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

DWELLY P. GAINES,

Plaintiff,

REPORT AND
RECOMMENDATION

v.

00-C-358-C

KENNETH S. APFEL, Commissioner of
Social Security,

Defendant.

REPORT

This is a petition for judicial review of a decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). Plaintiff Dwelly P. Gaines, a 47-year old with a general equivalency degree, contends that the ALJ erred in denying his application for supplemental security income ("SSI") under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381 *et seq.*. Applying the five-step sequential analysis, the ALJ concluded that plaintiff had not engaged in substantial gainful activity since 1992 (Step 1); that he suffered from severe degenerative joint disease affecting his lumbar spine, knees and left shoulder; memory deficits; and was status post cardiac arrythmia with catheterization, ventriculography and arteriography (Step 2); that these impairments did not meet or equal the SSA listings (Step 3); that plaintiff was not capable of performing his past relevant work as a security guard and maintenance worker (Step 4); and that the SSA had met its burden of demonstrating that plaintiff was capable of performing other work in the national economy (Step 5). In

reaching his conclusions at Step 5, the ALJ found that despite his impairments, plaintiff could perform certain sedentary jobs–specifically, information clerk, order clerk and security guard–in which he would be able to change his position frequently and would not have to remember and understand detailed instructions. Because a significant number of such jobs exist in the national economy, the ALJ concluded that plaintiff was not disabled as defined in the Social Security Act.

Plaintiff contends that the ALJ got everything right except one thing: he failed at Step 5 to properly assess the impact that plaintiff's memory deficits would have on his ability to perform a limited range of sedentary work. The ALJ's assessment of the severity of plaintiff's memory deficits was critical because a limited ability to understand and remember simple instructions would preclude plaintiff from performing even unskilled, sedentary work. *See* Soc. Sec. Ruling 96-9p, 1996 WL 374185, *8 (1996). Plaintiff argues that the ALJ erred by crediting plaintiff's report of memory deficits, on the one hand, and on the other hand, finding that plaintiff's ability to understand and remember detailed instructions was nonetheless "limited but satisfactory." (The ALJ did not find any limitation on plaintiff's ability to remember simple instructions.) According to plaintiff, there is no support in the record for the ALJ's conclusion that his memory deficits are not so severe as to prevent him from performing any job. Plaintiff asks this court to remand the case to the Commissioner for the limited purpose of re-assessing plaintiff's memory deficits.

I recommend that this court deny plaintiff's request for a remand and affirm the decision of the Commissioner. Plaintiff did not present any medical evidence to support his contention that he suffers from memory deficits at all, much less memory deficits so severe as to preclude him from remembering even simple instructions.

I.

The Social Security Act, 42 U.S.C. § 405(g), requires the Commissioner's findings to be sustained if supported by substantial evidence. 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 determining whether substantial evidence exists to support the Commissioner's decision, the court reviews the entire administrative record, but does not reweigh the evidence, resolve conflicts, decide questions of credibility or substitute its own judgment for that of the Commissioner. *See Clifford v. Apfel*, – F.3d– , 2000 WL 1297717 (7th Cir. Sept. 14, 2000); *Powers v. Apfel*, 207 F.3d 431, 434-45 (7th Cir. 2000). The court is limited to determining whether the Commissioner could find reasonably, on the basis of the evidence contained in the record at the time, that plaintiff could perform a limited range of sedentary work. *See Brewer v. Chater*, 103 F.3d 1384, 1390 (7th Cir. 1997). When the Appeals Council denies review and determines that the ALJ's decision is final, this court reviews the ALJ's determination as well as any new

evidence that the Appeals Council may have determined to be immaterial. *Nelson v. Apfel*, 131 F.3d 1228, 1234 (7th Cir. 1997).

Although the ALJ's reasonable resolution of evidentiary inconsistencies is not subject to review, *see Brewer*, 103 F.3d at 1390, and the ALJ's written opinion need not evaluate every piece of testimony and evidence submitted, the ALJ must articulate some legitimate reason for his decision. *See Herron v. Shalala*, 19 F.3d 329, 333 (7th Cir. 1994). "Most importantly, [the ALJ] must build an accurate and logical bridge from the evidence to his conclusion." *Clifford*, 2000 WL 1297717 (citing *Green v.Apfel*, 204 F.3d 780, 781 (7th Cir. 2000)).

Plaintiff argues that the ALJ did not build a logical bridge between his finding that plaintiff suffered from memory deficits to his conclusion that such deficits were not severe enough to prevent plaintiff from understanding and remembering simple instructions. I agree. The ALJ offered no explanation for his conclusion that, in spite of plaintiff's memory deficits, he retained a limited but satisfactory ability to understand and remember detailed instructions. Even more important, there is no medical support in the record for such a conclusion. Normally, such unexplainable gaps in the ALJ's reasoning would prompt a remand to the Commissioner. However, because it was error for the ALJ to conclude from the record that plaintiff suffered from memory deficits at all, remand is not warranted.

According to the Social Security regulations, an impairment must be established by medically acceptable clinical and laboratory diagnostic techniques, not just by the plaintiff's

recital of his symptoms. 20 C.F.R. § 416.908. To prove that he is disabled, a plaintiff "must furnish *medical* and other evidence that [the Commissioner] can use to reach conclusions about his medical impairments." 20 C.F.R. § 416.912(a) (emphasis added). In this case, the only evidence before the ALJ regarding plaintiff's memory deficits consisted of plaintiff's own statements and the testimony of his daughter, who both indicated that plaintiff often cannot recall things he just read or watched on television, has difficulty remembering the day of the week and often forgets where he leaves his tools.

The ALJ appears to have determined that the report of Dr. Robert Braco constituted the required medical evidence of plaintiff's memory impairment. Dr. Braco was the physician who, at the Social Security Administration's request, performed a consultative orthopedic examination of plaintiff after the administrative hearing. Although the SSA ordered the examination, it was plaintiff's representative who first suggested at the administrative hearing the need for such an examination. *See* AR 304-05. Plaintiff's representative requested the examination for the purpose of assessing plaintiff's physical impairments; she said nothing about needing an evaluation of plaintiff's alleged mental impairment.

In his written decision, the ALJ wrote that "Dr. Braco diagnosed the claimant as having short term to medium term memory deficits." AR 20. This was wrong. In the "Assessment" portion of his report, Dr. Braco listed "Memory loss reported for short term to medium term events." AR 277. Thus, Dr. Braco did not *diagnose* plaintiff as having

memory problems but merely noted what plaintiff had reported. In fact, later in his report, Dr. Braco stated that the extent to which plaintiff's reported memory loss affected his ability to work was "hard to explore or validate on this exam." AR at 277-78.

The ALJ also noted that, "during Dr. Braco's evaluation of the claimant, he noted that the claimant exhibited some memory deficits." AR 24. To the extent that this sentence can be read to mean that plaintiff exhibited demonstrable memory lapses during his evaluation with Dr. Braco, it is incorrect. Dr. Braco did not perform any tests of plaintiff's memory or any other mental abilities during the exam, but merely noted that plaintiff "described recently forgetting his anniversary this month and having trouble remembering days of the week and where tools have been left around the house. He had forgotten the identity of someone he worked with five years ago, someone who took one of their cats." AR 277. Thus, Dr. Braco made no medical findings regarding plaintiff's alleged memory defect nor even offered an opinion regarding plaintiff's credibility, but merely transcribed without comment plaintiff's subjective complaints about his memory. In the absence of any observable evidence of a memory impairment or any psychological tests showing the existence of such an impairment, Dr. Braco's report does not constitute objective medical evidence of plaintiff's asserted memory impairment. *See* 20 C.F.R. § 416.928 (explaining that signs and laboratory findings are required in addition to plaintiff's description of symptoms to establish existence of physical or mental impairment).

Plaintiff appears to concede that he did not provide specific medical evidence of his memory impairment, arguing instead that the regulation allows him to present medical *or other evidence* of his impairments. *See* Pltf.'s Reply Brief, dkt. #11, at 4-5. Plaintiff misreads the language of the regulation. It clearly requires "medical *and* other evidence." 20 C.F.R. § 416.912(a). *See also Luna v. Shalala*, 22 F.3d 687, 693 (7th Cir. 1994) ("Finally, although the Secretary has the burden of proving Luna's capability to perform sedentary work, it was Luna's duty, under [the regulation], to bring to the ALJ's attention everything that shows that he is disabled. This means that Luna must furnish medical *and* other evidence that the ALJ can use to reach conclusions about his medical impairment and its effect on his ability to work on a sustained basis.") (citing 20 C.F.R. § 404.1512(a), the equivalent under the DIB regulations to 20 C.F.R. § 416.912(a)) (emphasis added). The testimony of plaintiff and his daughter did not constitute medical evidence and was insufficient to carry plaintiff's burden to show that he had a medically determinable mental impairment.

The record, including Dr. Braco's report, is simply devoid of any objective medical evidence to support plaintiff's claim that he suffers from a memory impairment, much less one so severe that it prevents him from performing any work. Thus, to the extent that the ALJ relied on Dr. Braco's report as medical evidence of plaintiff's alleged memory impairment, he did so in error. Had the ALJ properly applied the regulations and carefully reviewed Dr. Braco's report, he could not have found that plaintiff's memory deficits constituted a medically determinable impairment. In essence, plaintiff is arguing that the

ALJ didn't err *enough* when he stopped short of finding that plaintiff's undiagnosed and untested memory impairment was not severe enough to prevent him from understanding and remembering even simple instructions. But it makes little sense to remand this case for a more thorough articulation of the ALJ's reasoning when his ultimate conclusion–that plaintiff is not disabled–was proper in light of the evidence before him.

Almost as an afterthought, plaintiff asserts in a two-sentence paragraph that additional evidence exists that neither the ALJ nor the Appeals Council considered in deciding his claim and asks that the case be remanded for consideration of this evidence. This request should be denied. First, plaintiff has waived his additional evidence argument by failing to develop it in any meaningful manner. *See, e.g., Duncan v. State of Wis. Dept. Health and Family Serv.*, 166 F.3d 930, 934 (7th Cir. 1999) (arguments that a party fails to develop in its brief in any meaningful manner will be deemed waived or abandoned); *Bratton v. Roadway Package Sys., Inc.*, 77 F.3d 168, 173 n. 1 (7th Cir. 1996) (same). The court is not obliged to construct the legal arguments open to the parties, especially when they are represented by counsel. *See, e.g., Sanchez v. Miller*, 792 F.2d 694, 703 (7th Cir. 1986); *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1118 (7th Cir. 1986).

Second, even if plaintiff had adequately developed his argument, he has not satisfied the criteria for remanding the case for consideration of additional evidence. "Remand for consideration of additional evidence is appropriate only upon a showing that the evidence is new and material to the claimant's condition during the relevant time period encompassed

by the disability application under review, and there is good cause for not introducing the evidence during the administrative proceedings." *Kapusta v. Sullivan*, 900 F.2d 94, 97 (7th Cir. 1989) (quoting *Anderson v. Bowen*, 868 F.2d 921, 927 (7th Cir. 1989)). In particular, the new evidence is not material. "'Materiality' means that there is a 'reasonable probability' that the Commissioner would have reached a different conclusion had the evidence been considered . . .". *Perkins v. Chater*, 107 F.3d 1290, 1296 (7th Cir. 1997) (citations omitted). Insofar as it relates to plaintiff's asserted memory deficits, the additional evidence consists of medical notes from a follow-up visit with Dr. K.I. Gold, plaintiff's primary care physician. Dr. Gold noted that plaintiff reported concerns about memory loss; in response, Dr. Gold recommended to plaintiff that he take gingko biloba. Dr. Gold did not examine plaintiff. His report thus does not augment or contradict the evidence that was before the ALJ and, as a result, would have made no difference to the outcome.

The remaining additional evidence consists of an x-ray report and MRI scan of plaintiff's back. Because plaintiff has not challenged the ALJ's findings regarding his physical residual functional capacity, this additional evidence is irrelevant.

In sum, while I agree with plaintiff that the ALJ's conclusion that plaintiff's memory deficits were not severe enough to prevent him from performing certain unskilled, sedentary jobs is unsupported by substantial evidence in the record, this only partially describes the ALJ's error. The ALJ erred more egregiously when he first concluded that plaintiff suffered from memory deficits at all. Plaintiff should not receive a windfall simply because the ALJ

failed to explain a conclusion that was unfounded at its inception. Because there is no reasonable likelihood that the outcome would be different upon remand, I recommend that the decision of the Commissioner denying plaintiff's application for supplemental security income be affirmed.

RECOMMENDATION

Pursuant to 28 U.S.C. §636(b)(1)(B) and for the reasons stated above, I respectfully recommend that the decision of the Commissioner denying plaintiff Dwelly Gaines's application for supplemental security income be AFFIRMED.

Entered this 27th day of October, 2000.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge