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

DALE PLAUTZ,

Plaintiff,

v.

ANDREW SAUL, Commissioner of Social Security,

Defendant.

OPINION AND ORDER

18-cv-433-wmc

Dale Plautz brings this appeal of a final decision of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). Plautz, a former auto mechanic and sales associate at Wal-Mart, suffers from back and leg pain, as well as foot pain and numbness, all related to diabetes and obesity. While Plautz was found disabled and qualified for disability insurance benefits ("DIB") as of October 1, 2014, the Commissioner determined that he was able to perform a substantial number of light, unskilled jobs before that date with appropriate accommodations for his various physical limitations. On appeal, Plautz argues the case should be remanded for further administrative proceedings on the grounds that the administrative law judge committed two errors: (1) he improperly discounted Plautz's subjective complaints; and (2) he failed to account for shortness of breath and fatigue in formulating Plautz's residual functional capacity ("RFC") assessment. For the reasons stated below, the court rejects both arguments, and it will affirm the decision of the Commissioner.

BACKGROUND

A. General Overview

Plautz was 51 years old on his alleged onset date. He dropped out of high school after 10th grade, and he has worked as an auto mechanic at a towing company and a sales associate at Wal-Mart. However, he has not worked since May 15, 2011.

In February 2011, Plautz was diagnosed with diabetes, for which he was prescribed insulin and metformin. He also suffers from related peripheral neuropathy, which causes numbness and pain in his feet. In addition, Plautz is morbidly obese, having a body mass index of 43.75, and he has had longstanding lower back pain. Given these limitations, Plautz contends that he cannot work because of the pain and numbness in his feet, back pain, leg pain, becoming "short-winded" with minimal exertion, fatigue, and coldness and stiffness in his fingers.

B. Administrative Proceedings

Plautz applied for DIB on August 20, 2012, alleging that he was disabled from May 15, 2011, as a result of diabetes, obesity, a bad back, and peripheral neuropathy. Arthur Schneider issued an unfavorable decision on that claim on July 26, 2013, and Plautz eventually appealed that decision to this court. On September 8, 2014, the court remanded his case to the agency pursuant to the parties' joint request for remand.

On remand, Plautz's case was assigned to ALJ Thomas Springer, who issued a partially favorable decision on April 3, 2015, which found that he became disabled as of October 1, 2014, when Plautz was within five months of reaching his 55th birthday, under

the Medical-Vocational guidelines that apply to persons of advanced age. (AR 382-91.) However, the ALJ also found that Plautz was not disabled from his alleged onset date through September 30, 2014, because he retained the ability to perform a restricted, but sufficient, range of light work during that time period. Plautz also appealed this latter finding back to this court, which the parties once again agreed to remand for reconsideration by the agency.

Accordingly, the only issue before the ALJ on remand was whether Plautz was disabled from May 1, 2011, to September 30, 2014. The ALJ held another hearing at which Plautz and a vocational expert testified. On December 8, 2016, ALJ Springer issued a written decision, again finding that Plautz was not disabled between his alleged onset date and September 30, 2014. (AR 639-53.) In particular, the ALJ found that although Plautz had severe impairments of diabetes mellitus with peripheral neuropathy and morbid obesity, he nonetheless retained the RFC to perform work at a light exertional level (lifting and carrying 20 pounds occasionally and 10 pounds frequently, with standing and walking about six hours total), subject to the following restrictions:

- no tandem walking (heel to toe in a straight line) or at distances exceeding two city blocks on any one occasion;
- only occasional operation of foot controls;
- sitting no more than 6 hours a day with the opportunity to sit or stand at will;
- no climbing of ladders or scaffolding;
- rare stair climbing or crouching;

- only occasional climbing of ramps, balancing, stooping, kneeling, or crawling; and

- no more than occasional exposure to temperature and humidity extremes or unprotected heights.

In reaching these conclusions, the ALJ relied heavily on a January 2013 consultative examination by Dr. Neil Johnson, who found at the time that Plautz had few physical difficulties with the exception of some pain with motion in his lower back, an inability to tandem walk, and severe difficulty squatting. (AR 323-27.) The ALJ also gave great weight to the opinions of state agency medical consultants Dr. Mina Khorshidi and Dr. Pat Chan, both of whom opined that claimant could perform a full range of light work. (AR 128, 138.) The ALJ further noted that these opinions were consistent with the medical evidence that generally showed unremarkable physical exams during this period, including having a normal lumbar range of motion, normal bilateral hip and knee range of motion (with no joint instability), a normal gait, and no need for an assistive device. (AR 649.) However, the ALJ found that additional, non-exertional limitations were warranted based on "the combined effects of claimant's impairments," particularly his diminished sensation in the feet, difficulty walking on his heels and toes, and poor balance. (AR 649.)

