Brown v. Commissioner of Social Security Administration

2018 | Cited 0 times | D. South Carolina | December 11, 2018

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION

Nolan Lamont Brown,)

Civil Action No. 6:17-3039-DCC-KFM Plaintiff,)

REPORT OF MAGISTRATE JUDGE vs.)

Nancy A. Berryhill, Acting) Commissioner of Social Security,)

Defendant.)

This case is before the court for a report and recommendation pursuant to Local Civil Rule 73.02(B)(2)(a)(D.S.C.), concerning the disposition of Social Security cases in this District, and Title 28, United States Code, Section 636(b)(1)(B). 1

The plaintiff brought this action pursuant to Sections 205(g) and 1631(c)(3) of the Social Security Act, as amended (42 U.S.C. 405(g) and 1383(c)(3)), to obtain judicial review of a final decision of the Commissioner of Social Security denying his claims for disability insurance benefits and supplemental security income benefits under Titles II and XVI of the Social Security Act.

ADMINISTRATIVE PROCEEDINGS The plaintiff filed applications for disability insurance benefits ("DIB") and supplemental security income ("SSI") benefits on February 25, 2014. In both applications, the plaintiff alleged that he became unable to work on January 25, 2014. Both applications were denied initially and on reconsideration by the Social Security Administration. On December 17, 2014, the plaintiff requested a hearing. The administrative law judge ("ALJ"), before whom the plaintiff and Robert E. Brabham, Sr., an impartial vocational expert,

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A report and recommendation is being filed in this case, in which one or both parties declined to

consent to disposition by the magistrate judge. 6:17-cv-03039-DCC Date Filed 12/11/18 Entry Number 28 Page 1 of 23

appeared on April 25, 2017, considered the case de novo, and on May10, 2017, found that the plaintiff was not under a disability as defined in the Social Security Act, as amended (Tr. 10-24). The ALJ's finding became the final decision of the Commissioner of Social Security when the Appeals Council denied the plaintiff's r equest for review on October 6, 2017 (Tr. 1-4). The plaintiff then filed this action for judicial review.

In making the determination that the plaintiff is not entitled to benefits, the Commissioner has adopted the following findings of the ALJ:

(1) The claimant meets the insured status requirements of the Social Security Act through September 30, 2014. (2) The claimant has not engaged in substantial gainful activity since January 25, 2014, the alleged onset date (20 C.F.R §§ 404.1571 et seq., 416.971 et seq.). (3) The claimant has the following severe impairments: seizure disorder, affective disorder and borderline intellectual functioning (20 C.F.R. §§ 404.1520(c), 416.920(c)). (4) The claimant does not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. §§ 404.1520(d), 404.1525, 416.920(d), 416.925, 416.926). (5) After careful consideration of the entire record, I find that the claimant has the residual functional capacity to perform a full range of work at all exertional levels but with the following nonexertional limitations: no climbing ladders/ropes/scaffolds and occasionally balancing, no exposure to hazards such as unprotected heights or moving machinery, no exposure to extreme heat or working outdoors, and no driving. He can perform simple, routine tasks for two-hour periods, and time off task can be accommodated by normal breaks with occasional interaction with the public. (6) The claimant is unable to perform any past relevant work (20 C.F.R. §§ 404.1565, 416.965). (7) The claimant was born on July 13, 1976, and was 37 years old, which is defined as a younger individual age 18-49, on the alleged disability onset date (20 C.F.R. §§ 404.1563, 416.963).

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(8) The claimant has a limited education and is able to communicate in English (20 C.F.R. §§ 404.1564, 416.964). (9) Transferability of job skills is not material to the determination of disability because using the Medical- Vocational Rules as a framework supports a finding that the claimant is "not disabled" w hether or not the claimant has transferable job skills (See SSR 82-41 and 20 C.F.R. Part 404, Subpart P, Appendix 2). (10) Considering the claimant's age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy that the claimant can perform (20 C.F.R. §§ 404.1569, 404.1569(a), 416.969, 416.969(a)). (11) The claimant has not been under a disability, as defined in the Social Security Act, from January 25, 2014, through the date of this decision (20 C.F.R. §§ 404.1520(g), 416.920(g)). The only issues before the court are whether proper legal standards were applied and whether the final decision of the

Commissioner is supported by substantial evidence.

APPLICABLE LAW Under 42 U.S.C. § 423(d)(1)(A), (d)(5) and § 1382c(a)(3)(A), (H)(i), as well as pursuant to the regulations formulated by the Commissioner, the plaintiff has the burden of proving disability, which is defined as an "inabili ty 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 12 months." 20 C.F.R. §§ 404.1505(a), 416.905(a).

To facilitate a uniform and efficient processing of disability claims, the Social Security Act has by regulation reduced the statutory definition of "disability" to a series of five sequential questions. An examiner must consider whether the claimant (1) is engaged in substantial gainful activity, (2) has a severe impairment, (3) has an impairment that meets or medically equals an impairment contained in the Listing of Impairments found at 20

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C.F.R. Pt. 404, Subpt. P, App. 1, (4) can perform his past relevant work, and (5) can perform other work. Id. §§ 404.1520, 416.920. If an individual is found not disabled at any step, further inquiry is unnecessary. Id. §§ 404.1520(a)(4), 416.920(a)(4).

A claimant must make a prima facie case of disability by showing he is unable to return to his past relevant work because of his impairments. Grant v. Schweiker, 699 F.2d 189, 191 (4 th

Cir. 1983). Once an individual has established a prima facie case of disability, the burden shifts to the Commissioner to establish that the plaintiff can perform alternative work and that such work exists in the national economy. Id. (citing 42 U.S.C. § 423(d)(2)(A)). The Commissioner may carry this burden by obtaining testimony from a vocational expert. Id. at 192.

Pursuant to 42 U.S.C. § 405(g), the court may review the Commissioner's denial of benefits. However, this review is limited to considering whether the Commissioner's findings "are supported by s ubstantial evidence and were reached through application of the correct legal standard." Craig v. Chater, 76 F.3d 585, 589 (4th Cir. 1996). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance." Id. In reviewing the evidence, the court may not "undertake to re-weigh conflicting ev idence, make credibility determinations, or substitute [its] judgment for that of the [Commissioner]." Id. Consequently, even if the court disagrees with Commissioner's decision, the court must uphold it if it is supported by substantial evidence. Blalock v. Richardson, 483 F.2d 773, 775 (4 th

Cir. 1972).

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EVIDENCE PRESENTED The plaintiff was 37 years old on his alleged disability onset date (January 25, 2014) and 41 years old at the time of the ALJ's decision (May 10, 2017). He completed the tenth grade and has past relevant work experience as a kitchen helper/dishwasher (Tr. 22, 38).

On March 7, 2013, the plaintiff presented to Jason Dahlberg, M.D., stating that he had a seizure in February and wanted to discuss changing medications as the one he was taking at the time, phenytoin, made him vomit. Dr. Dahlberg diagnosed him with epilepsy and switched his medication to Keppra 500mg (Tr. 373-74). Dr. Dahlberg also completed a residual functional capacity ("RFC") questionnaire, noting that he had been treating the plaintiff for his seizures since 2010. Dr. Dahlberg further stated that the plaintiff's seizures were generalized with lo ss of consciousness occurring about three times per month and that the plaintiff did not experience any warnings of an impending seizure. Dr. Dahlberg indicated that the plaintiff's la st three seizures were in July and December 2012, and February 2013. He circled that the plaintiff was compliant with medication. Dr. Dahlberg further reported that postictal manifestations include confusion, exhaustion, and severe headaches that could last two to three hours afterward. He further reported that the plaintiff was very fatigued following a seizure and experienced nausea and vomiting. Dr. Dahlberg opined that the plaintiff would need more supervision at work than an unimpaired worker and could not work with power machines or operate a motor vehicle. He stated that the plaintiff would not require unscheduled breaks. He would be absent from work about once a month (Tr. 416-20).

On April 9, 2013, the plaintiff saw Dr. Dahlberg for followup. Dr. Dahlberg noted that the plaintiff had not had a seizure since starting the Keppra; however, the medicine made him sleepy. Dr. Dahlberg recommended continuing the Keppra with followup in two months (Tr. 375-76).

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On June 12, 2013, the plaintiff saw Dr. Dahlberg, who noted that the plaintiff remained "seizure free" on Keppra. (Tr. 378). On September 5, 2013, he returned to Dr. Dahlberg and reported that he had suffered a seizure the month prior. The plaintiff stated that he had trouble exercising because he would suffer a seizure if he got overheated. Dr. Dahlberg increased the Keppra to 1000mg twice a day (Tr. 379-80). On October 9, 2013, the plaintiff reported no seizures since his last visit (Tr. 381-82). On March 11, 2014, he reported no seizures since increasing Keppra in September. His seizures were "well controlled" (Tr. 383).

In a function report dated April 18, 2014, the plaintiff noted that his seizures caused him not to work. He reported that was able to make simple meals, sweep, dust, make the bed, wash dishes, read, collect comic books, watch television, go out three to four times per week, and spend time with his brother and uncle at their house (Tr. 316-23).

On May 29, 2014, state agency physician Dina Nabors, M.D., reviewed the record and opined that the plaintiff had no exertional limitations, except he could not climb ladders, ropes, or scaffolds; could occasionally balance; should avoid concentrated exposure to heat; and should avoid all exposures to hazards, such as machinery and heights (Tr. 93-94, 106-08).

On July 8, 2014, the plaintiff reported " like 4 seizures" since May. He believed that the seizures were related to the heat. The plaintiff also reported worsening depression and hearing voices, but Dr. Dahlberg was "not sure what to make of this story," as the plaintiff was fairly nonchalant and not concerned about the voices. The plaintiff stated that he had heard voices for years but only confessed to Dr. Dahlberg about the issue because other people have heard him having conversations with the voice. Dr. Dahlberg started the plaintiff on risperidone at night for his hallucinations and directed him to continue taking the Keppra (Tr. 397-98).

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On July 21, 2014, the plaintiff underwent a consultative examination performed by Ron O. Thompson, Ph.D. He complained of grand mal seizures and auditory hallucinations. He reported living with his common-law wife and three stepchildren and stated that he engaged in normal chores like washing clothes, heating up food in the microwave, and attending to his personal needs. The plaintiff stated that he had no friends, but his brother came over to visit and helped him around the house. The plaintiff reported having epilepsy since birth and that he had at least one seizure per month. He reported having three seizures in June. The plaintiff sometimes would see spots before an impending grand mal seizure. He stated that he worried about not being able to see his children due to his seizures because their mother would not allow them to see him due to his condition. He reported that he felt the Keppra helped decrease his seizures (Tr. 393- 94).

On examination, the plaintiff had normal psychomotor activity and normal mood. Although he was initially a bit surly, it did not appear intentional, and his affect became more appropriate after rapport was easily established. In reviewing the plaintiff's mental status, Dr. Thompson noted:

The examinee was about 5 days off on the date, but oriented as to month, year, day of the week, and specific reason why was he present today. He knew the name of the President of the United States. Insight and judgment however appeared to be limited, as his estimated level of intellect by way of task tapping abstraction suggests high mild MR to low borderline capability. I would suggest that he may require formal intellectual testing, as he did report a history of learning disabled classes and not being able to read and write well and attended school only up to the 7th grade. The examinee's thought process is quite concrete and he endorses command voices that tell him to "go some place because someone might kill me." He states he last heard these voices earlier this morning telling him "don't go to see that doctor." He hears wh ispers, but cannot identify gender of voices or whether it is singular or many and indicates "they are whispers." . . .

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He reports that voices bother him mostly when he is alone and at night, but indicated that he actually is hearing them now, but did not appear to be responding to any internal stimuli. (Tr. 393-94). Dr. Thompson further stated that the plaintiff was unable to spell "world" forwards or backwards or subtract four dollars from ten and seemed to function intellectually "in the deficient range." He also did not feel that the plaintiff was capable of managing his own funds. The plaintiff reported being independent in all of his personal needs. He noted that he last worked as a dishwasher and grill cook at Blazers Seafood Restaurant but was terminated when he began having seizures at work. Dr. Thompson's impression was 1) report of learning disorder with minimal ability to read and write; 2) no apparent mood disorder, occasional mild dysthymia; 3) report of endorsement of auditory hallucinations; 4) probable mild mental retardation to low borderline ability; 5) report of grand mal seizures, juvenile onset. Dr. Thompson noted that the plaintiff did not appear to be in acute psychiatric distress and that the plaintiff's majo r concern might be more related to grand mal seizures. Dr. Thompson deferred to the medical community on that determination (Tr. 394- 95).

On September 11, 2014, state agency psychologist Michael Neboschick, Ph.D., reviewed the record and assessed mild difficulties in activities of daily living and social functioning; moderate difficulties concentration, persistence, or pace; and no repeated episodes of decompensation of extended duration. He opined that the plaintiff could understand and remember basic instructions; sustain attention on simple tasks for two hour segments; make simple, work related decisions; maintain appropriate appearance and hygiene; recognize and appropriately respond to hazards; work within the presence of others; and accept supervision (Tr. 91-92, 96, 104-05, 109).

On October 3, 2014, the plaintiff reported that he last had a seizure two months prior. Dr. Dahlberg determined that the plaintiff should keep the current dose of Keppra. He planned a recheck in a month and would increase Keppra if the plaintiff had

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additional seizures. Dr. Dahlberg noted that the plaintiff had continued to hear voices. He stated that the voices were occurring mostly during the day, but he also heard them at night. He also reported that he got extremely depressed at times and had suicidal thoughts. Dr. Dahlberg increased risperidone (Tr. 400-02).

On November 11, 2014, Dr. Dahlberg noted that the plaintiff had another seizure and was still hearing voices. Dr. Dahlberg increased his risperidone to 1mg in the morning and 2mg at night and referred him to psychiatry (Tr. 426-27).

Also on November 11, 2014, the plaintiff underwent a psychological consultative examination with John C. Whitley, III, Ph.D. At this examination, the plaintiff reported auditory hallucinations that

come and go and seizures three times per month. The plaintiff indicated that his daily routine included taking medication, eating breakfast, performing his own hygiene skills, and watching television; he did not text or use the internet and had no hobbies, interests, or activities. He microwaved food, made the bed, swept, washed, and folded clothes. He was able to organize and perform basic shopping for food and clothes. Dr. Whitley believed the plaintiff was less than forthcoming as he offered minimal elaboration. The plaintiff had below average judgment, poor insight, and adequate impulse control, although his remote and recent memory were difficult to assess due to a mild sense of embellishment. The plaintiff was oriented to time, place, and home address; could recite three digits forwards and backwards; could recite serial threes and fives, but not sevens; could not state the day of the week, month, or year; could not name the current president or any recent president; could not name the governor or a current event; had poor proverb interpretation; could not subtract seven from 11; could not spell the word "world," but could spell "cat" and "dog"; and could not name three famous people. The plaintiff's thought process was coherent and organized, though concrete and limited in regard to production. His mood was mildly depressed and congruent to affect, and he had no perceptual abnormalities (Tr. 410).

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Dr. Whitley administered the Weschler Adult Intelligence Scale – Fourth Edition ("WAIS-IV"), and the plaintiff scored a fu ll scale IQ of 46. However, Dr. Whitley felt that the plaintiff put forth less than optimal effort, which impacted his overall results. The plaintiff had a history of menial and simple work tasks, which appeared to be his level of functioning (Tr. 411-12).

Dr. Whitley opined that the plaintiff could communicate with others adequately for a work setting, but would be precluded from complex work instructions requiring multiple steps. He could manage stress, change, expectations, and pressure during a normal workday, with only a mild impact from psychological symptoms. He could interact with coworkers and others in public in stable and appropriate manner, which would be "mild to mildly" impacted by his depression. He coul d make basic and daily decisions and organize basic appointments and schedules, but might require assistance managing his finances appropriately (Tr. 412).

On December 8, 2014, Xanthia Harkness, Ph.D., a state agency psychologist, reviewed the updated record (including the July 2014 consultative examination and mental health treatment records) (Tr. 121-22, 125-26, 139-40, 143-44). Dr. Harkness adopted the same "B" criteria findings and RFC as Dr. Neboschick (Tr. 121-22, 125-26, 139-40, 143-44).

On December 9, 2014, state agency physician William Hopkins, M.D., agreed with Dr. Nabors' opinion submitted in May 2014 that the plaintiff had no exertional limitations, except he could not climb ladders, ropes, or scaffolds; could occasionally balance; should avoid concentrated exposure to heat; and should avoid all exposures to hazards, such as machinery and heights (Tr. 124-25, 141-43).

On December 15, 2014, the plaintiff was seen by Lisa Cometto, NP, at Beckman Mental Health. Ms. Cometto noted that the plaintiff reported he began hearing voices over a year earlier and had continued to hear them constantly. He stated that often times the voices were just whispers that were indiscernible, however, there were times that

he could distinguish what the voices were saying. He reported the voices would call his name and say "what are you waiti ng on?" The plaintiff also st ated that he had trouble falling asleep and described his mood as depressed. He reported decreased energy, crying spells, and intense anger. He admitted to having suicidal ideations of walking into traffic. He reported that he had seizures and that his last one was in October 2014. On mental status examination, he was cooperative and calm; alert and oriented; had normal speech; intact associations; logical/goal-directed thought processes; no delusions; no homicidal or suicidal ideation; no obsessions, though he reported auditory/visual hallucinations; depressed mood; appropriate affect; intact memory, concentration, and attention; average language; and fair judgment and insight. Ms. Cometto diagnosed the plaintiff with severe major depressive disorder with psychotic features. She prescribed Latuda to target the psychosis and Remeron to help with sleep (Tr. 421-22).

On December 19, 2014, Dr. Dahlberg completed a medical source statement in which he opined that the conditions and limitations contained in his report dated March 2013 continued to be present and were expected to continue for at least 12 months. He also opined that the plaintiff's conditions and limitations had not improved despite medical treatment and would cause problems with focusing on a task, concentration, work production, and pace. Dr. Dahlberg further opined that the plaintiff was not capable of full time work even at a sedentary level and that his conditions and limitations were most probably permanent (Tr. 415).

On January 28, 2015, the plaintiff was seen in a followup examination by Ms. Cometto. She noted that the plaintiff reported the Latuda had been helpful for the voices but did not stop them completely. He also reported having continued suicidal thoughts but no plans to act on them. Ms. Cometto stated that his mood had been "okay" with no intense anger or irritability. His mental status examination was similar to previous visits, including intact memory, concentration, and attention; his mood was euthymic. The plaintiff's energy

and concentration levels were normal. Ms. Cometto assessed a Global Assessment of Functioning ("GAF") score of 60

2 (Tr. 449). On March 10, 2015, the plaintiff returned to Dr. Dahlberg and reported no recent seizures. Dr. Dahlberg noted that his seizures were currently "well controlled" (Tr. 428-30).

On March 25, 2015, the plaintiff stated that he continued to hear voices and was afraid of them at times. He reported that he went to his uncle's house so he did not have to be alone. His mental status examination was similar to previous visits, including intact memory, concentration, and attention; his mood was euthymic. Ms. Cometto noted that his sleep and appetite were fine, and his energy and concentration were normal (Tr. 447).

On June 24, 2015, Ms. Cometto noted no psychosis, though the plaintiff still reported hearing auditory hallucinations. His mental status examination remained essentially the same, including intact memory, concentration, and attention, and euthymic mood. His medications were adjusted, and vocational rehabilitation and group therapy were suggested (Tr. 445-46).

On November 2, 2015, the plaintiff saw Ms. Cometto and complained of difficulty sleeping and being unable to find a job due to his seizure disorder with the most recent seizure occurring two weeks prior. He reported that he was doing somewhat better

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A GAF score is a number between 1 and 100 that measures "the clinician's judgment of the individual's overa ll level of functioning." See Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders, 32-34 (Text Revision 4 th

ed. 2000) (" DSM-IV"). A GAF score between 61 and 70 indicates some mild symptoms or some difficulty in social, occupational, or school functioning, but generally functioning pretty well. Id. A GAF score between 51 and 60 indicates moderate symptoms or moderate difficulty in social, occupational, or school functioning. Id.

The court notes that the fifth edition of the DSM, published in 2013, has discontinued use of the GAF for several reasons, including "i ts conceptual lack of clarity (i.e., including symptoms, suicide risk, and disabilities in its descriptors) and questionable psychometrics in routine practice." See Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders, 16 (5th ed. 2013) (" DSM–V ").

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after stopping Remeron. His mental status examination remained essentially the same. He continued to report hearing voices, mostly at night. He tried to say that the voices would "always" be there. When confront ed that it must be something other than mental illness because he was on medication, the plaintiff backed off, and said he did not hear voices every day, and that he was not taking his medication with food. He had not seen his therapist since May (Tr. 443).

On December 2, 2015, at a followup with Dr. Dahlberg, the plaintiff reported having a seizure one month earlier, but he might have missed several doses of Keppra prior to his seizure. Dr. Dahlberg

encouraged "stric t compliance" with Keppra and noted that the plaintiff's seizures appeared to be well controll ed as long as he was compliant with Keppra. He continued the plaintiff's current mental health medication (Tr. 431-33)

On February 22, 2016, the plaintiff reported to Ms. Cometto that he was taking his medication consistently and doing better with sleep on trazodone. He reported that his sleep was "OK, but could be better." He also stated that his mood was "mostly all right" but sometimes would switch and that his seizure disorder continued to keep him from obtaining a job. A mental status examination was essentially the same. The plaintiff requested a statement saying that he could not work. Mental health declined to make such a statement, but provided a letter saying that he was a client undergoing treatment (Tr. 425, 441).

On April 27, 2016, Dr. Dahlberg noted that while the plaintiff had not had any seizures in the last few months, he continued to experience feelings of confusion where he would "daze out" for short periods of time. The plaintiff did not want to add another seizure medication at that time and would let Dr. Dahlberg know if he had worsening symptoms (Tr. 434-35).

On June 13, 2016, the plaintiff was seen by Alfred R. Ebert, M.D., at Beckman Mental Health. The plaintiff reported when he was alone he heard voices telling him that he should not go on with life. Dr. Ebert reported that the plaintiff took all of his medications

yet still had visual and auditory hallucinations. The plaintiff was sleeping well with trazodone and Vistaril. He helped out while his girlfriend worked, visited his uncle the past weekend (who was helpful), and saw a counselor about once per month, which helped some. A mental status examination was essentially the same, including intact memory, concentration, and attention; he had a depressed and anxious mood, though his insight and judgment were good. Latuda was increased. Dr. Ebert suggested adding an antidepressant to his medicine regimen and increasing his trazodone (Tr. 439-40).

On August 17, 2016, Dr. Dahlberg noted that the plaintiff continued to have seizures, and he was taking the maximum dose of Keppra. He stated that he would usually have one seizure per month. Dr. Dahlberg noted that the plaintiff was not working due to his seizures and recommended adding a second medication. He planned to get the plaintiff's electroencephalogram ("EEG") results to review (Tr. 451).

On August 31, 2016, the plaintiff reported to Dr. Ebert that he was doing well, was taking his medications, and he felt they worked well. His mood was stable. He was seeing a doctor for seizures, which were "oka y." He last report ed a seizure one month earlier. He reported that he was less active in the hot summer months. He was told that a healthy lifestyle with diet and exercise would be a

good idea. A mental status examination was essentially the same, including intact memory, concentration, and attention; he had a euthymic mood and fair insight and judgment (Tr. 454).

On October 18, 2016, Dr. Dahlberg completed a physician statement in which he indicated that the plaintiff experienced generalized seizures on average of twice per month. His last seizures were on September 1 and 15, and October 3. He went on to state that the plaintiff did not have any warnings of an impending seizure and therefore could not always take safety precautions prior to one occurring. Dr. Dahlberg stated that there were no precipitating factors for his seizures, and once a seizure occurred, he experienced confusion and exhaustion. Dr. Dahlberg stated that the plaintiff was taking Keppra 1500mg

at the time, and the medication caused him to feel lethargic. Dr. Dahlberg opined that the plaintiff's seizures severely interfered with his activities of daily living; that he would be unable to work at heights; unable to work with power machines; and unable to drive. Dr. Dahlberg further opined that his seizures would likely disrupt the work of coworkers, but he would not need more supervision than an unimpaired worker. He stated that the plaintiff would likely need to take one to two unscheduled breaks throughout the workday and would be incapable of tolerating even low stress jobs. He would be absent from work two days per month (Tr. 456-58).

On October 19, 2016, the plaintiff followed up to have disability paperwork completed. He reported having "a couple of seizures per month," but also stated that he was "doing well" on Keppra. He stated that Keppra made him a "little" sleepy, but overall he did not have as many seizures. Dr. Dahlberg added Lamictal to the plaintiff's medicine regimen for treatment of his seizures (Tr. 462-63).

On November 16, 2016, the plaintiff reported that he sometimes heard a whisper, but he knew not to follow the voices. Dr. Ebert stated: "We did agree to start Trintellis for depression; and hopefully help mood, energy, and decrease [auditory hallucinations ("AH")]; which are of a negativ e nature; and highly suggestive of undertreated mood; and he agrees to monitor for side effects; symptom changes . . ." Dr. Ebert further noted that he would see the plaintiff again in four weeks, and if he was still experiencing auditory hallucinations, Dr. Ebert would add an antipsychotic medication. A mental status examination revealed intact memory, concentration, and attention; he had a depressed, anxious, irritable mood, but fair insight and good judgment. He felt counseling was good for him (Tr. 471-72). The plaintiff returned in December reporting that since taking the Trintellis he felt his mood was better, and he had not experienced any crying spells, fights, or suicidal/homicidal thoughts. He felt Latuda worked well with only occasional sounds and no words by the voices. He reported one seizure in the last month. A mental status

examination noted intact memory, concentration, and attention; a euthymic mood; and good insight and judgment. He was reminded to see his counselor (Tr. 473-74).

On December 6, 2016, the plaintiff reported only one seizure over the past month. Dr. Dahlberg increased the plaintiff's dose of Lamictal to 100 mg per day (Tr. 464- 65).

On March 6, 2017, the plaintiff was again seen by Dr. Ebert, who noted: Pt says he takes his medicine "on time," and he feels it helps him. No crying/anger, fights; he generally watches TV . . . has some seizures; sees Dr. Dahlburg for help. No AH/VH/paranoia; and endorse no bizarre delusions; he is friendly, cooperative and logical today at all times; denies any alcohol/weed/street drugs of any kind. Pt sees Corina for counseling; feels this helps him handle stress; and deal with interpersonal issues; and understand his illness better. (Tr. 476). A mental status examination was essentially the same, including intact memory, concentration, and attention; euthymic mood, and good insight and judgment (Tr. 476).

The plaintiff testified at the administrative hearing that he was let go from his last two jobs due to his seizures. He further testified that he experienced seizures once or twice per month, and they were worse during the summer months. When asked what happened when a seizure occurred, he testified that he lost consciousness and urinated on himself. He stated that it took anywhere from five to ten minutes for him to regain consciousness after a seizure, and he had to lie down for the rest of the day to regain his energy (Tr. 40-43). The plaintiff also reported his medication for his mental health conditions "helps some," but he still hear d voices "now and then" and sometimes saw people who were not actually there (Tr. 45-46).

The vocational expert testified at the hearing that, based upon a hypothetical person of the plaintiff's same age, educat ion, and work experience with an RFC that corresponded to that found by the ALJ, the individual could perform the representative jobs of assembler, hand packer, and production inspector. The ALJ then added to the

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hypothetical, asking the vocational expert to assume that the individual would require two additional 30 minute breaks per day and would be absent two days per month. The vocational expert testified that there would not be any jobs available for that individual. He further explained that jobs would not be available if an individual was absent more than once per month (Tr. 51-53).

ANALYSIS The plaintiff argues that the ALJ erred in failing to (1) properly evaluate whether his impairments satisfied Listing 11.02, (2) explain how the RFC accounted for his limitations due to his seizure disorder; (3) explain how the RFC accounted for his mental limitations in light of Mascio v. Colvin, 780 F.3d 632 (4 th

Cir. 2015); (4) comply with Social Security Ruling ("SSR") 96-7p in evaluating his s ubjective complaints, (5) properly consider the side effects from his medications on his ability to work, and (6) account for the vocational expert's testimony that there was no work that he could perform upon proper consideration of all his limitations (doc. 22 at 13-32). Listing 11.02

The plaintiff first argues that the ALJ erred in failing to properly evaluate whether his impairments satisfy Listing 11.02 (Epilepsy). See 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 11.02. The plaintiff specifically argues that the ALJ erred in finding that the seizure frequency requirement of Listing 11.02 was not met and that the finding is not based upon substantial evidence (doc. 22 at 13-21).

The regulations state that upon a showing of a listed impairment of sufficient duration, "we will find you di sabled without considering your age, education, and work experience." 20 C.F.R. §§ 404. 1520(d), 416.920(d). A listing analysis includes identifying the relevant listed impairments and comparing the criteria with the evidence of the plaintiff's symptoms. Cook v. Heckler, 783 F.2d 1168, 1173 (4 th

Cir. 1986) (stating that "[w]ithout such

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an explanation, it is simply impossible to tell whether there was substantial evidence to support the determination").

At step three of the sequential evaluation process, the ALJ found, in pertinent part:

The severity of the claimant's physical impairments, considered singly and in combination, does not meet or medically equal the criteria of any impairment listed in Section 11.00 of the neurological listings. The claimant does not meet the requirements of listing 11.02, convulsive epilepsy occurring at least once a month in spite of three months treatment. He does not meet the requirements of listing 11.03, nonconvulsive epilepsy occurring more frequently than once weekly in spite of at least three months of prescribed treatment. I find that frequency requirement of neither listing are met. (Tr. 16).

The language used by the ALJ references the version of Listing 11.02 that was effective until September 28, 2016. 3

That listing provided as follows: 11.02 Epilepsy—convulsive epilepsy, (grand mal or psychomotor), documented by detailed description of a typical seizure pattern, including all associated phenomena; occurring more frequently than once a month in spite of at least 3 months of prescribed treatment. A. Daytime episodes (loss of consciousness and convulsive seizures) or B. Nocturnal episodes manifesting residuals which interfere significantly with activity during the day. 20 C.F.R. Pt. 404,

Subpt. P., App. 1, § 11.02 (effective until Sept. 28, 2016) (emphasis added).

Listing 11.02 was revised effective September 29, 2016, while the plaintiff's application was pending and several months prior to the ALJ's decision. See 81 Fed. Reg. 43048-01, 2016 WL 3551949. Listing 11.03, which was also referenced by the ALJ (Tr. 16),

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The ALJ's decision is dated May 10, 2017 (Tr. 24).

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was removed and combined with Listing 11.02 in the revised version. The revised listing applies to "new applications filed on or after the effective date of the rules, and to claims that are pending on or after the effective date." Id. at 43051. In the Revised Medical Criteria for Evaluating Neurological Disorders, the Social Security Administration states that it will apply the revised listing "on and after [the] effective date in any case in which we make a determination or decision." Id. at 430561 n.6. Accordingly, the revised listing should have been used by the ALJ in the analysis of the plaintiff's claim.

The Social Security Administration further states: We expect that Federal courts will review our final decisions using the rules that were in effect at the time we issued the decisions. If a court reverses the Commissioner's final decision and remands a case for further administrative proceedings after the effective date of the final rule, we will apply the final rule to the entire period at issue in the decision we make after the court's remand. Id. at 430561 n.6. Accordingly, the revised version of Listing 11.02 will be used by the undersigned to review the ALJ's decision.

The criteria of revised Listing 11.02 provides as follows: 11.02 Epilepsy, documented by a detailed description of a typical seizure and characterized by A, B, C, or D: A. Generalized tonic-clonic seizures . . . , occurring at least once a month for at least 3 consecutive months . . . despite adherence to prescribed treatment . . . ; or B. Dyscognitive seizures . . . , occurring at least once a week for at least 3 consecutive months . . . despite adherence to prescribed treatment; or C. Generalized tonic-clonic seizures . . ., occurring at least once every 2 months for at least 4 consecutive months . . . despite adherence to prescribed treatment . . . ; and a marked limitation in one of [four categories]. . . or D. Dyscognitive seizures . . ., occurring at least once every 2 weeks for at least 3 consecutive months . . . despite adherence

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to prescribed treatment . . . ; and a marked limitation in one of [four categories]. . . . 4 20 C.F.R. Pt. 404, Subpt. P., App. 1, § 11.02 (effective Sept. 29, 2016) (emphasis added).

Like the ALJ, neither the plaintiff nor the Commissioner provides much discussion as to the types of seizures suffered by the plaintiff. However, in their briefs, both sides focus on the frequency requirements for convulsive seizures (also known as generalized tonic-clonic or grand mal seizures) (doc. 22 at 14-21; doc. 24 at 18-20). Accordingly, the undersigned will focus on this portion of the revised listing. As set out above, revised Listing 11.02(A) requires generalized tonic-clonic seizures occurring at least once a month for at least three consecutive months despite adherence to prescribed treatment. 20 C.F.R. Pt. 404, Subpt. P., App. 1, § 11.02(A) (effective Sept. 29, 2016). Compared to the previous version of the listing, revised Listing 11.02 "lowers the claimant's burden, reducing the necessary amount of seizures from more than one per month (i.e. at least two per month) to one per month." Coston v. Comm'r of Soc. Sec ., C.A. No. 16-10232,

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The revised regulations define "generaliz ed tonic-clonic" and "dyscognitive" seizures as follows:

a. Generalized tonic-clonic seizures are characterized by loss of consciousness accompanied by a tonic phase (sudden muscle tensing causing the person to lose postural control) followed by a clonic phase (rapid cycles of muscle contraction and relaxation, also called convulsions). Tongue biting and incontinence may occur during generalized tonic-clonic seizures, and injuries may result from falling. b. Dyscognitive seizures are characterized by alteration of consciousness without convulsions or loss of muscle control. During the seizure, blank staring, change of facial expression, and automatisms (such as lip smacking, chewing or swallowing, or repetitive simple actions, such as gestures or verbal utterances) may occur. During its course, a dyscognitive seizure may progress into a generalized tonic-clonic seizure. 20 C.F.R. Pt. 404, Subpt. P., App. 1, § 11.00(H)(1)(a), (b).

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2017 WL 522837, at *10 (E.D. Mich. Jan. 20, 2017), R&R adopted by 2017 WL 512772 (E.D. Mich. Feb. 8, 2017). 5

The ALJ provided no reasoning or explanation for his finding that the seizure frequency requirement of Listing 11.02 was not met (see Tr. 16). In the RFC assessment, the ALJ discussed certain treatment records dated between November 2014 and August 2016, noting that the plaintiff had "essentially been seizure free" during that time period (Tr. 19). However, he did not discuss treatment records from prior to and after these dates, which contain evidence that the plaintiff may meet the frequency requirement of revised Listing 11.02(A). Specifically, in July 2014, at which time the plaintiff was taking prescribed anti-seizure medication (Levetiracetam or Keppra), treatment records show that the plaintiff reported four seizures in the past two months (Tr. 397). Also in July 2014, Dr. Thompson noted that the plaintiff reported experiencing three seizures in the last month and at least one seizure per month (Tr. 393). Further, on August 17, 2016, Dr. Dahlberg stated in a treatment note that the plaintiff had a seizure "a few weeks ago, usually will have one seizure a month," despite being on

a maximum dos e of Keppra (Tr. 451). Two months later, Dr. Dahlberg stated that the plaintiff "still has a couple of seizures a month" and was doing well on Keppra (Tr. 462). Dr. Dahlberg added a medication "to try and get better control of seizures" (Tr. 463), but, in early December 2016, treatment records show that the plaintiff

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As set out above, the ALJ used the language of the outdated version of Listing 11.02. However, he stated that the required frequency for convulsive seizures was "at least once a month" (Tr. 16), which is the frequency requir ed in the revised version of Listing 11.02. Adding to the confusion, the plaintiff has not raised the ALJ's use of the wrong version of Listing 11.02 as an issue. In fact, the plaintiff quotes the outdated version of Listing 11.02 in his brief (doc. 22 at 14). Also, like the ALJ, the plaintiff convolutes the requirements of the two versions by quoting the outdated listing and then arguing that the record shows that he meets the listing because he "experiences seizures at least one time per month on average . . . ," which is the r equired frequency in the revised listing (doc. 22 at 21). Further complicating the issue, the Commissioner acknowledges that the ALJ applied the wrong version of the listing (doc. 24 at 17 n.4), but goes on to argue that the plaintiff has failed to meet his burden of showing that his seizures occurred "more frequently" than once per month, which is the frequency required in the outdated version of Listing 11.02 (doc. 24 at 17-20).

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still "had one seizure over the last month" (Tr. 464). In his opinion dated October 18, 2016, Dr. Dahlberg described the plaintiff's seizures as generalized with a loss of consciousness and a history of fecal or urinary incontinence during seizures (Tr. 456-57). He further stated that the "average frequency" of the plaintiff's seizures was two per month, and he noted that the plaintiff's last three seizures occurr ed on September 1 and 15 and October 3, 2016 (Tr. 456). Further, the plaintiff testified that he experienced seizures "like once or twice a month," with more seizures o ccurring when it was hot (Tr. 42). The plaintiff explained that, when he experiences a seizure: "I fall down, and you know, I don't know nothing until somebody wakes me up. And when I get up I urinated on myself and I have to lay down" (Tr. 42).

Based upon the foregoing, the undersigned recommends that this matter be remanded for further consideration at step three of the sequential evaluation process. Upon remand, the ALJ should be instructed to apply the appropriate version of Listing 11.02, to consider and evaluate the evidence of record regarding the plaintiff's seizures, and to explain his reasoning as to his step three findings. 6 Remaining Allegations of Error

In light of the court's recommendation that this matter be remanded for further consideration at step three as discussed above, the court need not specifically address the plaintiff's remaining allegations of error as the ALJ will be able to reconsider and re-evaluate the evidence as part of the

reconsideration of this claim. Hancock v. Barnhart, 206 F.

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In a footnote (doc. 24 at 17 n.4), the Commissioner argues that the plaintiff has not provided "at least one detailed description of . . . seizures, from someone, preferably a medical professional, who has observed at least one of . . . typical seizures," as required by the revised listing. 20 C.F.R. Pt. 404, Subpt. P., App. 1, § 11.00(H)(2) (effective Sept. 29, 2016). This is post-hoc rationalization not included in the decision, as the ALJ failed to even consider the appropriate version of the listing. See Golembiewski v. Barnhart, 322 F.3d 912, 916 (7th Cir.2003) ("[G]eneral principles of administrative law preclude the Commissioner's lawyers from advancing grounds in support of the agency's decision that were not given by the ALJ.").

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Supp.2d 757, 763–64 n.3 (W.D. Va. 2002) (on re mand, the ALJ's prior decision has no preclusive effect as it is vacated and the new hearing is conducted de novo). See Boone v. Barnhart, 353 F.3d 203, 211 n.19 (3d Cir. 2003) (remanding on other grounds and declining to address claimant's additional arguments). Accordingly, as part of the overall reconsideration of this claim upon remand, the plaintiff's remaining allegations of error should be considered and addressed by the ALJ as appropriate (see doc. 22 at 21-32).

CONCLUSION AND RECOMMENDATION Based upon the foregoing, this court recommends that the Commissioner's decision be reversed under sentence four of 42 U.S.C. § 405(g), with a remand of the cause to the Commissioner for further proceedings as discussed above. While the plaintiff argues that the Commissioner's decision "should be reversed outright and the case remanded to the Commissioner for certification of benefits . . . " (doc. 22 at 1; see also doc. 22 at 33), this court finds that the plaintiff' s entitlement to benefits is not wholly established and that this matter should be remanded for further consideration and assessment of the above- discussed evidence by the ALJ. See Crider v. Harris, 624 F.2d 15, 17 (4th Cir. 1980) (finding remand for an award of benefits was warranted where the individual's entitlement to benefits was "wholly established" on the state of the record).

IT IS SO RECOMMENDED.

s/Kevin F. McDonald United States Magistrate Judge December 11, 2018 Greenville, South Carolina

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