IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JASON PIOTROWSKI,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

OPINION AND ORDER

07-cv-587-jcs

- -

Because Judge Shabaz will be convalescing from shoulder surgery for an extended period, I have assumed administration of the cases previously assigned to him, including this one.

This is an action for judicial review of an adverse decision of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). Plaintiff Jason Piotrowski seeks reversal of the commissioner's decision that he is not disabled and therefore ineligible for Disability Insurance Benefits and Supplemental Security Income under Title II and Title XVI of the Social Security Act, codified at 42 U.S.C. §§ 416(i), 423(d) and 1382(c)(3)(A). Plaintiff contends that the administrative law judge's decision is not supported by substantial evidence because she 1) determined incorrectly that plaintiff's drug and alcohol abuse was

a material contributing factor to his disability; 2) failed to follow the proper analytical procedure for determining which of plaintiff's limitations were the result of drug and alcohol abuse; 3) failed to cite any medical evidence in support of her findings or consult a medical advisor; and 4) did not properly consider the opinions of plaintiff's treating physicians. I find that the administrative law judge properly applied the regulations, evaluating plaintiff's limitations both when he was and was not using alcohol. Because there is substantial evidence in the record of plaintiff's drug and alcohol abuse and his limitations when he was not using substances, it was not necessary for the judge to consult a medical expert. The administrative law judge concluded reasonably that plaintiff would not be disabled if he stopped abusing drugs and alcohol and she properly discounted the opinions of plaintiff's treating physicians. Accordingly, I am denying plaintiff's motion for summary judgment and affirming the administrative law judge's decision.

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

FACTS

A. Background and Procedural History

Plaintiff applied for social security disability benefits on February 7, 2005, alleging that he had been unable to work since December 1, 2003 because of schizophrenia. AR 37. Plaintiff had obtained his general equivalency diploma and had worked as a telephone order

taker and clerk, fast food clerk, housekeeper and bagger. AR 1010-11. Plaintiff also has a history of traffic violations (August 2000 and May and June 2003) and criminal convictions for battery (2005), shoplifting liquor (February 2005), underage drinking (April 2005), disorderly conduct (2005 and 2006), domestic abuse (2006) and criminal damage to property (2006). AR 115-30.

After the local disability agency denied his application initially and upon reconsideration, plaintiff requested a hearing, which was held on October 25, 2006 before Administrative Law Judge Margaret J. O'Grady in Wausau, Wisconsin. Plaintiff was 22 years old on the date of the hearing. AR 1009. The administrative law judge heard testimony from plaintiff, who was represented by a lawyer. AR 1009. She also heard testimony from plaintiff's social worker and a vocational expert. AR 1032. On March 8, 2007, the administrative law judge issued her decision, finding plaintiff not disabled from his alleged onset date through the date of the decision. AR 18-29. This decision became the final decision of the commissioner on August 24, 2007, when the Appeals Council denied plaintiff's request for review. AR 5-7.

B. Medical Evidence

1. July 2004 to August 2005

On July 6, 2004, plaintiff was seen by Randall Ambrosius, a social worker. At that time plaintiff was homeless, drinking heavily and using marijuana. AR 143. Ambrosius diagnosed him with polysubstance abuse and antisocial personality disorder. AR 154. On August 19, 2004, Dr. William Sullivan, a psychiatrist, evaluated plaintiff and diagnosed him with polysubstance abuse, intermittent explosive disorder and antisocial personality disorder. Plaintiff admitted to liberal use of various street drugs. The only drugs he had not tried were ecstasy and heroin. AR 141-142. Sullivan gave plaintiff a global assessment functioning score of 50 and prescribed Depakote for mood control. AR 142. By September, plaintiff had stopped taking the Depakote because he did not want to be influenced by any substances. AR 139-140. In October 2004, Ambrosius closed plaintiff's case because he failed to come to his appointments. AR 133.

On January 20, 2005, plaintiff was seen at the emergency room of St. Michael's Hospital because he had been struck in the head with a baseball following an altercation. AR 177. His lab results were positive for tetrahydrocannabinol (marijuana). AR 174. He was placed in the mental health unit and discharged on January 26, 2005 with diagnoses of paranoid schizophrenia, abuse of dextromethorn (the active ingredient in cough syrup) and antisocial personality disorder. Sullivan noted that plaintiff had overdosed on cough

medication and that his global assessment functioning score was 45. AR 165. Plaintiff was referred to Sullivan and Ambrosius for continuing treatment. AR 165.

On January 31, 2005, plaintiff reported to Ambrosius that he heard voices and that he had a history of polysubstance abuse. AR 145. On February 14, 2005, plaintiff reported abusing alcohol, cough syrup and marijuana. AR 261. In early 2005, plaintiff stopped taking Amplify and Depakote, his prescription medications. AR 291-293.

Sullivan referred plaintiff to the Portage County Department of Health and Human Services for a psychological examination. Amy Trizinski and Terry Kaddatz evaluated plaintiff on April 8, 2005 and diagnosed him with attention deficit hyperactivity disorder. AR 238, 240.

On May 26, 2005, plaintiff went to the emergency room at St. Michael's Hospital complaining of a headache. AR 217. The emergency room doctor concluded that plaintiff's headache was a manifestation of his psychiatric symptoms and prescribed Klonopin. Plaintiff was released and directed to contact Sullivan, his psychiatrist, the next morning. AR 218. Two days later, plaintiff returned to the emergency room complaining of a headache. He was given Toradol, Droperidol and Decadron, none of which relieved his headache. AR 215. Although plaintiff requested a prescription for narcotic medication, he was given Tylenol. AR 215. On May 29, 2005, plaintiff returned to the emergency room complaining of headaches and hearing voices. AR 211. His medications were adjusted, and

he was advised again to see Sullivan. AR 211. On May 31, 2005, plaintiff returned to the emergency room with the same symptoms. That same day, Sullivan saw plaintiff, increased his Zyprexa dosage and prescribed Artane. Sullivan declined to give him pain pills. Plaintiff then caused a disturbance in the parking lot. AR 288.

On June 9, 2005, plaintiff reported to the emergency room and was admitted to the mental health unit. AR 380. Plaintiff was discharged on June 10, 2005 and instructed to continue with outpatient services. AR 354.

On August 8, 2005, plaintiff's social worker, Heather Grassl, completed a professional contact questionnaire for the state agency. AR 99-101. She noted that plaintiff had been frustrated with his psychiatric symptoms. She further noted that plaintiff had threatened his family and their property. Plaintiff had reported to Grassl that he was abusing hard liquor and marijuana.

2. Crossroads group home (September 2005-February 2006)

By September 2005, plaintiff was residing at Crossroads, a group home serving as an alternative to revocation. AR 285. While he was there, his medications were dispensed to him from a locked cabinet by staff. AR 1042. He continued to see Sullivan monthly for medication management. On December 13, 2005, Sullivan noted that plaintiff was doing much better. AR 283. On December 27, 2005, plaintiff reported to the doctor at St.

Michael's Urgent Care that he was not hearing any voices and that his schizophrenia was fairly well controlled. AR 349. Plaintiff obtained his general equivalency diploma during this period. AR 1025.

In January 2006, Sullivan noted that plaintiff was more irritable and non-compliant. However, by February 7, 2006, Sullivan reported that plaintiff was doing very well. Plaintiff did not report using drugs or alcohol at Crossroads. In addition, he had no reported hospitalizations during this time period.

In February 2006, plaintiff moved from Crossroads to independent living. AR 281. Plaintiff's social worker noted that plaintiff was living in an apartment supported by county social services. Plaintiff reported to the county social services medication room twice a week. AR 1043.

3. April 2006 to October 2006

On April 20, 2006, Sullivan indicated that plaintiff reported a marked reduction in auditory hallucinations and was feeling calmer, sleeping most nights and having fewer headaches. AR 279. Also in April 2006, plaintiff saw a neurologist, Pamela Gedney, for his headaches. AR 324-327. Plaintiff reported that he was no longer using alcohol or drugs. Gedney noted that plaintiff's neurological examination was normal and prescribed Nadolol

and Imitrex for his headaches. On May 2006, plaintiff returned to see Gedney and reported that when he used Imitrex, it relieved his headaches. AR 312.

On June 13, 2006, plaintiff was hospitalized on the psychiatric unit at St. Michael's Hospital. He was diagnosed with paranoid schizophrenia, given a global assessment functioning score of 40 and his medications were adjusted. AR 517. Upon discharge, plaintiff was doing well. AR 514.

On July 18, 2006, plaintiff was transported to the emergency room by ambulance and admitted to the psychiatric unit. AR 451. Reportedly, he had taken four boxes of chorpheniramine (an active ingredient in cold medicine). AR 438. Sullivan prescribed Geodon, an anti-psychotic drug, for plaintiff. When he was discharged on July 20, 2006, plaintiff was doing better. AR 436. However, on August 8, 2006, plaintiff was readmitted to the psychiatric unit because he was suicidal. Plaintiff's Geodon dosage was increased. He was discharged on August 10, 2006 and denied ongoing auditory hallucinations or suicidal thoughts. AR 705.

When Sullivan saw plaintiff on August 15, 2006, he noted that plaintiff appeared to be abusing street substances again. AR 276. Sullivan cautioned plaintiff against using any street substance because his probation could be revoked. AR 276. On August 24, 2006, plaintiff saw Sullivan and requested narcotic pain relief for his headaches. Sullivan denied his request. AR 275.

On September 5, 2006, plaintiff reported to the emergency room after abusing Dextromethorphan. AR 613. He was admitted with a diagnosis of drug-induced psychosis related to Dextromethorphan and chronic paranoia schizophrenia. AR 611-612. He was discharged on September 7, 2006 but was readmitted on October 7, 2006 because of Dextromethorphan intoxication. AR 829-832. At that time, his global assessment functioning score was 35 and he tested positive for opiates. AR 826, 849. Plaintiff admitted that after he was discharged from Crossroads, he had been taking morphine that he had got from a friend. AR 826.

In September 2006, plaintiff returned to see Gedney, complaining of continued headaches. He told her that he used a variety of substances to get high. AR 974. Gedney advised plaintiff that if he continued to use these substances to get high, he would be undermining his chances of improving his headache condition. AR 975. On October 30, 2006, plaintiff saw Dr. Todd Rave for his headaches. Rave noted that plaintiff's headaches had improved with Imitrex and that his examination was normal. AR 825.

4. Residual functional capacity assessments

On November 20, 2006, Rave completed a physical residual functional capacity questionnaire for plaintiff. AR 811. Although Rave did not report plaintiff's functional limitations, he indicated that plaintiff's headaches would frequently interfere with the

attention and concentration needed to perform simple work tasks. He also noted that plaintiff was unable to perform low stress work because of his hallucinations. AR 812.

On October 24, 2006, Sullivan completed a mental impairment questionnaire concerning plaintiff's ability to work. AR 797-803. Sullivan concluded that plaintiff had schizophrenia that met Listing 12.03 (schizophrenia). After indicating that he had seen plaintiff every two to four weeks for about two years and daily during hospital admissions, Sullivan found that plaintiff had extreme limitations of daily living and social functioning and four or more episodes of decompensation. AR 802. Sullivan indicated that plaintiff did not have the needed mental abilities and aptitudes to do unskilled work. AR 800-01. Sullivan noted on the form that plaintiff's substance abuse did not contribute to any of plaintiff's limitations. AR 803.

Dr. Maureen Leahy, a resident psychiatrist for the Portage County Department of Health and Human Services, saw plaintiff one time on October 25, 2006 and reviewed his medical records. AR 807. Leahy completed a mental impairment questionnaire for plaintiff on November 20, 2006. She listed plaintiff's diagnoses as dysthymia disorder and attention deficit disorder combined, intermittent explosive disorder, social personality disorder, polysubstance dependence and chronic and differentiated schizophrenia. She noted that plaintiff continued to have psychiatric symptoms despite aggressive treatment. Leahy concluded that plaintiff had marked restrictions of daily living and social functioning,

extreme deficiencies of concentration, persistence or pace and marked levels of decompensation that met the listing for mental disorders. AR 809. Leahy indicated that plaintiff would miss four days a month because of his illness. AR 810.

5. State consulting physicians

On April 11, 2005, state agency consulting psychologist William Merrick completed a psychiatric review technique form for plaintiff, finding that he had schizophrenia, personality disorder and substance addiction disorder. AR 190. He concluded that plaintiff had no restrictions of activities of daily living and no episodes of decompensation but that he had moderate difficulties in maintaining social functioning and concentration, persistence or pace. AR 200. He further found that evidence did not establish that he meet the "C" criteria for schizophrenia. AR 201. Merrick also completed a mental residual functional capacity assessment for plaintiff and found that plaintiff had no marked limitations in any mental abilities related to work. AR 186. He concluded that plaintiff's condition did not preclude the performance of simple, low stress, routine competitive work.

On October 12, 2005, Dr. Rachel Pallen saw plaintiff at the request of the Social Security Determination Bureau. AR 155-61. Plaintiff told her that he had not used alcohol or marijuana within the past month or two because he had been in jail. Pallen diagnosed plaintiff with polysubstance abuse, schizophrenia (paranoid type) and antisocial personality

disorder. She concluded that his prognosis was very good and that his hallucinations should diminish over time as long as he genuinely worked with a psychiatrist. Pallen found that plaintiff had the ability to understand, remember and carry out simple instructions, respond appropriately to supervisors and coworkers and maintain concentration, attention and an adequate work pace. She noted that he would have limited abilities to withstand routine work stresses and to adapt to changes. AR 161. Pallen also interviewed plaintiff's social worker, Heather Grassl, who indicated that noncompliance with medication appeared to be the primary factor for plaintiff's poor progress. AR 160.

C. Hearing Testimony

Plaintiff testified that he had a general equivalency diploma and had worked at Airway Tents in the summer of 2004 for three days. He quit the job because he was hearing too many voices. AR 1011. Plaintiff testified that he was taking Trihexyphene, Nadalol, Zonegran, Rozeram and Clozaril and that the only medication with side effects was Clozaril, which made him tired and his legs feel weird. AR 1013-14.

Plaintiff testified that he took care of his personal needs, cooked, washed dishes, did laundry and cleaned his apartment. He also spent time with his neighbor and a friend he had met at Crossroads. AR 1014. He testified that he had not drunk alcohol for a month and a half and had stopped using marijuana because he did not want to go to jail. AR 1015-

16, 1024. He also testified that he had been hospitalized for overdosing on cold medicine, which he took to get rid of the voices and headaches and to get high. AR 1019.

Plaintiff further testified that he had previously been on probation, confined in jail and had lived at Crossroads for six months as an alternative to jail placement. AR 1019. In response to questions from the administrative law judge, plaintiff testified that at times he had stopped taking certain prescribed medications, including Dekapote and Amplify. AR 1020. He admitted that he had taken morphine and Vicodin for his headaches but that neither had been prescribed for him. Plaintiff denied taking the illegal drug phencyclidine even though he had tested positive for the drug on one occasion. AR 1021.

Plaintiff's social worker, Heather Grassl, testified that she had worked with plaintiff since January 2005. AR 1032. She stated that she sees him weekly, schedules his appointments and makes sure that he takes care of himself and his apartment. AR 1033. She testified that plaintiff could make simple decisions but that he could not meet the normal standards of cleanliness expected in the workplace or handle work place stress. AR 1035-36. Grassl testified that plaintiff had been treated as an outpatient by Sullivan until August 2006 and was seen as an inpatient by Sullivan in September 2006. AR 1039.

Michael Guckenberg testified as a neutral vocational expert. AR 1044. The administrative law judge asked Guckenberg whether there were jobs that could be performed by an individual with plaintiff's age, education and work experience who could perform

routine, repetitive, simple, non-complex unskilled work with no public contact and limited interaction with coworkers. AR 1045. The expert testified that there were jobs in the economy that this individual could perform, including housekeeping, hand packaging and cleaning. AR 1046.

D. The Administrative Law Judge's Decision

In reaching her conclusion that plaintiff was not disabled, the administrative law judge performed the required five-step sequential analysis. See 20 C.F.R. § 404.1520. At step one, she found that plaintiff had not engaged in substantial gainful activity since his alleged onset date of December 1, 2003. At step two, she found that plaintiff had severe impairments of substance abuse, dextromethorphan abuse, schizophrenia, antisocial personality disorder, intermittent explosive disorder, dysthymia, attention deficit hyperactivity disorder, psychalgia and headaches. AR 21.

At step three, the administrative law judge found that plaintiff's schizophrenia and anti-social personality disorders met the criteria of Listing 12.03, noting that he suffered from severe paranoia, hearing voices, headaches and temper control. AR 21-22. She also determined that as a result, plaintiff's substance abuse met the criteria set forth in Listing 12.09 (requiring only that listing for other mental disorder is met). 20 C.F.R. Part 404, Subpart P, Appendix 1.

The administrative law judge found substantial evidence in the record demonstrating plaintiff's noncompliance with his prescribed treatment during the period relevant to the decision. 20 C.F.R. §§ 404.1520 and 416.920 (must follow prescribed treatment if it would restore ability to work). She wrote that his noncompliance was causally related to his marked difficulties in maintaining concentration, persistence and pace and his episodes of decompensation. The administrative law judge also noted that the substance abuse combined with his mental impairments prevents plaintiff from completing a routine, interacting acceptably with coworkers and the public, maintaining regular attendance and remaining on task. In support of her findings, she detailed plaintiff's substance abuse, diagnoses and hospitalizations described in the treatment notes from Sullivan, St. Mary's Hospital and the Portage County Department of Health and Human Services. AR 22.

The administrative law judge concluded that if plaintiff stopped his substance abuse, he would continue to have a severe impairment or combination of impairments. However, she stated that plaintiff would not have the degree of functional limitation necessary to satisfy the "B" criteria of the listings. The administrative law judge noted that while plaintiff was at Crossroads from September 2005 through February 2006, he was sober and complying with his treatment. She also noted that at a December 27, 2005 urgent care visit, plaintiff reported that he was not hearing voices and that his schizophrenia was well-controlled. The administrative law judge concluded that the record established that when

plaintiff was sober and not abusing drugs, he could control the symptoms of his psychological disorders with prescription medication. AR 26. Specifically, the administrative law judge stated:

> During his period of compliance any difficulties experienced with concentration, persistence and pace were not so great that they interfered with his ability to keep regularly scheduled appointments, obtain a GED, care for basic needs, maintain or participate in activities that interested him, and at least minimally interact with others as needed.

The judge noted that her determination was consistent with the October 2005 findings of Pallen, who concluded that plaintiff had the ability to understand, remember and carry out simple instructions; respond appropriately to supervisors and coworkers; and maintain concentration, attention and adequate work pace. The administrative law judge then found that plaintiff's substance and dextromethorphan abuse were contributing factors material to the finding of disability. AR 25-26.

At step four, the administrative law judge determined that absent substance abuse, plaintiff retained the residual functional capacity necessary to perform unskilled work at any exertional level provided that it was low stress, required only simple repetitive tasks, did not involve any contact with the general public and required only limited interaction with co-workers. AR 26. In making this determination, the administrative law judge considered the opinions of plaintiff's physicians but did not give them controlling weight. AR 26.

Although the administrative law judge agreed that Sullivan was a specialist and had a long-term relationship with plaintiff, she found that his progress notes contained little objective medical evidence to support the extreme mental limitations that he noted in the check-list questionnaire. She also found that plaintiff's statements to Sullivan did not support such extreme functional limitations. The administrative law judge concluded that the treatment records showed that plaintiff demonstrated significant symptomatic improvement when he complied with treatment, but when he abused drugs and alcohol and failed to comply with treatment, his symptoms significantly worsened.

The administrative law judge noted that Leahy's opinion was not accompanied by a mental status examination and did not cite any supporting clinical findings. The administrative law judge further found that the evaluation relied almost entirely on plaintiff's statements, which she did not find entirely credible. AR 26. Similarly, the administrative law judge gave little weight to Rave's opinion that plaintiff's headaches would interfere frequently with his attention and concentration because he did not complete a physical residual functional capacity questionnaire concerning plaintiff's functional limitations. She noted that Gedney's notation that plaintiff's substance abuse was interfering with the treatment of his headaches did not support Rave's opinion.

Additionally, the administrative law judge noted that records from St. Michael's Hospital showed that plaintiff continually abused coricidin, morphine and oxycontin. She

found that this information raised serious questions concerning the significance of plaintiff's low global assessment of functioning scores. AR 27. Specifically, the administrative law judge wrote that:

> This is true both with respect to claimant's behavior during the time period that each particular GAF score was assessed and with respect to the credibility of the information that claimant conveyed to Dr. William Sullivan regarding the functional limitations caused by his mental impairments.

The administrative law judge concluded that plaintiff's accounts of his mental impairments lacked credibility because he had been charged with multiple criminal violations, including underage consumption of alcohol, theft of alcohol, criminal damage to property, disorderly conduct and disobeying a traffic officer. The judge noted that plaintiff's criminal activity demonstrated his ability to perpetuate deceit and dishonesty over an extended period of time and that he had not been completely candid about his substance abuse. AR 27. She also discounted plaintiff's subjective complaints of pain because of the lack of objective findings, noting that there were no additional records submitted from Gedney and Rave to show any loss of function or sensory, reflex or neurological problems.

The administrative law judge found plaintiff had no past relevant work but had performed work as a telephone order taker or clerk, fast food cook, housekeeper and bagger. The expert testified that this work as described by plaintiff was unskilled sedentary and light work. Relying on the vocational expert's testimony, the administrative law judge found that

absent substance abuse, plaintiff was able to perform a significant number of jobs including housekeeper, hand packer and janitor. AR 28. The expert testified that plaintiff's nonexertional limitations would not prevent him from fulfilling the requirements of these occupations. In light of this finding, the administrative law judge concluded that plaintiff's substance use was a contributing factor material to the determination of disability. Accordingly, she found that plaintiff was not disabled from his alleged onset date through the date of her decision. AR 29.

OPINION

A. Standard of Review

The standard by which a federal court reviews a final decision by the commissioner is well settled: the commissioner's findings of fact are "conclusive" so long as they are supported by "substantial evidence." 42 U.S.C. § 405(g). 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), the court cannot reconsider facts, reweigh the evidence, decide questions of credibility or otherwise substitute its own judgment for that of the administrative law judge regarding what the outcome should be. Clifford v. Apfel, 227 F.3d 863, 869 (7th Cir. 2000). Thus, where conflicting evidence allows reasonable minds to differ

as to whether a claimant is disabled, the responsibility for that decision falls on the commissioner. Edwards v. Sullivan, 985 F.2d 334, 336 (7th Cir. 1993). Nevertheless, the court must conduct a "critical review of the evidence" before affirming the commissioner's decision, id., and the decision cannot stand if it lacks evidentiary support or "is so poorly articulated as to prevent meaningful review." Steele v. Barnhart, 290 F.3d 936, 940 (7th Cir. 2002). When the administrative law judge 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).

A. Substance Abuse

Plaintiff asserts that the administrative law judge incorrectly applied the law and erroneously found that his alcohol and drug abuse was a material contributing factor to his disability. In support of this assertion, he claims that the administrative law judge 1) did not find him disabled before making this determination; 2) failed to articulate a basis in the record for her conclusion that plaintiff abused drugs and alcohol or that his substance abuse had more than a minimal impact on his ability to work; 3) did not consult a medical advisor before making this determination; and 4) failed to conduct the "differentiating analysis" required by the regulations.

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 Social Security Administration 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).

Plaintiff argues that the administrative law judge failed to follow this regulation because she did not first find plaintiff disabled. The administrative law judge found that plaintiff's impairments, including schizophrenia, substance abuse and anti-social personality disorder, met the criteria set forth in Listing 12.03 (mental disorders) and 12.09 (substance abuse disorder). AR 21. The administrative law judge then found absent the substance abuse, plaintiff's schizophrenia would not meet the listed impairment because there was no evidence that he satisfied the "B" criteria of listing 12.03. This analysis was consistent with the regulation.

Plaintiff argues that the administrative law judge played doctor when she determined that plaintiff's substance abuse was material to the finding of disability because there is no evidence in the record supporting this finding. I agree that there is no medical opinion in the record that specifically states that plaintiff's substance abuse was a factor material to his disability or details the effect that substance abuse has on plaintiff's mental impairments. Plaintiff argues that in the absence of such evidence, the administrative law judge's determination of this question reflects merely her own lay opinion and is insufficient to

support her decision. Plaintiff cites Emergency Teletype, No. EM-96200, issued August 30, 1996, by the Social Security Administration. Dkt. #7, Attachment #1, 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 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.

Dkt. #7, Appx #1 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. The teletype does not impose a requirement upon the administrative law judge to call a medical or psychological consultant or advisor to testify regarding the materiality issue.

Although plaintiff argues that the administrative law judge should have called a medical expert, plaintiff's attorney represented him at the hearing and did not request the

testimony of a medical expert. When a plaintiff is represented by an attorney, the administrative law judge is entitled to assume that the attorney will make a request for a consultative expert if he or she deems it important. Glenn v. Secretary of Health and Human Services, 814 F.2d 387, 391 (7th Cir. 1987) (administrative law judge can assume that applicant represented by counsel is "making his strongest case for benefits"). Further, respondent correctly notes that the administrative law judge must consult a medical expert only if she concludes that the evidence before her is insufficient to make a determination. 20 C.F.R. § 416.927(f)(2)(iii) (administrative law judge may ask for opinion from medical expert on nature and severity of impairment and on whether impairment equals listed impairment).

The evidence before the administrative law judge was adequate to allow her to decide the materiality of plaintiff's alcohol abuse despite the lack of a medical opinion on that issue. First, contrary to plaintiff's assertions, his substance abuse problem was well-documented. Sullivan notes during the entire time that he treated plaintiff, except while plaintiff was residing at Crossroads, plaintiff was abusing alcohol and illegal substances. From July 2004 until at least June 2005, plaintiff reported that he was drinking heavily, liberally using street drugs (including marijuana) and abusing cough syrup. On August 8, 2005, Grassl reported that plaintiff was abusing alcohol and hard drugs. On July 18, 2006, plaintiff overdosed on chlorpheniramine. When plaintiff was hospitalized in August 2006, Sullivan noted that he

suspected that plaintiff was using street drugs. On September 5, 2006 plaintiff was hospitalized after abusing dextromethorphan, and he reported to the doctors that he had been getting high. Sullivan had diagnosed plaintiff with polysubstance abuse. At the hearing, plaintiff testified that he had a history of substance abuse.

In conformance with the regulation, the administrative law judge properly addressed the evidence in the record to determine whether plaintiff would be disabled if he were not abusing substances. She compared plaintiff's symptoms when he was sober and residing at Crossroads from September 2005 through February 2006 to his symptoms before and after that period. The administrative law judge concluded that when plaintiff was sober and compliant with treatment, he did not have marked difficulties with concentration, persistence and pace and that he was able to take care of his personal needs and obtain his general equivalency diploma.

Plaintiff criticizes the administrative law judge for relying on his noncompliance with treatment and argues that she did not follow the regulations when finding that plaintiff failed to comply with treatment. 20 C.F.R. §§ 404.1530(a) and 416.930. Although the administrative law judge discusses plaintiff's noncompliance with treatment, she did not give this as a reason for discounting his subjective complaints and finding him not disabled. Rather, the administrative law judge found plaintiff not disabled because his substance abuse was a factor material to his disability. Her discussion of plaintiff's noncompliance with

treatment merely supported her conclusion that plaintiff's substance abuse was a material factor affecting his impairments. In any event, in her discussion of plaintiff's substance abuse the administrative law judge thoroughly addressed the question whether treatment would have restored plaintiff's's ability to work. The administrative law judge also found plaintiff refused treatment when he was intoxicated or high. This is not the type of acceptable reason anticipated in the regulations. 404.1530(c) and 416.930(c). Further, plaintiff has not offered any reason for refusing treatment.

Substantial evidence in the record supports the administrative law judge's finding that plaintiff's substance abuse was a material factor in her finding that he was disabled. Notably, Sullivan's treatment notes during the time period that plaintiff was residing at Crossroads and not abusing substances show that plaintiff's symptoms of hearing voices and headaches were neither as severe or frequent. While at Crossroads, plaintiff was able to take care of his personal needs, obtain his general equivalency diploma and make friends. When he was sober, he was not hospitalized nor charged with any crimes. Pallen found that in the same period that plaintiff was doing well.

In April 2005, Merrick found that plaintiff did not have marked limitations in the mental abilities required for work and that he could perform simple, low stress routine competitive work. The record indicates that plaintiff was using drugs and alcohol in early 2005 and stopped taking his medications. Plaintiff's mental health symptoms substantially

increased in May 2005 when he went to the emergency room for severe headaches. Although the administrative law judge gave plaintiff the benefit of the doubt and did not adopt Merrick's opinion that plaintiff was able to work while he was reportedly using substances, it was reasonable for her to conclude that plaintiff would be able to work when he was not using substances. Pallen's October 2005 opinion also supports the administrative law judge's conclusion. Pallen found that plaintiff's prognosis was good and that he was not limited in his ability to work except in the areas of withstanding routine work stresses and adapting to change. At the time he saw Pallen, plaintiff was residing at Crossroads and told Pallen that he had not used alcohol or marijuana during the past month or two.

In contrast, before and after plaintiff's period of sobriety, the administrative law judge found that plaintiff's symptoms were more severe. Medical evidence for these periods show that plaintiff had increased symptoms, substance abuse and hospitalizations. Between July 2004 until at least June 2005, plaintiff was hospitalized in the mental health unit at St. Michael's Hospital twice and seen in the emergency room numerous times because of hearing voices and headaches. He had tested positive for marijuana and overdosed on cough syrup. On February 14, 2005 plaintiff reported to his social worker that was abusing alcohol, cough syrup and marijuana. In June 2006, after his release from Crossroads, he was hospitalized for an exacerbation of his paranoid schizophrenia. On July 18, 2006 plaintiff was transported to the emergency room by ambulance and admitted to the psychiatric unit

because he had overdosed on cold medicine. On August 8, he was readmitted to the psychiatric unit because he was suicidal. Sullivan suspected plaintiff was abusing street substances. On September 5, 2006 and October 7, 2006 plaintiff was hospitalized because of dextromethorphan abuse.

There is substantial evidence in the medical record from which the administrative law judge reasonably could conclude that plaintiff's substance abuse affected his mental impairments, even in the absence a medical opinion to that effect. Kendrick v. Shalala, 998 F. 2d 455, 458 (7th Cir. 1993) ("How much evidence to gather is a subject on which district courts must respect the Secretary's reasoned judgment"). Because the administrative law judge properly considered whether plaintiff would still be disabled if he was not a substance abuser, remand is not warranted. Kangail v. Barnhart, 454 F.3d 627, 628 (7th Cir. 2006).

B. Physician's Opinions

Plaintiff contends that the administrative law judge did not give the proper weight to the opinions of Sullivan, Leahy and Rave. Although an administrative law judge must consider all medical opinions of record, she is not bound by those opinions. Haynes v. Barnhart, 416 F.3d 621, 630 (7th Cir. 2005). "[T]he weight properly to be given to testimony or other evidence of a treating physician depends on circumstances." Hofslien v.

Barnhart, 439 F.3d 375, 377 (7th Cir. 2006). When a treating physician's opinion is well supported and no evidence exists to contradict it, the administrative law judge has no basis on which to refuse to accept the opinion. Id.; 20 C.F.R. § 404.1527(d)(2). When, however, the record contains well-supported contradictory evidence, the treating physician's opinion "is just one more piece of evidence for the administrative law judge to weigh," taking into consideration the various factors listed in the regulation. Id. Among these factors are how often the treating physician has examined the claimant, whether the physician is a specialist in the condition claimed to be disabling and how consistent the physician's opinion is with the evidence as a whole, and other factors. 20 C.F.R. § 404.1527(d)(2). An administrative law judge must provide "good reasons" for the weight he gives a treating source opinion. Id. He also must base his decision on substantial evidence and not mere speculation. White v. Apfel, 167 F.3d 369, 375 (7th Cir. 1999).

Because Sullivan was plaintiff's treating psychiatrist for a long period of time, the administrative law judge gave careful consideration to the mental impairment questionnaire that Sullivan completed. Sullivan stated that plaintiff had extreme limitations of daily living and social functioning, four or more episodes of decompensation and did not have the necessary mental abilities and aptitudes to do unskilled work. The administrative law judge found that Sullivan's progress notes contained little objective medical evidence to support these extreme functional limitations.

Sullivan also noted that plaintiff's substance abuse did not contribute to any of plaintiff's limitations. However, the administrative law judge did not find this opinion persuasive because treatment records showed that plaintiff had demonstrated significant symptomatic improvement when he was not using drugs or alcohol but significant exacerbations during periods of abuse. Prior to his stay at Crossroads in September 2005, plaintiff was hospitalized twice and seen numerous times in the emergency room because of hearing voices and headaches. During this period, he reported abusing alcohol and illegal substances. Between June 13, 2006 until October 2006 indicate that plaintiff's symptoms were exacerbated by his abuse of cough syrup and illegal drugs. Plaintiff was hospitalized four times because his substance abuse had increased his symptoms.

The administrative law judge found reasonably that plaintiff's own statements concerning his activities when he was not abusing substances did not support the extreme functional limitations assessed by Sullivan. Plaintiff testified that he was able to take care of his personal needs, cook, wash dishes, do laundry and clean his apartment. He also testified that he had obtained his general equivalency diploma and that he spent time with his neighbor and a friend he had met at Crossroads. While plaintiff was at Crossroads and sober, his schizophrenia was well controlled.

Unlike Sullivan, Leahy and Rave were not plaintiff's treating physicians and their opinions were not entitled to controlling weight. 404.15327(d) and 416.927(d). The

administrative law judge noted that Leahy formed her opinion after only one 30-minute evaluation. Plaintiff argues that this is incorrect because Leahy also based her opinion on a review of the medical record. However, the administrative law judge rejected Leahy's opinion because it was not accompanied by a report of a mental status examination, did not cite any clinical findings in support of her conclusions and relied almost entirely on plaintiff's subjective statements, which she found not credible. It is well-settled that an administrative law judge may disregard a medical opinion premised on the claimant's self-reported symptoms if the administrative law judge has reason to doubt the claimant's credibility. Diaz v. Chater, 55 F.3d 30 0, 307 (7th Cir. 1995) (administrative law judge could reject portion of physician's report based upon plaintiff's own statements of functional restrictions where administrative law judge found plaintiff's subjective statements not credible); Mastro v. Apfel, 270 F.3d 171, 177-78 (4th Cir. 2001) (affirming administrative law judge's disregard of treating physician's opinion because it "was based largely upon the claimant's self-reported symptoms" and was not supported by the objective medical evidence); Morgan v. Commissioner of the Social Security Administration, 169 F.3d 595, 602 (9th Cir. 1999) (physician's opinion of disability premised to large extent on claimant's own accounts of symptoms and limitations may be disregarded where those complaints have been properly discounted).

The administrative law judge found plaintiff's subjective complaints lacked credibility because his criminal activity demonstrated his ability to perpetuate deceit and dishonesty over an extended period of time and plaintiff had been less than candid about his substance abuse. She found also that plaintiff's subjective complaints of pain were not supported by objective medical evidence from Gedney and Rave. It was not patently wrong for the administrative law judge to conclude that plaintiff's accounts of his mental impairments lacked credibility. Therefore, it follows that she could reject Leahy's opinion based on those accounts.

The administrative law judge noted that Rave did not assess plaintiff's functional limitations and only summarily concluded that his headaches would interfere with his ability to work. Further, the administrative law judge wrote that Gedney's prior treatment notes indicated that plaintiff's substance abuse was interfering with the treatment of his headaches. These findings were well-founded. Plaintiff saw Rave only one time and his examination findings were normal. Rave also found plaintiff's headaches had improved with Imitrex. Therefore, it was reasonable for the administrative law judge to infer that plaintiff's headaches would not interfere with his ability to work if he were not using illegal substances.

In sum, the administrative law judge provided good reasons supported by substantial evidence for not giving controlling weight to the opinions of Leahy, Sullivan and Rave.

C. Residual Functional Capacity

Plaintiff argues that in determining plaintiff's residual functional capacity, the administrative law judge failed to incorporate all of plaintiff's mental limitations as assessed by the state consulting physicians. The determination of residual functional capacity is an assessment of what work-related activities plaintiff can perform despite her limitations. 20 C.F.R. § 404.1545(a)(1). It must be based on all the relevant evidence in the record. Id.

After finding that plaintiff's substance abuse was a material factor contributing to his disability, the administrative law judge found that if plaintiff stopped his substance abuse he could perform unskilled work at any exertional level that is low stress, requires only simple repetitive tasks and does not involve any contact with the general public and only limited interaction with coworkers. This was consistent with the opinions of both state agency consulting physicians. Although Merrick found that plaintiff had moderate difficulties in certain areas, he concluded that plaintiff could perform simple, low stress, routine competitive work. Pallen also found that plaintiff had the ability to understand, remember and carry out simple instructions, respond appropriately to supervisors and co workers and maintain concentration, attention and an adequate work pace. Plaintiff testified that he took care of his personal needs, cooked, washed dishes, did laundry and cleaned his apartment. Accordingly, the administrative law judge did not err in formulating her residual

functional capacity assessment and relying on the resulting testimony of the vocational expert.

ORDER

IT IS ORDERED that the decision of defendant Michael J. Astrue, Commissioner of Social Security, is AFFIRMED and plaintiff Jason Piotrowski's appeal is DISMISSED. The clerk of court is directed to enter judgment and close this case.

Entered this 21st day of April, 2008.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge