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

GARY EDGAR,

Plaintiff,

v.

JO ANNE B. BARNHART
Commissioner of Social Security,

Defendant.

REPORT AND
RECOMMENDATION

04-C-820-C

REPORT

This case presents an appeal from an adverse determination of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). Plaintiff Gary Edgar, who is proceeding *pro se*, challenges the commissioner's determination that he is not disabled and therefore not entitled to either Disability Insurance Benefits or Supplemental Security Income under sections 216(I) and 223 and 1614(a)(3)(A) of the Social Security Act, codified at 42 U.S.C. §§ 416(I), 423(d) and 1382c (3)(A). I am recommending that this court remand this case to the commissioner for a new evaluation of plaintiff's mental impairments. It is unclear whether the administrative law judge (ALJ) considered substantial evidence in the record showing plaintiff's difficulties concentrating, processing verbal information and interacting with others. This evidence, if credited, might preclude plaintiff from performing his past relevant work or the other jobs identified by the ALJ. Therefore, remand is necessary.

In all other respects, however, the administrative law judge's opinion is supported by substantial evidence and should be affirmed. Finally, the additional evidence submitted by plaintiff does not afford an independent basis for remand. The evidence is not material because it fails to show that plaintiff had more severe limitations on the date of the commissioner's final decision than those found by the administrative law judge.

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, 416.920. The inquiry at steps four and five requires an assessment of the claimant's "residual functional capacity," which the commissioner has defined as "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).

I draw the following facts from the administrative record:

Facts

I. Background and Medical Evidence

In October 2000, when plaintiff was 35 years old, he had a massive heart attack requiring five-vessel bypass surgery. He was hospitalized again in January 2001 for chest

pain; cardiac catheterization revealed that two of his vessels had collapsed. Since that time, however, plaintiff's heart condition has been relatively stable, with stress testing showing no ischemic changes or arrhythmia. In November 2000, plaintiff's doctor advised him to begin an exercise program. Although plaintiff was hospitalized for chest pain in early April 2001, his chest pain was determined to be secondary to stress and anxiety and not his heart condition. On November 6, 2001, Dr. Margaret Ness cleared plaintiff to return to work.

On February 28, 2001, plaintiff told Dr. Christopher Gilman that he had a long-standing history of anxiety with panic attacks associated with driving and difficulty sleeping. Dr. Gilman observed that plaintiff appeared anxious, noting that he sat forward in his chair in a somewhat twisted posture and had mild tremor of the hands. Plaintiff had a furtive glance with poor eye contact and answered questions slowly. Dr. Gilman started plaintiff on Zoloft samples.

On May 15, 2001, plaintiff told Dr. Ness that from a physical standpoint, he was doing pretty well, with no chest pain or shortness of breath. Of more concern to plaintiff was his mental health, with plaintiff reporting that he was under a lot of stress, depressed, slept a lot and lacked motivation. Plaintiff, who was adopted as a child, was in the process of attempting to have his birth name restored. He stated that he had been taking Zoloft for the past two months. Dr. Ness concluded that plaintiff was depressed and would benefit from bi-weekly visits to deal with his social issues.

On June 22, 2001, at a follow-up visit with Dr. Ness, plaintiff reported that he was feeling better on the Zoloft. He felt much less anxious, was more comfortable in public or behind the wheel and his ability to deal with the pressure and stress in his life had improved. Dr. Ness noted that plaintiff appeared more relaxed and less easily agitated, but he was still guarded and slightly tense when sitting. He understood the questions that were asked of him, but responded in a slow and quiet manner. Dr. Ness diagnosed an anxiety disorder and instructed plaintiff to continue on Zoloft.

On July 30, 2001, Dr. Ness completed a psychiatric questionnaire regarding plaintiff. She reported that plaintiff had been diagnosed with an anxiety/panic disorder. She indicated that plaintiff had logical thought processes and good recall of recent and remote events, but some difficulty with concentration and comprehension. She reported that plaintiff's panic attacks had decreased to 2-3 times a month after being prescribed Zoloft, although he still had symptoms of depression, including low energy and motivation. She said he was able to complete tasks at home but only if forced to do so by family members. She described plaintiff as having a "minimal" ability to relate to others and assessed his prognosis as fair. AR 192-194.

On August 13, 2001, Roger Rattan, Ph.D., a consulting state agency psychologist, completed a Mental Residual Functional Capacity Assessment of plaintiff. From his review of the record, Dr. Rattan concluded that plaintiff had moderate limitations in his ability to understand, remember and carry out detailed instructions, to perform work tasks requiring

sustained concentration and persistence, to get along with coworkers, accept criticism from supervisors and set realistic goals. He opined that plaintiff had a "marked" limitation in his ability to interact appropriately with the general public. Overall, Dr. Rattan thought plaintiff capable of performing routine, low stress work that did not require frequent contact with other people. AR 203-205.

On May 18, 2002, Plaintiff underwent a consultative evaluation with Peter Koehn, Ph. D. AR 324-329. Plaintiff reported that he had difficulty working because of poor concentration, mixing up numbers and problems following directions and limited physical endurance. Plaintiff reported worrying a lot about his own mortality and the possibility that he could die suddenly from another heart attack. However, he reported that his other anxiety symptoms had diminished on the Zoloft. Plaintiff also reported memory problems. Memory testing showed that plaintiff had poor remote memory but adequate immediate memory. Plaintiff's concentration was adequate but his processing speed was very slow.

Plaintiff reported the ability to engage in various daily activities, including cooking with a microwave, laundry and cleaning the house. He reported that he did not grocery shop or pay bills because his mother did those tasks, although he said he could perform them if he had to. With respect to social functioning, Dr. Koehn observed that plaintiff had a limited ability to relate during the examination and appeared to be uncomfortable with the social interaction. Dr. Koehn summarized his conclusions:

> [T]his is an individual who is currently experiencing significant problems with his cognitive processing, along with a history of

> depressed mood and deficits in his interpersonal functioning. He had consistent difficulty formulating responses to verbal questions and recalling even basic background information was a struggle for him. His ability to concentrate and provide consistent information appeared to be seriously impaired during the evaluation. The client's depressed mood is likely contributing to his cognitive and memory deficits. While he is experiencing significant worries related to his physical health, evidence indicates that his other anxiety symptoms are being effectively treated through his medication. His social isolation and possible learned helplessness (in the face of his heart condition) are likely contributing to his mood problems.

AR 328.

With regard to plaintiff's capacity for work, Dr. Koehn wrote:

> With regard to cognitive and memory skills, the client is impaired in terms of his ability to carry out mental tasks in a timely manner. If employed in a setting where he has minimal contact with other people, and with few time constraints, it is possible that he could be effective in his job. His principal difficulty is likely to be his very slow processing of verbal information and stress brought about by his desire to avoid other people. He would also not be well-suited to any position that involved physical labor, as such jobs would involve tasks that could exacerbate stamina deficits (and worries) related to his heart condition.

Id.

On June 11, 2002, state agency psychologist Jack Spear, Ph. D., concluded from his review of the record that plaintiff was moderately limited in his ability to perform the following mental activities: maintain attention and concentration for extended periods; perform activities within a schedule, maintain regular attendance and be punctual with customary tolerances; complete a normal workday and workweek without interruptions from

psychologically based symptoms; perform at a consistent pace without an unreasonable number and length of rest periods; interact appropriately with the general public; accept instructions and respond appropriately to criticism from supervisors; and set realistic goals or make plans independently of others.

In July 2002, Dr. Aymel Tarrar took over for Dr. Ness as plaintiff's primary treating physician. Between July 22, 2002 and November 15, 2002, Dr. Tarrar saw plaintiff five times, mainly to manage plaintiff's medications and to monitor his hyperlipidemia. On August 29, 2002, Dr. Tarrar noted that he had talked to plaintiff's mother about plaintiff's course of treatment because plaintiff was "a little bit mentally challenged." AR 464. On November 5, 2002, Dr. Tarrar noted that because he had a hard time getting any history from plaintiff, he had asked plaintiff to return in 10 days with his mother and all of his medications. AR 462. On November 15, 2002, Dr. Tarrar noted again that plaintiff was "slightly mentally challenged." AR 461. Dr. Tarrar did not administer any psychological tests or provide any mental health treatment to plaintiff apart from refilling his Zoloft prescription.

On January 22, 2003, plaintiff told Dr. William Winkler that he generally felt good and that his depression was well-controlled by the Zoloft. He denied any recent chest pain or shortness of breath.

On February 18, 2003, Dr. Tarrar completed a mental residual functional capacity questionnaire. He reported that plaintiff suffered from a generalized anxiety disorder and

mild mental retardation, describing plaintiff's symptoms as generalized persistent anxiety, difficulty thinking or concentrating, loss of intellectual ability of 15 IQ points or more and impaired memory. Dr. Tarrar indicated that plaintiff would be unable to meet competitive standards in a number of work-related areas, including understanding, remembering and carrying out very short and simple instructions, asking simple questions or requesting assistance and accepting instructions and responding appropriately to criticism from supervisors. AR 537-541.

Dr. Tarrar also completed a cardiac residual functional capacity questionnaire on which he indicated that plaintiff could walk about one block, lift 10 pounds or less and should avoid concentrated exposure to fumes, odors, dusts, gases and poor ventilation. AR 531-536. He noted that although plaintiff had an anxiety disorder, it was "hard to say" if that was associated with his physical condition because Dr. Tarrar had had "limited interaction with the patient." AR 532.

II. Hearing Testimony

Plaintiff filed applications for Supplemental Security Income and Disability Insurance Benefits on December 27, 2001 and January 22, 2002, respectively. He alleged that he was disabled since October 21, 2000 as a result of hypertension, coronary artery disease, depression, anxiety, hyperlipidemia and rheumatic arthritis. After the local disability agency

denied his applications, plaintiff requested a hearing before an ALJ. A hearing was held on February 25, 2003, at which plaintiff was represented by counsel.

At that time, plaintiff was 37 years old. He had a high school equivalency degree and past work experience in a variety of jobs, including production and assembly worker, janitor, grinder, orderly and general laborer. Plaintiff testified that as a result of his heart condition, he suffered shortness of breath, weakness, fatigue and chest pain and required a daily nap lasting up to three hours. Plaintiff reported suffering from anxiety that caused him to become confused, sweaty and dizzy. Plaintiff said he had problems being around other people although he "[didn't] know really how to explain it." AR 558.

Victoria Rei testified as a vocational expert. The ALJ posed a hypothetical in which he asked Rei to assume an individual of plaintiff's age, education and past work experience who was limited to light work, required a contaminant-free work environment, and who had a limited but satisfactory ability to deal with coworkers, deal with the public, maintain attention and concentration, remember and carry out detailed job instructions and demonstrate reliability. In response to further questioning by the ALJ, Rei responded that such an individual could perform plaintiff's past semi-skilled work as a production assembler. In addition, she said, that individual could perform the jobs of marker, of which there were 2,400 jobs in the state of Wisconsin; inspector/packager (13,000 jobs); and rag sorter (2,400 jobs). Rei testified that if the hypothetical was modified so that the individual was limited to sedentary work, that individual could perform the following jobs: bench hand assembler

(4,200 jobs); table worker (2,400 jobs); and lens block gauger in the optical manufacturing industry (2,000 jobs).

In response to questioning by plaintiff's lawyer, Rei testified that an individual with the mental limitations identified by Dr. Tarrar on his mental RFC would not be able to perform any jobs.

III. The ALJ's Decision

The ALJ applied the commissioner's five-step sequential evaluation process to plaintiff's claim. At step one, he found that although plaintiff had performed seasonal part-time work in December 2001, he had not engaged in substantial gainful activity after the alleged onset of his disability. At step two, he concluded that plaintiff had two severe impairments: a severe anxiety disorder and residuals of five-vessel bypass surgery. The ALJ rejected plaintiff's contention that he also suffered from severe hypertension, hyperlipidemia and arthritis, finding no evidence in the record of significant arthritis and no evidence that plaintiff's hypertension or hyperlipidemia imposed any work-related limitations.

At step three, the ALJ concluded perfunctorily that plaintiff's severe impairments did not meet or equal the requirements of any impairment listed in Appendix 1, Subpart P, Regulations No. 4.

At step four, the ALJ found on the basis of the vocational expert's testimony that plaintiff could perform his past relevant work as a production and assembly worker. He

reached this conclusion after determining that plaintiff could perform light work not requiring exposure to environmental contaminants and that he had a limited but satisfactory ability to relate to the public and coworkers, to perform tasks requiring attention and concentration, to demonstrate reliability and to engage in work requiring that he understand, remember and carry out detailed instructions.

Although the ALJ decided plaintiff's claim at step four, he made an alternative step five determination, concluding that even if plaintiff could not perform his past relevant work, the vocational expert had testified that there were other light jobs that plaintiff could perform, namely, 2,400 marker jobs, 13,000 inspecting/packaging jobs, and 2,400 rag sorting jobs.

I will discuss the ALJ's decision in more detail in the analysis below.

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 but instead reviews 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). When reviewing the commissioner's findings under § 405(g), this court 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. Listing of Impairments–Step 3

20 C.F.R., Pt. 404, Subpt. P., Appendix 1 contains a list of various impairments that the commissioner has determined are presumptively disabling, that is, severe enough to prevent a person from performing any work. 20 C.F.R. §§ 404.1525, 416.925. A claimant who meets or medically equals all of the criteria of an impairment listed in Appendix 1 is found to be disabled at step three of the commissioner's sequential evaluation process.

Plaintiff appears to be contending that the ALJ erred in finding that he was not disabled at step three. Plaintiff contends that he meets or medically equals the listings for

a cardiac impairment, a psychotic disorder and an anxiety disorder. However, two state agency physicians and two state agency psychologists filled out Disability Determination and Transmittal forms and stated that plaintiff was not disabled through September 12, 2002. AR 27, 28, 413, 419.

These forms conclusively establish that "consideration by a physician . . . designated by the Commissioner has been given to the question of medical equivalence at the initial and reconsideration levels of administrative review." *Farrell v. Sullivan*, 878 F.2d 985, 990 (7th Cir.1989); Soc. Sec. Ruling 96-6p (signature of State agency medical or psychological consultant on Disability Determination and Transmittal Form ensures that consideration by physician or psychologist designated by Commissioner has been given to question of medical equivalence at initial and reconsideration levels of administrative review).

At the administrative level, these findings of fact by the state agency physicians became expert opinions upon which the ALJ could properly rely. Soc. Sec. Ruling 96-6p; *Scott v. Sullivan*, 898 F.2d 519, 524 (7th Cir. 1990). Plaintiff did not present any substantial evidence to show that he met or equaled the listings; to the contrary, he conceded that he did not meet or equal a listing. *See* Prehearing Mem., AR 442. The reports of the state agency physicians constitute substantial evidence to support the ALJ's finding that plaintiff did not meet or equal a listing.

III. Residual Functional Capacity/Hypothetical Question

An individual who is not found to be presumptively disabled at step three still may be disabled if his impairments cause physical or mental limitations that prevent him from performing substantial gainful activity. Under the commissioner's sequential evaluation process, the combined effect of these limitations is described as a claimant's "residual functional capacity," which is defined as "the most you can still do despite your limitations." 20 C.F.R. §§ 404.1545(a), 416.945(a). A claimant's residual functional capacity is used at step four to determine if a claimant can perform his past relevant work, and if not, at step five to determine whether the claimant can make an adjustment to other work. 20 C.F.R. §§ 404.1520(a)(4)(iv) and (v), 416.920(a)(4)(iv) and (v). As in many social security disability cases, the outcome of this case turns on whether substantial evidence in the record supports the ALJ's residual functional capacity assessment.

A. Physical Limitations

The ALJ concluded that in spite of his residuals from cardiac bypass surgery, plaintiff still could meet the exertional demands of light work. Light work involves lifting a maximum of 20 pounds occasionally with frequent lifting or carrying of objects weighing 10 pounds, and typically requires a good deal of walking or standing. 20 C.F.R. §§ 404.1567(b), 416.967(b). Substantial evidence in the record supports the ALJ's conclusion that plaintiff is capable of performing this type of work. As the ALJ noted, plaintiff's heart condition had

been relatively stable since his bypass surgery: he had required no additional surgery; catheterization showed normal left ventricular function; and electrocardiogram testing showed no evidence of ischemia or acute cardiac disease. In November 2000, plaintiff's doctor advised him to begin an aerobic cardiac exercise program; in November 2001, plaintiff was cleared to return to work.

As the ALJ noted, state agency consulting physicians who reviewed this evidence concluded that plaintiff could perform light to medium work. The only contradictory medical evidence was the residual functional capacity questionnaire completed by Dr. Tarrar, who opined that plaintiff could never lift more than 10 pounds and could walk only one block. As one of plaintiff's treating physicians, Dr. Tarrar's opinion was entitled to controlling weight if it was well supported by medical findings and not inconsistent with other substantial evidence in the record. 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2). When an ALJ decides not to give controlling weight to a treating physician's opinion, the ALJ must support that decision with "good reasons." *Id*. "A contradictory opinion of a non-examining physician does not, by itself, suffice" as a reason for rejecting an examining physician's opinion. *Gudgel v. Barnhart*, 345 F.3d 467, 470 (7th Cir. 2003).

Here, the ALJ articulated several reasons for rejecting Dr. Tarrar's opinion. First, Dr. Tarrar incorrectly noted that plaintiff had had an abnormal echocardiogram in April 2001, when actually that test had showed no signs of ischemia. Second, the clinical evidence showed that overall, plaintiff's heart condition was stable, with no evidence of acute cardiac

disease. Third, the ALJ observed that Dr. Tarrar had been plaintiff's treating physician for only a short time before completing the RFC forms and had admitted that he was not that familiar with plaintiff's history. These were adequate reasons, supported by the evidence in the record, for the ALJ to reject Dr. Tarrar's opinion in favor of that offered by the agency physicians. 20 C.F.R. §§ 404.1527(d), 416.927(d).

The only other evidence suggesting plaintiff's inability to perform light work were his own statements at the hearing and on forms submitted in support of his claim, in which he claimed shortness of breath, weakness, fatigue and chest pain. When the objective medical evidence shows that a claimant has an impairment that reasonably could be expected to cause pain or other symptoms, the ALJ must consider a claimant's statements about his symptoms and explain how he weighed them. 20 C.F.R. §§ 404.1529, 416.929; Soc. Sec. Ruling 96-7p. Because the ALJ is in the best position 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).

The ALJ found that plaintiff's allegations of disability lacked a reasonable medical basis and were not credible. In reaching this conclusion, the ALJ noted that in contrast to his statements at the hearing, plaintiff consistently had told his doctors that he did not have shortness of breath, chest pain or palpitations. In fact, in May 2001, plaintiff told Dr. Ness that his mental condition was of more concern to him than his physical condition. These inconsistences coupled with the lack of objective medical evidence to support plaintiff's allegations establish that that the ALJ's credibility determination was not patently wrong.

In sum, the ALJ gave reasons, supported by the record, for rejecting the evidence in the record that tended to support plaintiff's claim that he suffers from disabling physical impairments. The remainder of the evidence is adequate to support the ALJ's conclusion that plaintiff can perform light work.

B. Mental Limitations

It is a closer question whether substantial evidence supports the ALJ's conclusion that plaintiff had the mental ability to perform his past relevant work or the other jobs identified by the vocational expert. Plaintiff's strongest advocate on this point was Dr. Tarrar, who opined that plaintiff had severe mental limitations precluding him from adequately performing any job. However, the ALJ had sufficient grounds to reject this opinion. Dr. Tarrar's assessment was based partly on his conclusion that plaintiff was mentally retarded, but as the ALJ noted, there was no clinical support (*e.g.,* IQ test results) for this conclusion. Moreover, as the ALJ pointed out, plaintiff earned his GED and served in the military (albeit briefly), facts that contradicted Dr. Tarrar's finding of mental retardation. The lack of foundation for Dr. Tarrar's conclusion on this point gave the ALJ an adequate reason to question Dr. Tarrar's entire report, including his assessment of plaintiff's limitations. Dr. Tarrar's limited treatment history with plaintiff was another proper reason for the ALJ to reject Dr. Tarrar's opinion. 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2).

All this being so, Dr. Tarrar's report was not the only evidence in the record supporting plaintiff's claim that he suffered from significant mental limitations. Notably, Dr. Koehn found that plaintiff had "significant problems" in his cognitive functioning that impaired his ability to carry out mental tasks in a timely manner. Dr. Koehn observed during his interview with plaintiff that plaintiff was "seriously impaired" in his ability to concentrate and to provide consistent information. In addition, he found that plaintiff had "significant difficulties" relating to others. Dr. Tarrar made similar observations during his interactions with plaintiff, perceiving plaintiff to be "mentally challenged." In fact, Dr. Tarrar so mistrusted plaintiff's ability to provide a reliable medical history that he asked plaintiff's mother to attend his appointments.

Dr. Ness also found plaintiff to have problems with concentration and comprehension along with a "minimal" ability to relate to others. One of the state agency psychologists, Dr. Rattan, concluded that plaintiff would have "moderate" limitations in his ability to understand, to remember and carry out detailed instructions, to perform work tasks requiring sustained concentration and persistence, to get along with coworkers, to accept criticism from supervisors and to set realistic goals, and would have a "marked" limitation in his ability to interact appropriately with the general public. The other state agency psychologist, Dr. Spear, opined that plaintiff was "moderately" limited in his ability to maintain attention and concentration for extended periods; to perform activities within a schedule; to maintain regular attendance and be punctual with customary tolerances; to

complete a normal workday and workweek without interruptions from psychologically based symptoms; to perform at a consistent pace without an unreasonable number and length of rest periods; to interact appropriately with the general public; to accept instructions and respond appropriately to criticism from supervisors; and to set realistic goals or make plans independently of others.

Having carefully reviewed the record, I am unable to determine whether the ALJ's assessment of plaintiff's residual functional capacity adequately considered all of plaintiff's mental limitations. For example, although the ALJ discussed Dr. Koehn's report in his decision, he did not mention Dr. Koehn's finding that plaintiff was impaired in his ability to concentrate and process verbal information. It is clear that the ALJ was not persuaded that plaintiff had significant *memory* problems, as Dr. Koehn had found: the ALJ pointed out more than once that Dr. Ness had found plaintiff to have "good recall of recent and remote memories." However, the ability to remember things is not the same as the ability to concentrate. The ALJ also noted accurately that plaintiff's panic attacks were well-controlled on Zoloft and that plaintiff was "able to organize himself extremely well in his various letters arguing for disability." AR 18. But again, neither of these facts are inconsistent with Dr. Koehn's conclusion that plaintiff has significant cognitive deficits. A careful reading of Dr. Koehn's report shows that plaintiff's difficulties in processing information were separate from his anxiety symptoms and were present in spite of Zoloft's other benefits. And plaintiff's ability to present himself well in his written communications proves nothing absent some indication how long it took plaintiff to prepare those documents.

The ALJ also gave short shrift to the substantial evidence in the record indicating that plaintiff was significantly impaired in his ability to relate to others. Dr. Koehn described plaintiff as having "significant difficulties" relating to others, and reported that stress produced by plaintiff's desire to avoid others at work was one of plaintiff's primary work limitations. Dr. Ness also noted that plaintiff had a "minimal" ability to relate to others. The ALJ's opinion provides no assurance that he considered this evidence. He mentioned that plaintiff's anxiety symptoms were reduced on Zoloft and that plaintiff had reported feeling less anxious while driving or out in public, but this evidence does not necessarily translate into a conclusion that plaintiff's ability to interact with others also had improved.

