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

DAVID ALLAN SLAYTON,

Plaintiff,

v.

ANDREW SAUL,
Commissioner of Social Security,

Defendant.

OPINION AND ORDER

19-cv-533-wmc

For the second time, plaintiff David Slayton has appealed the denial of his application for supplemental security income to this court. Plaintiff argues generally that the Commissioner's residual functional capacity ("RFC") finding is not supported by substantial evidence, and thus should be reversed or remanded. (Pl.'s Br. (dkt. #13) 13.) For the reasons discussed below, the court concludes that the Administrative Law Judge issued a remarkably thorough opinion, but that he erred in purporting to interpret "new and potentially decisive medical evidence," including further examinations by plaintiff's treating physician and numerous x-rays, MRIs and CAT scans, without the benefit of a medical expert in violation of settled Seventh Circuit case law. *Goins v. Colvin*, 764 F.3d 677, 680 (7th Cir. 2014). Accordingly, the Commissioner's decision will once again be remanded.[1]

[1] Oral Argument was held via telephone on this appeal on May 22, 2020, with plaintiff represented by Stephen Sloan of Daley Disability Law, P.C., and the Commissioner represented by David Levitt of the Social Security Administration.

BACKGROUND[2]

A. Overview of Claim

On February 18, 2015, Slayton filed his original application for supplemental security income, alleging disability due to back and neck problems beginning on October 16, 2014. (AR at 160, 222.) After Slayton's claim was denied initially and upon reconsideration, a hearing was held before ALJ David Bruce, who also denied his claim. (AR at 24.) Slayton then filed a civil action with this court on November 8, 2017. Before the court could consider the merits of Slayton's appeal, however, the parties jointly moved this court to enter a judgment reversing and remanding the cause to the Commissioner, which was granted. In turn, the Social Security Administration Appeals Council ordered ALJ Bruce

> to give further consideration to the medical opinion evidence pursuant to the provisions of 20 CFR 416.927 and explain the weight given, to the claimant's maximum residual functional capacity and provide appropriate rationale with specific references to evidence of record in support of the assessed limitations and if warranted obtain supplemental evidence from a vocational expert to clarify the effect of the assessed limitation on the claimant's occupational base. (Exhibit 10A/5).

(AR at 648.)

Consistent with that order, ALJ Bruce then held a second video hearing on November 16, 2018, after which he issued a more thorough decision, again denying Slayton's claim for supplemental security income on February 27, 2019. Slayton appealed this decision, which after repeated administrative affirmances, is once again before this

[2] The following facts are drawn from the administrative record. (Dkt. #11.)

court. In early 2020, Slayton also reapplied for supplemental security income prospectively.

B. Medical Record

The medical record indicates that Slayton began reporting neck and back pain as early as April of 2013. (AR at 615.) From April 3 through at least May 23, 2013, Slayton met periodically with Thomas Hoover, a chiropractic doctor, who noted his reported neck pain with episodes of regional pain and stiffness. (AR at 618.) Between December of 2014 and November of 2015, multiple treatment notes indicated: (1) Slayton's reported back pain was not completely relieved by medication; (2) a diagnosis of degenerative disc disease; (3) tenderness in the spine on physical examination; (4) objective evidence of disc degeneration revealed in multiple MRIs; and (5) limited range of motion. (AR at 290-306, 338, 363, 381-84, 391-96.)

During this same timeframe, Slayton's treating orthopedic specialist, John Cragg, also evaluated and treated Slayton, completing a "return to work note" on December 26, 2014, in which he opined that Slayton would not be able to work through March 1, 2015. (AR at 350.) Dr. Cragg later completed similar notes, excusing Slayton from work for "medical reasons" on February 27, 2015, July 27, 2015, and April 12, 2018. (AR at 349, 474, 1241.) On March 23, 2015, Slayton's chiropractor, Hoover, further opined that Slayton would be off task more than 10% of a workday and unreliable in attending full-time employment, as any exertional or repetitive duties or static postures would gradually create pain. (AR at 372-74.) In contrast, in March of 2015, state agency consultant Janis Byrd, M.D., concluded that Slayton was limited to sedentary work with no more than

occasional stopping. (AR at 71.) Finally, state agency consultant Mina Khorshidi, M.D., arrived at the same conclusion as Dr. Byrd based on her review of the medical records in May of 2015. (AR at 83-84.)

In May, June, and August of 2015, Slayton was also seen for right shoulder pain, having previously undergone right shoulder surgery. (AR at 460-63, 467, 471, 478-79.) Those records show that x-rays and MRIs revealed certain abnormalities in his shoulder, and Slayton reported pain and limited range of motion. (AR at 460-63, 467, 471.) In particular, on June 23, 2015, Slayton's primary care physician, Daniel Lochmann, M.D., completed a "return to work note," which indicated that Slayton could not work from June 23, through July 13, 2015. (AR at 469.) Dr. Lochmann also completed similar notes dated July 27, 2015, and July 11, 2017. (AR at 1200, 474.)

On January 13, 2016, Slayton underwent back surgery -- specifically, an L4-L5 and L5-S1 discectomy with fusion at each level. (AR at 563.) Both surgeries were performed by Dr. Kamal Thapar. (AR at 517.) Shortly after surgery, Slayton reported doing well, (AR at 569), but in April of 2016, he reported that his pain remained essentially the same as before the surgery (AR at 513). Then in May of 2016, Slayton reported worse pain "centralized over the surgical site," with an average rating of 8-9 out of 10, and his treating provider Nurse Practitioner Christine Hines confirming that "it does seem overall [the pain] is worsening." (AR at 517.) An x-ray was next conducted on May 26, 2016 (AR at 519), and a CT scan was completed on July 19, 2016 (AR at 52).

On July 29, 2016, Dr. Thapar opined that Slayton: would be off task more than 10% of the day; could not sit, stand, or walk for 8 hours continuously, 5 days per week on

a sustained basis; would have to take more than three daily breaks; and would be unable to work because of chronic back pain. (AR at 596-98.) At the same time, Dr. Thapar acknowledged that no objective evidence supports the limitations found (AR at 598), and in a separate treatment note, it was reported that "Dr. Thapar . . . was questioning as to why the patient continu[es] to have such significant pain." (AR at 524.) A CT scan was next performed in January of 2017 and reviewed by Dr. Thapar, who wrote: "it is disconcerting to see the patient having ongoing discomfort in his lumbar spine, but fortunately there are no complications that appear to be evident, either clinically or radiologically." (AR at 605.) In September of 2017, Slayton again reported that his pain was worse as compared to before the surgery. (AR at 1212.) In an effort to treat his back pain, Slayton continued various chiropractic appointments between March of 2017 and May of 2018. (AR at 1249-58.)

Slayton continued receiving treatment for shoulder pain between May and June of 2017 as well. (AR at 934, 1189-95.) On July 12, 2017, Slayton also underwent a left shoulder arthroscopy with extensive debridement of labral tear and arthroscopic subacromial decompression (AR at 1089). An x-ray was ordered in January of 2018, which (when compared to a March 2017 x-ray) showed "[m]oderate degenerative changes at the acromioclavicular joint with slight downsloping lateral acromion and mild degenerative changes at the glenohumeral joint." (AR at 1083.) An MRI was then conducted in February of 2018 (AR at 1074-75), and between March and May of 2018, Slayton continued to be treated for ongoing complaints of back and shoulder pain. (AR at 1225-

28, 1060, 1237, 983, 1240-45.) Finally, two further MRIs were conducted of his spine. (AR at 1060, 983.)

C. ALJ Opinion

On February 27, 2019, ALJ David Bruce issued his second, written decision denying Slayton's application for supplemental security income through that date. (AR at 648-71.) Considering Slayton's claim under the five-step, sequential framework set forth in the regulations, the ALJ determined at step one that Slayton had not engaged in substantial gainful activity since January 6, 2015. (AR at 650.) At step two and three, the ALJ found that Slayton's lumbar and cervical degenerative disc disease (including his status post-lumbar fusion), bilateral shoulder degenerative joint disease, depression, and anxiety, *all* qualified as severe impairments, but that none of his impairments met the listing level criteria. (AR at 651-55.)

At step four, the ALJ further concluded that Slayton has the residual functional capacity ("RFC") to perform sedentary work with the following, additional limitations:

> [T]he claimant can only lift and carry ten pounds occasionally and less than ten pounds frequently, and push and pull as much as he can lift and carry. The claimant can only frequent[ly] handle and finger items with his left upper extremity. The claimant can occasionally balance, stoop, kneel, crouch, crawl and climb ramps and stairs but never at unprotected heights, with moving mechanical parts, in extreme cold, in extreme heat and in vibration. The claimant is able to perform simple and routine tasks, [make] simple work-related decisions and occasionally interact with supervisors, coworkers and the general public. The claimant's time off task is accommodated by normal work breaks and lunch.

(AR at 655.) In arriving at this conclusion, the ALJ reviewed Slayton's medical record and evaluated each of the medical opinions submitted. (*See* AR at 655-68.)

Finally, at step five, relying on vocational expert testimony, the ALJ found jobs existed in significant numbers in the national economy that Slayton was capable of performing. (AR at 669-70.) Accordingly, ALJ Bruce concluded that Slayton was not disabled and denied his application. (AR at 670.)

OPINION

There is a well-settled standard by which federal courts are to review a final decision by the Commissioner of Social Security. 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). Thus, where 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" before affirming the Commissioner's decision. *Edwards*, 985 F.2d at 336. 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). In particular,

even when adequate record evidence exists to support the decision, the court may not affirm if the Commissioner has failed "to build an accurate and logical bridge" from the evidence to the conclusion. *Berger v. Astrue*, 516 F.3d 539, 544 (7th Cir. 2008); *Sarchet v. Chater*, 78 F.3d 305, 307 (7th Cir. 2006).

On his second appeal to this court, plaintiff argues that the ALJ's "most critical error" was "interpret[ing] *nearly four years* of evidence *with[out] any medical opinion* to support his conclusions." (Pl.'s Br. (dkt. #13) 14 (emphasis in original).) In fairness, plaintiff acknowledges that the ALJ gave "some weight" to the opinions from the state agency consultants in May of 2015, but complains this was long before the ALJ's decision in February of 2019 and, more importantly, only after the ALJ was left to interpret post-May 2015 evidence on his own, which included "nearly 600 pages of records documenting a two-level fusion surgery, a left shoulder surgery, [and] a plethora of MRIs." (*Id.*)

As a general matter, an ALJ is not required to rely on any one medical opinion and may independently assess objective medical evidence on the record. *See Diaz v. Chater*, 55 F.3d 300, 306 (7th Cir. 1995). However, as plaintiff points out, the Seventh Circuit has said that "an ALJ may not 'play[] doctor' and interpret 'new and potentially decisive medical evidence' without medical scrutiny." *McHenry v. Berryhill*, 911 F.3d 866, 871 (7th Cir. 2018) (quoting *Goins*, 764 F. 3d at 680). Of particular relevance to this case, the Seventh Circuit has specifically held in a series of decision beginning with *Goins*, that an ALJ is not qualified to interpret MRI results showing new, potentially material limitations without the benefit of an expert opinion. *See id.* ("As in *Akin* [*v. Berryhill*, 887 F.3d 314 (7th Cir. 2018)], where we reasoned that the ALJ was not qualified to determine on his

own whether the MRI results would corroborate the claimant's complaints 'without the benefit of an expert opinion,' 887 F.3d at 318, here, the ALJ was not qualified to assess on his own how the April 2014 MRI results related to other evidence in the record."); *Akin v. Berryhill*, 887 F.3d 314, 317-18 (7th Cir. 2018) ("[W]ithout an expert opinion interpreting the MRI results in the record, the ALJ was not qualified to conclude that the MRI results were 'consistent' with his assessment. . . . The MRI results may corroborate Akin's complaints, or they may lend support to the ALJ's original interpretation, but either way the ALJ was not qualified to make his own determination without the benefit of an expert opinion."); *Goins*, 764 F.3d at 680 ("Fatally, the administrative law judge failed to submit that MRI to medical scrutiny, as she should have done since it was new and potentially decisive medical evidence.").

In response, the Commissioner points to *Keys v. Berryhill*, 679 F. App'x 477 (7th Cir. 2017), and similar cases, in which the Seventh Circuit found that an ALJ did not err in relying on the opinions of two, uncontradicted state agency physicians even though they had not reviewed the plaintiff's most recent MRI findings. *Id.* at 481. By way of guidance away from the *Goins* line of cases, the *Keys* court explained that "[i]f an ALJ were required to update the record any time a claimant continued to receive treatment, a case might never end." *Id.* (citing *Scheck v. Barnhart*, 357 F.3d 697, 702 (7th Cir. 2004)). Moreover, the court found significant that plaintiff's failure to explain how the more recent reports indicated greater limitations than those included in the ALJ's RFC findings. *Id.* Finally, the state agency physician opinions in *Keys* were uncontradicted and provided only one year prior to the ALJ's hearing. *Id.*

Here, after the state agency opinions were provided in March and May of 2015, Slayton underwent a two-stage surgery fusing multiple discs in his lumbar spine, after which he reported *worse* pain. Moreover, the record contains numerous, subsequent x-rays, MRIs, and CT scans. To his credit, the ALJ thoroughly cited to and discussed this new evidence, concluding generally that "objective radiologic imaging shows that while the claimant's underlying pathology is abnormal, there is no significant longitudinal worsening . . . to support the claimant's allegations of an inability to function on an on-going basis." (AR at 657.) Specifically, the ALJ reviewed the imaging after Slayton's January 2016 back surgery, concluding that "post-fusion imaging . . . shows stable findings, intact hardware and indications of progressive healing." (AR at 660-61.) The ALJ also considered the imaging evidence regarding Slayton's left shoulder pain following his July 2017 arthroscopy, concluding that "the claimant's initial radiological imaging shows no evidence of an aggressive worsening pathology." (AR at 662.) The ALJ further concluded that "radiologic imaging shows no bony abnormalities consistent with the degree of functional limitation the claimant alleges at hearing." (AR at 663.)

In evaluating this post-2015 evidence and arriving at these conclusions, the ALJ did not rely on any medical opinions. (AR at 666-67.) More importantly, while he gave "some weight" to the early 2015 opinions of the state agency consultants, he gave little or no weight to the remaining opinions, including *all* opinions reached by plaintiff's treating orthopedist, Dr. Cragg, rendered after the middle of 2015. (AR at 666-67.)

The court is not unsympathetic to the difficult position faced by ALJs in a situation like this one. On the one hand, they are tasked with interpreting medical evidence, often

received as updates before the evidentiary hearing, but after any medical opinion evidence. On the other hand, they are warned against playing doctor and making their own medical findings. Where one begins and the other ends is not always clear. In this case, the record contains *years* of arguably significant, new medical evidence, including complicated imaging from MRIs, x-rays, and CAT scans, which the ALJ independently evaluated without the benefit of an expert opinion. While this length of time and even volume of new scans may be sufficient by itself, the parties' agreed at oral argument that the dividing line between the *Goins* line of cases and the *Keys* line is the potential for this new medical evidence to be decisive. *Compare McHenry*, 911 F.3d at 871 (ALJ purporting to determine the significance of an MRI that showed "multiple impinged nerves in addition to spinal cord compression"); *Akin*, 887 F.3d at 316 (ALJ discounting the medical significance of two MRIs, one of which "showed moderate to severe spinal canal stenosis at T10-T11 secondary to ligamentum flavum hypertrophy and a disk protrusion at L4-L5," and another showing "a worsening disk herniation at C5-6 which causes moderate spinal stenosis and cord impingement) (internal brackets and quotations omitted); *Goins*, 764 F.3d at 679 (ALJ discounting an MRI "which revealed degenerative disc disease, stenosis (a narrowing of the spinal canal), and a 'Chiari I' malformation, which is a condition in which brain tissue extends into the spinal canal"); *with Keys*, 679 F. App'x at 481 (relatively recent MRIs suggested *no* greater limitations beyond those found by ALJ).

Under Seventh Circuit precedent, therefore, plaintiff must at least point to medical evidence post-dating the early 2015 agency opinions that would potentially change the ALJ's formulated RFC, preferably including disturbing scans similar to the MRIs meriting

remand in *Goins* and its progeny. While the significance of the plaintiff's back and should surgeries in 2016 and 2017 may still not be enough, the combination of post-surgical MRIs in 2018 suggesting degeneration of the discs immediately above the site of the lumbar disc fusion surgeries (AR 983), which Dr. Cragg found indicative "facet spondylosis" and the explanation for plaintiff's reports of increasing pain (AR 1240), is at least enough to justify the ALJ seeking an additional medical opinion before rejecting plaintiff's claims of worsening disability due to extreme pain beginning in May of 2016.[3] To avoid this error, the ALJ could -- and this case, should -- have sought an updated medical opinion. *Akin*, 887 F.3d at 318 (citing *Green v. Apfel*, 204 F.3d 780, 782 (7th Cir. 2000)).

Plaintiff also offers a variety of other, somewhat cursory, arguments to support his contention that the ALJ erred. First, plaintiff contends that the ALJ erred by failing to discuss a particular treatment note from Slayton's January 2016 back surgery, describing parts of Slayton's spine as "very degenerative" and "very irregular," among other descriptions. (Pl.'s Br. (dkt. #13) 15.) While an ALJ may not ignore an entire line of evidence, he is not required to address every piece of medical evidence in the record. *Golembiewski v. Barnhart*, 322 F.3d 912, 917 (7th Cir. 2003). Here, the ALJ elsewhere discussed evidence indicating that Slayton had degenerative disc and irregularities in his spine. (AR at 657-61.) Therefore, the ALJ did not err in failing to specifically discuss this one piece of evidence.

[3] In fairness, the ALJ certainly did not *ignore* this evidence, but rather purported to discount it based on what he found to be plaintiff's subsequent course of conservative treatment and limited follow up, but neither are necessarily inconsistent with Dr. Cragg's findings, and it was not the ALJ's role to rad these MRIs differently without an updated medical opinion.

Second, plaintiff criticizes the ALJ for citing a treatment note that reported Slayton did "not want a Band-Aid to treat his problem for back pain." ((Pl.'s Br. (dkt. #13) 16 (citing AR at 659).) However, this statement is part of the medical record and, as such, the ALJ was certainly entitled to consider it. Moreover, an ALJ may consider a claimant's treatment history, as well as his willingness to engage in or seek certain treatment. *See* 20 C.F.R. § 404.1529(c)(3)(v); Social Security Ruling 16-3p; *Bachim v. Berryhill*, Case No. 16-cv-856-slc, 2017 WL 4797909, at **1, 5 (W.D. Wis. Oct. 20, 2017). Accordingly, the ALJ's consideration of this record was certainly not error by itself.

Finally, plaintiff suggests that the ALJ erred in rejecting the opinions of five treating sources. (Pl.'s Br. (dkt. #13) 18.) As discussed in more detail above, to the extent that plaintiff argues that the ALJ erred by rejecting the uncontradicted opinions of medical specialists in lieu of the ALJ's own interpretation of the evidence, the court agrees. However, insofar as plaintiff contends that the ALJ should have given more weight to certain of the medical opinions, this argument is not supported. The ALJ appears to have evaluated and assigned weight to each of the opinions after weighing the proper regulatory factors. *See* 20 C.F.R. § 416.927. Having pointed to no errors in the ALJ's basic analysis, plaintiff has not demonstrated that the ALJ erred in rejecting these opinions.

Accordingly, plaintiff has advanced no basis to reverse the ALJ's findings that he was not disabled between January 6, 2015, the date of his original application, and May of 2016, when he began reporting new, more extreme pain, but failed to seek additional medical opinion regarding that pain consistent with his treating physician's finding that the cause of his new pain was reflected in updated MRI scans in 2018.

ORDER

IT IS ORDERED that the decision of defendant Andrew M. Saul, Commissioner of Social Security, denying plaintiff David Slayton's application for supplemental security income is AFFIRMED for the period of January 6, 2015, through April 30, 2016, but REVERSED AND REMANDED under sentence four of 42 U.S.C. 405(g) for further proceedings as to his claim of disability after that date consistent with the opinion set forth above. On remand, the ALJ is also encouraged to consolidate his findings with plaintiff's 2020 application.

Entered this 27th day of May, 2020.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge