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

DENNIS DAVID PIERSON II,

Plaintiff,

v.

OPINION AND ORDER

18-cv-114-wmc

KILOLO KIJAKAZI, Acting Commissioner
for Social Security,

Defendant.

Dennis David Pierson II seeks judicial review of an adverse decision of the Commissioner of Social Security on the grounds that the administrative law judge: (1) failed to find that his fibromyalgia was a severe impairment; and (2) gave undue weight to the opinions of the state agency physicians and psychologists, rather than the more favorable opinion of one of his treating physicians. For the reasons that follow, the court will affirm the Commissioner's decision.

UNDISPUTED FACTS[1]

I. Medical Overview

Pierson has a history of chronic neck pain dating back to the early 2000s, likely the result of repetitive physical work as a steel fabricator. In approximately 2002, he was diagnosed with multilevel cervical degenerative disc disease, which is most pronounced at C5-7, along with associated radiculopathy. The issued restrictions accompanying that diagnosis prevented Pierson from returning to his past work. Fortunately, in September

---

[1] The following facts are drawn from the Administrative Record ("AR").

2004, Pierson obtained new employment as a dispatcher for a freight brokerage business, where he continued to work until January 2013.

After experiencing low back pain radiating into his hips and thighs, Pierson next began seeing Dr. Timothy Romang, M.D., a physiatrist, in January of 2015. After an MRI of Pierson's lumbar spine on February 16, 2015, which revealed a bulging disc at L3-4, Dr. Romang concluded his conservative treatment efforts had failed, and at that point, Pierson opted for surgery. On December 22, 2015, Dr. Lee Sandquist performed a laminotomy with decompression of the nerve roots and excision of the herniated disc at L3-4. In addition to his back and neck pain, Pierson has also had problems with his right hand and wrist because of carpal tunnel syndrome. As a result, on December 12, 2016, Dr. Scott Murch performed right carpal tunnel and cubital tunnel release surgery. Finally, Pierson has also been diagnosed with depression and anxiety, for which he takes medication. From August 3, 2015 to February 2017, he received counseling on a somewhat regular basis from Marjorie Debevec-Marksteiner, LPC, a therapist at Peaceful Solutions Counseling.

II. Medical Source Opinions

A. State Agency Consulting Physicians

On November 19, 2014, Dr. Pat Chan reviewed Pierson's medical records and other information and rendered opinions about his physical impairments. Dr. Chan determined that plaintiff had the medically determinable impairments of degenerative disc disease and fibromyalgia, both of which were severe. (AR 91.) Assessing Pierson's residual functional capacity ("RFC"), Dr. Chan nevertheless concluded that Pierson was able to: (1) lift or carry 10 pounds occasionally; (2) lift or carry less than 10 pounds frequently; (3) stand or

walk for a total of two hours a day; and (4) sit for a total of about six hours in an 8-hour day. As a result, Dr. Chan explained that Pierson was limited to sedentary work. (AR 93.)

On April 9, 2015, Dr. Mina Khorshidi re-evaluated Pierson's application in connection with his request for reconsideration. After noting that Pierson had had a lumbar MRI in February 2015 that showed a moderate-sized disc protrusion at L3-4 and mild facet arthropathy at L3-4, L4-5, and L5-S1, for which he was going to be receiving epidural steroid injections, Dr. Khorshidi agreed with Dr. Chan's assessment that Pierson was limited to sedentary work. (AR 104.)

B. State Agency Psychological Consultants

On November 21, 2014, Beth Jennings, Ph.D., reviewed Pierson's application and accompanying medical records. Jennings noted that Pierson had not alleged any mental health problems or limitations and did not receive any regular mental health treatment. Although noting that Pierson had been found on exam to be positive for depressed mood, fatigue, and anxiety, Jennings further observed these symptoms appeared to be "situational and secondary to pain." (AR 91.) Overall, Dr. Jennings determined that Pierson's symptoms produced no more than mild mental limitations, such that no mental RFC assessment was needed. (*Id.*)

On reconsideration, Dr. Stephen Kleinman affirmed Dr. Jennings' assessment on April 9, 2015, noting that Pierson had not alleged or established any worsening of his mental condition. (AR 102.)

C. Treating Physician Romang

Dr. Romang, a physiatrist, saw Pierson on January 23, February 27, April 24 and July 14, 2015, as well as March 5 and May 31, 2016. On July 14, 2015, Dr. Romang noted that Pierson had undergone two epidural steroid injections at L3-4, without complete relief. Specifically, Pierson reported still having low back pain on a daily basis, as well as neck pain. On physical examination, Dr. Romang noted painful areas in Pierson's neck, shoulders and lower back, which were accompanied by increased muscle tension, trigger points and tenderness. Neurologically, Pierson had normal strength and reflexes, but a positive Romberg test for swaying, indicating decreased balance. As a result, Dr. Romang suspected that there was a "superimposed myofascial component" to Pierson's pain, noting that he had previously been diagnosed with fibromyalgia.

For his part, Pierson reported that his fibromyalgia symptoms had improved since increasing his dosage of Lyrica, although he was concerned that the medication was affecting his balance. Pierson also reported that he constantly needed to alternate positions between sitting and standing, and could only stand or walk 30 minutes at a time, while needing to lie down at unpredictable intervals. In addition, Pierson noted that he easily became "weepy" during the day and that he was scheduled to see a therapist for depression and anxiety.

Ultimately, Dr. Romang diagnosed Pierson with: (1) chronic, recurrent low back pain associated with pain radiating into the hips and thighs; (2) a history of neck pain secondary to multilevel cervical degenerative disc disease; (3) a history of widespread pain and fatigue, previously diagnosed as fibromyalgia, improved since starting Lyrica; (4) a

balance impairment, possibly a side effect of the Lyrica; and (5) severe depression and anxiety, which was currently inadequately treated. "In light of his significant functional limitations," Dr. Romang further opined that "it would be essentially impossible for [Pierson] to maintain gainful employment." (AR 467-68.) Dr. Romang also completed an RFC questionnaire around this same time, indicating that Pierson: (1) could lift less than 10 pounds; (2) could stand and walk about 3 hours in an 8-hour day; (3) could sit about 4 hours in an 8-hour day; (4) could sit for a maximum of 30 minutes before changing position; (5) needed to take breaks every 30 minutes to walk around for 30 minutes' duration; (6) would need to lie down up to 3 times per shift at unpredictable intervals; (7) was limited in reaching, handling, pushing, and pulling due to neck and upper back pain and tennis elbow; (8) should avoid hazards because of balance issues; (9) could occasionally twist, stoop, crouch, and climb stairs and ladders; and (10) would be absent from work more than three times a month. (AR 469-71.)

Dr. Romang saw Pierson again on March 15 and May 31, 2016, almost three months and six months after his L3-4 laminectomy/discectomy procedure, respectively.[2] By May 31st, Dr. Romang noted that Pierson was "doing very well," and no longer had radicular symptoms in his legs, but reported experiencing two episodes of "nerve pain" in his arms and hands. An updated cervical MRI on May 9, 2016, also showed minor disc bulging at C5-6 and C6-7, but no central canal or foraminal stenosis "beyond a mild degree." (AR 479.) On physical exam, Pierson similarly had minimally restricted cervical

[2] The record of plaintiff's March 15, 2016, visit with Dr. Romang does not appear in the administrative record.

range of motion and mild point tenderness at the L5-S1 facets, but he was neurologically intact. Dr. Romang further noted that: Pierson's lower limb symptoms were much improved; his fibromyalgia pain was improved on Lyrica; his balance had improved; and his depression and anxiety were stable. In addition, Pierson declined injections for his cervical symptoms, explaining that he had tried them in the past, found them very painful and was not interested in trying them again. Dr. Romang adjusted Pierson's medications and advised him to follow up as needed. Even so, Dr. Romang reiterated his opinion that Pierson could not maintain gainful employment in light of his significant functional limitations, but Dr. Romang did not complete a new RFC assessment. (AR 479-80.)

C. Administrative Proceedings

Pierson originally applied for a period of disability and disability insurance benefits on June 15, 2014, alleging that he had been disabled since January 31, 2013, due to neck pain, chronic pain, "over active nerves," arm numbness at night, back pain, and nerve damage in both arms. (AR 218.) He was 42 years old on his alleged disability onset date. Pierson reported that he had stopped working on January 18, 2013, because the freight brokerage office closed, and he had been unable to find another job within his abilities. (AR 218.)

After his claim was denied initially and on reconsideration, Pierson requested a hearing before an administrative law judge ("ALJ"), which was held via videoconference on March 20, 2017. Pierson appeared with a non-attorney representative and testified, as did Clifford Brady, an impartial vocational expert.

After the hearing, the ALJ issued a decision finding Pierson not disabled. Applying the commissioner's five-step evaluation process for disability claims, the ALJ found at Step 1 that Pierson had not engaged in substantial gainful activity after his alleged onset date. (AR 17.) At Step 2, the ALJ found that Pierson had the severe impairments of degenerative disc disease of the lumbar and cervical spine and bilateral carpal tunnel syndrome, but no "medically determinable" impairment of fibromyalgia. (AR 17-18.) With respect to Pierson's depression and anxiety, the ALJ considered Pierson's mental functioning in accordance with the disability regulations, finding that he only had mild limitations in interacting with others and in concentrating, persisting, or maintaining pace, but no other limitations. (AR 19.) Accordingly, the ALJ concluded that these impairments were not severe. At Step 3, the ALJ found that none of Pierson's medically determinable impairments singly or in combination met or medically equaled the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1. (AR 21.)

As a predicate to his findings at Steps 4 and 5, the ALJ assessed Pierson's RFC and determined that he was capable of performing sedentary work, with the following exceptions: (1) no more than frequent reaching in all planes, including overhead bilaterally; (2) no more than frequent handling bilaterally; (3) no concentrated exposure to extreme cold and extreme heat; and (4) no concentrated exposure to dangerous machinery and unprotected heights. (AR 21-22.) In arriving at this conclusion, the ALJ gave great weight to the opinions of state agency physicians Chan and Khorshidi and only partial weight to the opinion of Pierson's treating physician Romang. (AR 24-25.) Specifically, although noting Dr. Romang's opinion that Pierson could lift at most ten

pounds was consistent with the degenerative changes in Pierson's spine, the ALJ found Romang's opinion that Pierson could only sit for four hours and perform postural activities occasionally "not consistent with physical examinations indicating negative straight leg raises, normal strength, full range of motion, and intact sensation," or with Pierson's noted ability to walk and tandem walk without difficulty. (AR 25.)

Relying on the vocational expert's testimony at the hearing in response to a hypothetical incorporating the limitations set forth above, the ALJ then found at Step 4 that Pierson was capable of returning to his past relevant work as a dispatcher, both as he actually performed it and as generally performed in the national economy. (AR 26.) In addition, the ALJ made an alternative, Step 5 finding that Pierson could make a vocational adjustment to a number of other, sedentary jobs existing in significant numbers in the national economy, such as: (1) information clerk (291,000 jobs nationally); (2) order clerk (90,000 jobs nationally); and (3) callout operator (34,600 jobs nationally). (AR 27-28.)

OPINION

Judicial review of a final decision by the Commissioner of Social Security is authorized by 42 U.S.C. § 405(g). An ALJ's findings of fact are considered "conclusive," so long as they are supported by "substantial evidence." § 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). In reviewing the Commissioner's findings, 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).

At the same time, the court must conduct a "critical review of the evidence" before affirming the Commissioner's final decision. *Edwards v. Sullivan*, 985 F.2d 334, 336 (7th Cir. 1993). If the Commissioner's decision lacks evidentiary support or adequate discussion of the issues, then the court must remand the matter. *Villano v. Astrue*, 556 F.3d 558, 562 (7th Cir. 2009). This opinion addresses each of plaintiff's challenges to the final decision under this deferential standard.

I. Fibromyalgia

Plaintiff first argues that the ALJ erred by failing to find that he has the medically determinable impairment of fibromyalgia. The rule at issue, Social Security Rule 12-2p, permits a claimant to establish fibromyalgia under two different standards: either the 1990 ACR Criteria for the Classification of Fibromyalgia or the 2010 ACR Preliminary Diagnostic Criteria. The major difference is that the former requires positive tender points, while the latter instead relies on "manifestations of six or more [fibromyalgia] symptoms." *See* Social Security Ruling, SSR 12-2p, Titles II and XVI: Evaluation of Fibromyalgia, 77 Fed. Reg. 43,640, 43641-42 (July 25, 2012) (hereinafter "SSR 12-2p"). After noting the two standards, the ALJ here found that although plaintiff had been diagnosed with fibromyalgia in the past, "examination demonstrated only eight out of eighteen tender points." (AR 18.) In addition, the ALJ noted that "no other providers have . . . [since]

diagnosed the claimant with fibromyalgia or noted any findings consistent with fibromyalgia symptoms." (*Id.*)

Plaintiff concedes there are no records establishing the necessary trigger points to meet the 1990 ACR Criteria, but argues that remand is required because the ALJ offered only a perfunctory discussion of the 2010 criteria and failed to "evaluate the evidence" to determine if he had "repeated manifestations of six or more fibromyalgia symptoms" or if his physicians had ruled out other disorders that might cause these recurring symptoms. (Br. in Supp. (dkt. # 9) 13.) However, plaintiff bears the burden to establish the existence of a medically determinable impairment. *Young v. Sec'y of Health & Human Servs.*, 957 F.2d 386, 389 (7th Cir. 1992). Although plaintiff cites in his brief to a few records indicating difficulty sleeping, dizziness, anxiety and depression, he neither offers proof of the necessary "repeated manifestations" of six or more symptoms, nor demonstrates that other disorders that might cause such symptoms have been ruled out, with the exception of rheumatoid arthritis and Lyme disease.

Even if plaintiff could establish that he meets the 2010 diagnostic criteria, the court agrees with defendant that the ALJ's finding to the contrary was harmless in this case, since the ALJ accounted indirectly for plaintiff's fibromyalgia by adopting the limitations of the state agency physicians, who considered plaintiff's fibromyalgia diagnosis in arriving at their conclusion that plaintiff could perform sedentary work. (AR 93, 101 ("Given the ongoing sx's of pain regarding fibro and multi-level spinal degeneration clmt is limited to sedentary RFC").) In *Skarbeck v. Barnhart*, 390 F.3d 500 (7th Cir. 2004), the Seventh Circuit observed that an ALJ can account for an impairment by adopting the limitations of

specialists and reviewing doctors who were aware of the impairment. *Id*. at 504 (noting that by adopting the limitations of those who were aware of the claimant's obesity, it was factored into the ALJ's decision even if it was not explicitly considered); *see also Carradine v. Barnhart*, 360 F.3d 751, 754 (7th Cir. 2004) ("The issue in the case is not the existence of these various conditions of hers but their severity."). Here, the ALJ not only accepted the state agency physicians' recommended language in concluding that plaintiff could perform sedentary work despite a fibromyalgia diagnosis, but added even more limitations to the RFC. Tellingly, plaintiff does not identify any functional limitation resulting from his fibromyalgia beyond those already adopted in the existing RFC assessment. Accordingly, remand on this issue is not required. *Fisher v. Bowen*, 869 F.2d 1055, 1057 (7th Cir. 1989) ("No principle of administrative law or common sense requires us to remand a case in quest of a perfect opinion unless there is reason to believe that the remand might lead to a different result.").

II. State Agency Consultants' Opinions

Plaintiff next argues that the ALJ erred in adopting the opinions of the state agency medical and psychological consultants because new evidence was added to the record after they formed their opinions. In making this argument, plaintiff points to a line of cases from the Seventh Circuit holding that an ALJ "should not rely on an outdated assessment if later evidence containing new, significant medical diagnoses reasonably could have changed the reviewing physician's opinion." *Moreno v. Berryhill*, 882 F.3d 722, 728 (7th Cir. 2018), as amended on reh'g (Apr. 13, 2018); *see also Goins v. Colvin*, 764 F.3d 677, 680 (7th Cir. 2014) (ALJ erred in failing to submit claimant's first MRI in 11 years to

medical scrutiny and in interpreting results herself); *Stage v. Colvin*, 812 F.3d 1121, 1125 (7th Cir. 2016) (ALJ erred in accepting a state agency physician's opinion where physician did not have access to later medical evidence containing "significant, new, and potentially decisive findings," including new MRI report, that could "reasonably change the reviewing physician's opinion").

Starting with the state agency medical consultants, plaintiff points out that after they provided their opinions, he had lumbar surgery, carpal tunnel surgery, and an updated cervical MRI. In spite of these records being "new," however, plaintiff again fails to develop any meaningful argument as to what in those records make it "reasonably likely" to change the state agency consultants' opinions. Instead, plaintiff appears to suggest that remand was required merely because the records consisted of an MRI scan and other technical reports that he says the ALJ lacked the expertise to interpret. As this court observed in *Salvino v. Saul*, No. 19-CV-422-JDP, 2020 WL 467902 (W.D. Wis. Jan. 29, 2020), however, the rule of *Moreno* does not require remand any time new evidence is added to the record after the state agency's review, but rather only where the plaintiff shows the new evidence either is significant or "too technical for the ALJ to consider." *Id.* at *2-*3. What matters is whether the plaintiff has limitations that prevent him from working full time, not that the plaintiff may have received a new diagnosis. *Id*. at *3.

Here, the court is persuaded that the new evidence plaintiff cites was neither significant nor too technical for the ALJ to consider. Indeed, plaintiff fails to explain what difference the lumbar surgery, the carpal tunnel release surgery, or the cervical MRI could possibly make to the state agency opinions or to the ALJ's ultimate RFC assessment. To

the contrary, as plaintiff *himself* points out, Dr. Romang observed on May 31, 2016, that plaintiff's "lower limb radicular symptoms are now *very much improved* since his L3-4 laminectomy/discectomy procedure dated 12/22/15." (Br. in Supp. (dkt. # 9) 17) (citing AR 479) (emphasis added). In that same report, Dr. Romang noted that plaintiff's updated cervical MRI did not show any central canal or foraminal stenosis "beyond a mild degree." (*Id*.) Finally, as for the carpal tunnel surgery, plaintiff offers no basis to challenge the ALJ's finding that after the surgery, as reflected in the unambiguous medical records, plaintiff "had full composite fist formation, normal strength, and intact sensation, and it was noted that he could use his hand effectively." (AR 23.) In fact, the medical records suggest that, if anything, plaintiff's surgeries were effective in *relieving* at least some of his symptoms and the cervical MRI does not show any significant changes. Because there is no basis to conclude that this evidence would have led the state agency physicians to issue more severe restrictions, remand is not warranted on this basis either.

Similarly, plaintiff argues that the state agency consulting psychologists' opinions were outdated because they "never saw or evaluated" the records of plaintiff's counseling sessions at Peaceful Solutions Counseling. Specifically, apart from citing to the administrative record where those session notes can be found, plaintiff again fails to discuss any particular counseling record or develop any specific argument as to how those notes undermine the state agency psychologists' conclusion that plaintiff's diagnosed anxiety and depression caused only mild mental limitations. This court will not comb through the numerous counseling records, attempting to craft an argument as to why they reasonably could have changed the reviewing psychologists' opinions. That was plaintiff's job. *See*

United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs."). Absent more than a skeletal argument from plaintiff as to *why* the counseling records are inconsistent with the conclusions reached by the state agency psychologists, the court has no basis to order a remand on this ground. *Id*. ("A skeletal 'argument', really nothing more than an assertion, does not preserve a claim.").

III. Dr. Romang's Opinion

Finally, plaintiff argues that the ALJ erred in rejecting Dr. Romang's conclusion that he could not work on a full-time basis. First, plaintiff argues that the ALJ's analysis of Dr. Romang's opinion was tainted by his failure to find fibromyalgia as one of plaintiff's impairments, asserting that "Dr. Romang evaluated Pierson's condition in light of his fibromyalgia." (Br. in Supp. (dkt. # 9) 24). As explained earlier, however, substantial evidence supports the ALJ's determination that plaintiff's fibromyalgia was not a medically determinable impairment, so this argument fails at the outset. Moreover, the extent to which fibromyalgia factored into Dr. Romang's opinion is not entirely clear. Rather, Dr. Romang, who is not a rheumatologist, merely noted that plaintiff had been "previously diagnosed" with fibromyalgia, but he did not treat him for that impairment. Further, Dr. Romang noted that plaintiff's fibromyalgia symptoms had improved since he started Lyrica.

Next, plaintiff argues that the ALJ inappropriately "played doctor" by concluding that Dr. Romang's opinion that plaintiff could sit for only four hours and perform postural activities occasionally was inconsistent with physical examinations that found normal strength, full range of motion, negative straight leg raises, intact sensation, normal gait,

and the ability to tandem walk without difficulty. However, the regulations in effect at the time specifically directed the ALJ to evaluate the extent to which a medical opinion was supported by medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. § 404.1527(c)(2); SSR 96-2p. In addition, at that time, the ALJ need only give a treating physician's opinion controlling weight if it is not inconsistent with other substantial evidence in the record. *Id*. Thus, the ALJ did nothing improper by considering the extent to which the limitations endorsed by Dr. Romang were supported by the objective medical evidence. Further, reasonable minds could agree that Dr. Romang's conclusion that plaintiff could not sit for more than four hours total in a workday was inconsistent with the relatively normal physical examination findings both before and after plaintiff's lumbar surgery, but especially *after*, considering Dr. Romang's observation that plaintiff's lower limb symptoms were "much improved" after the surgery. Of course, plaintiff's argument also ignores that the ALJ did not simply pick the limitations in the RFC based on his own failure to endorse Dr. Romang's conclusion, but rather based on the contrary opinions of two state agency physicians as already discussed.

Finally, plaintiff accuses the ALJ of "cherry-picking" the record and ignoring evidence that supported Dr. Romang's more restrictive opinion. However, an ALJ need not discuss every piece of evidence in the record, so long as his decision shows that he considered the important evidence and the court can trace his reasoning. *Carlson v. Shalala*, 999 F.2d 180, 181 (7th Cir. 1993). Here, the evidence that plaintiff accuses the ALJ of ignoring consists mainly of plaintiff's subjective reports of pain and other symptoms. (Br. in Supp. (dkt. # 9) 25.) Contrary to plaintiff's assertion, the ALJ *did* consider this evidence,

finding plaintiff's allegations of pain and other disabling symptoms not entirely consistent with other evidence in the record, including: (1) plaintiff's failure to pursue certain treatments; (2) his fairly robust daily activities; and (3) evidence suggesting that plaintiff's unemployment might be unrelated to his impairments. (AR 24.) Plaintiff has not challenged any of these findings, thereby waiving any challenge to the ALJ's assessment of plaintiff's subjective complaints. *Schomas v. Colvin*, 732 F.3d 702, 707 (7th Cir. 2013) (argument not raised is waived).

In the end, although the ALJ's discussion of Dr. Romang's opinion is somewhat concise, the ALJ said enough to show that he considered all the evidence and explain why he rejected that opinion. Although reasonable minds could disagree, the lack of objective support for Dr. Romang's opinion, combined with the contrary opinions of the state agency physicians, and the various reasons to discount plaintiff's subjective complaints, all provided the ALJ with more than sufficient reasons to reject Dr. Romang's ultimately opinion.

ORDER

IT IS ORDERED that the decision of the Commissioner of Social Security denying Dennis David Pierson II's application for disability insurance benefits is AFFIRMED. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 28th day of December, 2021.

BY THE COURT:
/s/
WILLIAM M. CONLEY
District Judge