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

GABRIEL HUICHAN,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

REPORT AND RECOMMENDATION

05-C-0268-C

REPORT

Plaintiff Gabriel Huichan brings this action pursuant to 42 U.S.C. § 405(g) for review of the defendant Commissioner's final decision denying his application for Supplemental Security Income under section 1614(a)(3)(A) of the Social Security Act, codified at 42 U.S.C. § 1382c (3)(A). The administrative law judge who considered plaintiff's claim at the administrative level found that although plaintiff had severe limitations that prevented gainful employment, those limitations resulted from plaintiff's alcoholism, an impairment for which individuals cannot receive benefits. The ALJ concluded that but for plaintiff's alcoholism he would be able to perform simple, routine, repetitive and low stress jobs that exist in the regional economy.

Plaintiff contends that the ALJ committed myriad legal and evidentiary errors in reaching this decision. He asks this court to reverse the commissioner's decision and to award benefits, or in the alternative, to remand his case for further proceedings.

For the reasons explained below, I am recommending that this court reject all of plaintiff's arguments except his claim that the ALJ failed to consider a favorable report from a consultative examiner. Because that report contains findings arguably suggesting that plaintiff is disabled even absent alcoholism, remand is required.

Before setting out the facts, it is helpful to review the legal and statutory backdrop for plaintiff's claim:

LEGAL AND STATUTORY FRAMEWORK

To be entitled to supplemental security income 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 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. § 416.920.

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

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. § 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. § 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. § 416.935(b)(2)(I).

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

FACTS

I. Procedural History

Plaintiff filed an application for Supplemental Security Income benefits ("SSI") on April 22, 2002, alleging that he had been disabled since May 15, 1999 from post-traumatic stress syndrome, depression, anxiety and bipolar syndrome. This application was plaintiff's second. His first claim for benefits was denied at the reconsideration level and plaintiff did not appeal that decision. However, medical records and other exhibits developed in connection with that claim are part of the record for plaintiff's instant application.

The local disability agency had its consulting physicians review plaintiff's claim, then it denied benefits initially and on reconsideration, finding that drug/alcohol addiction was a contributing factor material to plaintiff's disability. Plaintiff requested a hearing before an administrative law judge, which was held June 30, 2004. Plaintiff appeared with a lawyer. Plaintiff, his mother, a medical expert and a vocational expert testified.

On September 22, 2004, the ALJ issued a decision denying plaintiff's application for benefits. On March 11, 2005, the Appeals Council denied plaintiff's request for review, making the ALJ's decision the final decision of the commissioner.

II. Background

Plaintiff was born on June 23, 1962, making him 42 years old at the time of the hearing. He has a high school education plus one year of technical school training. His past

work experience consists of working as an assistant in an antiques store that he owned with his partner.

Plaintiff has suffered from alcoholism since he was a teenager. He underwent inpatient alcohol rehabilitation in 1984, after which he remained sober for about 10 years. He began drinking very heavily in 1999 after his partner of many years committed suicide. Plaintiff lost the antiques store and never returned to the work force.

From plaintiff's claimed onset date of May 1999 until the administrative hearing in June 2004, plaintiff received a great deal of treatment for alcoholism, ranging from emergency room visits with referrals to detox, to longer term chemical dependency treatment. In 2002 and in 2004, plaintiff was hospitalized for severe symptoms of alcohol withdrawal, including hallucinations and delirium tremens. On both occasions, plaintiff's hospitalization was followed by chemical dependency treatment at Tellurian. At the time of his administrative hearing, plaintiff was living at Tellurian. He had been there since April 2004 and had been sober for three months.

Plaintiff has been seen by various psychiatrists while hospitalized for alcohol-related treatment. On October 23, 2000, Warren Olson, M.D., noted that plaintiff had been diagnosed recently with bipolar disorder, personality disorder and alcohol dependence. Dr. Olson reported that plaintiff had been prescribed multiple medications for his psychiatric condition "to little avail in the past partly because of his failure to comply with a regimen on a regular basis and partly because of his continued use of alcohol." AR 358. On January

15, 2001, Dr. Battaglia, M.D., concurred with Dr. Olson's assessment, finding that plaintiff had a bipolar disorder, alcohol dependence in partial remission and a personality disorder. Dr. Battaglia noted that if plaintiff remained compliant with psychiatric treatment and did not abuse alcohol, "his prognosis is greatly improved." AR 370.

III. Treating Physicians

A. Dr. Goldrosen

Plaintiff's primary care physician was Dr. Michael Goldrosen. Every several months from January 2001 to April 2002, Dr. Goldrosen submitted a form to the county interim assistance program reporting that plaintiff was unable to work. AR 155, 158, 160-62, 164, 280-81. On these forms Dr. Goldrosen reported that plaintiff suffered from alcoholism, bipolar disorder, hypertension, anxiety and panic attacks. Dr. Goldrosen reported on some of the forms that plaintiff's alcoholism was in partial remission, insofar as plaintiff was reporting that he was abstaining from alcohol.

In a letter to the Social Security Administration dated September 9, 2002, Dr. Goldrosen wrote:

> Mr Huichan suffers from severe alcoholism and I do not believe that he is able to maintain any employment in his current situation. His functional impairment is severe. I do not believe he would be capable of carrying out necessary job requirements nor work under pressure.

AR 195.

From September 29, 2002 to October 9, 2002, plaintiff was hospitalized for alcohol withdrawal with severe delirium tremens. He was discharged from the hospital to Tellurian, an inpatient alcohol treatment program, which was followed up by residential treatment at a facility called Hope Haven. Dr. Goldrosen noted after an office visit with plaintiff on October 18, 2002 that plaintiff was "now off the alcohol, but it still sounds like he has hallucinations." Dr. Goldrosen diagnosed "Alcoholism, psychosis, likely as an underlying problem with hallucinations, even when he's not drinking alcohol or in withdrawal, but certainly worsened when he is." AR 397.

On January 14, 2003, after plaintiff had completed his treatment, Dr. Goldrosen still opined that plaintiff was "unable to hold down a job." AR 399. Dr. Goldrosen completed a functional assessment form on which he indicated that plaintiff suffered from alcoholism, psychosis and possible bipolar disorder. AR 258-264. However, he declined to complete the section of the form calling for a DSM-IV Multiaxial Evaluation, indicating that a psychiatrist would have to complete that part of the form. Dr. Goldrosen indicated that plaintiff's symptoms included difficulty thinking or concentrating, substance dependence and hallucinations or delusions. Dr. Goldrosen opined that although plaintiff had an unlimited or very good ability to understand and remember very short and simple instructions, he had no useful ability to maintain regular attendance, sustain an ordinary routine without special supervision, complete a normal workday without interruptions from psychologically based symptoms or deal with normal work stress.

On April 24, 2003, Dr. Goldrosen reported that although plaintiff still was maintaining sobriety, he might be experiencing some hallucinations; otherwise, plaintiff was doing "pretty well" on his medications. AR 401.

Plaintiff relapsed in early June 2003. He was hospitalized for severe alcohol withdrawal with hallucinations from June 5, 2003 to June 10, 2003 and again from July 3, 2003 to July 17, 2003. AR 377-78, 430-36. In September 2003, plaintiff reported having abstained from drinking since July and had been seeing an alcohol counselor from the county. However, plaintiff's outpatient treatment terminated when he relapsed again in October and was re-admitted to detox. Plaintiff attempted to resume counseling in late 2003 but his file was closed because he failed to keep his appointments. AR 337-43.

On April 17, 2004, Dr. Goldrosen admitted plaintiff to the hospital for acute alcohol withdrawal. AR 520. At the time of admission, plaintiff was in stage II alcohol withdrawal and was hallucinating. Plaintiff remained in the hospital until April 29, 2004. At the time of discharge, Dr. Goldrosen noted that plaintiff's mental status had cleared although plaintiff still had intermittent hallucinations. Plaintiff was discharged to Tellurian for long-term alcohol rehabilitation. AR 520-521.

B. Dr. Schiffman

Plaintiff was seen at Tellurian by Dr. Jeffrey Schiffman, a psychiatrist, for an initial evaluation on June 17, 2004. AR 544-548. Plaintiff told Dr. Schiffman he had been

experiencing visual and auditory hallucinations since childhood and that he began drinking at age 16 to mute the voices in his head. Plaintiff reported that the hallucinations had worsened after his partner's death in 1999, but that his current medications (Zyprexa, paxil and propanalol) had decreased his symptoms.

On mental status examination, Dr. Schiffman noted that plaintiff's grooming was appropriate, his speech was within normal limits, his eye contact was fair, his memory was intact and his abstract thinking was within normal limits. He noted that plaintiff's thought process was tangential and that he complained of auditory and visual hallucinations. He noted that plaintiff had decreased concentration and "fair" insight and judgment. AR 547. Dr. Goldrosen diagnosed schizophrenic disorder and alcohol abuse. He prescribed Geodon to help the Zyprexa decrease plaintiff's hallucinations. AR 552.

Dr. Schiffman completed a functional assessment form in July 2004. He reported that plaintiff had schizophrenia, on which anti-psychotic medication had had a fair response. AR 566-71. He reported that plaintiff was markedly limited in his ability to maintain activities of daily living, social functioning, and concentration, persistence and pace, and that plaintiff experienced repeated episodes of decompensation. AR 570. In Dr. Schiffman's opinion, plaintiff would be unable to meet competitive standards on all mental skills. AR 568-569. Dr. Schiffman's functional capacity assessment form suggested that he had seen plaintiff several times since his initial evaluation on June 17, 2004; however, there are no additional clinic notes from Dr. Schiffman in the record.

IV. Non-Treating Physicians

On March 23, 2001, Robert Hodes, Ph.D., a state agency psychological consultant, filled out a Psychiatric Review Technique Form in connection with plaintiff's prior application for benefits. AR 554-64. From his review of the medical records in the file at that time, Dr. Hodes found that plaintiff met the medical criteria for a substance addiction disorder, an affective disorder (depression and bipolar disorder), and a personality disorder. Although he found that plaintiff's impairments resulted in functional limitations that qualified plaintiff as "disabled" even without consideration of vocational factors, Dr. Hodes recommended affirming the denial of plaintiff's application on the ground that drug and alcohol abuse were material to plaintiff's disability. In his "Consultant's Notes," Dr. Hodes explained:

> All decompensations are associated with intoxication from alcohol or benzodiazepines. His hospitalizations are brief and more typical of detox rather than severe major depression. His suicidal ideation clears up when he is sober. His mood disorder is relatively well controlled when he takes his medications.

Supplemental Record, dkt. 10.

On May 28, 2002, Dr. Chang-Wuk Kang, M.D., another state psychiatric consultant, completed a Psychiatric Review Technique Form in connection with plaintiff's second application for SSI. AR 165-78. From his review of the medical evidence, Dr. Kang concluded that plaintiff suffered from a substance addition disorder and had a history of bipolar disorder and posttraumatic stress disorder. Like Dr. Hodes, Dr. Kang concluded that

plaintiff was disabled because he had “marked” limitations in two of the “B” Criteria (maintaining social functioning and concentration, persistence or pace), but that he was not entitled to benefits because his substance addiction disorder was material to his disability.

On February 4, 2004, Linda Ingison, Ph.D., a consultative examiner, conducted a mental status evaluation of plaintiff. AR 268-273. Plaintiff was accompanied by his father and a friend. Plaintiff reported that his chief complaint was “psychosis.” He told Dr. Ingison that beginning around the time his partner died in 1999, he periodically experienced visual hallucinations such as faces coming out of walls, midgets, clowns and images of family members. Plaintiff reported that he usually landed in the hospital when he hallucinated. During this interview, plaintiff minimized his alcoholism and stated that he had abstained since October. Dr. Ingison observed that although plaintiff appeared somewhat anxious, his thinking was orderly and goal-directed. He was oriented to person, place and time and had reasonably good memory for recent and remote events. However, Dr. Ingison reported that “concentration does appear to be a problem,” with plaintiff having difficulty performing serial 7's and spelling. Plaintiff was able to follow a simple three-step command. Dr. Ingison reported that plaintiff had variable judgment and little insight into his difficulties.

As for functional abilities, plaintiff told Dr. Ingison that he tried to keep up with daily tasks but typically watched television all day. He reported that he was unable to concentrate and could not watch a half-hour program through to the end. His parents took him to buy groceries and helped him with finances. Plaintiff’s friend reported that plaintiff changed

clothes several times a day, often checked doors and windows; and would not be able to handle finances on his own. Plaintiff's father reported that plaintiff washed his hands frequently and often didn't seem to know where he was. With respect to social functioning, plaintiff reported that he always had gotten along with others, although he was avoiding social interaction at the time. His friend and father both described plaintiff as having an adequate ability to function socially.

Dr. Ingison opined that plaintiff had a likely psychotic disorder; likely bipolar disorder; likely obsessive-compulsive disorder; a history of significant alcohol dependence and abuse; and an anxiety disorder. With respect to plaintiff's work capacity, Dr. Ingison offered the following summary:

> The claimant could understand, remember, and carry out instructions typical in this evaluation today for which he had the skills. He was capable of responding appropriately to this evaluator, and no history is given that he has had problems with supervisors or others in the past. Concentration and attention appeared in the low-adequate range. His ability to maintain in the face of stress, pace, or change demands would appear to be low. Given his significant history of substance abuse and his description today as being unable to handle finances in his own best interests, a payee is recommended.

AR 272-73.

Dr. Ingison completed a mental residual functional capacity assessment form, opining that plaintiff had a fair to poor/no ability to relate to coworkers, to deal with the public, to function independently, to deal with work stresses, to relate predictably in social settings, to behave in an emotionally stable manner or to demonstrate reliability. AR 265-67. As

support for these limitations, Dr. Ingison noted that plaintiff could not leave home and suffered from anxiety attacks, depression, psychosis, obsessive compulsive disorder and alcoholism. AR 266.

V. Hearing Testimony

A. Plaintiff

Plaintiff testified that he had been part owner of an antiques store from 1988 until May 1999 when his partner committed suicide. AR 588-89. He said that his job included working the cash register, handling some accounting and monitoring people who came into the store. AR 588. Plaintiff stated that for the five years before May 1999, he worked only 20 to 30 hours a week because he was depressed and anxious. AR 594. Plaintiff also testified that he worked part time (20 hours a week) for the state Department of Revenue from 1984 to 1988, doing bookkeeping and handling travel requests. AR 595.

Plaintiff reported that he first experienced visual and auditory hallucinations when he was 5 or 6, seeing midgets and clowns and hearing things. AR 597. As a teen, plaintiff also experienced anxiety attacks and obsessive compulsive behavior. AR 598-99. Plaintiff reported feeling very depressed around that same time because his mother left home for a while and because he was being sexually abused by someone outside his family. AR 600. Plaintiff reported having difficulty in high school, although he did graduate. AR 587.

Plaintiff reported that from 1994-99 he was a weekend drinker; he started drinking heavily in 1999 when he "flipped out" and began having more frequent hallucinations after his partner died. Plaintiff testified that drinking helped suppress the severity of his hallucinations although they did not stop completely. AR 606.

Plaintiff testified that as of the hearing date, he had abstained from alcohol for three months. AR 607. Plaintiff was staying at Tellurian, a rehabilitation center, and had experienced improvement with medication. AR 608-10. Plaintiff stated that he continued to experience visual hallucinations on occasion and to hear music and voices that made it difficult for him to concentrate. AR 610-11.

Plaintiff's mother testified. She corroborated plaintiff's testimony that he had exhibited symptoms of mental illness at an early age, including anxiety attacks and seeing things that weren't there.

B. Medical Expert

Larry Larrabee, a clinical psychologist, testified at the administrative hearing as a neutral medical expert. From his review of the medical record, Dr. Larrabee concluded that plaintiff had an affective disorder, noting that Dr. Goldrosen had diagnosed plaintiff with major depressive disorder with anxiety symptoms. He also concluded that plaintiff suffered from a personality disorder characterized by pathological dependency and a substance addiction disorder. AR 648. Dr. Larrabee testified that both with and without substance

abuse, plaintiff would have moderate difficulties performing activities of daily living, maintaining social function, and maintaining concentration, persistence or pace. AR 649. He indicated that he was unable to determine from the record how frequently plaintiff had episodes of decompensation. *Id*. Dr. Larrabee opined that many of plaintiff's functional restrictions were self-imposed as opposed to the product of mental impairments. AR 651.

C. Vocational Expert

Vocational expert Robert Verkins testified at the administrative hearing. The ALJ asked Verkins to consider a hypothetical individual with plaintiff's vocational profile and who was limited to simple, routine, repetitive and low stress work. Verkins testified that such an individual would not be able to perform plaintiff's past work as a retail clerk, which he classified as semi-skilled, light work. AR 686-87. However, Verkins opined that such an individual could perform unskilled medium jobs such as hand packager and machine feeder; unskilled light jobs such as industrial assembly, production inspector, machine feeder and hand packager; and unskilled sedentary work such as inspector, hand packager and machine feeder. AR 686-87.

On cross examination, Verkins testified that in accounting for the hypothetical's limitation to "low stress" work, he had looked for jobs that did not require public contact, were routine and repetitive and could be learned with just a short demonstration or instruction, did not require working closely with coworkers, and would not require significant supervision. AR 689-690.

VI. ALJ's Decision

In his written decision, the ALJ followed the commissioner's five-step process for evaluating disability claims. At step one, he found that plaintiff had not engaged in substantial gainful activity since his alleged onset date. Proceeding to step two, the ALJ found that plaintiff had two severe mental impairments, a substance addiction disorder and a bipolar disorder. The ALJ rejected Dr. Schiffman's opinion that plaintiff has schizophrenia in favor of the opinions of Dr. Larrabee, plaintiff's treating physicians and the stage agency physicians, who all concluded that plaintiff has a mood disorder. The ALJ cited a number of reasons for discounting Dr. Schiffman's opinion, including the brevity of his treatment relationship with plaintiff and his failure to support his opinion with clinic notes, detailed descriptions of plaintiff's symptoms or abnormal findings. Also, the ALJ noted that Dr. Shiffman's report "was based on the claimant's statements which, especially relating to his alcohol use, are not totally credible." AR 20.

At step three of the sequential evaluation process, the ALJ found that plaintiff met the criteria for the listing for a substance addiction disorder, finding that plaintiff's alcoholism resulted in marked functional limitations and periods of mental decompensation. However, he found that, absent the alcohol addiction, plaintiff's remaining impairment imposed only moderate functional limitations and therefore was not severe enough to meet the listings. In reaching this conclusion, the ALJ credited the reports of the state agency physicians, who found that alcoholism was the primary cause of plaintiff's symptoms, and

Dr. Larrabee, who concluded that plaintiff would only have moderate functional limitations were it not for his alcoholism.

The ALJ found that absent the consumption of alcohol, plaintiff retained the residual functional capacity to perform simple, routine, repetitive, low stress work. AR 25. He noted that most of plaintiff's treatment was for problems related to alcoholism and that Dr. Goldrosen had opined that plaintiff's inability to work was the result of his alcoholism. The ALJ further noted that although plaintiff had been prescribed medication to treat his other mental impairments, plaintiff had not taken these medications as prescribed but had continued to use alcohol, thereby interfering with the efficacy of the medications. Finally, the ALJ noted that plaintiff's last employment was "in a business with his partner which failed, and there is no evidence that the claimant's impairments were a factor in his work stoppage." He pointed out that plaintiff was not actively seeking work or participating in any vocational or other program directed toward returning him to the work force.

Relying on the vocational expert's testimony, the ALJ judge found at step four that plaintiff could not perform his past work as a semi-skilled retail clerk. Relying on that same testimony, he found that plaintiff could make a vocational adjustment to numerous unskilled jobs. Accordingly, the ALJ concluded that plaintiff was not disabled at step five of the five-step sequential evaluation.

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 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).

II. Dr. Ingison

Plaintiff contends that the ALJ's decision must be reversed and remanded because he failed in his decision to mention the opinion of Dr. Ingison. Plaintiff observes that Dr. Ingison completed a mental RFC form on which she indicated that plaintiff had serious limitations in his ability to perform various work-related functions, including the ability to demonstrate reliability, deal with work stresses and behave in an emotionally stable manner. Plaintiff points out that the vocational expert testified that an individual with no ability to be reliable could not perform any job.

The commissioner concedes that the ALJ did not mention Dr. Ingison's report anywhere in his decision. Nonetheless, the commissioner asserts that this omission is immaterial because Dr. Ingison assessed plaintiff's limitations *with* alcoholism, not without, and the ALJ agreed that plaintiff was disabled if his alcoholism was factored into the analysis. As support for her contention that Dr. Ingison's report accounted for symptoms caused by plaintiff's alcoholism, the commissioner points out that Dr. Ingison listed "history of significant alcohol dependence and abuse" as one of her diagnoses.

The commissioner's argument is unpersuasive. Dr. Ingison noted that at the time she saw plaintiff, he was in a period of remission, reportedly having abstained from alcohol for about six months (although she did note that in past self-reports of alcohol use plaintiff had minimized his use estimates). There is no indication that plaintiff was using alcohol or suffering from withdrawal symptoms at the time, or that Dr. Ingison's assessment of

plaintiff's limitations described plaintiff's functioning when he was using alcohol. To the contrary, it seems that Dr. Ingison estimated plaintiff's work-related abilities based on her contemporaneous mental status evaluation, her observations of plaintiff and the history reported by plaintiff, his father and his friend. The fact that she noted plaintiff's history of alcoholism among her diagnoses does not by itself show that her functional assessment was irrelevant to the materiality analysis. Indeed, given plaintiff's history of alcoholism, Dr. Ingison would have been remiss not to have mentioned it as one of plaintiff's impairments. Because Dr. Ingison's report was important evidence of plaintiff's baseline mental status absent alcoholism, the ALJ was required to discuss it in his decision.[1]

That said, Dr. Ingison's report does not *necessarily* undermine the ALJ's conclusion that plaintiff is not disabled. The ALJ found that even without alcoholism, plaintiff's ability to work was "significantly compromised" by his mental limitations. AR 24. To that end, the ALJ assigned plaintiff a very restrictive mental residual functional capacity, limiting him to jobs that were simple, routine, repetitive and low stress. By virtue of the vocational expert's interpretation of the term "low stress," this meant that within the set of jobs that were routine, repetitive and could be learned with minimal demonstration or instruction, plaintiff was limited to the smaller subset of jobs that did not require public contact, significant supervision or working closely with coworkers. These tight limitations essentially mirror those found by Dr. Ingison.

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[1] Worth noting: Dr. Ingison's report was not reviewed by either of the state agency physicians who concluded that alcoholism was material to plaintiff's disability.

Indeed, the only limitation endorsed by Dr. Ingison that plaintiff suggests is more restrictive than the ALJ's RFC is her assessment of plaintiff's ability to demonstrate reliability, which she rated as lying somewhere between "fair" and "poor/none."[2] Plaintiff points to the vocational expert's testimony as proof that an individual so limited could not perform any job. However, the vocational expert's testimony on this point is equivocal. The relevant testimony from the administrative hearing is as follows:

PLAINTIFF'S ATTORNEY: If you add to hypothetical 1 the -- between a fair and poor to none ability to demonstrate reliability in the workplace.

VE: I guess I'm a little confused, because as far as fair. I guess, if there's no ability to demonstrate reliability, you know, then I don't think such a person could perform any job in the national economy.

PLAINTIFF'S ATTORNEY: And if the person has a poor to none ability to demonstrate reliability, could that person perform.

VE: No. Again, with none, no ability to be reliable, I don't think you could perform any competitive job.

AR 690. The vocational expert's testimony suggests that plaintiff would be unemployable if he had *no* ability to be reliable, but Dr. Ingison's report indicates that she thought plaintiff had at least *some* ability to be reliable, insofar as she rated his ability in that category as being less than "fair" but more than "poor/none."

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[2] In his reply brief, plaintiff misstates the record when he asserts that Dr. Ingison "recommends payment of disability benefits." Br. in Reply, dkt. 14, at 5. Dr. Ingison recommended that if disability benefits were awarded, then they should be payable to a responsible third party because of plaintiff's history of substance abuse and reported inability to manage his finances. AR 272-273.

On the other hand, the mental RFC form that Dr. Ingison completed indicated that a “fair” ability in any category meant that the individual was “seriously limited, but not precluded” from performing the activity. One could argue that someone with less than a “fair” ability to be reliable had essentially no useful ability to function in that area. Moreover, Dr. Ingison endorsed limitations in other categories that suggest that plaintiff would have other problems performing any job on a full time basis, including a less-than-fair ability to deal with work stress or to maintain emotional stability. Because Dr. Ingison’s report reasonably could be interpreted as supporting plaintiff’s claim, the ALJ should have discussed it; his failure to do so leads to the conclusion that his decision is not supported by substantial evidence. *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 the review of the substantiality of the evidence takes into account whatever in the record fairly detracts from its weight.").

For all these reasons, I conclude that this court should remand this case to the commissioner for consideration of Dr. Ingison’s report. In particular, the administrative law judge should account for Dr. Ingison’s report in assessing plaintiff’s impairment severity and mental residual functional capacity absent alcoholism.

III. Dr. Schiffman and Dr. Goldrosen

Plaintiff contends that the ALJ erred by rejecting the opinions of his treating physicians, Drs. Schiffman and Goldrosen, who both concluded that plaintiff has severe functional limitations inconsistent with the ability to work. Plaintiff is incorrect. The ALJ discussed Dr. Schiffman's opinion at length in his decision, determining it was entitled to little weight because Dr. Schiffman's treatment relationship with plaintiff was very brief; his opinion was not adequately supported by detailed clinical notes or descriptions of abnormal findings; and his opinion that plaintiff had chronic undifferentiated schizophrenia was inconsistent with the other medical opinions in the record, including that of Dr. Larrabee. The ALJ also observed that Dr. Schiffman's opinion appeared to be based entirely on plaintiff's self-report, which the ALJ found not credible.

This determination by the ALJ conformed with the applicable regulations. ALJs are to evaluate medical opinions in light of the patient's relationship and length of treatment with the doctor, how well-supported and consistent the opinions are, specialization of the doctor, and other factors. 20 C.F.R. § 416.927(d)(2). A treating doctor's opinion controls only if it is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and . . . not inconsistent with the other substantial evidence." *Id.*; *White v. Barnhart*, 415 F.3d 654, 658 (7th Cir. 2005). The record adequately supports the ALJ's conclusion that Dr. Schiffman's opinion was neither well-documented nor consistent with the other substantial evidence in the record. As the ALJ pointed out, Dr. Schiffman was the

first psychiatrist to conclude that plaintiff has schizophrenia. Perhaps time will reveal that Dr. Schiffman was the first doctor to nail the diagnosis, but the ALJ had sufficient reason to doubt this in light of Dr. Schiffman's lackluster clinical documentation and his brief relationship with plaintiff. This court has no basis to second-guess the ALJ's decision to give little weight to Dr. Schiffman's conclusion that plaintiff is disabled by schizophrenia.

To the same effect, it was not improper for the ALJ to reject the disabling limitations endorsed by Dr. Goldrosen. As the ALJ noted, Dr. Goldrosen indicated on his mental RFC form that plaintiff's alcoholism was his primary impairment and he told the SSA that he thought plaintiff was disabled by alcoholism.

As support for his claim that Dr. Goldrosen thought plaintiff was disabled even in the absence of alcoholism, plaintiff points to notes in the record wherein Dr. Goldrosen indicated that he supported plaintiff's pursuit of disability benefits even after plaintiff had completed alcohol treatment. But these notes establish no more than that there was a conflict in the evidence, which was the ALJ's prerogative to resolve. *Jens v. Barnhart*, 347 F.3d 209, 212 (7th Cir. 2003) (reviewing court "is not allowed to substitute its judgment for the ALJ's by reconsidering facts, reweighing evidence, resolving conflicts in evidence, or deciding questions of credibility.") The ALJ reasonably concluded that Dr. Goldrosen's communications in support of plaintiff's disability claim were entitled to more weight than his office visit notes.

IV. Evaluation of Mental Limitations

Plaintiff devotes a significant portion of his brief complaining that the ALJ did not follow strictly the commissioner's procedure for evaluating mental impairments set forth at 20 C.F.R. § 416.920a.[3] Plaintiff first bemoans that the ALJ failed to make specific findings with respect to plaintiff's degree of limitation in each of the "B" functional categories. He points out that the ALJ merely found that "absent alcohol, the claimant does not have the degree of functional limitations required in the B criteria in order for the claimant to be considered disabled" as opposed to making a specific finding regarding plaintiff's limitations in each of the B categories. However, a commonsensical reading of the ALJ's opinion shows that he had adopted Dr. Larrabee's conclusion that, absent alcohol, plaintiff would have moderate limitations in activities of daily living, social functioning, and concentration, persistence and pace. Although the ALJ could have done a better job documenting the evidence in the record on this point, his analysis comports with 20 C.F.R. § 416.920a. Remand is not necessary to correct what plaintiff contends is a technical error.

In another elevation of form over substance, plaintiff argues that reversal is required because the ALJ's mental RFC finding failed to track each of the expanded work-related areas

[3] Plaintiff also contends that the ALJ did not adhere to the commissioner's procedure for determining whether drug or alcohol abuse is a contributing factor material to the disability determination, as set forth in the SSA's Program Operations Manual System (POMS) at DI 90070.050. However, this is simply a contention that the ALJ improperly weighed the evidence in reaching his conclusion that absent alcoholism, plaintiff's limitations were not disabling. Like many of plaintiff's arguments, his "POMS" argument is beside the point and need not be addressed.

of mental functioning listed on the SSA's Mental Residual Functional Capacity Assessment Form. Plaintiff's law firm first raised this same issue in this court almost five years ago in a case involving a different client. The court didn't buy it then and it's not buying now. *See Jones v. Massanari*, 01-C-0024-C, Oct. 19, 2001 Rep. & Rec., dkt. 21, at 30 ("Although requiring ALJs to use the [Mental RFC] form would seem to promote uniformity in evaluating mental impairments, as noted previously, the Commissioner currently does not demand this documentation"). Plaintiff cites no authority suggesting that the legal landscape has changed since then; accordingly, this court's ruling in *Jones* stands.

So too for plaintiff's argument that, at a minimum, the ALJ's RFC assessment and corresponding hypothetical to the vocational expert should have included the "moderate" limitations found by Dr. Larrabee and adopted by the ALJ. In the *Jones* case and others that followed, this court consistently has rebuffed suggestions by claimants that the ALJ must phrase his RFC in terms identical to his findings with respect to the paragraph "B" criteria. *See, e.g., Heller v. Barnhart*, 03-C-0587-C, May 18, 2004 Rep. & Rec., dkt. 14, at 23-24 (ALJ's failure to include in RFC assessment and corresponding hypothetical the limitations endorsed by state agency physician on MRFC form did not warrant reversal where jobs identified by vocational expert were consistent with state agency physician's conclusion that plaintiff could perform unskilled work), *aff'd* 2005 WL 643360 (7th Cir. Mar. 16, 2005) (unpublished opinion); *Seamon v. Barnhart*, 05-C-0013-C, July 29, 2005 Rep. & Rec., dkt. 11, at 34 ("an administrative law judge is free to formulate his mental residual functional

capacity assessment in terms such as 'able to perform simple routine, repetitive work' so long as the record adequately supports that conclusion") (quoting *Kusilek v. Barnhart*, 2005 WL 567816, *4 (W.D. Wis. March 2, 2005)). Indeed, in *Seamon*, this court spent nearly six pages discussing this issue–even though it was immaterial to the issues at hand–in the obviously futile hope of putting it to rest.[4]

In *Young v. Barnhart*, 2004 WL 1946423 (W.D. Wis. Aug. 30, 2004), *rev'd and remanded*, 2005 WL 1140287 (7th Cir. May 10, 2005), this court sustained a RFC and corresponding hypothetical phrased in terms of types of work rather than vocational limitations, but hinted that it might not do so in the future. *Id*. at *6 (indicating that court would be "less charitable to the commissioner in future cases involving hypotheticals phrased in terms of types of work rather than vocational limitations."). However, in *Seamon*, this court made clear that that language was dicta:

> Accordingly, notwithstanding the red flag hoisted in *Young*, this court should reject plaintiff's challenge to the form of the ALJ's mental RFC finding and focus on its substance namely whether the ALJ's RFC and corresponding hypothetical incorporated all of plaintiff's limitations supported by medical evidence in the record.

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[4] As the court noted,

> [B]ecause the question to what extent the ALJ's mental RFC assessment must 'mirror' credited findings by state agency physicians is one that arises frequently and has been discussed in recent decisions by this court, it is worth addressing now in the hope of offering guidance to the commissioner and future SSI plaintiffs in this court.

Id. at 29.

Seamon, Rep.& Rec. at 34.

Seamon made plain that however symmetrically pleasing it might be for ALJs to phrase their mental RFC assessments so as to track either the commissioner's mental RFC form or the paragraph "B" criteria, this argument is completely devoid of legal merit.

Although plaintiff's attorneys represented the plaintiff in *Seamon*, they nonetheless persist in citing the language from *Young* that this court expressly disavowed in *Kusilek* and *Seamon*. Plaintiff goes so far as to cite the *Seamon* case as *support* for his position without acknowledging those parts of the opinion that undermine his position. For plaintiff's attorneys to raise these issues without acknowledging the contrary authority generated in this court in their previous cases insults the court's intelligence and violates the code of professional conduct. Because the Daley, Debofsky & Bryant law firm cannot take a hint, I will spell it out: if any lawyer from this firm takes this struthious approach to this issue in future disability appeals in this court, then this court will sanction that lawyer and the law firm for violating Rule 3.3(a)(3) of the Illinois Supreme Court's Rules of Professional Conduct. (If for some reason the firm deems it necessary to preserve this issue for appeal, it may do so *tersely* while acknowledging the contrary holdings of this court on this point).

Finally, there is no support for plaintiff's bald assertion that an individual with the "moderate" limitations found by Dr. Larrabee *de facto* would be unable to work. To the contrary, the Court of Appeals for the Seventh Circuit has found that such moderate limitations are not inconsistent with the ability to perform substantial gainful activity. *Jens*,

347 F.3d at 212-13 (affirming ALJ's RFC finding that plaintiff could perform semiskilled work notwithstanding ALJ's finding that plaintiff "often" had deficiencies in concentration, persistence or pace); *Nelson v Apfel*, 210 F.3d 799, 802 (7th Cir. 2000) (claimant who "often" has deficiencies of concentration, persistence or pace not necessarily precluded from engaging in substantial gainful activity).

V. Plaintiff's Remaining Arguments

Plaintiff raises a number of other objections to the ALJ's decision, none of which support reversal. Plaintiff complains that the ALJ's use of the term "low stress" "failed to account for the individualized restrictions Plaintiff had due to his mental conditions." Pltf. Brf. in Supp., dkt. 9, at 38. But even accepting plaintiff's contention that the term "low stress" is somewhat vague, the vocational expert filled in the gaps by explaining that he had determined that a "low stress" job was one that did not require public contact, significant supervision or working closely with coworkers. Apart from those limitations identified by Dr. Ingison, plaintiff has not specified what other "individualized restrictions" he had that would prevent him from performing such jobs.

Plaintiff also attacks the ALJ's credibility finding, arguing that the ALJ improperly discounted his credibility and "treated him with condescension" by doubting plaintiff's assertion that he no longer drank and had been sober for four months. With due deference to plaintiff's sensibilities, he is overreacting by taking offense. For at least five years

preceding the hearing plaintiff was an intractable alcoholic with a history of repeated relapses despite his stated intent–and presumably, genuine desire–to remain sober. The ALJ had good reason to doubt the reliability of plaintiff's assertion that he had stopped drinking.

The only other aspect of the ALJ's credibility finding to which plaintiff objects is the ALJ's suggestion that plaintiff's symptoms from his mood disorder likely would be lessened if plaintiff took his medication and stopped drinking. Plaintiff accuses the ALJ of "playing doctor," characterizing this finding as an improper medical opinion for which the ALJ cited no medical authority. I disagree. Contrary to plaintiff's argument, the ALJ's conclusion about the relationship between plaintiff's symptoms and alcohol was not simply the ALJ's own lay opinion, but was supported by psychiatric reports in the record.

Plaintiff contends that the ALJ erred in a number of other ways, including failing to account for GAF scores in the record showing that plaintiff has moderate-to-serious symptoms, treating his attorney in an inquisitorial manner and relying on a vocational expert who allegedly identified jobs with requirements more demanding than those contained in the hypothetical. Having carefully reviewed plaintiff's arguments and the record, I conclude that none of these objections are valid for the reasons set forth in the commissioner's brief.

VI. Conclusion

Although plaintiff has filed a 43-page brief raising numerous objections to the ALJ's decision, his objections are, with one exception, either unfounded, immaterial or both.

Plaintiff succeeds solely on his claim that the ALJ failed to make clear that he considered the report of the consultative examiner, Dr. Ingison, who made findings that, if credited, could support plaintiff's claim that he suffers from mental impairments that are disabling even when he is sober. Accordingly, this court should reverse the commissioner's decision and remand it to the agency for the issuance of a new decision that takes Dr. Ingison's report into account. Plaintiff is not entitled to reversal or remand on any other contention.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I respectfully recommend that the decision of the Commissioner denying plaintiff Gabriel Huichan's application for supplemental security income be REVERSED AND REMANDED pursuant to sentence four of 42 U.S.C. § 405(g) for the reasons set forth in this report.

Entered this 20th day of March, 2006.

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

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
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Madison, Wisconsin 53701

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U.S. Magistrate Judge

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March 20, 2006

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Re: Huichan v. Barnhart
Case No. 05-C-268-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 April 3, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by April 3, 2006, 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, District Judge