IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GARY ALLORD,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

REPORT AND
RECOMMENDATION

04-C-738-C

This is an appeal from an adverse determination of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). Plaintiff Gary Allord suffers from severe post traumatic stress disorder stemming from his combat experience in the Vietnam War. Plaintiff challenges the commissioner's determination that he is not entitled to Social Security Disability Insurance Benefits. Although there is no doubt that plaintiff had post traumatic stress disorder before December 31, 1992 and little doubt that plaintiff was disabled by the disease at the time of his administrative hearings in 1997 and 2003, the administrative law judge who decided this case concluded that the evidence was insufficient to show that the impairment was of disabling severity before December 31, 1992, the date on which plaintiff's eligibility for benefits expired.

The narrow question before this court on appeal is whether substantial evidence in the record supports this conclusion. I conclude that there is sufficient support for the ALJ's decision to withstand plaintiff's challenge. The record does not provide overwhelming support for the ALJ's conclusion, and the ALJ made some unfounded assumptions along the

way. However, careful review of the record and the ALJ's decision persuade me that there is sufficient support for the ALJ's conclusion such that reasonable minds could accept it. Accordingly, this court should affirm the decision of the commissioner.

Legal and Statutory Framework

To be entitled to either disability insurance benefits or supplemental security income payments under the Social Security Act, a claimant must establish that he is under a disability. The Act defines "disability" as the "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 twelve months." 42 U.S.C. § 1382c(a)(3)(A). A physical or mental impairment is "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 1382c(a)(3)(c).

The commissioner has promulgated regulations setting forth the following five-step sequential inquiry to determine whether a claimant is disabled:

(1) Is the claimant currently employed?

(2) Does the claimant have a severe impairment?

(3) Does the claimant's impairment meet or equal one of the impairments listed by the SSA?

(4) Can the claimant perform his or her past work? and

(5) Is the claimant is capable of performing work in the national economy?

See 20 C.F.R. § 404.1520. The inquiry at steps four and five requires assessment of the claimant's "residual functional capacity," that is, "an assessment of an individual's ability to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis." Social Security Ruling 96-8p. "A 'regular and continuing basis' means 8 hours a day, for 5 days a week, or an equivalent work schedule." *Id*.

In seeking benefits the initial burden is on the claimant to prove that a severe impairment prevents him from performing past relevant work. If he can show this, then the burden shifts to the commissioner to show that the claimant was able to perform other work in the national economy despite the severe impairment. *See Stevenson v. Chater*, 105 F.3d 1151, 1154 (7th Cir. 1997); *Brewer v. Chater*, 103 F.3d 1384, 1391 (7th Cir. 1997).

Central to this case is the requirement that an individual seeking disability insurance benefits must establish that he was disabled *during the time he was insured* for benefits. *See* 42 U.S.C. § 423(a)(1)(A), (c)(1); 20 C.F.R. § 404.131. A physician's retrospective opinion that the claimant was disabled during the relevant time period is relevant and may be substantial evidence of disability if it is corroborated by evidence contemporaneous with the eligible period. *Estok v. Apfel*, 152 F.3d 636, 640 (7th Cir. 1998). Corroborating evidence need not consist of medical reports; it may include lay evidence that relates back to the claimed period of disability. *Wilder v. Chater*, 64 F.3d 335, 337 (7th Cir. 1995). *See also Likes v. Callahan*, 112 F.3d 189, 191 (5th Cir. 1997); *Jones v. Chater*, 65 F.3d 102, 104 (8th Cir. 1995).

I have drawn the following facts from the Administrative Record ("AR"):

Facts

I. Background and Procedural History

Plaintiff is a decorated combat veteran of the Vietnam War, having served two tours as an infantry officer from 1969 to 1971. After returning to the United States, plaintiff continued to serve in the Marines, performing desk jobs until his retirement in July 1987. After retiring from the military, plaintiff attempted to work as the proprietor of two small businesses, moving household goods and performing minor renovations on houses.

On December 31, 1992, plaintiff's insured status with SSA lapsed. Plaintiff was 45 years old.

In April 1993, plaintiff visited the Veterans Center in Silver Spring, Maryland, where he saw psychologist Aphrodite Matsakis, a post traumatic stress disorder (PTSD) specialist. Dr. Matsakis saw plaintiff on approximately six occasions between April 26, 1993 and June 7, 1993. She diagnosed plaintiff with severe and chronic PTSD. Plaintiff stopped seeing Dr. Matsakis on June 7, 1993 and did not see any other mental health professional until March 1996, when he resumed contact with Dr. Matsakis. For the next three years, until March 1999, plaintiff maintained a regular treatment relationship with Dr. Matsakis.

On October 1, 1996, plaintiff applied for social security disability benefits, alleging that he could not work because of headaches, hearing loss in his right ear, back problems and

PTSD. The local disability agency denied his claim initially and on reconsideration, finding insufficient evidence to show that plaintiff was disabled before December 31, 1992, the expiration date of his status as an insured individual. Plaintiff requested and was granted a hearing before an administrative law judge.

In the meantime, on December 19, 1997, the Department of Veterans Affairs found plaintiff 100% disabled by PTSD. The VA's determination was independent of the SSA's proceedings.

On December 23, 1997, the SSA's ALJ issued a decision denying plaintiff's claim, finding that plaintiff had failed to show the existence of a severe impairment before December 31, 1992. In reaching this conclusion, the ALJ rejected the retrospective opinion of Dr. Matsakis, who had submitted reports supporting plaintiff's claim. Dr. Matsakis offered the opinion that plaintiff suffered from symptoms of severe PTSD as early as the 1970s and that those symptoms had rendered plaintiff unemployable since 1987. The ALJ also rejected the retrospective opinion of a second doctor, Jonathan Shay, who conducted a psychiatric evaluation of plaintiff in July 1997. Like Dr. Matsakis, Dr. Shay concluded that plaintiff was unemployable as a result of severe limitations caused by PTSD. Finally, the ALJ rejected a written statement by a lay witness, Melissa Chappell-White, who stated that she had known plaintiff since 1985 and had observed behavior consistent with PTSD, including plaintiff's lack of enjoyment in most activities, inability to socialize, hypervigilance, and startle reactions.

Plaintiff requested review by the Appeals Council. Plaintiff submitted additional supporting evidence including new reports from Drs. Matsakis and Shay. On June 14, 2000, the Appeals Council denied plaintiff's request for review. Plaintiff then filed a civil action for judicial review.[1] While the case was pending, the parties agreed to have the case remanded to the social security administration pursuant to sentence four of § 405(g).

On March 26, 2001, the court entered an order remanding the case for the purpose of obtaining and reviewing additional evidence. Pursuant to that order, the Appeals Council ordered the case assigned to an ALJ for the purpose of evaluating the new evidence.

II. Evidence Before the Second ALJ

A. Hearing Testimony

On September 30, 2003, SSA convened a second administrative hearing. Plaintiff was represented by counsel. Plaintiff testified and presented the testimony of Chappell-White and Dr. Matsakis. Tanja Henteleff Hubacker testified as a neutral vocational expert. Plaintiff stipulated that his physical problems would not have prevented him from engaging in substantial work activities before his date last insured; thus the focus was on whether plaintiff's PTSD was disabling prior to the December 31, 1992 expiration of plaintiff's coverage.

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[1]Plaintiff was living in Washington, D.C. at the time, so he filed his lawsuit in the United States District Court for the District of Columbia. Plaintiff then moved to Middleton, Wisconsin.

Plaintiff testified that after he retired from the Marines in August 1987 until 1990, he had attempted to run a home repair business and a moving business. Plaintiff testified that he stopped his moving business in 1987. AR 536. He testified that the home repair business involved performing minor home repairs and renovations. Plaintiff did not advertise but obtained jobs by referral from neighbors and past customers. Plaintiff's work involved writing estimates, performing the work and supervising others who worked for him. Plaintiff testified that one of his customers was Chappell-White, for whom he performed three or four small repair jobs. He said Chappell-White "may have" referred him to others. AR 530-33. Plaintiff said he worked three or four days a week some weeks; other weeks, he didn't work at all. AR 531. Plaintiff testified that he made just enough money from the business to cover his expenses but not enough to pay himself. AR 532.

Plaintiff testified that he stopped running his home repair business because he couldn't find any more work. He said he had problems communicating with most of his customers and keeping to a schedule. AR 541.

Plaintiff repeated his testimony from the first hearing, explaining that before December 1992, he realized there was something wrong with him mentally but he did not know what it was. Plaintiff testified that he had a "couple" appointments at the Washington School of Psychiatry but found them of little help. Plaintiff testified that in 1991, he also sought help at a VA Hospital but was told that he was not eligible for treatment there unless he had a service-connected disability. AR 540.

Chappell-White testified that she had known plaintiff since 1985. She described herself as a "long-time friend." She testified that she met plaintiff while he was still in the Marines and was operating a moving business on weekends with some other men; Chappell-White had called the moving company to help her with a move. She testified that plaintiff had helped her move two or three times over the years and also had performed some home repair work for her. She said she also saw plaintiff socially on occasion.

Chappell-White testified that over the period plaintiff performed work for her (which was before 1990) she observed plaintiff's mental condition deteriorate. She said that plaintiff could not communicate, could not execute or follow work instructions, and could not show up on a regular basis. AR 549. She denied having referred plaintiff to neighbors to perform work but said she knew people in the neighborhood who had hired plaintiff on their own. AR 551. She testified that she learned from her neighbors that they had experienced the same difficulties with plaintiff. AR 549-50. Chappell-White testified that she had overheard agitated phone conversations between plaintiff and other customers who were unhappy with plaintiff's work. AR 553.

Dr. Matsakis testified that plaintiff had severe PTSD before she began treating him in April 1993, describing him as "one of the most destroyed men I've ever seen in my twenty-some years." AR 558. When asked to explain the basis for her opinion that plaintiff was incapable of performing any employment before December 31, 1992, Dr. Matsakis replied:

> The memory problems. The fears he has about being with people. The anger, the distrust, the state of paranoia, the withdrawal. If he's successful at anything, at the teeniest hint, which he doesn't even dream of that, even if he was he would be frightened because of triggers, which we don't have time to go into which would take probably a year to explain. But basically anything that anyone does will set him off. Being in a closed room will set him off, being in open spaces. Noise sets him off. Silence sets him off. Kindness sets him off. Hostility sets him off and sends him off into either no man's land where he can't think or you see that angry look in his eye and he's doing everything to control it. If the scratches and bruises I've seen on him a couple times are evidence that he sometimes can't control himself . . .
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> . . . The only work he does is staying alive, which is amazing that he's even here. No, he can't do anything.

AR 565-66.

B. Medical Evidence

1. Dr. Foster Hutchinson

On November 6, 1987, plaintiff saw Foster L. Hutchinson, Ph.D., at the Washington School of Psychiatry for a mental health evaluation. Plaintiff was referred to Dr. Hutchinson by Chappell-White. Plaintiff told Dr. Hutchinson that he had two concerns he wanted to address in therapy: 1) his feelings associated with his wife's recent request for a divorce and 2) his problems adjusting from military to civilian life. With respect to the latter, plaintiff reported that he enjoyed running his moving and home repair business but was concerned about making social and business contacts on his own and was finding it difficult to relate

to others outside of work. Plaintiff reported that most of his social contacts were other Marines with whom he had worked before retiring and that he had few civilian friends.

Dr. Hutchinson described plaintiff as a "pleasant, controlled and articulate white male" with above average intellectual functioning and capacity for insight. Plaintiff's speech was normal in rate and content. Dr. Hutchinson saw no evidence of memory difficulties or other cognitive impairment. Plaintiff's mood was sad and he had a restricted range of flat affect. Plaintiff reported that he had experienced depression, self-doubt, diminished concentration, restless sleep and decreased appetite in the last 10 days since being told that his wife was filing for divorce. Dr. Hutchinson diagnosed an adjustment disorder with depressed mood and a compulsive personality disorder. Although he recommended that plaintiff receive at least weekly therapy, plaintiff did not return after the initial consultation, indicating that he was planning to relocate to Alabama in the hopes of repairing his marriage. On a case-closing worksheet, Dr. Hutchinson indicated that plaintiff had a "mild" impairment in his level of vocational/ educational functioning, "serious" impairment in family and social relations and "moderate" impairment in personal/emotional functioning. AR 243-248.

2. Dr. Matsakis

The next record of any mental health treatment is about 5½ years later, on April 26, 1993, four months after plaintiff's SSD coverage expired. This is when plaintiff began working with Dr. Matsakis. Dr. Matsakis's notes indicate that plaintiff appeared for his initial intake meeting unkempt, frightened and hyper-vigilant. He reported nightmares,

intrusive thoughts, numbing, and symptoms of clinical depression. AR 270. Dr. Matsakis diagnosed PTSD and possible clinical depression. AR 273-74. Plaintiff had four or five sessions with Dr. Matsakis, but was reluctant to pursue group therapy or further counseling. Plaintiff stopped seeing Dr. Matsakis in June 1993.

In March 1996, plaintiff resumed treatment with Dr. Matsakis. Plaintiff reported that he had recently lost his job and was having problems with the IRS. AR 277. Dr. Matsakis observed that plaintiff was "in a severe state of dissociation." Plaintiff received regular counseling from Dr. Matsakis for the next three years until she retired in early 1999.

The record contains reports from Dr. Matsakis dated November 4, 1996; January 29, 1997; September 24, 1997; and March 16, 1999. In the report dated January 29, 1997, Dr. Matsakis stated that plaintiff was "100 % unemployable" as a result of his symptoms of PTSD. She indicated that she had diagnosed plaintiff in 1993 with severe and chronic PTSD and clinical depression and that her diagnosis had not changed. According to Dr. Matsakis:

> [Plaintiff's] distrust of almost everyone; his intense fear of losing control of himself; his intense focus on issues of justice, honesty and fairness; and his difficulties interacting with others, even on a casual level, make it impossible for him to work with others or hold a steady job . . .
>
> His work record shows that he has been fired due to personality clashes and the inability to get along with others. Also, the amount of energy he has to bring to a job situation is limited because a lot of his energy is spent monitoring and controlling his aggression and his fears. He sleeps poorly, has many nightmares, and is suffering from symptoms of depression

> as well as combat trauma, which make him emotionally and physically unavailable to concentrate on getting a task done and being productive . . .
>
> This veteran is 100% unemployable. He's socially isolated and has no friends and only tenuous family connections. His PTSD has permanently and severely damaged his ability to work or maintain relationships.

AR 193.

In the September 24, 1997 report, Dr. Matsakis stated that plaintiff had been unemployable since 1987. AR 232.

On March 16, 1999, Dr. Matsakis wrote that she had spent nearly 200 hours counseling and treating plaintiff since 1993. Dr. Matsakis wrote that plaintiff displayed numerous examples of "severe manifestations" of PTSD including: anhedonia and pervasive loss of interest in all activities; continual gross sleep disturbances, including nightmares; feelings of profound guilt and worthlessness; episodes of suicidal depression; fatigue; hopelessness; diminished ability to concentrate; severe dissociation in which he lost a sense of time; difficulties concentrating resulting from intrusive memories of combat and flashbacks; severe distrust of anyone in authority and low frustration tolerance. AR 257. Dr. Matsakis continued:

> Based on my history of treating Mr. Allord, I am confident in my opinion that Mr. Allord suffered from these same effects of PTSD long before I began treating him in 1993. When I first saw Mr. Allord in 1993, I saw a severely depressed individual who had almost all of the symptoms of PTSD in severe form. Such a progressed state of PTSD could not have emerged overnight. His physical condition mirrored his

> psychological state of desperation. In my twenty some years experience in working with combat veterans, I would say that Mr. Allord's condition was a later stage condition of PTSD.

AR 258. Dr. Matsakis stated that she had "confirmed" her retrospective opinion by interviewing Chappell-White on December 30, 1998. According to Dr. Matsakis, Chappell-White's observations of plaintiff starting in 1985 were consistent with post traumatic stress disorder and many were identical to symptoms that Dr. Matsakis had observed in treatment. AR 259. Dr. Matsakis offered the opinion that "based on what [Chappell-White] described and based on my treatment of Mr. Allord that his disorders merited severity ratings and more than met the requirements in the Social Security regulations relating to Affective Disorders and Anxiety Disorders during the late 1980s and early 1990s." AR 262.

3. Dr. Shay

At Dr. Matsakis's request, Dr. Jonathan Shay, a staff psychiatrist at the Department of Veterans Affairs in Boston, conducted a psychiatric evaluation of plaintiff in July 1997. Dr. Shay diagnosed plaintiff with PTSD with associated major depressive episode. AR 221. Dr. Shay concluded that plaintiff had been unemployed since July 1987 "because of the pervasive and disabling effect of his symptoms of PTSD." AR 220. According to Dr. Shay:

> He is chronically sleep-deprived because of repetitive combat nightmares and because he sleeps "in a way that I can respond to any danger." Whatever sleep he gets is watchful, fragmented sleep. This impairs daytime concentration and memory function. He is extremely distrustful, irritable, and easily angered by the smallest sign of dishonesty, carelessness, self-

> serving, fraudulent "looking good," or indifference in work situations. Such things act as triggers for recollection of the dead, many who died because of these things. Both with sensory triggers and without them, he is subject to sensory flashbacks of smells and sounds of combat, which are extremely frightening and distracting in a work situation. He always is planning his escape route in any situation, constantly monitoring his surroundings for danger.

AR 220.

Dr. Shay assigned plaintiff a score of 20 on the Global Assessment of Functioning Scale, which indicates that plaintiff had some danger of hurting himself or others.[2] He found that plaintiff was "unable to initiate and maintain normal social relationships, and is unable to initiate or maintain even the simplest employment at the present time because of his PTSD symptomatology, nor is he likely to be able to hold employment in the future." AR 222.

On September 8, 1997, Dr. Shay provided a one-page addendum to his report in which he stated:

> In my professional opinion, based on long, specialized experience with the psychiatric condition that this retired Marine manifests, and upon many hours of personal interview with him and review of documents, this veteran was *completely* disabled for even the simplest employment from before his retirement from the Marine Corps in 1987, and continuously through the date of December 31, 1992, until the present.

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[2] Dr. Shay's reports that a GAF score of 20 signals a "persistent" danger of hurting self or others. The correct modifier is "some" danger. *See Diagnostic and Statistical Manual of Mental Disorders* (4th ed. Text Revision), at 34.

AR 211, emphasis in original.

Dr. Shay prepared another report on plaintiff's behalf in connection with plaintiff's appeal of the first ALJ's decision denying his claim for benefits. In that report, Dr. Shay indicated that he had interviewed Chappell-White on December 30, 1998. According to Dr. Shay, Chappell-White's contemporaneous observations of plaintiff's occupational functioning during the time period in question confirmed his clinical inference that plaintiff was suffering from post traumatic stress disorder and major depression at that time. AR 409.

III. The ALJ's Decision

On November 3, 2003, the ALJ issued a decision rejecting plaintiff's claim. The ALJ accepted that plaintiff had PTSD as of his date last insured and that it was "severe," meaning that it imposed more than minimal work limitations. However, the ALJ found that the evidence of record was insufficient to show that the disorder either was severe enough to satisfy the criteria of a listed mental impairment, or resulted in limitations that precluded plaintiff from performing all substantial gainful activity before his date last insured. In reaching this conclusion, the ALJ considered the opinions of Dr. Matsakis and Dr. Shay and plaintiff's contention that their retrospective opinions, as corroborated by the contemporaneous observations of Chappell-White, were sufficient to establish that he was disabled on December 31, 1992.

The ALJ concluded that neither doctor's opinion was corroborated sufficiently to support plaintiff's claim. In particular, the ALJ found that both doctors had relied for corroboration on information provided by Chappell-White, whom the ALJ determined was neither credible or impartial. In the ALJ's view, absent Chappell-White's statements the evidence was not consistent with disability: the only objective medical evidence prior to expiration of plaintiff's eligibility was the 1987 psychological evaluation by Dr. Hutchinson indicating that plaintiff had only mild to moderate mental limitations. In addition, the ALJ noted that both Dr. Matsakis and Dr. Shay appeared to have based their opinions solely on plaintiff's own description of his symptoms, without making any objective clinical assessments of his mental functioning, and without performing any mental status examination, intelligence testing or psychological testing. The ALJ also noted that Dr. Matsakis's 1993 intake notes failed to mention many of the symptoms that she attributed to plaintiff in her later reports, such as anhedonia, episodes of suicidal depression, fatigue or a diminished ability to concentrate. He noted that Dr. Shay appeared to be partial to plaintiff in that he described himself as a friend and plaintiff had performed small favors for Dr. Shay on occasion.

The ALJ found that plaintiff was not fully credible. The ALJ noted that although plaintiff described himself as a "total basket case" prior to his date last insured, he never had hospitalized or seen in the emergency room for mental health issues, was taking no medications and was operating two different businesses for a period of time. The ALJ

discounted plaintiff's assertion that he had been stonewalled when he had tried to obtain help through the VA, finding that assertion to be unreasonable "in light of the VA's willingness to try to reach out to help veterans." AR 594. The ALJ also pointed out that there were various inconsistencies in the record regarding plaintiff's reported attempts to obtain treatment before his date last insured.

The ALJ determined that although plaintiff had some anxiety, depression, lack of concentration, and limited ability to cope with stress during the relevant time period, his symptoms were not of such duration, frequency or intensity as to have precluded him from performing any work-related activity. The ALJ found that before plaintiff's date last insured, plaintiff had the residual functional capacity to perform work at the medium exertional level with various limitations, including a limitation to work requiring no more than moderate attention, concentration, persistence and pace for prolonged periods. In addition, the ALJ found that plaintiff was moderately limited in his ability to work in coordination with others without distracting them or being distracted by them and in his ability to maintain socially appropriate behavior and act in an emotionally stable manner. Although the ALJ gave plaintiff the benefit of the doubt and found that these limitations would prevent plaintiff from performing his past relevant work as the manager and operator of a home repair business, he found on the basis of testimony provided by the vocational expert that plaintiff could perform various other jobs, including packer, kitchen helper, floor waxer, cleaner and others.

The ALJ's decision became the final decision of the Commissioner when the Appeals Council denied plaintiff's request for review.

I will discuss additional facts as part of my analysis.

Analysis

I. Standard of Review

In a social security appeal brought under 42 U.S.C. § 405(g), this court does not conduct a new evaluation of the case. The court's role is limited to reviewing the final decision of the commissioner. This review is deferential: under § 405(g), the commissioner's findings are conclusive if they are supported by "substantial evidence." *Clifford v. Apfel*, 227 F.3d 863, 869 (7th Cir. 2000). Substantial evidence means "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 some cases, the record contains substantial evidence cutting in opposite directions such that the commissioner could support a decision in favor of either granting or denying benefits. In such a case–indeed in any case under § 405(g)–when this court reviews the commissioner's findings, it cannot reconsider facts, reweigh the evidence, decide questions of credibility, or otherwise substitute its own judgment for that of the ALJ regarding what the outcome should be. *Clifford*, 227 F.3d at 869. Thus, where conflicting evidence allows

reasonable minds to differ as to whether a claimant is disabled, the responsibility for that decision falls on the commissioner. *Edwards v. Sullivan*, 985 F.2d 334, 336 (7th Cir. 1993).

Nevertheless, the court must conduct a "critical review of the evidence" before affirming the commissioner's decision, *id.*, and the decision cannot stand if it lacks evidentiary support or "is so poorly articulated as to prevent meaningful review." *Steele v. Barnhart*, 290 F.3d 936, 940 (7th Cir. 2002). When the ALJ denies benefits, he must build a logical and accurate bridge from the evidence to his conclusion. *Zurawski v. Halter*, 245 F.3d 881, 887 (7th Cir. 2001).

II. Dr. Matsakis

Plaintiff contends the ALJ erred in rejecting Dr. Matsakis's opinion that plaintiff was disabled from post traumatic stress disorder before his date last insured.

Plaintiff first contends that Dr. Matsakis, by stating in her March 1999 report that plaintiff "met the requirements" of both an affective disorder and an anxiety disorder, was opining that plaintiff's PTSD was so severe as to meet the listings for those impairments. To meet the listings for a mental impairment, the claimant must first satisfy the "A" criteria, which is a set of medical findings that substantiate the presence of a particular mental disorder. In addition, he must have "marked" limitations in at least two of the following four areas of functioning, known as the "B" criteria: 1) activities of daily living; 2) social

functioning; 3) concentration, persistence or pace; and 4) episodes of decompensation. *See generally* 20 C.F.R., Pt. 404, Subpt. P, App. 1 at 12.00.

Dr. Matsakis never offered any retrospective opinion regarding plaintiff's degree of impairment in the four "B" categories, so we cannot be certain that she actually considered the listings; certainly Dr. Matsakis concluded that plaintiff was severely impaired by PTSD during the relevant time period and was incapable of performing any substantial gainful activity. In the end, it is irrelevant whether Dr. Matsakis's opinion is tied to step three or step four of the sequential evaluation process because in either case, crediting this opinion would lead to the conclusion that plaintiff is disabled. Therefore, the operative question on appeal is whether substantial evidence supports the ALJ's decision to discount Dr. Matsakis's opinion.

Treating physician's opinions are entitled to controlling weight if they are well supported and "not inconsistent with the other substantial evidence in the case record." 20 C.F.R. § 404.1527(d)(2); *Gudgel v. Barnhart*, 345 F.3d 467, 470 (7th Cir. 2003). However, because a treating physician's objectivity often is difficult to determine, a patient is not entitled to benefits simply because a physician reaches the conclusion that the patient is disabled. *Dixon v. Massanari*, 270 F.3d 1171, 1177 (7th Cir. 2001); *Diaz v. Chater*, 55 F.3d 300, 308 (7th Cir. 1995).

The ALJ cited three reasons for rejecting Dr. Matsakis's opinion that plaintiff was disabled before his date last insured: 1) she did not treat plaintiff before his date last

insured; 2) her retrospective opinion was not supported by her intake notes of April 1993; and 3) her retrospective opinion was based largely on information given to her by Chappell-White, whose testimony the ALJ found was not credible.

Plaintiff argues first that the ALJ should not have treated Dr. Matsakis's opinion as retrospective because Dr. Matsakis concluded that plaintiff was suffering from severe post traumatic stress disorder when she first saw him in April 1993, a mere four months after plaintiff's date last insured. Plaintiff argues that because this was so close in time to the expiration of plaintiff's insured status and because PTSD does not develop overnight, Dr. Matsakis's opinion should be treated as contemporaneous and should have been given controlling weight "even in the absence of additional corroboration."[3]

Plaintiff's argument makes too much of the distinction between contemporaneous and retrospective opinions. Even a contemporaneous medical opinion is not entitled to controlling weight unless it is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence" in the record, in other words, unless it is corroborated. 20 C.F.R. § 404.1527(d)(2). The cases involving "retrospective" opinions simply make clear that in cases in which the nature of an impairment does not become clear until the claimant's eligibility for disability insurance

[3] On page 8 of his brief, plaintiff quotes from a letter written by Dr. Matsakis to the Appeals Council in connection with plaintiff's request for review of the second ALJ's decision. Because this evidence was not before the administrative law judge, I have not considered it. *Eads v. Sec'y of Dept. of Health and Human Services*, 983 F.2d 815, 817 (7th Cir. 1993).

expires, a claimant should not be foreclosed from obtaining benefits retroactively merely because of a lack of corroborating medical evidence during the relevant time period; in such cases, lay evidence can provide the requisite corroboration. *Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir. 1998) ("What is required [to establish a retrospective diagnosis] is contemporaneous corroboration of the mental illness . . . not necessarily contemporaneous *medical* corroboration.") (citations omitted) (emphasis in original). *Accord* Soc. Sec. Ruling 83-20 ("With slowly progressive impairments, it is sometimes impossible to obtain medical evidence establishing the precise date an impairment became disabling.). However, in no case must the commissioner accept a conclusory medical opinion or one that conflicts with other substantial evidence in the record.

On the other hand, the commissioner is incorrect to suggest that the ALJ was not required to consider Dr. Matsakis's retrospective opinion *at all* in light of the existence of contemporaneous medical evidence from the relevant time period (namely, Dr. Hutchinson's November 1987 report in which he concluded that plaintiff had an adjustment disorder and was only mildly limited in vocational functioning). Insofar as Dr. Matsakis offered an opinion regarding plaintiff's medical condition and ability to work during the relevant time period, it was relevant, and the ALJ was required to consider it. *See* 20 C.F.R. 404.1527(d) ("Regardless of its source, we will evaluate every medical opinion we receive"); *Wilder*, 64 F.3d at 337 ("The question what stage a physical or mental illness had probably reached some years before it was first diagnosed is a medical question"); *Basinger v. Heckler*, 725 F.2d

1166, 1169 (8th Cir. 1984) ("[M]edical evidence of a claimant's condition subsequent to the expiration of the claimant's insured status is relevant evidence because it may bear upon the severity of the claimant's condition before the expiration of his or her insured status.")

That said, Dr. Hutchinson's November 1987 report does contain findings that contradict Dr. Matsakis's opinion that plaintiff was unable to perform any work as early as July 1987. As noted by the ALJ, Dr. Hutchinson found in November 1987 that although plaintiff had a sad mood and flattened affect, he displayed no manifestations of a thought disorder, delusions, preoccupations or suicidal/homicidal ideation. Dr. Hutchinson described plaintiff as "pleasant, controlled and articulate" with above average intellectual functioning and capacity for insight. Plaintiff's speech was normal in rate and content and Dr. Hutchinson saw no evidence of memory difficulties or other cognitive impairment. Dr. Hutchinson diagnosed plaintiff with an adjustment disorder with depressed mood and compulsive personality disorder. On a case closing worksheet, Dr. Hutchinson indicated that plaintiff had a "mild" impairment in his level of vocational/educational functioning, "serious" impairment in family and social relations and "moderate" impairment in personal/emotional functioning.

Plaintiff argues that Dr. Hutchinson's report does not contradict Dr. Matsakis's opinion because Dr. Hutchinson did not consider whether plaintiff had PTSD. Plaintiff points to Dr. Matsakis's March 1999 report wherein she explained that one of the characteristics of the disorder is that persons who suffer from it avoid discussing their trauma

and often fail to reveal all of their symptoms in a single interview. AR 260-61. Therefore, argues plaintiff, Dr. Hutchinson's report cannot be viewed as presenting an accurate picture of plaintiff's diagnosis or symptoms at the time.

However, even accepting plaintiff's contention that he met the diagnostic criteria of post traumatic stress disorder as early as November 1987, that would not necessarily establish that he was disabled from it at that time. Even if in November 1987 plaintiff was suffering from–but declined to report–flashbacks, nightmares and other subjective symptoms of post traumatic stress disorder, this would not contradict Dr. Hutchinson's objective observations that plaintiff was controlled, articulate and was experiencing no memory difficulties or other cognitive impairment, nor would it contradict his opinion that plaintiff was no more than mildly impaired in his vocational functioning. Those clinical observations and assessments, regardless of plaintiff's reported symptoms or Dr. Hutchinson's diagnosis, provide substantial support for the ALJ's conclusion that plaintiff was not disabled from PTSD beginning in July 1987, as Dr. Matsakis opined.

That being so, I am not persuaded that Dr. Hutchinson's report constitutes substantial evidence establishing that plaintiff *never* was disabled by PTSD from November 1987 until December 31, 1992. To prove disability, a claimant must establish that he has a disabling condition that has lasted or "is expected to last"at least 12 consecutive months and that he had that condition while he had disability insurance coverage. As plaintiff points out, Dr. Matsakis saw plaintiff just four months after his disability insurance coverage

expired. Given that PTSD is not a suddenly-occurring condition and its symptoms are not necessarily static, the temporal proximity of Dr. Matsakis's observations to plaintiff's date last insured would militate toward giving as much weight to her conclusions about plaintiff's limitations on December 31, 1992 as to those made by Dr. Hutchinson five years earlier. Stated another way, Dr. Hutchinson's report does not necessarily contradict Dr. Matsakis's opinion with respect to plaintiff's functioning in late 1992 because plaintiff's condition could have deteriorated in the five years from November 1987 to December 1992.

But the ALJ did not reject Dr. Matsakis's opinion *solely* because it was contradicted by Dr. Hutchinson's report. The ALJ also found that Dr. Matsakis's 1997 description of plaintiff's condition in 1993 was inconsistent with her contemporaneous treatment notes from that time period. The ALJ observed that Dr. Matsakis's initial intake notes documented only nightmares; this contrasts vividly with her post-hoc report that when she first saw plaintiff in 1993, he had numerous symptoms of post traumatic stress disorder including a loss of interest in all activities, sleep disturbances, nightmares, feelings of profound guilt and worthlessness, episodes of suicidal depression, fatigue, hopelessness, diminished ability to concentrate, inability to maintain social relationships and difficulties with activities of daily living, In addition, the ALJ noted that Dr. Matsakis had not supported her opinion with any contemporaneous clinical observations of plaintiff such as affect, mood, orientation, intellectual functioning "or any of the other standard assessments

of mental functioning." *Id*. Finally, he noted that there was no record of any prescribed medications for plaintiff's symptoms. *Id*.

Plaintiff has not addressed any of these findings in his brief.[4] I infer that his silence arises from his view that these points became academic when the ALJ allegedly committed an error of law by stating, "Additionally for a retrospective opinion to come into play there must be medical evidence during the period covered that supports such an opinion and the same is lacking." AR 584. The ALJ's statement that there "must" be contemporaneous medical evidence does misstate the law; as noted previously, a retrospective medical opinion can be corroborated by contemporaneous evidence that is non-medical in nature. *Wilder*, 153 F.3d at 803.

However, in finding that Dr. Matsakis's opinion was not adequately supported by her intake notes or clinical observations, the ALJ was not criticizing Dr. Matsakis's inferences about the severity of plaintiff's condition during the time period before she began treating him, he was criticizing her description (as reported post hoc in 1997) of plaintiff's condition *at the time* she began treating him in April 1993. Because Dr. Matsakis had been treating plaintiff in 1993, the ALJ could consider whether her treatment notes or clinical observations actually written in 1993 supported her 1997 retrospective opinion about the severity of

[4] In arguing that no inconsistency exists, plaintiff addresses only the ALJ's observation that Dr. Matsakis's initial intake note indicated that plaintiff's diagnosis was "most likely PTSD." Plaintiff is correct that Dr. Matsakis's initial, qualified diagnosis after her first meeting with plaintiff by itself would not suffice to impeach her subsequent, more helpful opinion but as just noted, this was not the only "inconsistency" that caught the ALJ's eye.

plaintiff's condition in 1993. Moreover, in spite of his misstatement of the law, the ALJ went on to consider the contemporaneous corroboration offered by Chappell-White. Because the ALJ conducted the proper analysis by evaluating the corroborating lay evidence presented by plaintiff, his erroneous statement of the law is harmless.

The ALJ's conclusion that Dr. Matsakis's 1997 post hoc description of plaintiff's condition in April 1993 did not jibe with her intake notes is adequately supported by the record. As the ALJ noted, although in 1997 Dr. Matsakis described a plethora of symptoms with which plaintiff presented in April 1993, the only one of those that she noted at that time was nightmares. Her notes from April to June 1993 show that plaintiff had other symptoms including survivor guilt, hopelessness and sadness, but there are no notes from that time period documenting the diminished concentration or severe disassociation that Dr. Matsakis reported four years later.

As the ALJ also noted, Dr. Matsakis failed to record any clinical observations of plaintiff's mental functioning apart from general descriptions of plaintiff's mood and appearance. For example, Dr. Matsakis did not offer any contemporaneous assessment of plaintiff's ability to concentrate, intellectual functioning or orientation or perform a mental status examination in accordance with standard clinical practice. Finally, as the ALJ noted, plaintiff was not taking any prescribed medications for his symptoms and there is nothing in Dr. Matsakis's notes from 1993 indicating that she encouraged him to do so.

As already noted, a treating physician's opinion is entitled to controlling weight only if it is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence in the record. Given the dearth of objective findings and contemporaneous clinical notes, the ALJ was justified in questioning the accuracy of Dr. Matsakis's post-hoc reports as to the severity of plaintiff's condition during the short time period during which she treated him in 1993.[5]

It's possible that a different ALJ might have taken a more charitable view of Dr. Matsakis's opinion and might have accepted it notwithstanding her sparse contemporaneous documentation. But this possibility does not entitle plaintiff to reversal on appeal. It was within this ALJ's province, as the arbiter of facts, to question Dr. Matsakis's credibility and to determine how much weight to give it. Moreover, the ALJ could question Dr. Matsakis's overall impartiality in light of her willingness to opine that plaintiff could not work as early as 1987 even though the only medical evidence from *that* time period suggested that plaintiff was functioning adequately. In short, the record does not provide overwhelming support for the ALJ's decision to reject Dr. Matsakis's opinion, and the call could have gone the other way. But it didn't, and the ALJ's decision passes the low threshold of the substantial evidence test. Therefore, this court has no authority to alter the outcome.[6]

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[5] It is worth noting that of the 200 hours that Dr. Matsakis spent treating plaintiff; 4 or 5 of those hours were in 1993; the rest took were in1996-1999.

[6] Plaintiff has not argued that the ALJ should have accepted the retrospective opinion of Dr. Shay. For completeness's sake, I find that the ALJ's decision to reject Dr. Shay's opinion was reasonable for many of the same reasons that he rejected the opinion of Dr. Matsakis. Like Dr. Matsakis, Dr. Shay did not

III. Melissa Chappell-White

Plaintiff argues that the ALJ should have accepted Dr. Matsakis's [and Dr. Shay's] retrospective opinion even in the absence of contemporaneous medical support because it was corroborated by the statements of Chappell-White. The ALJ concluded that Chappell-White was "less than a credible witness and certainly not a totally disinterested party as she would have one believe." AR 594.

Because the ALJ is best positioned to evaluate the credibility of a witness, a court cannot reverse an ALJ's credibility finding unless it is "patently wrong." *Powers v. Apfel*, 207 F.3d 431, 435 (7th Cir. 2000) (internal quotations and citation omitted). "Where, however, 'the reasons given by the trier of fact do not build an accurate and logical bridge between the evidence and the result,' we cannot uphold the ALJ's determination." *Shramek v. Apfel*, 226 F.3d 809, 811 (7th Cir. 2000).

Plaintiff is correct that the ALJ made some factual errors and drew some questionable inferences in reaching his conclusion that Chappell-White was not credible. For example, the ALJ found that if Chappell-White had

> really thought [plaintiff] was as mentally dysfunctional, as she would now have one believe, she would have {if she really cared about him during the period prior to date insured} taken steps to try to get him the professional help that he needed mentally.

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record the results of any mental status examination or any other objective findings to support his diagnosis or assessment of the severity of plaintiff's condition when he evaluated him. Dr. Shay did not see plaintiff until almost five years after his date last insured, so he had no direct knowledge of plaintiff's actual functioning during or even near the relevant time period. Insofar as Dr. Shay formed a retrospective diagnosis on the basis of contemporaneous observations by Chappell-White, the ALJ found that Chappell-White's statements were not credible. I address that credibility assessment in the next section.

Id. Apart from the questionable logic underlying this statement–that to be deemed credible a lay witness has to act on her observations that an acquaintance is mentally ill–the record shows that Chappell-White actually *did* this: she is the person who referred plaintiff to Dr. Hutchinson in 1987, well before plaintiff's date last insured. Thus, the ALJ erred in finding no evidence that Chappell-White had taken steps to get help for plaintiff before his date last insured.

Resting on similarly faulty facts and logic is the ALJ's conclusion that Chappell-White would not have had plaintiff perform work for her or referred him to others if he was as mentally dysfunctional as she alleged. First, Chappell-White explicitly denied having made referrals; what she said was that she knew that other people in her neighborhood contacted plaintiff to perform odd jobs. AR 551 ("I don't want you to misunderstand that I was referring him to others. I knew other people that were trying to give him some work."). Second, the ALJ's reasoning gives short shrift to Chappell-White's explanation that her motives were largely altruistic: she gave plaintiff odd jobs *in spite of* the mental deficiencies that made him an unreliable worker because she perceived him as someone who needed help.

The ALJ also discounted Chappell-White's testimony on the ground that she was not merely a "disinterested" party but was someone who cared about and wanted to help plaintiff. However, the commissioner's regulations provide that a claimant's "family, neighbors, friends, or other persons" are appropriate sources of evidence about a claimant's functional limitations. 20 C.F.R. § 404.1545(a)(3); Soc. Sec. Ruling 83-20 (if date of onset

of disability cannot be determined from medical evidence alone, information regarding course of claimant's condition should be obtained from "family members, friends, and former employers"). When it comes to third party lay witnesses, who else but someone close to the claimant could offer relevant evidence about the degree to which he is limited by his impairments? The obvious corollary is that a claimant's family and friends are more likely to be biased in his favor than strangers would; perforce, an ALJ must consider carefully a third party's relationship to a claimant and her motives for testifying when assessing her credibility. Even so, a neighbor's admission that she "cares" about the claimant, without more, does not appear to be a fair or sufficient basis to discount her testimony.

These aspects of the ALJ's assessment of Chappell-White's credibility are troubling because they create the impression that the ALJ went out of his way to discredit Chappell-White and plaintiff's claim for benefits. Despite these questionable tactics, the record nonetheless supports the ALJ's decision: substantial evidence supports his conclusion that Chappell-White's statements did not provide sufficient corroboration for Dr. Matsakis's opinion.

First, as the ALJ observed, Chappell-White did not have regular, frequent contact with plaintiff throughout the entire time period in question. Most of her contact with plaintiff was during the time period before 1990, when Chappell-White employed plaintiff to help her renovate an old house and to assist her with her ailing mother. Although Chappell-White testified that she had remained "in touch" with plaintiff after 1990, she testified

initially that "Everything I say is 1990 and prior... Mainly around '87." AR 550-51. Even then, Chappell-White testified that plaintiff was not at her house very often. AR 553. In light of Chappell-White's sporadic contact with plaintiff during the relevant period, the ALJ reasonably could conclude that her observations were entitled to little weight.

Second, contrary to plaintiff's assertion, the ALJ did not reject Chappell-White's testimony wholesale. Rather, he appears to have credited Chappell-White's testimony in part to the extent that he found that plaintiff had "some anxiety, depression, lack of concentration, and limited ability to cope with stress" and that these symptoms would have imposed moderate limitations on plaintiff's ability to perform certain work-related functions during the relevant time period. AR 595. Although plaintiff argues that the ALJ should have gone farther and found from Chappell-White's observations that plaintiff's symptoms prevented him from performing *all* work, substantial evidence supports the ALJ's conclusion that the limitations described by Chappell-White would not necessarily preclude plaintiff from performing the low stress, routine jobs identified by the vocational expert.

As the ALJ noted, most of Chappell-White's observations about plaintiff's behavior do not necessarily correlate to limitations that would have prevented plaintiff from working. For example, in her statements and testimony, Chappell-White indicated that plaintiff lacked enthusiasm for activities, lacked the ability to socialize, was hypervigilant and easily startled, rarely spoke, had trouble with memory and concentration, was unkempt and seemed distant. These symptoms correspond with a diagnosis of PTSD and undoubtedly

made it difficult for plaintiff to succeed as the manager and operator of his own business. Moreover, a quiet, aloof, disheveled person with poor social skills, bad memory and a quick startle reflex realistically would be next to unemployable.

However, to establish that he was disabled during the relevant time period, plaintiff had to show that his disorder resulted in work-related limitations so severe and persistent that he was *unable* to perform *any* kind of work. This is a very high bar. The ALJ reasonably concluded that Chappell-White's lay observations failed to provide that evidentiary link. Moreover, even if one were to accept Chappell-White's observations as showing that plaintiff was disabled, her assessment is contradicted by Dr. Hutchinson's observations, which were made during the period in which Chappell-White testified she had the most contact with the plaintiff. So, there was conflicting evidence on this point and it was the ALJ's prerogative to choose who and what to believe.

In sum, although the ALJ drew some questionable adverse inferences about Chappell-White's motives and credibility, reasonable minds still could agree that Chappell-White's statements did not provide sufficient corroboration for Dr. Matsakis or Dr. Shay's opinion regarding the severity of plaintiff's condition before his date last insured. Accordingly, substantial evidence supports the ALJ's conclusion that neither doctor's opinion was sufficiently supported to satisfy plaintiff's burden of demonstrating that he was disabled before December 31, 1992.

IV. Plaintiff's Testimony

Plaintiff contends that the ALJ erred in discounting plaintiff's testimony regarding his limitations during the relevant time period. First, plaintiff attacks the ALJ's finding that plaintiff was not as socially isolated as he claimed to be because, among other things, he met with Dr. Shay socially, provided him with transportation on two occasions and corresponded with him via e-mail. Plaintiff takes umbrage at the ALJ's assertion that "Dr. Shay was considered a friend," arguing that a person with "ordinary" social relationships would not have "perceived Dr. Shay's professional attention to be that of a friend, rather than that of a physician" and that it was unreasonable for the ALJ to "magnify the misperceptions of a mentally impaired individual into proof that the disability does not exist." AR 16-17.

The vigor with which plaintiff assails this small passage in the ALJ's decision is misplaced. First, it was not a "misperception" for plaintiff to consider Dr. Shay to be a friend insofar as the record indicates that Dr. Shay perceived his relationship with plaintiff in a similar light. AR 403 (indicating that Dr. Shay regarded plaintiff as a friend). In any case, plaintiff's focus on whether the ALJ correctly described his relationship with Dr. Shay as a friendship misses the point: the point is that plaintiff had social contact with Dr. Shay on more than one occasion. In addition, as the ALJ found, plaintiff had social contact with Chappell-White and other veterans. Although the record suggests that these contacts were limited, it was not unreasonable for the ALJ to conclude that these contacts tended to undermine plaintiff's claim that he totally isolated himself.

Second, plaintiff argues that the ALJ resorted to sophistry and ignored important evidence in the record when he posited that, if plaintiff "was suffering the severity of the problems he now asserts that he would have taken some actions to obtain help." AR 594. Plaintiff argues that this conclusion ignores Dr. Matsakis's explanation that one symptom of PTSD is a sense of shame that prevents many veterans from seeking help for mental problems, and that plaintiff was full of such shame. Plaintiff also contends that there is no cause for the ALJ's skepticism toward his claim that he was stonewalled upon seeking help at the VA hospital; plaintiff notes that both Dr. Matsakis and Dr. Shay indicated that the VA was not well-versed in PTSD when plaintiff first sought help in 1989.

I agree that the ALJ's discussion of plaintiff's failure to obtain treatment for PTSD before his date last insured does not elucidate whether the ALJ considered evidence in the record explaining that failure. The ALJ never mentioned Dr. Matsakis's declaration that in her experience, it was not unusual for the VA to fail to provide help for veterans with PTSD, or Dr. Shay's assertion that the VA was not well-equipped in the 1980s to treat PTSD.

That said, this omission is not sufficient to warrant a remand. Apart from questioning the legitimacy of plaintiff's claim that the VA would not help him, the ALJ noted that plaintiff had provided inconsistent statements regarding his efforts to obtain treatment. For example, the ALJ pointed out that plaintiff once stated that he had received treatment for post traumatic stress disorder on 4 to 5 occasions before his date last insured, but

testified at the hearing that he had talked to someone only " a couple of times."[7] In addition, plaintiff testified at the first hearing that when he had tried to obtain treatment at the VA Hospital, he waited for six hours before being told that the doctors were too busy to see him; at the second hearing, however, plaintiff testified that he was refused treatment because he did not have a service-connected disability. Are these significant inconsistencies? No. But on appeal from an administrative decision, they don't have to be. Employing once again the litotes of deference, it was not unreasonable for the ALJ to conclude that these inconsistencies, along with the absence of medical records to support plaintiff's claims of treatment prior to his-date-last-insured, "d[id] not add credence to [plaintiff's] position." AR 594.

There's more: the ALJ noted that despite plaintiff's claim of a totally disabling mental impairment, at all relevant times plaintiff lived alone, did his own cleaning, required no emergency room treatment and owned and operated two business for a period of time. Plaintiff testified that as part of his home improvement business, he drew up estimates and contracts, attempted to solicit new customers, supervised other employees, handled money, paid his employees and maintained records. As the ALJ observed, these tasks involved more than moderate attention, concentration and communication skills. Although plaintiff testified that he ultimately failed at his business and performed no work after 1990 because

[7] I infer that the ALJ was referring to plaintiff's testimony regarding Dr. Hutchinson. Actually, at the first hearing, plaintiff said he saw Dr. Hutchinson 10-15 times.

of problems communicating with customers and his inability to stick to a schedule, the ALJ could reasonably conclude that plaintiff's ability to work during part of the relevant time period undermined the credibility of his claim that he was incapable of performing any work from July 31, 1987 through his date last insured.

Finally, as previously noted, the ALJ did not completely reject plaintiff's assertion that he suffered from work-related mental limitations during the relevant time period. The ALJ credited plaintiff's testimony insofar as he found that plaintiff had "some anxiety, depression, lack of concentration, and limited ability to cope with stress." However, the ALJ found the evidence insufficient to support plaintiff's claim that these symptoms imposed more than moderate limitations on plaintiff's ability to perform the mental demands of work. Although plaintiff explains the absence of medical evidence to support his claim, the ALJ articulated adequate reasons for rejecting those explanations. As a result, this court has no basis to overturn the ALJ's credibility determination.

V. RFC Assessment and Hypothetical

Plaintiff challenges the ALJ's assessment of his residual functional capacity and the hypothetical question to the vocational expert incorporating that assessment. Most of these challenges repeat arguments that I addressed earlier in this report. For example, plaintiff argues that the ALJ should have found, on the basis of Chappell-White's and Dr. Matsakis's statements, that plaintiff lacked the residual functional capacity to perform any job.

However, the ALJ did not have to include limitations in his RFC assessment that were not supported by credible evidence in the record. I concluded above that the ALJ did not commit reversible error by rejecting the opinions of Dr. Matsakis and Chappell-White; it is unnecessary to repeat that analysis in the context of an RFC challenge.

Plaintiff's remaining arguments require little discussion. Plaintiff argues that the it was inconsistent for the ALJ to find that plaintiff would have "moderate" limitations in his ability to maintain concentration, persistence and pace, work in coordination with others and to maintain socially appropriate behavior, while also concluding at step two of the sequential evaluation process that plaintiff's PTSD was "severe." This is a non-starter. To meet the severity requirement at step two, a claimant's impairment must "significantly limit" his ability to perform basic work activities. 20 C.F.R. § 404.1521(a). However, as the commissioner's evaluation process makes clear, this is a threshold requirement that does not equate with a finding of disability. An impairment can be "severe" but not disabling if it does not result in severe work-related limitations. In this case, the ALJ explicitly found that the record did not support a finding that plaintiff had above-moderate-to-severe limitations on his ability to work.

Plaintiff makes the related argument that the ALJ failed adequately to explain why he rejected the vocational expert's response to a hypothetical premised on above-moderate-to-severe limitations. But the ALJ explained on page 20 of his decision that he had rejected a finding of more-than-moderate limitations for reasons "discussed previously" in his

decision. The ALJ was not required to repeat the reasoning presented on pages 1-19 of his decision.

Finally, plaintiff contends that the ALJ's RFC assessment failed to account for the affidavit of David Kovach, an attorney who previously had worked on behalf of plaintiff and who had hired plaintiff for home improvement work. Kovach submitted an affidavit in which he averred that he cancelled his arrangement with plaintiff because Kovach could not get plaintiff to complete the work on time. AR 444-45. The ALJ concluded that Kovach's statements did not establish that plaintiff was precluded from all work during the period in question. AR 588. This was a reasonable conclusion. The inarguable fact that plaintiff was lousy at running his own home repair business, Kovach's affidavit does not establish that plaintiff had limitations during the time period in question more severe than those found by the ALJ.

Overall, substantial evidence supports the ALJ's conclusion that the record establishes at most that plaintiff had moderate limitations in his ability to perform the mental demands of work during the relevant time period. The ALJ's conclusion that plaintiff was not disabled was premised on the vocational expert's response to a hypothetical that included such moderate limitations. Apart from his challenges to the adequacy of the hypothetical, plaintiff does not separately challenge the reliability of the vocational expert's response to the hypothetical. Accordingly, substantial evidence in the record supports the ALJ's conclusion at step five that there were jobs existing in significant numbers in the regional economy that plaintiff could perform despite his limitations.

VI. Conclusion

This is a close case brought by a plaintiff for whom one cannot help but sympathize.[8] The evidence establishes that plaintiff suffered from PTSD before his eligibility for disability insurance benefits expired; it also seems clear that plaintiff is now–or at least for a time period in 1996-1997 was–disabled by that disease. Unfortunately for plaintiff, however, these are not the salient issues in this review of the commissioner's denial of benefits. To obtain SSD benefits, plaintiff had the burden of showing not only that he was suffering from PTSD before December 31, 1992, but also that the condition was of sufficient severity and duration as to have precluded him from performing all work on or before that date. After thoroughly examining all of the evidence submitted by plaintiff and paying particular attention to the retrospective opinions of Dr. Matsakis and Dr. Shay, the ALJ made a reasoned and articulate determination that, in spite of the doctors' zealous advocacy, the evidence was insufficient to show that plaintiff's post traumatic stress disorder was disabling before December 31, 1992.

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[8] By complete coincidence, I am issuing this report and recommendation on Flag Day, instituted to venerate a symbol of the freedom and democracy on which this country is founded and for which soldiers like Gary Allord have been pressed into combat all over the globe. It would be philosophically and emotionally satisfying just to award SSD benefits to plaintiff as some small recompense for the sacrifices he made for his country. He certainly has paid a horrific price for his military service.

But to belabor what is obvious after 40 pages of judicial review, things aren't always as simple as we might wish. The SSD application process can be a gauntlet for claimants, some of whom may be deserving on an equitable level but who do not qualify for benefits under the commissioner's arcane rules and regulations. This isn't the first such case this court has reviewed and it won't be the last. But this court's duty is to apply the laws and regulations as they are written without orientation toward a particular outcome.

Having carefully reviewed that determination against the deferential backdrop of § 405(g), I am persuaded that substantial evidence in the record supports the ALJ's decision. Given the evidence in the record and the deferential standard of review on appeal, had the ALJ reached the opposite conclusion and awarded benefits, this court probably would have upheld that decision as well. Anomalous as it may seem, in social security disability cases, sometimes opposite conclusions are available and defensible. Perhaps this case could have gone the other way, but given the narrow scope of judicial review, this court is not free to substitute a different outcome based on its own view of what might have been appropriate in a given case. If the district judge to whom I am reporting were to determine that the ALJ's decision is not supported by substantial evidence, then reversal and remand would be in order.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I respectfully recommend that the decision of the commissioner denying plaintiff Gary Allord's application for Disability Insurance Benefits be AFFIRMED.

Entered this 14th day of June, 2005.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

June 14, 2005

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Re: Allord v. Barnhart
Case No. 04-C-738-C

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before July 1, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by July 1, 2005, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge