UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

MICHAEL H. B., Plaintiff,	:	
v.	:	C.A. No. 17-530WES
NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, Defendant.	:	

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

Before the Court is the motion of Plaintiff Michael H. B. to reverse the Commissioner's decision denying Supplemental Security Income ("SSI") under § 1631(c)(3) of the Social Security Act, 42 U.S.C. §§ 405(g), 1383(c)(3) (the "Act"). Plaintiff challenges as unsupported by substantial evidence the Step Two finding of the Administrative Law Judge ("ALJ") that gout is not a severe impairment. He also contends that the ALJ erred in failing to consider the functional limitations caused by gout in determining Plaintiff's residual functional capacity ("RFC").[1] Defendant Nancy A. Berryhill asks the Court to affirm the Commissioner's decision. The matter has been referred to me for preliminary review, findings and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B). Having reviewed the entirety of the relevant record, I find that the ALJ's findings are consistent with applicable law and amply supported by substantial evidence. I recommend that Plaintiff's Motion to Reverse, without or, Alternatively, with a Remand for a Rehearing of the Commissioner's Final Decision (ECF No. 12) be DENIED

[1] Residual functional capacity is "the most you can still do despite your limitations," taking into account "[y]our impairment(s), and any related symptoms, such as pain, [that] may cause physical and mental limitations that affect what you can do in a work setting." 20 C.F.R. § 416.945(a)(1).

and Defendant's Motion for an Order Affirming the Decision of the Commissioner (ECF No. 13) be GRANTED.

I. Background

This case presents a narrow and relatively simple issue – whether the ALJ's reliance at Step Two on the report of a consultative examining physician, Dr. Jay Burstein, and on the opinion of an expert file-reviewing physician, Dr. Henry Laurelli, somehow leaves the Step Two finding without the support of substantial evidence.

Dr. Burstein examined Plaintiff on May 30, 2014, focused on his complaints of chronic pain in the lower extremities based on gout, and found "no other functional limits from the orthopedic perspective," apart from limits on "running and jumping." Tr. 482. Dr. Laurelli examined the file assembled as of June 25, 2014, (which included the Burstein report, as well as observations of knee locking, swelling, tenderness, pulse diminishment and mildly antalgic gait), and opined that '[n]o severe MDI has been identified." Tr. 108. No contrary opinion was submitted by any treating source. After a detailed survey of the medical evidence, the ALJ found these opinions to be consistent with the "overall record"; based on that finding, the ALJ made the determination that their opinions should be afforded significant weight, resulting in his Step Two finding that gout (including gouty arthropathy) is not a severe impairment. Tr. 19-20. Further, in continuing the sequential analysis based on finding that Plaintiff's depression was severe, the ALJ did not ignore Plaintiff's symptoms of lower extremity pain and difficulty walking, allegedly caused by gout. To the contrary, the ALJ specifically considered Plaintiff's reports of "chronic pain" and "physical problems" in connection with the analysis of Plaintiff's functional limitations that formed the basis for the RFC finding. Tr. 23, 26. Further, the RFC is based, *inter alia*, on the opinion of the consultative examining psychologist, Dr. Wendy Schwartz, who

specifically noted Plaintiff's lower extremity arthritis and claimed need for a cane or walker. Tr. 471-79.

II. Standard of Review

The Commissioner's findings of fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). Substantial evidence is more than a scintilla – that is, the evidence must do more than merely create a suspicion of the existence of a fact, and must include such relevant evidence as a reasonable person would accept as adequate to support the conclusion. Ortiz v. Sec'y of Health & Human Servs., 955 F.2d 765, 769 (1st Cir. 1991) (per curiam); Rodriguez v. Sec'y of Health & Human Servs., 647 F.2d 218, 222 (1st Cir. 1981); Brown v. Apfel, 71 F. Supp. 2d 28, 30 (D.R.I. 1999). Once the Court concludes that the decision is supported by substantial evidence, the Commissioner must be affirmed, even if the Court would have reached a contrary result as finder of fact. Rodriguez Pagan v. Sec'y of Health & Human Servs., 819 F.2d 1, 3 (1st Cir. 1987); see also Barnes v. Sullivan, 932 F.2d 1356, 1358 (11th Cir. 1991); Lizotte v. Sec'y of Health & Human Servs., 654 F.2d 127, 128 (1st Cir. 1981).

The determination of substantiality is based upon an evaluation of the record as a whole. Brown, 71 F. Supp. 2d at 30; see also Frustaglia v. Sec'y of Health & Human Servs., 829 F.2d 192, 195 (1st Cir. 1987); Parker v. Bowen, 793 F.2d 1177, 1180 (11th Cir. 1986) (court also must consider evidence detracting from evidence on which Commissioner relied). Thus, the Court's role in reviewing the Commissioner's decision is limited. Brown, 71 F. Supp. 2d at 30. The Court does not reinterpret the evidence or otherwise substitute its own judgment for that of the Commissioner. Id. at 30-31 (citing Colon v. Sec'y of Health & Human Servs., 877 F.2d 148, 153 (1st Cir. 1989)). "[T]he resolution of conflicts in the evidence is for the Commissioner, not the courts." Id. at 31 (citing Richardson v. Perales, 402 U.S. 389, 399 (1971)). A claimant's

complaints alone cannot provide a basis for entitlement when they are not supported by medical evidence. See Avery v. Sec'y of Health & Human Servs., 797 F.2d 19, 20-21 (1st Cir. 1986); 20 C.F.R. § 416.929(a). The Court must reverse the ALJ's decision if the ALJ applies incorrect law, or if the ALJ fails to provide the Court with sufficient reasoning to determine that the law was applied properly. Nguyen v. Chater, 172 F.3d 31, 35 (1st Cir. 1999) (per curiam); accord Cornelius v. Sullivan, 936 F.2d 1143, 1145-46 (11th Cir. 1991).

III. Disability Determination

The law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. §§ 416(i), 423(d)(1); 20 C.F.R. § 416.905. The impairment must be severe, making the claimant unable to do previous work, or any other substantial gainful activity which exists in the national economy. 42 U.S.C. § 423(d)(2); 20 C.F.R. § 416.905-911.

A. The Five-Step Evaluation

The ALJ must follow five steps in evaluating a claim of disability. See 20 C.F.R. § 416.920. First, if a claimant is working at a substantial gainful activity, the claimant is not disabled. 20 C.F.R. § 416.920(b). Second, if a claimant does not have any impairment or combination of impairments that significantly limit physical or mental ability to do basic work activities, then the claimant does not have a severe impairment and is not disabled. 20 C.F.R. § 416.920(c). Third, if a claimant's impairments meet or equal an impairment listed in 20 C.F.R. Part 404, Appendix 1, the claimant is disabled. 20 C.F.R. § 416.920(d). Fourth, if a claimant's impairments do not prevent doing past relevant work, the claimant is not disabled. 20 C.F.R. § 416.920(e)-(f). Fifth, if a claimant's impairments (considering RFC, age, education and past

work) prevent doing other work that exists in the local or national economy, a finding of disabled is warranted. 20 C.F.R. § 416.920(g). Significantly, the claimant bears the burden of proof at Steps One through Four, but the Commissioner bears the burden at Step Five. Wells v. Barnhart, 267 F. Supp. 2d 138, 144 (D. Mass. 2003) (five step process applies to SSI claims).

B. Step Two Determination

An impairment is "not severe" at Step Two if the medical evidence establishes no more than a slight abnormality that would have only a minimal effect on an individual's ability to work. SSR 85-28 at *2, 1985 WL 56856 (Jan. 1, 1985). As the First Circuit has long held, Step Two is a screening device used to eliminate applicants "whose impairments are so minimal that, as a matter of common sense, they are clearly not disabled from gainful employment." McDonald v. Sec'y of Health & Human Servs., 795 F.2d 1118, 1123 (1st Cir. 1986); Burge v. Colvin, C.A. No. 15-279S, 2016 WL 8138980, at *7 (D.R.I. Dec. 7, 2016), adopted sub nom., Burge v. Berryhill, C.A. No. 15-279S, 2017 WL 435753 (D.R.I. Feb. 1, 2017). Further, if there is error at Step Two, but the sequential analysis continues because of another severe impairment, the error is generally deemed harmless. White v. Colvin, C.A. No. 14-171S, 2015 WL 5012614, at *8 (D.R.I. Aug. 21, 2015); see Syms v. Astrue, No. 10-cv-499-JD, 2011 WL 4017870, at *1 (D.N.H. Sept. 8, 2011) ("[A]n error at Step Two will result in reversible error only if the ALJ concluded the decision at Step Two, finding no severe impairment.") (collecting cases). Thus, as long as the ALJ's RFC analysis is performed in reliance on the opinions of state agency reviewing experts or treating sources who considered the functional impact of the impairment in question, there is no material error in failing to include it as a severe impairment at Step Two. Evans v. Astrue, C.A. No. 11–146S, 2012 WL 4482366, at *4-6 (D.R.I. Aug. 23, 2012) (no error

in ignoring diagnosis of antisocial personality disorder at Step Two where ALJ relied on medical expert's testimony regarding resulting limitations).

IV. Analysis

Plaintiff contends that the ALJ's Step Two finding that gout is not severe is erroneous because it is unsupported by substantial evidence, as well as that the error requires remand because the ALJ failed to account for the functional limitations stemming from gout when making the RFC assessment. To buttress the claim of error, Plaintiff essentially asks the Court to reweigh the evidence itself by considering a handful of treating notations and to make its own medical finding that these notations establish Step Two severity, contrary to the opinions of the experts to whom the ALJ turned for guidance.

For starters, Plaintiff asks the Court to interject itself improperly into the merits determination by taking note of a bone scan, Tr. 528, done in August 2014, which resulted in a finding of "arthritic and degenerative changes"; the argument ignores the benign clinical assessment of the scan by the treating physician who ordered it. Tr. 511 ("The bone scan was normal."); Tr. 711 ("normal bone scan documented"). Second, Plaintiff asks the Court to reweigh various observations by treating sources of occasional range of motion limitations, frequent lower extremity tenderness, diminished pulses and discomfort. The problem with the argument is that these references all pertain to issues that appear in the portion of the file reviewed by Dr. Laurelli,[2] while others mirror observations recorded by Dr. Burstein. Accordingly, all such observations were taken into account by the experts on whom the ALJ relied for his Step Two finding. Further, such adverse post-file review treating references as

[2] To be clear, some of the notations to which Plaintiff points the Court appear in the portion of the file reviewed by Dr. Laurelli, while others are in the portion of the file that Dr. Laurelli did not see. What matters is that Plaintiff did not point to any material difference between the two sets, nor did the Court's review suggest any material differences.

appear of record are contradicted by the rheumatologist responsible for treating Plaintiff's gout.[3] E.g., Tr. 518 ("I continue to be puzzled by the the patient's at times dramatic complaints of pain in his lower extremities and the paucity of physical findings and radiographic findings."); Tr. 522 ("Exam . . . does not demonstrate any instability of the knees or decreased range of motion of knees, hips or ankles"). Third, Plaintiff asks the Court to draw its own conclusions from various observations of impaired gait. However, Dr. Burstein made that precise observation ("mildly antalgic gait"), yet found no work-impairing limitations. Tr. 481-82. Moreover, the treating record is largely inconsistent with Plaintiff's argument. E.g., Tr. 511, 513 (treating rheumatologist observes "non-antalgic gait and brisk gait while using [his mother's borrowed] walker"); Tr. 732 (treating rheumatologist observes, "he can walk rather briskly without a cane").

The *de minimis* impact of gout on Plaintiff's ability to function is dramatically confirmed by a notation made by the nurse practitioner who worked with the rheumatologist tasked with treating Plaintiff's gout. Noting that "patient is interested in disability," she advised him in December 2014 that, "[b]ecause of his relatively normal physical exam and I discouraged him from doing that." Tr. 554. Similarly, the neurologist to whom Plaintiff was sent by his attorney "to get a neurologic evaluation for both his own knowledge and for whether he is disabled," noted that the "[e]xam is unremarkable." Tr. 583-84; see Tr. 586 ("Impression: Normal" based on nerve conduction study and needle exam).

The Commissioner argues correctly that, while Plaintiff need not scale the mountain at Step Two, he must do some climbing. With a record reflecting the ALJ's appropriate reliance on

[3] For example, while a physical therapist (a non-acceptable medical source) noted "significant ROM limitations," Tr. 566, the contemporaneous observation of the rheumatologist (an acceptable medical source with expertise in the requisite specialty) was "knees, ankles and hips have full passive and active range of motion." Tr. 513.

two opinions that amply support the Step Two finding that gout was not severe, I find no error and recommend that the Commissioner's decision be affirmed.[4] See Rodriguez Pagan, 819 F.2d at 3 ("We must affirm the Secretary's resolution, even if the record arguably could justify a different conclusion, so long as it is supported by substantial evidence.").

V. Conclusion

Based on the foregoing analysis, I recommend that Plaintiff's Motion to Reverse, without or, Alternatively, with a Remand for a Rehearing of the Commissioner's Final Decision (ECF No. 12) be DENIED and Defendant's Motion for an Order Affirming the Decision of the Commissioner (ECF No. 13) be GRANTED. Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
August 6, 2018

[4] Because I find no error, there is no need for the Court to consider whether any error was harmless. However, because it is also clear that the sequential analysis continued and that Plaintiff's claim of limitations caused by gout was considered both by the ALJ directly, as well as by the consultative examining psychologist on whom the ALJ relied, if this Court concludes that it was error not to find gout to be a severe impairment at Step Two, I also find that such a Step Two error is harmless in the circumstances presented by this case and alternatively recommend that the Commissioner's decision be affirmed on that basis.