The ALJ did note that Dr. Koehn found that in spite of his mental limitations, plaintiff probably could perform a job that involved "minimal contact with other people and few time constraints." The commissioner asserts that this evidence shows that "given the right circumstances, [plaintiff] could be an effective worker" and therefore supports the ALJ's finding that plaintiff is not disabled. Mem. in Supp. of Comm.'s Decision, dkt. 9, at 15.

The problem with this argument is that neither the ALJ's residual functional assessment nor his hypothetical question to the vocational expert captures the "circumstances" set out by Dr. Koehn. The ALJ found that plaintiff had a "limited but satisfactory" ability to relate to the public and coworkers, perform tasks requiring attention and concentration, engage in work requiring that he remember and carry out detailed job instructions and demonstrate reliability. This RFC says nothing of limiting contact with

supervisors, even though substantial evidence in the record indicates that plaintiff has difficulty accepting instructions and responding appropriately to criticism from supervisors. *See Young v. Barnhart*, 362 F.3d 995, 1002 (7th Cir. 2004) (RFC requiring plaintiff to have limited contact with public and coworkers inadequate because it failed to account for evidence of limitations in ability to interact with supervisors). Moreover, the RFC does not contain any finding that purports to limit plaintiff to jobs with "few time constraints." Finally, given the concentration and processing deficits identified by Dr. Koehn and observed by Drs. Ness and Tarrar, it is doubtful that plaintiff is able to understand, remember and carry out detailed job instructions, particularly in a job requiring the performance of tasks at a steady pace.

It is possible that the ALJ meant to capture all of plaintiff's cognitive and social limitations within his RFC. If that is the case, however, then the ALJ's decision fails to build an "accurate and logical bridge from the evidence to his conclusion so that, as a reviewing court, we may assess the validity of the agency's ultimate findings and afford a claimant meaningful judicial review." *Scott v. Barnhart*, 297 F.3d 589, 595 (7th Cir. 2002); *see also Steele v. Barnhart*, 290 F.3d 936, 941 (7th Cir. 2002). The ALJ addressed some of plaintiff's alleged mental limitations, but nothing in his decision makes clear how he accounted for the substantial evidence in the record indicating that plaintiff has significant limitations in his ability to concentrate, process information and relate to others, including supervisors. "Although the ALJ need not discuss every piece of evidence in the record, he must confront

the evidence that does not support his conclusion and explain why it was rejected." *Indoranto v. Barnhart*, 374 F.3d 470, 474 (7th Cir. 2004) (citations omitted); *Bauzo v. Bowen*, 803 F.2d 917, 923 (7th Cir. 1986) ("Both the evidence favoring the claimant as well as the evidence favoring the claim's rejection must be examined, since review of the substantiality of evidence takes into account whatever in the record fairly detracts from its weight") (citation omitted).

The ALJ's conclusion that plaintiff is not disabled was based upon the vocational expert's responses to hypothetical questions that were based, in turn, entirely upon the flawed RFC. Accordingly, the ALJ's decision cannot stand. "When the hypothetical question is fundamentally flawed because it is limited to the facts presented in the question and does not include all of the limitations supported by medical evidence in the record, the decision of the ALJ that a claimant can adjust to other work in the economy cannot stand." *Young*, 362 F.3d at 1005.

For this reason I am recommending remand to the commissioner for further proceedings consistent with this opinion. In the event the commissioner objects to this recommendation, then I recommend that the district court appoint a lawyer to represent plaintiff for the purpose of responding to the commissioner's objection.

IV. Additional Evidence

For the sake of completeness, I address the additional evidence that plaintiff has attached to his briefs. Plaintiff has attached reports from D.L. Reilly, D.O., a staff

psychiatrist, who apparently first saw plaintiff on July 28, 2003. On March 29, 2004, Dr. Reilly completed a mental residual functional capacity questionnaire on which he stated that plaintiff suffers from a probable schizo-affective disorder and shows signs of a thought disorder, noting among other things that plaintiff was very vague, had a poor ability to recall things and was withdrawn and socially avoidant. Dr. Reilly rated plaintiff's abilities to perform mental work-related tasks as "fair" or "poor to none" and indicated that plaintiff would likely be absent from work more than three times a month because of his impairments or treatment. Dr. Reilly stated that the earliest date on which the above limitations would apply was July 28, 2003, although he noted that the date might be earlier "if [plaintiff's] self reporting could be collaborated." [*sic*].

Because the reports from Dr. Reilly did not exist at the time of the ALJ's decision, this court cannot consider them in determining whether the ALJ's decision is supported by substantial evidence. Plaintiff avers that he provided Dr. Reilly's reports to the Appeals Council; however, nothing in the Appeals Council's decision denying review indicates that it had a copy of Dr. Reilly's reports. In any event, when the Appeals Council denies review, the ALJ's decision becomes the final decision of the commissioner, and any evidence submitted to the Council after the ALJ issued his decision is not part of the record for judicial review. 20 C.F.R. § 404.981; *Perkins v. Chater*, 107 F.3d 1290, 1296 (7th Cir. 1997).

This court could remand the case for consideration of Dr. Reilly's reports if plaintiff shows the reports are new, "material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." 42 U.S.C. § 405(g); *Perkins*, 107 F.3d at 1296. Evidence is "new" if it "was not in existence or available to the claimant at the time of the administrative proceeding." *Perkins*, 107 F.3d at 1296. New evidence is "material" if there is a "reasonable probability" that the ALJ would have reached a different conclusion had the evidence been considered. *Johnson v. Apfel*, 191 F.3d 770, 776 (7th Cir. 1999). Thus, to be material, the new evidence must relate to the claimant's condition "during the relevant time period encompassed by the disability application under review." *Kapusta v. Sullivan*, 900 F.2d 94, 97 (7th Cir. 1989).

Dr. Reilly's reports are new but they are not material. The ALJ issued his decision on March 14, 2003; plaintiff did not see Dr. Reilly until July 28, 2003. Dr. Reilly expressly limited his opinions regarding plaintiff's mental limitations to the time period after July 27, 2003. Although Dr. Reilly suggested the possibility that the limitations might apply earlier if plaintiff's self-reporting could be corroborated, the fact remains that Dr. Reilly has not offered any opinion regarding plaintiff's mental limitations during the time period before he first saw plaintiff on July 28, 2003.

Plaintiff insists that Dr. Reilly's reports are material because he has had the impairments diagnosed by Dr. Reilly since childhood. Indeed, the central theme running through all of plaintiff's submissions is his apparent belief that he is entitled to disability

benefits based upon the sheer number of physical and mental impairments with which he has been diagnosed. However, the existence of an impairment or even multiple impairments do not establish entitlement to social security benefits. Rather, to be entitled to disability benefits, those impairments must limit the claimant in such a way as to render him or her unable to engage in any substantial gainful activity. 20 C.F.R. §§ 404.1505(a), 416.905(a). Thus, more critical to the disability inquiry than the impairments themselves are the work-related limitations imposed by the impairments.

Because Dr. Reilly's reports do not indicate that plaintiff was unable to work as a result of his mental impairments during the time period encompassed by the ALJ's decision, they are not material. Thus, they do not provide an independent basis for this court to remand the case to the commissioner. However, in the event the district court agrees to remand this case pursuant to sentence four of § 405(g) for a new evaluation of plaintiff's mental impairments, as recommended above, then presumably plaintiff could submit Dr. Reilly's reports to the commissioner as part of those proceedings.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I respectfully recommend that the decision of the commissioner denying plaintiff Gary Edgar's applications for disability insurance benefits and supplemental security income be REVERSED AND REMANDED pursuant to sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this opinion.

Entered this 31st day of May, 2005.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

May 31, 2005

Gary L. Edgar
803 East 4th Avenue
Brodhead, WI 53520

Richard D. Humphrey
Assistant United States Attorney
P.O. Box 1585
Madison, WI 53701-1585

Re: Edgar v. Barnhart
Case No. 04-C-820-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 June 14, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by June 14, 2005, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge