant presents medical evidence and makes the de minimis showing of medical severity, the ALJ proceeds to step three.¹⁵ The ALJ in this case concluded that plaintiff satisfied the severity requirement based on the following impairments: substance abuse disorder; depressive and anxiety disorders, including PTSD; one or two myocardial infarctions; cardiac stent placement; hepatitis C; and degenerative disease of the lumbar spine. Thus, the ALJ proceeded to step three.

In step three, the ALJ “determines whether the impairment is equivalent to one of a number of listed impairments that the Secretary acknowledges are so severe as to preclude substantial gainful activity.”¹⁶ If the impairment is listed and thus conclusively presumed to be disabling, the claimant is entitled to benefits.¹⁷ If not, the evaluation proceeds to the fourth step, where the claimant must show that the “impairment prevents [the claimant] from performing work he has performed in the past.”¹⁸ If the claimant is able to perform his previous work, he is not disabled.¹⁹ With respect to the third step of

¹³*Id.* at 750-51 (citing 20 C.F.R. §§ 404.1521(b), 416.921(b) (1986)).

¹⁴*Id.* at 751.

¹⁵*Id.*

¹⁶*Id.* (citing 20 C.F.R. §§ 404.1520(d), 416.920(d) (1986); *Bowen v. Yuckert*, 482 U.S. at 141).

¹⁷*Id.*

¹⁸*Id.* (citing 20 C.F.R. §§ 404.1520(e), 416.920(e) (1986); *Bowen v. Yuckert*, 482 U.S. at 141).

¹⁹*Id.*

the process in this case, the ALJ determined that plaintiff met listing 12.09 based on his drug addiction and alcoholism. This requires the ALJ to determine whether plaintiff's drug addiction and/or alcoholism is a contributing factor to his impairment.²⁰ The ALJ determined that plaintiff's substance abuse was a contributing factor, and that his impairments were not listed or medically equivalent to those listed in the relevant regulations absent his substance abuse. At the fourth step, the ALJ concluded that plaintiff was unable to perform his past relevant work.

Thus, the ALJ proceeded to the fifth and final step of the sequential evaluation process—determining whether the claimant has the residual functional capacity (RFC) “to perform other work in the national economy in view of his age, education, and work experience.”²¹ At that point, the ALJ properly shifted the burden of proof to defendant to establish that plaintiff retains the capacity “to perform an alternative work activity and that this specific type of job exists in the national economy.”²² At this step, the ALJ concluded that plaintiff was not disabled, finding that plaintiff, despite possessing certain non-exertional limitations, nonetheless could perform a significant number of jobs in the state and national economies, including small parts assembler, marking clerk (light), and plastic parts assembler (sedentary).

IV. Analysis of Plaintiff's Specific Arguments

Plaintiff contends that the ALJ failed to: (1) properly assess plaintiff's drug addiction and

²⁰20 C.F.R. §§ 404.1535, 416.935.

²¹*See Williams*, 844 F.2d at 750.

²²*See id.* (citations omitted); *accord White*, 271 F.3d at 1258 (at fifth step, burden of proof shifts to Commissioner to show that claimant retains the functional capacity to do specific jobs).

alcoholism under the relevant statutes and regulations; (2) adequately support his decision that plaintiff's impairments did not meet or equal a Listed Impairment; and (3) adequately support his determination of plaintiff's residual functional capacity. The Court addresses each of these arguments in turn.

A. Drug Addiction and Alcoholism

Plaintiff argues that the ALJ improperly evaluated his drug addiction and alcoholism when making his disability determination. The ALJ must find plaintiff not disabled if alcoholism or drug addiction is a contributing factor material to his disability determination.²³ The key question is whether plaintiff would still be disabled if he stopped using drugs or alcohol.²⁴ The ALJ must determine which of plaintiff's limitations would remain if he stopped using drugs or alcohol.²⁵ Then the ALJ determines whether plaintiff is disabled based on these remaining limitations.²⁶ If plaintiff's remaining limitations would not be disabling, his drug addiction or alcoholism is a contributing factor material to his disability determination; if plaintiff's remaining limitations are still disabling, his drug addiction and alcoholism is not a contributing factor material to his disability determination, and he will be found disabled independent of his addictions.²⁷

In this case the ALJ determined that plaintiff met listing 12.09–Substance Addiction

²³42 U.S.C. §§ 423(d)(2)(C), 1382c(a)(3)(J).

²⁴20 C.F.R. §§ 404.1535, 416.935.

²⁵*Id.*

²⁶*Id.*

²⁷*Id.*

Disorders.²⁸ The ALJ found plaintiff had mental impairments that caused episodes of decompensation, and marked limitations in: activities of daily living; social functioning; and concentration, persistence, and pace. Thus the ALJ determined plaintiff was disabled. The ALJ then considered plaintiff's mental limitations absent the effects of drugs and alcohol. The ALJ determined that without drug or alcohol use, plaintiff's mental limitations caused: only mild restrictions in activities of daily living; mild to moderate limitations in concentration, persistence, and pace; mild deficiencies in social functioning; and no episodes of decompensation of extended duration. Because these limitations would not be disabling, the ALJ concluded that plaintiff's drug addiction and alcoholism was a contributing factor material to his determination of disability. Therefore, the ALJ determined plaintiff's RFC absent the effects of substance abuse.

Plaintiff argues that the ALJ's analysis was "fatally flawed" because he looked "through the lense of whether drug addiction or alcoholism was a contributing factor." But that is exactly what the regulations require the ALJ to do. The ALJ determined that plaintiff was disabled because he met Listing 12.09; he discussed evidence showing that plaintiff's limitations would not be as severe if he stopped using drugs and alcohol; and he determined that plaintiff's limitations were not disabling absent his limitations caused by substance abuse. Thus the ALJ properly considered plaintiff's drug and alcohol addiction according to the statutes and regulations.

Plaintiff also argues that the ALJ improperly determined that he was disabled at step three based on Listing 12.09; and therefore the ALJ should not have considered plaintiff's impairments

²⁸Appendix 1, Subpart P of 20 C.F.R. Part 404 .

absent his drug addiction and alcoholism.²⁹ While the Court agrees that the ALJ did not state with specificity his reasons for determining plaintiff met Listing 12.09, remanding this case for further development would be an exercise in futility. Whether the ALJ finds plaintiff disabled or not disabled at steps three, four or five, the ALJ's determination must include consideration of plaintiff's impairments absent the effects of drug addiction and alcoholism. Thus, the Court declines to remand, despite the paucity of the ALJ's findings at step three.

B. The Listing of Impairments

Plaintiff further alleges that the ALJ erred in determining that his mental impairments were not equal to a Listed Impairment. Plaintiff argues that the ALJ failed to consider all the evidence in the record. Plaintiff cites to a Psychiatric Review Technique Form (PRTF) filled out by psychologist George Hough, Ph.D. as evidence that plaintiff meets a Listing. Although Dr. Hough opined that plaintiff's allegations of PTSD and depression were credible, and that these impairments were greater than non-severe, Dr. Hough concluded that these impairments were equivalent to a Listing. Notably, Dr. Hough opined that these impairments would be under better control were they not exacerbated by plaintiff's drug addiction and alcoholism. Plaintiff argues that Dr. Hough determined that he had a 12.04 Affective Disorder, a 12.06 Anxiety-Related Disorder, a 12.07 Somatoform Disorder, and a 12.08 Personality Disorder. But Dr. Hough only mentioned these on the PRTF as the disorders he considered in determining that plaintiff did not meet a Listed Impairment. Dr. Hough's opinion actually supports the ALJ's determination that plaintiff's impairments were not equal to a Listed Impairment.

²⁹*Drapeau v. Massanari*, 255 F.3d 1211, 1214-15 (10th Cir. 2001) (stating that the ALJ must first make a determination that the claimant is disabled before determining whether the claimant would still be disabled if he or she stopped using drugs or alcohol).

Plaintiff also contends that the records of Dr. Boll, a consulting psychologist who examined him on June 12, 2001, are evidence that he meets a Listing. Dr. Boll opined that plaintiff was low-average intellectually; and Dr. Boll would not rule out borderline mental retardation. Dr. Boll also opined that plaintiff was incapable of managing his benefits in his own best interest, as he had limited numerical reasoning ability. Dr. Boll noted that plaintiff would probably have some problem with an authoritarian or critical supervisor. Most importantly, Dr. Boll opined that these problems are exacerbated by plaintiff's continued use of drugs and alcohol. Moreover, none of this evidence shows that plaintiff's impairments meet or equal a Listed Impairment. Nor is there any such evidence in the VA Medical Center records plaintiff cites to.

The ALJ appropriately applied correct legal standards in determining that without drug or alcohol abuse, plaintiff's mental impairments did not meet or equal a listed impairment. And, the ALJ supported this determination with substantial evidence from the record. Therefore, the Court finds no error.

C. RFC Determination

Plaintiff contends that the ALJ improperly determined his RFC, arguing that the ALJ substituted his own opinion when he stated that plaintiff was "not shown to sustain psychological difficulty of the serious degree alleged when he is not using drugs and alcohol." Plaintiff states that the ALJ failed to include some of his social limitations, including Dr. Hough's statement that because plaintiff has "some history of interpersonal conflicts in the past and interpersonal bellicosity, he may demonstrate moderate limitations regarding his capacity to relate to others or supervisors in a work environment." However in the same paragraph, Dr. Hough also stated that all of plaintiff's symptoms would be reduced in their

level of impairment if plaintiff reduced or eliminated his alcohol and marijuana consumption. The ALJ's RFC determination appropriately included limitations that were not influenced by plaintiff's drug and alcohol abuse.

Plaintiff also argues that the ALJ erred in completely discounting his allegations of chronic pain in his lower back and neck. Plaintiff testified that he uses traction three times a day, as well as heat, hot showers, and a portable massage to get relief. Plaintiff further testified that he has to lie down in bed with a heating pad for 30 minutes, three to four times a week; and that four or five times a week his arms go to sleep, making him unable to pick up things. Plaintiff also testified that he cannot take pain medications due to their addictive nature and because he has hepatitis C.

The ALJ did not completely discount plaintiff's allegations of pain; he merely found them not completely credible. The ALJ does not have to include limitations based on plaintiff's testimony alone.³⁰ When assessing credibility, the ALJ must consider the objective medical evidence and such factors as: plaintiff's persistent attempts to find relief and willingness to try any treatment prescribed; whether plaintiff has regular contact with a doctor; plaintiff's daily activities; plaintiff's regular use of crutches or a cane; and the dosage, effectiveness, and side effects of plaintiff's medication.³¹ The ALJ must give specific reasons for rejecting plaintiff's subjective complaints.³² Ultimately, credibility determinations "are peculiarly the province of the finder of fact," and should not be upset if supported by substantial

³⁰*Musgrave v. Sullivan*, 966 F.2d 1371, 1376 (10th Cir. 1992).

³¹*Barnett v. Apfel*, 231 F.3d 687, 690 (10th Cir. 2000) (citing *Luna*, 834 F.2d 161, 165-66 (10th Cir. 1987)).

³²*White v. Massanari*, 271 F.3d 1256, 1261 (10th Cir. 2001) (citing *Kepler v. Chater*, 68 F.3d 387, 390-91 (10th Cir. 1995)).

evidence.³³

The ALJ appropriately considered the objective medical evidence in the record. In addition to plaintiff's subjective complaints, the record shows that plaintiff had a CT and MRI which showed degenerative disc disease. But the medical reports characterized plaintiff's back pain as a mild condition, and the ALJ noted that plaintiff had only had conservative treatment for his back pain. The ALJ also noted that although plaintiff had regularly been seen for his psychological and substance abuse problems, his back problem had not required much active treatment.³⁴ The ALJ should have considered plaintiff's explanation that narcotic pain medications were not a viable option. But it was also appropriate to consider that plaintiff did not consistently complain to his doctors about back pain or request any alternative treatment, other than the traction device, massage, heat, and aspirin that he testified to using.

The ALJ's partial discount of plaintiff's credibility was also appropriately based on inconsistencies in plaintiff's testimony. Plaintiff testified that he had problems with his back for 30 years, yet he worked for a number of years with that purported back problem. And although plaintiff told a therapist that his physical condition prevented him from doing his past work, he also testified that he had lost jobs because of his excessive drinking or transportation problems, not because of his physical impairments. The fact that plaintiff left his jobs for reasons other than his impairments is a factor the

³³*Id.* (citing *Kepler*, 68 F.3d at 390-91).

³⁴*See Qualls v. Apfel*, 206 F.3d 1368, 1372 (10th Cir. 2000) (stating that the ALJ may consider what attempts a claimant has made to relieve his pain in order to evaluate the veracity of the claimant's contention that his pain was disabling); *see also Noble v. Callahan*, 978 F. Supp 980, 986 (D. Kan. 1997); *Bates v. Barnhart*, 222 F. Supp. 2d 1252, 1261 (D. Kan. 2002).

ALJ may rely on in determining credibility.³⁵

Finally, the ALJ determined that plaintiff's inconsistent statements regarding his alcohol consumption undermined his overall credibility. The ALJ found that at the hearing plaintiff presented himself as a moderate drinker when the record as a whole demonstrated that he is more than a moderate drinker. The ALJ's determination of plaintiff's credibility finds substantial support in the record, and the determination of RFC was proper.

In sum, after carefully reviewing the record in this case and considering all of plaintiff's arguments in light of the record, the Court concludes that substantial evidence supports defendant's decision to deny plaintiff's application for disability benefits and that no deviation from established legal standards occurred.

IT IS THEREFORE ORDERED BY THE COURT THAT plaintiff's motion for judgment is **denied** and defendant's decision denying plaintiff disability benefits is affirmed.

IT IS SO ORDERED.

Dated this 19th day of August, 2004, at Topeka, Kansas.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge

³⁵See *Potter v. Sec'y of Health & Human Servs.*, 905 F.2d 1346, 1349 (10th Cir. 1990); *Williams v. Chater*, 923 F. Supp. 1373, 1379 (D. Kan. 1996).