As for Plautz's subjective complaints, the ALJ found them only "partially credible," noting several pieces of evidence in the record that were inconsistent with his allegations of disabling pain and discomfort:

- Plautz testified that he did not like driving because of medication side effects, not because of any sensation problems in his feet, which suggested that claimant's peripheral neuropathy was not "always as limiting as alleged;"

- Plautz consistently denied medication side effects to his treatment providers;

- Plautz had consistently been noncompliant with his diabetes treatment, including failing to check his blood sugar or take his insulin as prescribed, which again suggested that the complications resulting from his poor blood sugar control were not as severe as alleged;

- Plautz offered conflicting explanations for losing his job as a sales associate at Wal-Mart in 2011, some of which did not have to do with any physical ability to do the job;

- His daily activities "were not limited to the extent one would expect," given his complaints of disabling symptoms and limitations; and

- The medical opinions and objective medical evidence supported the conclusion that claimant could perform a limited range of light work.

(AR 648-49, 651.)

Relying on the vocational expert's answer to a hypothetical question that incorporated the limitations set out above, the ALJ found that Plautz was unable to perform his past relevant work, but that he would be able to make a vocational adjustment to other work existing in significant numbers in the economy, namely, assembler, inspector, and hand packer. Accordingly, the ALJ determined that Plautz was not disabled before October 1, 2014.

OPINION

This court must defer to an ALJ's decision to deny benefits unless it is unsupported by substantial evidence or based on an error of law. *Terry v. Astrue*, 580 F.3d 471, 475 (7th Cir. 2009). Substantial evidence is "such relevant evidence as a reasonable mind

might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). However, the ALJ must create an "accurate and logical bridge" between the evidence and the conclusion that the claimant is not disabled. *McKinzey v. Astrue*, 641 F.3d 884, 889 (7th Cir. 2011) (citing *Lopez ex rel. Lopez v. Barnhart*, 336 F.3d 535, 539 (7th Cir. 2003)). This means that although a reviewing court is not to "reweigh the evidence, resolve conflicts, decide questions of credibility, or substitute [its] own judgment for that of the commissioner," *Clifford v. Apfel*, 227 F.3d 863, 869 (7th Cir. 2000) (citations omitted), the court must conduct a "critical review of the evidence" before affirming or overturning a decision to deny benefits, *McKinzey*, 641 F.3d at 889.

Claimant contends that the ALJ erred by finding his subjective complaints of back and leg pain, tingling and numbness in his feet, along with the resulting limitations, to be only "partially credible." Absent a contrary opinion from a treating physician (or some other overwhelming evidence), the ALJ's credibility determinations are entitled special deference, since the ALJ, rather than the court, had the best opportunity to observe the claimant testify. *Castile v. Astrue*, 617 F.3d 923, 929 (7th Cir. 2010); *Sims v. Barnhart*, 442 F.3d 536, 538 (7th Cir. 2006). Moreover, the Seventh Circuit Court of Appeals has made plain that lower courts should uphold an ALJ's subjective symptom evaluation *unless* it is "patently wrong." *Curvin v. Colvin*, 759 F.3d 811, 815-16 (7th Cir. 2015). Where the ALJ provides multiple reasons for finding a claimant's subjective complaints less than fully credible, the court will affirm the credibility finding even if some of the ALJ's reasons are "bad," so long as the other reasons are "good." *McKinzey v. Astrue*, 641 F.3d 884, 890 (7th

Cir. 2011) (affirming a credibility finding because it was not "patently wrong," even though the court found "some merit in two out of three of [the plaintiff's] attacks").

Claimant argues that the record fails to support any of the reasons the ALJ gave for discounting claimant's subjective allegations, but the court disagrees. Although claimant's challenges are not entirely without merit, and none of the ALJ's reasons is exactly a "smoking gun" disproving claimant's allegations, overall they pass muster. For example, one need not be a doctor to know that driving requires use of the feet, so it was not unreasonable for the ALJ to infer that claimant's ability to drive without difficulty from his legs and feet suggested that his peripheral neuropathy "is not always as limiting as alleged." (AR 648.) Similarly, although it is true that an ALJ must be careful not to read too much into a claimant's ability to tend to household activities given that home and work are different, *see, e.g., Mendez v. Barnhart*, 439 F.3d 360, 362 (7th Cir. 2006), the ALJ did *not* find that claimant's activities evinced an ability to work full time, only that they were "not limited to the extent one would expect" considering claimant's reports of intense back, leg, and foot pain, shortness of breath, and stiff and swollen fingers.

Given claimant's ability to complete tasks requiring a fair amount of standing, motion, and strength (mopping, sweeping, lawn mowing, and snow blowing) and to use his hands to prepare meals and for fishing, writing, picking up coins, and opening jars, the ALJ reasonably concluded that claimant appeared to be overstating the severity of his symptoms. Likewise, the ALJ did not err in doubting whether claimant actually had been fired from his job at Wal-Mart because he could not perform the physical demands of the job, given that claimant had actually reported being fired because he got into an argument

with someone *and* that his attendance up until then had not been a problem. (AR 678, 680, 687.) Finally, claimant says nothing about the opinions of the state agency physicians, each of whom determined that claimant was capable of performing light work, or about the objective evidence, including Dr. Johnson's thorough evaluation, which generally shows few abnormalities other than some diminished sensation in the feet and difficulties with tandem walking, squatting, and balance, all of which the ALJ accounted for in his RFC assessment.[1]

Although ultimately still unpersuasive, claimant's strongest challenge is to the ALJ's relatively harsh credibility assessment, finding he had been "willfully noncompliant" with his diabetes treatment. Claimant acknowledged not always following treatment advice, but argues that the ALJ may not draw adverse inferences from the claimant's failure to pursue treatment without at least exploring the claimant's reasons for lack of medical care. *Craft v. Astrue*, 539 F.3d 668, 679 (7th Cir. 2008). *See also* SSR 16-3p, 2016 WL 1119029, at *8 ("We will not find an individual's symptoms inconsistent with the evidence in the record [for lack of compliance with treatment] without considering possible reasons he or she may not comply with treatment or seek treatment consistent with the degree of his or her complaints."). Here, claimant cites treatment notes which indicate that at times, he

[1] As is true here, an ALJ may also properly rely on the lack of objective medical confirmation for the claimant's symptoms as one of multiple factors in evaluating credibility. *Powers v. Apfel*, 207 F.3d 431, 435 (7th Cir. 2000) ("While a hearing officer may not reject subjective complaints of pain solely because they are not fully supported by medical testimony, the officer may consider that as probative of the claimant's credibility.").

was without health insurance or the funds to pay for his treatment, yet the ALJ did not mention this in his decision.

Yet claimant overlooks the fact that he testified *at the most recent hearing* that he had been able to obtain financial assistance for about two years from the Bridge Community Health Clinic, where he began treating his diabetes in February 2012. (AR 677.) Further, *at the first hearing* before ALJ Springer, claimant testified that beginning in April 2014, he had insurance through the BadgerCare program (Wisconsin's insurance program for low-income residents). (AR 420.) Thus, claimant's middling compliance cannot be blamed entirely on lack of finances or insurance. Indeed, claimant acknowledges that he had not followed his doctor's orders to take two doses of insulin a day, because he didn't "even like sticking a needle in myself once a day." (AR 423.) The record contains other notes where claimant simply refused to follow treatment offered to him, with no indication that his refusal was financially motivated. *See, e.g.* AR 304 (noting claimant was not very compliant with his medications and does not check blood sugars); 564 (claimant not checking blood sugars very regularly); AR 336 (claimant only taking lisinopril three times a week even though his doctor directed him to take it daily). Accordingly, the ALJ did not err in drawing an adverse inference from claimant's apparently lackluster compliance with his doctors' treatment recommendations.

Even if the ALJ did err on this point, the other reasons cited by the ALJ are sufficient to uphold his overall determination that claimant's subjective complaints were not consistent with the record as a whole. As noted previously, the medical opinions, the objective medical evidence, claimant's ability to perform various activities, including

driving, and the evidence suggesting that he was still capable of performing his job at Wal-Mart at the time he was fired, all provide a reasoned basis for the ALJ's determination that claimant's subjective allegations of disabling back and lower extremity pain were not credible before October 1, 2014.

Finally, remand is not required for explicit consideration of claimant's complaints of fatigue and shortness of breath. While the record shows that claimant complained of shortness of breath on exertion or walking short distances, the ALJ's RFC limited walking to no more than two city blocks at a time and lifting to no more than 20 pounds, even though claimant estimated he could lift 50 pounds. As for claimant's sporadic complaints of fatigue, they are too vague to support a need for further limitations. Indeed, claimant does not suggest what additional limitations the ALJ should have included to account for either his fatigue or shortness of breath.[2] Accordingly, remand is not warranted on this basis.

[2] Although it is true that the ALJ did not mention these symptoms, it is well-settled that an ALJ need not discuss every piece of evidence in the record, *Herron v. Shalala*, 19 F.3d 329, 333 (7th Cir. 1994), and in any case claimant fails to make a colorable argument that the outcome would be any different even if he had. *See Shinseki v. Sanders*, 556 U.S. 396, 410 (2009) (burden of showing harmful error is on party attacking the agency's decision); *Parker v. Astrue*, 597 F.3d 920, 924 (7th Cir. 2010) ("[H]armless error ... is applicable to judicial review of administrative decisions and is thus an exception to the *Chenery* doctrine.").

ORDER

IT IS ORDERED that:

The decision of the Commissioner finding Dale Plautz not disabled from the time period through September 30, 2014 is AFFIRMED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 9th day of September, 2019.

BY THE COURT:

/s/

_____

WILLIAM M. CONLEY
District Judge