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

THOMAS SAGE, JR.,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

REPORT AND
RECOMMENDATION

06-C-0465-C

REPORT

Before the court for report and recommendation is Thomas Sage, Jr.'s appeal of an adverse decision by the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). An administrative law judge denied plaintiff's applications for disability insurance benefits and supplemental security income under sections 216(I) and 223 and 1614(a)(3)(A) of the Social Security Act after determining that plaintiff's alcoholism was a material factor contributing to his disability. This determination became the final decision of the commissioner when the Appeals Council denied review. As explained below, I am recommending that the court affirm the commissioner's decision.

Plaintiff contends on appeal that the administrative law judge's decision must be reversed because: 1) the ALJ failed to consult with a medical advisor concerning whether plaintiff's alcoholism was a material contributing factor to plaintiff's disability; 2) the ALJ failed to follow the proper analytical procedure for determining which of plaintiff's limitations were the result of alcohol abuse; and 3) the ALJ inaccurately portrayed the facts in reaching his decision.

My review of the record leads me to conclude that the ALJ applied the regulations properly and evaluated plaintiff's limitations both when he was and was not using alcohol. Further, because there was substantial evidence in the record of plaintiff's limitations when he was not using alcohol, it was not necessary for the ALJ to consult with a medical advisor on that issue. Finally, the ALJ did not make any material misrepresentations of fact in reaching his determination that plaintiff's alcoholism was a material factor contributing to his disability.

Before setting out the facts, it is helpful to review the legal standards governing this case:

LEGAL AND STATUTORY FRAMEWORK

To be entitled to disability insurance benefits or supplemental security income under the Social Security Act, a claimant must establish that she 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 Commissioner?

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

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

20 C.F.R. §§ 404.1520; 416.920.

In seeking benefits the initial burden is on the claimant to prove that a severe impairment prevents her from performing past relevant work. If she can show this, 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. *Stevenson v. Chater*, 105 F.3d 1151, 1154 (7th Cir. 1997); *Brewer v. Chater*, 103 F.3d 1384, 1391 (7th Cir. 1997).

In 1996, Congress enacted Public Law 104-121, which provides in relevant part that an individual cannot be considered disabled if drug addiction or alcoholism would be "a contributing factor material to the Commissioner's determination that the individual is disabled." 42 U.S.C. § 423(d)(2)(C). When there is medical evidence showing that the claimant has drug or alcohol addiction, the Social Security Administration considers whether the claimant would be found to be disabled if his alcohol or drug use stopped. 20 C.F.R. §§ 404.1535; 416.935. The applicable regulation states:

> (a) General. If we find that you are disabled and have medical evidence of your drug addiction or alcoholism, we must determine whether your drug addiction or alcoholism is a contributing factor material to the determination of disability.
>
> (b) Process we will follow when we have medical evidence of your drug addiction or alcoholism. (1) The key factor we will examine

> in determining whether drug addiction or alcoholism is a contributing factor material to the determination of disability is whether we would still find you disabled if you stopped using drugs or alcohol.
>
> (2) In making this determination, we will evaluate which of your current physical and mental limitations, upon which we based our current disability determination, would remain if you stopped using drugs or alcohol and then determine whether any or all of your remaining limitations would be disabling.

20 C.F.R. §§ 404.1535; 416.935.

Thus, the SSA first makes a disability determination irrespective of substance abuse; then, it considers what limitations, if any, would remain if the claimant's drug or alcohol addiction was absent. If the claimant's limitations absent substance abuse would not prevent him or her from working, then drug or alcohol addiction is "material" to the disability determination and the claimant cannot receive benefits. 20 C.F.R. §§ 404.1535(b)(2)(I); 416.935(b)(2)(I).

The following facts are drawn from the administrative record ("AR"):

FACTS

I. Procedural History

Plaintiff filed applications for disability insurance benefits (DIB) and supplemental security income (SSI) on May 8, 2002, alleging that he became unable to work on July 30, 2000, due to paranoid schizophrenia, a learning disorder, tuberculosis and "dead feet." Plaintiff's insured status for DIB expired on December 31, 2002, meaning that to receive benefits, plaintiff had to establish that he was disabled on or before that date.) After the state agency denied

plaintiff's claim initially and upon reconsideration, plaintiff requested a hearing before an administrative law judge. A hearing was convened on September 1, 2005 at which plaintiff appeared with counsel and testified. At the hearing, plaintiff submitted more than 100 pages of medical records that had not previously been considered by the state agency, including records indicating that plaintiff was abusing alcohol during the time period under consideration.

On October 26, 2005, the ALJ issued a decision finding that plaintiff had severe mental impairments, one of which was a substance abuse disorder in early remission. The ALJ determined that although plaintiff suffered from disabling limitations when he used alcohol, without the alcohol use plaintiff would be able to perform his past relevant work as a saw mill worker. Accordingly, the ALJ determined that plaintiff was not eligible for either DIB or SSI. The ALJ's decision became the final decision of the Commissioner when the Appeals Council denied plaintiff's request for review.

II. Background and Medical Evidence

At the time of the ALJ's decision, plaintiff was 33 years old. Plaintiff dropped out of school in the ninth grade. He has a sporadic work history, having worked a number of short-term jobs, including work as a security guard, restaurant worker, laborer and lumber mill worker. On his disability application forms and during his testimony, plaintiff indicated that he could not tolerate being around people as a result of psychological problems.

Plaintiff has a long history of drug and alcohol abuse and related criminal convictions, including several for battery. In May 2002, shortly after he filed his applications for disability

benefits, plaintiff sought assistance with his reported anger management problems from the Wood County Department of Unified Services. Mary Readel, a counselor, conducted an intake assessment. Plaintiff reported that he became nervous if too many people were around and that he had been diagnosed with paranoid schizophrenia and antisocial personality disorder in the past. According to plaintiff, from the time he was 16 he had had numerous police contacts and jail stays because of physical and verbal violence. Plaintiff reported that he was on probation for battery and facing charges for another incident in which plaintiff had beat someone up in March 2002. Plaintiff also reported having committed several violent acts in the past as a result of visual or auditory hallucinations. Plaintiff was living with his fiancé and her two children and the couple was expecting a baby at the end of June. Plaintiff had three of his own daughters but he did not have contact with any of them.

Plaintiff told Readel that he had abused alcohol and drugs, including crack cocaine, from the time he was a teenager until May 24, 2001, and that until that time, "everything revolved around drugs and alcohol." Plaintiff stated that he had promised his fiancée and her children that he would not use, and that he had been clean and sober for the past year.

Readel observed that plaintiff presented as an "anxious fidgety, 29-year-old of below average intelligence." His speech was pressured and plaintiff appeared overwhelmed and frustrated by his current symptoms. Based upon plaintiff's reported symptoms, history and Readel's mental status examination, Readel opined that plaintiff was suffering from paranoid schizophrenia and intermittent explosive disorder, with the possibility of an antisocial personality disorder. Readel referred plaintiff to Bernadette Bashinski, a psychiatric nurse, to

evaluate his need for medication. Plaintiff agreed to meet Readel biweekly for counseling. Readel's report was reviewed and signed by Dr. Steven C. Andrews, a psychiatrist. AR 162-65.

During his evaluation by Bashinski plaintiff complained of depression, anxiety, irritability; angry outbursts which he did not recall after they occurred; violent thoughts; bouts of crying; and hallucinations. Plaintiff stated that his sleep consisted of catnaps, he paced frequently, and his mind raced "100 miles an hour" so that he could not complete any task. Plaintiff reported the need to seclude himself in order to contain his explosiveness. He reported receiving poor grades in school that led him to skip habitually and eventually to drop out. As for job history, plaintiff said he had had about five jobs which always ended because "he has problems understanding directions and becomes frustrated." Plaintiff reported that he had not consumed any alcohol in the past two years. Plaintiff was unable to recall details about his substance abuse except that he had used marijuana for six years and crack cocaine for two to three years. Plaintiff reported being hospitalized around 1990 after he tried to hang himself while drunk.

Bashinski affirmed Readel's diagnosis of paranoid schizophrenia and intermittent explosive disorder. She recommended treatment with Risperdal and cognitive therapy. She also wrote a note for plaintiff indicating that plaintiff could not work because of his strong history of physical violence and explosiveness. AR 166-69.

In September 2002, Rodger Ricketts, Psy.D., performed a consultative examination at the request of the state agency. Plaintiff complained of a learning disorder, hallucinations, an anger control problem, irritability and crying spells. Plaintiff told Dr. Ricketts that he was

concerned about his drug and alcohol problems, but plaintiff did not expand on that concern. Plaintiff reported that he experienced auditory and visual hallucinations, including voices that told him to harm himself and to attack others. Plaintiff's fiancé told Dr. Ricketts that plaintiff slept only two to three hours; paced a lot at night; had anger control problems; and talked to himself. Dr. Ricketts diagnosed a learning disorder by history, schizophrenia (paranoid type), and an intermittent explosive disorder. AR 137-42.

At the request of the state agency, Robert Hodes, Ph.D., and Jean Warrior, Ph.D., reviewed the record evidence in September 2002 and May 2003, respectively, and concluded that plaintiff's disorders included schizophrenia, paranoid type, and a personality disorder. Both Dr. Hodes and Dr. Warrior determined that plaintiff did not have a listing-level mental impairment. AR 143-60.

Plaintiff continued to see Readel for therapy and Bashinski for medication management on a regular basis through August 2005. Bashinski adjusted plaintiff's medications on various occasions and periodically wrote notes indicating that plaintiff could not work. Plaintiff often presented with poor hygiene and was noticeably anxious, although his symptoms of hallucinations and paranoia improved on medication. Plaintiff reported continued problems with anxiety around people, sleeplessness, and episodes of raging anger, including incidents in which he smashed out car windows and punched a tree. Plaintiff stated that he "blacked out" during these episodes and afterward could not remember what he did or said. AR 176, 178, 181, 187, 350-52, 360-63, 368, 380. Plaintiff admitted that he once bought a bottle of beer, but he claimed that he dumped it out after his stepson intervened. AR 185. Otherwise, plaintiff

consistently denied alcohol use. In January 2004, however, plaintiff began asking for medication to help curb his cravings for alcohol. Bashinski prescribed Gabitril. AR 343, 346, 347.

In April 2004, a state court sentenced plaintiff to three years' probation after he was convicted of selling prescription drugs. Plaintiff expressed a desire for alcohol treatment, reporting that the Gabitril was not quelling his craving for alcohol. He stated that he had gone through AODA treatment in 1992 and 1993 but had remained sober for only one month after treatment. Plaintiff told Readel that he had been lying about his alcohol use over the past several months. AR 331. Plaintiff met with AODA counselor Richard Kopelke, who deferred making a treatment recommendation until he gathered more information. AR 290.

In May 2004, plaintiff served jail time as a result of having someone in his home who possessed marijuana. After his release in June, plaintiff told Bashinski that he felt slightly better after one of his medications, neurontin, was stopped during his incarceration. Plaintiff reported having used no alcohol since he was jailed. AR 322-323.

At the end of June, 2004, plaintiff was referred to day treatment for his AODA issues, but he attended only four sessions. AR 287.

At an August 25, 2004 visit with Bashinski, plaintiff reported that his anxiety and his sleep were both improved. His energy and motivation were good, he showered daily, was able to keep busy, do chores and attend some garage sales. Plaintiff denied hallucinations, delusions or paranoia. He appeared well-groomed and clean. He related easily, and his thoughts were logical and goal-directed towards treatment, with no psychotic symptoms noted. Plaintiff reported that he had only had a "sip" of alcohol in the past five months. AR 317-18.

On November 5, 2004, Bashinski wrote that plaintiff had a noted improvement in his symptoms of explosiveness on his current medication regime, although he was experiencing daytime drowsiness. Plaintiff presented as pleasant and calm, with a euthymic mood and affect. Bashinski adjusted plaintiff's medications. AR 308-09.

From November 2004 to April 2005 plaintiff was incarcerated in the Wood County Jail for disorderly conduct. AR 287. Plaintiff told Readel he had gotten into a fight while drunk. AR 286. At a visit with Bashinski on April 8, 2005, plaintiff reported that he had not been taking his Gabitril or Abilify while in jail but had taken thorazine and Benadryl, which had kept his schizophrenia in check. Plaintiff reported that after returning home, he experienced decreased productivity and had aimed one angry outburst at his wife. Plaintiff had run out of his medications two days before his visit with Bashinski. Bashinski noted that plaintiff's schizophrenic symptoms were starting to surface due to plaintiff's increased stress and lack of medication. AR 295-96. Bashinski restarted plaintiff's medications.

On April 15, plaintiff reported that he had not yet picked up his medications as a result of transportation problems. Plaintiff said that he felt antsy when not on medication but not angry or depressed. Plaintiff was well-groomed with good hygiene and presented with a normal affect and euthymic mood. Plaintiff said his sleep had improved and he avoided other people in order to stay calm. Bashinski noted that plaintiff's symptoms had improved in spite of his non-compliance with medication. Bashinski prescribed a new set of medications.

On May 3, 2005, plaintiff had an AODA evaluation with Connie Nelson. Plaintiff told Nelson that as a result of his chemical use, his 12-year old stepdaughter was living in foster care,

his wife had spent a week in a shelter in 2004 and he was not allowed to see any of his three daughters. Plaintiff admitted craving alcohol but denied recent drinking. Plaintiff denied that he currently was a danger to himself or others but admitted that he presented such a danger when drinking. Nelson referred plaintiff to day treatment to be followed by continued care. AR 287-88.

On May 5, 2005, Bashinski reported "improvement to remission" of plaintiff's symptoms of schizophrenia on his medications. She noted that in spite of various stressors, plaintiff had become only a little nervous at times with no angry outbursts reported. AR 293-94.

At a therapy session with Readel on May 6, 2005, plaintiff reported that he had begun to work on his high school equivalency diploma while jailed and planned to attend Mid State Technical College. Plaintiff said his moods were staying level with his current medication, Lamictal. Plaintiff admitted that he had been lying about his alcohol use prior to November; he had been mixing whisky with his medications. AR 286. Plaintiff stated that his symptoms of schizophrenia, including auditory hallucinations, had not recurred in many months. Plaintiff opined that his anger would abate if he avoided alcohol and took his Lamictal. AR 286.

On June 8, 2005, plaintiff reiterated that his symptoms of schizophrenia were well controlled by his current medication. Plaintiff was feeling depressed about his family's lack of finances and was considering seeking temporary work through a temporary employment agency. Plaintiff reported having a better relationship with his three-year old daughter now that he was not drinking and generally was able to control his temper. Plaintiff was following through with his AODA day treatment but had not been attending Alcoholics Anonymous meetings. Plaintiff

told Readel that he was not comfortable in large groups but he was considering attending a small alcohol recovery group. He also agreed to participate in an anger management group. AR 278.

On August 10, 2005, plaintiff appeared "extremely anxious" at a therapy session with Readel. Plaintiff reported increased stress at home as a result of his wife allowing friends to stay with them and his fear that her probation would be revoked if she used alcohol or associated with people on probation. Plaintiff reported that Bashinski had prescribed propanolol to reduce his anxiety, but he was uncertain how often he could take it. AR 273, 276.

III. Hearing Testimony

At the September 1, 2005 administrative hearing, plaintiff testified that he has problems being around other people. Plaintiff explained that being around too many people caused him to become nervous and scared, and in turn, explosive and violent. Plaintiff stated that he stayed in his house most of the time. For instance, he had avoided entering the waiting area outside the hearing room because there were "too many people in one place." Plaintiff reported having problems accepting criticism at a past roofing job; when his boss told him he wasn't doing something right, plaintiff responded by throwing something or by cussing and yelling. Plaintiff testified that his problems worsened under stress. He reported difficulty adhering to a schedule, and explained that his wife helped him remember appointments. Plaintiff indicated that he had short term memory problems, including "black outs" of various incidents. He also stated that he got confused if he had to perform more than two or three instructions at a time.

At the hearing, plaintiff submitted the records from Wood County Department of Unified Services covering the period from April 17, 2003 to August 10, 2005. Neither plaintiff's lawyer nor the ALJ asked plaintiff any questions about those records or about his alcohol use.

IV. ALJ's Decision

In his written decision, the ALJ followed the commissioner's five-step sequential evaluation process for evaluating whether a claimant is disabled. 20 C.F.R. §§ 404.1520; 416.920. At step one, he found that plaintiff had not engaged in substantial gainful activity after his alleged onset date. At step two, he found that plaintiff suffered from a combination of mental impairments that were severe, namely, polysubstance abuse and dependence in early remission since May 2005; schizophrenia, paranoid type; intermittent explosive disorder; and learning disability, by history.[1] At step three, the ALJ found that plaintiff's impairments, including his substance use disorder, were severe enough to meet the listings for schizophrenic, paranoid and other psychotic disorders; personality disorders; and substance abuse disorders. The ALJ noted that these were the listings used by the state agency psychologists when they considered plaintiff's case. However, the ALJ did not adopt the state agency psychologists's conclusion that plaintiff's impairments were not severe enough to meet the listings; the ALJ explained that the record at the time the psychologists reviewed it did not accurately reveal the level of plaintiff's substance use or its effect on his functioning.

[1] The ALJ also found that none of plaintiff's alleged physical impairments constituted medically determinable impairments that could support a finding of disability. Plaintiff does not challenge this finding.

Conducting his own evaluation of the record, the ALJ determined that when plaintiff did not abstain from alcohol, he was severely impaired in two areas of functioning (described in the "B" criteria of the listings): in social functioning, which the ALJ rated as "marked," and in episodes of deterioration or decompensation, which the ALJ rated as "repeated." However, because of the evidence suggested that plaintiff has a substance use disorder, the ALJ then assessed whether this disorder was a contributing factor material to the determination of disability.

The ALJ answered this question in the affirmative. Summarizing his findings, the ALJ explained:

> [T]he undersigned is persuaded the primary reason for the claimant's significant maladaptive behaviors, primarily the report of visual and auditory hallucinations, as well as anxiety and violence toward others, is secondary to polysubstance dependence and abuse. After a thorough evaluation of the medical evidence of record, the undersigned is persuaded that any additional mental impairment or impairments the claimant may have are likely caused by the secondary effects of substance abuse. Further, any residual symptoms the claimant may experience when not abusing substances are entirely controllable with medication, counseling and avoidance of substances. As outlined below, the claimant would be capable of sustaining work activity at the unskilled to semi-skilled level when avoiding substances and remaining compliant with mental health treatment.

The ALJ went on to evaluate plaintiff's functioning under the "B" criteria when plaintiff was not abusing substances. The ALJ found that, without the substance abuse, plaintiff's functional limitations from his mental impairments were not severe enough to satisfy the listings. With respect to social functioning, the ALJ found that plaintiff's limitations in that area were

only "moderate" when he avoided alcohol. In support of this finding, the ALJ noted several records indicating that plaintiff was able to manage his anger responses and cope well when he was compliant with his medications and not drinking. In addition, the ALJ noted, plaintiff was able to leave home to go shopping once a week and had indicated that he would be able to participate in treatment groups so long as they were small. The ALJ found that when plaintiff was not drinking, his only limitation was his anxiety dealing with large groups in public.

With respect to the category of concentration, persistence and pace, the ALJ found that plaintiff had only "mild" limitations. The ALJ acknowledged that the consultative examiner, Dr. Ricketts, was of the opinion that plaintiff had a poor prognosis because of poor coping skills, borderline intelligence and psychotic disorder. But the ALJ found that Dr. Ricketts had not been aware of plaintiff's ongoing substance abuse; further, Dr. Ricketts had indicated that plaintiff still could perform a job that required the performance of very simple tasks with minimal stress and minimal extraneous stimuli. The ALJ noted that although plaintiff's reading ability and cognitive skills were limited because of his lack of education, plaintiff was able to concentrate sufficiently to work towards his HSED while in jail, was planning on continuing his training at technical school, and had begun considering temporary work in June 2005.

As for plaintiff's episodes of decompensation, the ALJ found that since plaintiff had stopped drinking and remained compliant with his medication, he had had no such episodes.

At step four, the ALJ found that if plaintiff stopped abusing substances, he would be able to return to his past relevant work as a saw mill worker. In reaching this conclusion, the ALJ found that when plaintiff wasn't abusing substances and was compliant with his mental health

treatment regimen, plaintiff had the residual functional capacity to perform simple to moderately complex work at all exertional levels that did not require him to work with large numbers of the public. Reviewing the description of "Mill Helper" as set forth in the *Dictionary of Occupational Titles*, the ALJ found that the job fell within this residual functional capacity insofar as it was a semi-skilled job that did not require work with the general public or in the presence of large groups of people.

In light of his finding that plaintiff could perform his past relevant work if he stopped abusing alcohol, the ALJ concluded that plaintiff's substance use was a contributing factor material to the determination of disability. Accordingly, he found that plaintiff was not eligible for either disability insurance benefits or supplemental security income.

ANALYSIS

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 simply 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 making that decision is the commissioner's. *Edwards v. Sullivan*, 985 F.2d 334, 336 (7th Cir. 1993).

Nevertheless, this 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).

Plaintiff argues three points in support of his claim that the ALJ erred in concluding that plaintiff's substance use disorder was material to his disability. First, he contends that the ALJ was required to consult a medical advisor before making this determination. Second, he contends that the ALJ failed to conduct the "differentiating analysis" required by the regulations. Third, he contends that the ALJ's conclusion that alcoholism is a material contributing factor to plaintiff's disability is not supported by substantial evidence in the record because it rests upon a misunderstanding of the facts.

Plaintiff's second contention requires little discussion. Plaintiff argues that the ALJ failed to separate out the limitations caused by alcohol abuse from those caused by plaintiff's other mental conditions. But the ALJ's written decision demonstrates that he hewed carefully to his mandated duty to determine which of plaintiff's limitations would remain if he stopped using drugs or alcohol. The ALJ explained in detail his assessment of plaintiff's limitations both with and without substance abuse and explained the basis for his conclusion that plaintiff's most

severe limitations would diminish if he abstained from alcohol and remained compliant with his medications. It is unclear from plaintiff's briefs what more he thinks the ALJ should have done.[2] Plaintiff's claim that the ALJ failed to comply with the DAA regulation is unfounded and should be rejected.

Plaintiff's first contention–that the ALJ should have consulted with a medical expert– is thornier. As a starting point, I do not agree with plaintiff that the ALJ "played doctor" when he rejected the reports of the state agency physicians and Dr. Ricketts, who all found that plaintiff had schizophrenia and explosive personality disorder but made no finding that plaintiff had a substance abuse disorder. As the ALJ noted, none of these mental health professionals even was aware that plaintiff had an active substance abuse problem at the time they reviewed the record and examined plaintiff. Because these reports were rendered on the basis of incomplete, inaccurate information, they do not amount to substantial medical evidence showing that plaintiff's substance abuse was not material to his mental functioning.

The fact is that the record contains *no* medical opinion addressing specifically the question whether plaintiff's substance abuse is a factor material to his disability or explaining the effect, if any, that alcohol use has on plaintiff's other mental impairments. Plaintiff argues

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[2] In his reply brief, plaintiff suggests that the ALJ erred by failing to call a vocational expert to assess the impact that plaintiff's non-exertional limitations would have on the occupational base identified in the medical-vocational guidelines set out at Appendix 2 of Subpart P of 20 C.F.R. § 404, commonly referred to as the "grids." Reply Br., dkt. 12, at 14 & n.2. Because plaintiff raised this argument for the first time in his reply, he has waived it. *United States v. Adamson*, 441 F.3d 513, 521 n. 2 (7th Cir.2006).

Even if not waived, plaintiff's argument has no merit because the ALJ did not apply the grids in this case, finding at step four that plaintiff could perform his past relevant work as a saw mill worker.

that in the absence of such evidence, the ALJ's determination of this question reflects merely his own lay opinion and is insufficient to support his decision. Plaintiff cites a number of cases in support of his argument, including *Rohan v. Chater*, 98 F.3d 966, 970 (7th Cir. 1996), but *Rohan* and the other cases cited stand only for the proposition that the ALJ may not *substitute* his opinion for that of the medical expert. These cases do not address the ALJ's responsibilities in a situation where the record lacks *any* medical expert opinion.

Apart from these inapposite cases, the only other authority cited by plaintiff is an Emergency Teletype, No. EM-96200, issued August 30, 1996, by the Social Security Administration. Emergency Teletype, Office of Disability, Social Security Administration, "Questions and Answers Concerning DAA from the July 2, 1996 Teleconference-Medical Adjudicators-ACTION," August 30, 1996 (the "Emergency Teletype"). The Emergency Teletype provides in part that

> [t]here will be cases in which the evidence demonstrates multiple impairments, especially cases involving multiple mental impairments, where the [medical consultant/psychological consultant ("MC/PC")] cannot project what limitations would remain if the individuals stopped using drugs/alcohol. In such cases, the MC/PC should record his/her findings to that effect. Since a finding that [drug or alcohol addiction ("DAA")] is material will be made only when the evidence establishes that the individual would not be disabled if he/she stopped using drugs/alcohol, the [disability examiner] will find that DAA is not a contributing factor material to the determination of disability.

Emergency Teletype, attached to Appendix A to Plt.'s Br., dkt. 10, at 10. However, this excerpt indicates only that in the event a medical or psychological consultant cannot determine which of the claimant's limitations would remain if the claimant abstained from alcohol, a decision

should be made in favor of claimant. In other words, a tie goes to the claimant,. The teletype does not impose a requirement upon the ALJ to call a medical or psychological consultant or advisor to testify regarding the materiality issue.

I conclude that the commissioner's argument is correct: it was the ALJ's responsibility to determine whether plaintiff's alcohol abuse was material to his disability, and that the ALJ needed to consult a medical expert only if he concluded that the evidence before him was insufficient to make this determination. *See* 20 C.F.R. § 416.919a(b) (ALJ may order consultative examination "when the evidence as a whole, both medical and nonmedical, is not sufficient to support a decision on [the] claim"); 20 C.F.R. § 416.927(f)(2) (iii) (ALJ may ask for opinion from medical expert on nature and severity of impairment and on whether impairment equals listed impairment).

I further conclude that in this case, the evidence before the ALJ was adequate to allow him to decide the materiality of plaintiff's alcohol abuse despite the lack of a medical opinion on that issue. First, the mental health records from Wood County Unified Services provided the ALJ with medical evidence of plaintiff's functioning during a four-month period of sobriety. These records, which contain documentation from a psychiatric nurse and a counselor, established that when plaintiff abstained from alcohol and took his medications as prescribed, his mood remained generally even, his angry outbursts were controlled and he had no hallucinations or other symptoms of schizophrenia. Second, plaintiff demonstrated improved functioning, reporting that he had worked in his garden, his relationship with his children was improving and he was interested in returning to crafts. Other evidence supporting the ALJ's

conclusion were plaintiff's own statements to health providers regarding his belief that his anger problems would improve if he stopped drinking and kept taking his medications; plaintiff's ability to begin working towards his H.S.E.D. when he was sober; and plaintiff's interest in pursuing part time work.

It is true, as plaintiff argues, that neither Bashinski nor Readel noted explicitly that plaintiff's improved functioning was a direct result of his abstention from alcohol, but the absence of such evidence is not fatal to the ALJ's decision. The records from Wood County provide a fairly clear "before" and "after" picture of plaintiff's functioning with and without alcohol. Even absent a medical opinion, the ALJ reasonably could deduce from these records that plaintiff's alcohol use was a significant contributing factor to his disability. "How much evidence to gather is a subject on which district courts must respect the Secretary's reasoned judgment." *Kendrick v. Shalala* 998 F.2d 455, 458 (7th Cir. 1993). I am satisfied that the evidence before the ALJ was sufficient to support his determination that plaintiff's alcoholism was a material contributing factor to his disability and that a remand for further evidence gathering is not warranted.

Last, plaintiff argues that the ALJ's decision was not supported by substantial evidence because it was based upon several mischaracterizations of the record, including misstatements concerning plaintiff's periods of sobriety and his criminal history. Having reviewed each of plaintiff's arguments, set forth in his brief at pages 50-53, I find that they are mostly unfounded. The only objection warranting discussion is plaintiff's contention that the record does not support the ALJ's finding that plaintiff had "never been sober during his treatment." Plaintiff

points out that plaintiff told Readel on April 21, 2004 that he had been lying about his substance use only "over the past several months," and argues that this admission does not support a conclusion that plaintiff had been untruthful about his alcohol use during the entire time he was treated by Readel and Bashinski.

However, the record contains other evidence supporting the ALJ's finding that prior to November 2004, plaintiff had not been sober for any significant length of time during his treatment. Readel noted on May 6, 2005 that plaintiff had been lying about his alcohol use prior to November 2004. Plaintiff told a counselor that he had struggled with alcohol problems throughout most of his life and reported significant family and legal problems as a result of his alcohol abuse, including the removal of two stepchildren from his home. Overall, the record reasonably supports the ALJ's conclusion that plaintiff's alcohol use was chronic and significant and that his treatment records before November 2004 did not provide an accurate or reliable picture of plaintiff's functioning when he was not using alcohol.

Finally, it bears noting that although plaintiff's attorney submitted the medical records documenting plaintiff's problems with alcohol at the hearing, he did not ask plaintiff whether he had any periods of sobriety before November 2004, whether his condition was affected by alcohol, or any questions pertaining to plaintiff's alcohol use. Also, plaintiff never asked the ALJ to order a consultative examination or to consult with a medical advisor. When an applicant is represented by a lawyer at the hearing, the ALJ is entitled to assume that the applicant is "making his strongest case for benefits." *Glenn v. Sec'y of Health & Human Services*, 814 F.2d 387, 391 (7th Cir. 1987).

Perhaps the relationship between plaintiff's schizophrenia and his alcohol abuse is more complex than the record reflects. But such conjecture does not militate toward remand, particularly given the limits governing this court's review. The evidence in the record before the ALJ provided adequate support for his conclusion that plaintiff's chronic alcoholism contributed to and was material to his inability to obtain and hold employment in the competitive economy. Therefore, this court should affirm the commissioner's determination that plaintiff is not disabled.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that the decision of the Commissioner denying plaintiff Thomas Sage's applications for disability insurance benefits and supplemental security income under the Social Security Act be AFFIRMED.

Entered this 16th day of April, 2007.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
120 N. Henry Street, Rm. 540
Post Office Box 591
Madison, Wisconsin 53701

Chambers of
STEPHEN L. CROCKER
U.S. Magistrate Judge

Telephone
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April 16, 2007

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Richard D. Humphrey
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Re: Sage v. Astrue
Case No. 06-C-465-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 newly-updated 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 May 7, 2007, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by May 7, 2007, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,
/s/ S. Vogel for

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, Chief Judge