

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

DARRIN J. DEPERRY,

Plaintiff,

OPINION AND ORDER

v.

19-cv-054-wmc

ANDREW M. SAUL, Commissioner of
Social Security,

Defendant.

Pursuant to 42 U.S.C. § 405(g), plaintiff Darrin J. Deperry seeks judicial review of a final determination that he was not disabled within the meaning of the Social Security Act. Specifically, Deperry raises three bases for remand: (1) the administrative law judge (“ALJ”) erred in failing to account for mental health limitations in Deperry’s residual functional capacity (“RFC”); (2) the ALJ erred in failing to consider the opinion of Deperry’s treating physician, Dr. Nathan Schoeppach; and (3) the ALJ failed to account for length of bathroom breaks in posing hypotheticals to the vocational expert.¹ For the reasons that follow, the court rejects plaintiff’s grounds for remand and will affirm the denial of benefits.

¹ In his opening brief, plaintiff also argued that the ALJ failed to resolve a conflict between the VE’s testimony that the identified jobs frequent reaching (without reference to direction of reaching) and the RFC’s limitation to occasional reaching overhead. (Pl’s Opening Br. (dkt. #9) 8-9.) However, plaintiff dropped this argument in his reply brief.

BACKGROUND²

A. Overview of Claim

Plaintiff Darrin J. Deperry applied for supplemental social security income on March 6, 2015, claiming an alleged disability onset date of January 1, 2014. With a birth date of June 10, 1968, Deperry was 46 years-old when he filed his application, putting him in the “younger individual” category. *See* 20 C.F.R. § 416.963. Deperry has not engaged in substantial gainful activity since his application date; indeed, Deperry testified at the hearing in front of the ALJ that he last worked as a plumber in 2008. He claimed disability based on lupus, rheumatoid arthritis, stomach condition, chronic alcohol dependence, and bipolar disorder. (AR 79.)

B. ALJ’s Decision

ALJ Micah Pharris held a video hearing on January 16, 2018, at which Deperry appeared personally and by counsel. As of the alleged onset date, the ALJ found that Deperry suffered from the following severe impairment: lupus; avascular necrosis of the bilateral hips and shoulders, status/post left hip replacement; chronic obstructive pulmonary disease; and colitis and inflammatory bowel disease. (AR 20.)³ However, the ALJ found that Deperry’s mental impairments did *not* constitute a severe impairment.

As for the latter finding, the ALJ concluded that Deperry had only mild limitations

² The following facts are drawn from the administrative record, which can be found at dkt. #7.

³ In so finding, the ALJ concluded that Deperry’s hypertension, acute supraventricular tachycardia and acute drug eruptions were not severe impairments, because they were all controlled or fully treated by medication. Deperry does not challenge this finding on appeal.

with respect to the four paragraph B broad functional areas, relying on the opinions of Deperry's treating therapist, Duane R. Majeres, M.S. Majeres completed a "Medical Statement Concerning Depression with Anxiety, OCD, PTSD or Panic Disorder for Social Security Disability Claim," and he also testified at the hearing with the ALJ. (AR 642-645 (12/4/17 form); AR 62-70 (hearing testimony).) In particular, the ALJ noted in his opinion that "once [DePerry] became sober in 2017, his treating psychologist, Mr. Majeres opined at 16F [his medical statement] that he did not have severe mental issues and that all work related limitations would be physical," and specifically marked "not significantly impaired" for all categories of work limitations related to psychiatric state. (AR 20; AR 643.) Consistent with that written statement, Majeres further testified at the hearing that DePerry's mental health issues had been improving over a two-year period, with "absolute cessation of alcohol in 2017," and "[w]hile it is true that claimant's mental impairments may have been severe at the protective filing date, the symptomology improved to be nonsevere within a year and by January 2017, the date of complete sobriety, they were a total non factor." (AR 21.)⁴ The ALJ also relied on Deperry's testimony and the function reports that he completed, indicating that his mental health issues had no impact on his activities of daily living. (*Id.*)

In contrast, the ALJ placed little weight on the state agency psychological consultants, including Eric Edelman, Ph.D., who wrote in a form dated June 1, 2015, that Deperry had moderate limitations in maintaining concentration persistence and pace (AR

⁴ While giving weight to these mental health opinions, the ALJ rejected Majeres's opinion that Deperry would miss four or more days a month of work due to his *physical* impairments, because that fell outside his expertise as a psychologist. (AR 21-22.)

84), and Susan Danahoo, Psy.D., who wrote the same in a form dated October 28, 2015 (AR 98). The ALJ discounted both opinions because they had relied on a “consultative examination opinion” by Marcus P. Desmonde, Psy.D., dated April 15, 2015, which purported to find, among other things, that Deperry “appears capable of understanding simple instructions, but may have difficulty carrying out tasks with reasonable persistence and pace.” (AR 374.) In placing little weight on his opinion, the ALJ explained that Desmonde’s findings are “inconsistent with the longitudinal record after the protective filing date,” specifically referencing Majeres’ opinion as Deperry’s treating therapist. (AR 21.)

As for DePerry’s physical impairments, the ALJ placed only little weight on the opinions of the state agency medical consultants, who concluded that Deperry could perform medium exertional level work, finding that those opinions failed to account for Deperry’s more recently diagnosed avascular necrosis of the hips and shoulders and bowel issues. (AR 30.) The ALJ also gave no weight to “Exhibit 15F,” which is “Medical Statement Regarding Lupus for Social Security Disability Claim,” dated December 12, 2017, and completed by plaintiff’s treating physician, Nathan R. Schoepach, M.D. (AR 634-37.) In this report, Schoepach concluded that Deperry could only work 2-4 hours in a workday, and would be limited to sitting and standing for no more than 30 minutes at a time, among other restrictions. (AR 636.) The ALJ relied “in particular on the progress note at Exhibit 13F/20, [indicating] the pain issues pertain[ed] to the avascular necrosis [rather] than to the lupus. The claimant’s orthopedic notes and exam findings are more consistent with light exertional work.” (AR 30.)

Based on these findings of fact, the ALJ determined that Deperry had the residual functional capacity (“RFC”) to perform light work, with additional, physical limitations like “only occasionally reach[ing] overhead bilaterally” and “work[ing] indoors in a work environment with ready access to a restroom.” (AR 23.) In crafting this RFC, the ALJ considered the medical record evidence, including that “[b]ased on the minimal to moderate clinical findings and signs, along with the primarily conservative course of treatment and care, with successful left hip total replacement on late-October 2017 during the relevant time-period, the claimant is capable of performing full-time work within the light residual functional capacity assessed.” (AR 29.)

Ultimately, the ALJ concluded on the record before him that Deperry could not perform any past relevant work given these limitations, but relying on the testimony of the vocational expert, determined that there were jobs in the national economy in significant numbers that Deperry could perform -- namely, mail clerk, office helper and routing clerk. In so finding, the ALJ noted that the vocational expert “acknowledged that the overhead reaching and indoor work and access to restrooms options are not addressed in the DOT; however, they are based on her professional observation and experience in placement, as well as her knowledge of ‘OSHA’ requirements regarding the availability of restrooms in indoor work settings, to know that the jobs cited could be performed with all the elements set forth in the residual functional capacity assessed.” (AR 32; AR 73-74 (VE Eisenhuth’s testimony).)

C. Medical Record

As has been plaintiff’s counsel’s unfortunate practice, he also includes a “medical

record excerpt” as an attachment to plaintiff’s opening brief, but the pages cited do not correspond to the administrative record, and, therefore, the excerpt is of little use. Moreover, plaintiff’s counsel does nothing to summarize or organize the medical records in a manner that advances or otherwise supports his arguments for remand. Even setting that major criticism aside, the medical records, as detailed in the ALJ’s decision, reflect ongoing treatment for lupus by Cynthia Weaver, M.D, a rheumatologist, which was originally diagnosed in 2003 and treated with prescription medications, including CellCept and Hydroxychloroquine. Plaintiff also sought treatment for various gastrointestinal issues, including colitis and inflammatory bowel disease, through ER visits and visits with his treating physician Dr. Schoepach, who was also providing treatment for lupus. Finally, in late 2017, plaintiff underwent left total hip arthroplasty.⁵

OPINION

The standard by which a federal court reviews a final decision by the Commissioner of Social Security is well-settled. 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, re-weigh the evidence, decide questions of credibility or otherwise substitute its own judgment for that of the ALJ. *Clifford v. Apfel*, 227 F.3d 863, 869 (7th Cir. 2000). Accordingly, where

⁵ As relevant, the court will address the specific medical records further in the opinion below.

conflicting evidence allows reasonable minds to reach different conclusions about a claimant's disability, the responsibility for the decision falls on the Commissioner. *Edwards v. Sullivan*, 985 F.2d 334, 336 (7th Cir. 1993). At the same time, the court must conduct a "critical review of the evidence," *id.*, and insure the ALJ has provided "a logical bridge" between findings of fact and conclusions of law, *Stephens v. Berryhill*, 888 F.3d 323, 327 (7th Cir. 2018).

As previously explained, Deperry raises three challenges to the ALJ's decision. The court addresses each of these challenges below.

I. Mental Health Limitations

Plaintiff first faults the ALJ for failing to consider mental health limitations in formulating his RFC. In turn, this argument has two aspects: (1) the ALJ should have incorporated some limitations, despite finding only mild limitations with respect to the four behavioral categories under paragraph B; and (2) the ALJ erred in not finding moderate limitations in concentration, persistence and pace ("CPP").

With respect to the first part of this challenge, plaintiff cites *Kasarsky v. Barnhart*, 335 F.3d 539 (7th Cir. 2003), in support of his argument that even *mild* impairments must be accounted for in the RFC. However, the *Kasarsky* court faulted the ALJ for not addressing in the RFC his finding that "Kasarsky suffered from *frequent* deficiencies of concentration, persistence, or pace." *Id.* at 544 (emphasis in original). The court did *not* hold that an ALJ must account for mild limitations in the paragraph B categories. Moreover, as the Commissioner pointed out in his response, any arguable error would be harmless in light of the ALJ's exchange with the VE during the hearing, in which he also

included a number of nonexertional limitations in his hypothetical questions, and the VE responded that jobs such as mail clerk or routing clerk would still be available. (Def.'s Opp'n (dkt. #11) 10 (citing AR 74-75).) Tellingly, in his reply, plaintiff offers no response to defendant's harmless error argument.

In an even more cursory fashion, plaintiff would secondarily fault the ALJ for not finding moderate limitations with respect to CPP. Specifically, plaintiff contends that the ALJ erred in not placing weight on Dr. Desmond's April 15, 2015, consultative examination report, in which he found more significant limitations in CPP than the mild limitations adopted by the ALJ. As the ALJ explained, however, Dr. Desmond's report captured a narrow period of time, rather than reflecting Deperry's mental health status across the relevant period of time. Regardless, the ALJ was free to rely instead on the more fulsome opinions of Deperry's *treating* therapist, who not only completed a formal "Medical Statement," but also appeared and testified at the hearing, each time finding DePerry had only mild limitations in CPP. (AR 21-22.) In this way, not only does the ALJ provide a logical bridge between his findings and the medical record, the court can see no error in the ALJ's treatment of these opinions.

II. Treatment of Dr. Schoepach's Opinion

Next, plaintiff would fault the ALJ for failing to "assign a weight" to the opinion of plaintiff's treating physician, Dr. Schoepach, including in particular that plaintiff was only capable of working 2-4 hours and had further limitations due to various exertional restrictions. (Pl.'s Opening Br. (dkt. #9) 7.) However, this argument fails to even engage with the ALJ's actual decision. As detailed above, while the ALJ did not identify Dr.

Schoeppach *by name* in the portion of the opinion where he addressed Schoeppach's opinion, the ALJ *did* consider his lupus report, even identifying it by exhibit number. (AR 30 (discussing Exhibit 15F).)

In his reply, plaintiff attempts to shift his argument a bit, having been forced to acknowledge that the ALJ *did* consider Schoeppach's report, and instead argues that "[t]he ALJ simply does not discuss why this opinion is being rejected." (Pl.'s Reply (dkt. #12) 2.) But again, this argument fails to confront the ALJ's actual decision. As detailed above, the ALJ also offered reasons for rejecting Schoeppach's opinion, finding that Schoeppach was asked to opine on plaintiff's physical work restrictions due to lupus, and the medical record, *including* Schoeppach's own treatment notes, does not support the extreme limitations he adopted to address DePerry's lupus. (AR 30.)

Moreover, while plaintiff is wrong to challenge the adequacy or accuracy of the ALJ's reasoning as to Dr. Schoeppach's opinion, the ALJ also pointed out in his review of the medical record that there are several independent medical notations, including by Dr. Weaver, Deperry's rheumatologist, *and* Dr. Schoeppach, indicating plaintiff's lupus was under "good control" with medication (AR 24; AR 286 (7/31/14 note from Dr. Weaver, describing improvement in joint symptoms with CellCept and hydroxychloroquine); AR 296 (11/14/14 note from Dr. Schoeppach, describing Deperry as being in a "good therapeutic place" and postponing follow-up appointment with Weaver); AR 601 (2/6/17 note from Dr. Weaver describing lupus as "under good control"); AR 693 (8/14/17 note from Dr. Weaver describing lupus as under "fair control"; "[l]ess pain, rash and fatigue"); AR 584 (10/24/17 note from Dr. Schoeppach, indicating that his lupus was "[u]nder much

better control than it was this summer”).⁶ For all of these reasons, the court soundly rejects plaintiff’s challenge to the ALJ’s treatment of Dr. Schoeppach’s opinions.

III. Consideration of Bathroom Breaks

Finally, plaintiff argues that the ALJ erred by requiring access to a bathroom as part of Deperry’s RFC, without explaining “how many times Deperry would be off task or how long these bathroom breaks would last.” (Pl.’s Opening Br. (dkt. #9) 10.) Again, this argument fails to address the substance of the ALJ’s opinion. The ALJ did *not* adopt a limitation in the RFC requiring additional bathroom breaks; instead, he simply required that Deperry “work indoors in a work environment with ready access to a restroom.” (AR 23.) There is no indication in the ALJ’s opinion, and DePerry fails to point to anything in the medical record, indicating that he would require more frequent bathroom breaks, just ready access when needed. As such, there is no error in the ALJ’s failure to include an off-task limitation to account for bathroom breaks in particular.

ORDER

IT IS ORDERED that:

- 1) The decision of defendant Andrew M. Saul, Commissioner of Social Security, denying plaintiff Darrin Deperry’s application for disability benefits is AFFIRMED.

⁶ For some portion of 2015 and 2016, plaintiff was incarcerated. It appears that he continued on these medications and, if anything, the limited exposure to sun helped with his lupus, especially his rash, something the ALJ also addressed by limiting him to working “indoors.” (AR 23.)

2) The clerk of court is directed to enter judgment for defendant.

Entered this 23rd day of March, 2020.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge