Hess v. Commissioner of Social Security Administration

2020 | Cited 0 times | D. South Carolina | November 4, 2020

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

ANDERSON/GREENWOOD DIVISION Terry Frank Hess,) Civil Action No: 8:20-cv-00191-BHH-JDA

Plaintiff,) REPORT AND RECOMMENDATION

OF MAGISTRATE JUDGE v.)

Commissioner of Social Security) Administration,)

Defendant.) _____)

This matter is before the Court for a Report and Recommendation pursuant to Local Civil Rule 73.02(B)(2)(a), D.S.C., and 28 U.S.C. § 636(b)(1)(B). 1

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) to obtain judicial review of a final decision of the Commissioner of Social Security (" the Commissioner") denying Plaintiff's claim for disability insurance benefits ("DIB"). For the reasons set forth below, it is recommended that the Commissioner's decision be reversed and remanded for administrative action consistent with this recommendation, pursuant to sentence four of 42 U.S.C. § 405(g).

PROCEDURAL HISTORY In January 2016, Plaintiff filed an application for DIB alleging disability beginning August 30, 2013, and Plaintiff later amended his alleged onset date to September 3, 2015. [R. 158, 732–33.] The claim was denied initially and on reconsideration by the Social Security Administration ("the Administration"). [R. 84–93.] Plaintiff requested a hearing before an administrative law judge ("ALJ"), and on August 2, 2018, ALJ Edward Morriss conducted a de novo hearing on Plaintiff's claim . [R. 29–43.]

1

A Report and Recommendation is being filed in this case, in which one or both parties declined to consent to disposition by a magistrate judge.

8:20-cv-00191-BHH Date Filed 11/04/20 Entry Number 20 Page 1 of 21

The ALJ issued a decision on January 14, 2019, finding Plaintiff not disabled under the Social Security Act ("the Act"). [R. 12–28.] At Step 1, 2

the ALJ found Plaintiff met the Act's insured-status requirements through December 31, 2018, and had not engaged in substantial gainful activity since September 3, 2015, the alleged onset date. [R. 17, Findings 1 & 2.] At Step 2, the ALJ found Plaintiff had the severe impairment of degenerative disc disease. [R. 17, Finding 3.] The ALJ also found Plaintiff had non-severe impairments of heart disease, including myocardial infarction; hypertension; degenerative joint disease of the knees and right shoulder; gout; diverticulitis; and depression/anxiety/post-traumatic stress disorder. [R. 17–18.] At Step 3, the ALJ found that Plaintiff did not have an impairment or combination of impairments that met or medically equaled one of the impairments listed at 20 C.F.R. Part 404, Subpart P, Appendix 1. [R. 19, Finding 4.]

Before addressing Step 4, Plaintiff's ability to perform her past relevant work, the ALJ found Plaintiff retained the following residual functional capacity ("RFC"):

[T]he claimant has the [RFC] to perform less than a full range of light work as defined in 20 CFR 404.1567(b). Light exertional work is described by the Commissioner of the Social Security Administration as requiring lifting/carrying of up to 20 pounds occasionally and 10 pounds frequently and standing, walking, and sitting for 6 hours in an 8-hour workday. The claimant is limited to frequent pushing/pulling with the lower extremities. He can perform frequent climbing, kneeling, crouching, and crawling, but is limited to occasional stooping. The claimant must avoid concentrated exposure to temperature extremes, humidity, and workplace hazards.

2

The five-step sequential analysis used to evaluate disability claims is discussed in the Applicable Law section, infra.

2 8:20-cv-00191-BHH Date Filed 11/04/20 Entry Number 20 Page 2 of 21

[R. 19, Finding 5.] At Step 4, the ALJ found that Plaintiff was incapable of performing his past relevant work as a fire captain. [R. 22, Finding 6]. Upon considering Plaintiff's age, education, work experience, and RFC, however, the ALJ found that there were jobs that existed in significant numbers in the national economy that Plaintiff could perform. [R. 22, Finding 10.] Thus, the ALJ found that Plaintiff had not been under a disability as defined by the Act from September 3, 2015, the alleged onset date, through the date of the decision. [R. 23, Finding 11.]

Plaintiff requested Appeals Council review of the ALJ's decision and the Appeals Council declined

review. [R. 1–6.] Plaintif f filed the instant request for judicial review on January 21, 2020. [Doc. 1.]

THE PARTIES' POSITIONS Plaintiff argues that the ALJ did not properly evaluate the opinion of Plaintiff's treating physician, Dr. Shailesh Patel [Doc. 14 at 6–9], that the ALJ erred in applying the grid rules [id. at 9–10], and that the ALJ's decision is inconsistent with substantial evidence [id. at 11–12]. The Commissioner, on the other hand, contends that substantial evidence supports the ALJ's decision. [Doc. 16 at 14–25.]

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—i.e., 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. See Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting

Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)); Laws v. Celebrezze, 368 F.2d 640, 642 (4th Cir. 1966) (citing Woolridge v. Celebrezze, 214 F. Supp. 686, 687 (S.D.W. Va. 1963)) ("Substantial evidence, it has been held, is evidence which a reasoning mind would accept as sufficient to support a particular conclusion. It consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance. If there is evidence to justify a refusal to direct a verdict were the case before a jury, then there is 'substantial ev idence.'").

Where conflicting evidence "allow s reasonable minds to differ as to whether a claimant is disabled, the responsibility for that decision falls on the [Commissioner] (or the [Commissioner's] designate, the ALJ)," not on the reviewing court. Craig v. Chater, 76 F.3d 585, 589 (4th Cir. 1996); see also Edwards v. Sullivan, 937 F.2d 580, 584 n.3 (11th Cir. 1991) (stating that where the Commissioner' s decision is supported by substantial evidence, the court will affirm, even if the reviewer would have reached a contrary result as finder of fact and even if the reviewer finds that the evidence preponderates against the Commissioner's decision). Thus, it is not within the province of a reviewing court to determine the weight of the evidence, nor is it the court's function to substitute its judgment for that of the Commissioner so long as the decision is supported by substantial evidence. See Bird v. Comm' r, 699 F.3d 337, 340 (4th Cir. 2012); Laws, 368 F.2d at 642; Snyder v. Ribicoff, 307 F.2d 518, 520 (4th Cir. 1962).

The reviewing court will reverse the Commissioner's decision on plenary review, however, if the decision applies incorrect law or fails to provide the court with sufficient reasoning to determine that the Commissioner properly applied the law. Myers v. Califano,

611 F.2d 980, 982 (4th Cir. 1980); see also Keeton v. Dep' t of Health & Human Servs., 21 F.3d 1064, 1066 (11th Cir. 1994). Where the Commissioner's decision " is in clear disregard of the overwhelming weight of the evidence, Congress has empowered the courts to modify or reverse the [Commissioner's] decision 'w ith or without remanding the cause for a rehearing.'" Vitek v. Finch, 438 F.2d 1157, 1158 (4th Cir. 1971) (quoting 42 U.S.C. § 405(g)). Remand is unnecessary where "the record does not contain substantial evidence to support a decision denying coverage under the correct legal standard and when reopening the record for more evidence would serve no purpose." Breeden v. Weinberger, 493 F.2d 1002, 1012 (4th Cir. 1974).

The court may remand a case to the Commissioner for a rehearing under sentence four or sentence six of 42 U.S.C. § 405(g). Sargent v. Sullivan, 941 F.2d 1207 (4th Cir. 1991) (unpublished table decision). To remand under sentence four, the reviewing court must find either that the Commissioner's decision is not supported by substantial evidence or that the Commissioner incorrectly applied the law relevant to the disability claim. See, e.g., Jackson v. Chater, 99 F.3d 1086, 1090– 91 (11th Cir. 1996) (holding remand was appropriate where the ALJ failed to develop a full and fair record of the claimant's residual functional capacity); Brenem v. Harris, 621 F.2d 688, 690– 91 (5th Cir. 1980) (holding remand was appropriate where record was insufficient to affirm but was also insufficient for court to find the claimant disabled). Where the court cannot discern the basis for the Commissioner's decision, a remand under sentence four is usually the proper course to allow the Commissioner to explain the basis for the decision or for additional investigation. See Radford v. Comm' r, 734 F.3d 288, 295 (4th Cir. 2013) (quoting Florida Power & Light

5 8:20-cv-00191-BHH Date Filed 11/04/20 Entry Number 20 Page 5 of 21

Co. v. Lorion, 470 U.S. 729, 744 (1985); see also Smith v. Heckler, 782 F.2d 1176, 1181–82 (4th Cir. 1986) (remanding case where decision of ALJ contained "a gap in its reasoning" because ALJ did not say he was discounting testimony or why); Gordon v. Schweiker, 725 F.2d 231, 235 (4th Cir. 1984) (remanding case where neither the ALJ nor the Appeals Council indicated the weight given to relevant evidence). On remand under sentence four, the ALJ should review the case on a complete record, including any new material evidence. See Smith, 782 F.2d at 1182 ("T he [Commissioner] and the claimant may produce further evidence on remand."). After a remand under sentence four, the court enters a final and immediately appealable judgment and then loses jurisdiction. Sargent, 941 F.2d 1207 (citing Melkonyan v. Sullivan, 501 U.S. 89, 102 (1991)).

In contrast, sentence six provides:

The court may . . . at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding . . . . 42 U.S.C. § 405(g). A reviewing court may remand a case to the Commissioner on the basis of new evidence only if four prerequisites are met: (1) the evidence is relevant to the determination of

disability at the time the application was first filed; (2) the evidence is material to the extent that the Commissioner's decision might reasonably have been different had the new evidence been before him; (3) there is good cause for the claimant's failure to submit the evidence when the claim was before the Commissioner; and (4) the claimant made at least a general showing of the nature of the new evidence to the reviewing court. Borders v. Heckler, 777 F.2d 954, 955 (4th Cir. 1985) (citing 42 U.S.C.

6 8:20-cv-00191-BHH Date Filed 11/04/20 Entry Number 20 Page 6 of 21

§ 405(g); Mitchell v. Schweiker, 699 F.2d 185, 188 (4th Cir. 1983); Sims v. Harris, 631 F.2d 26, 28 (4th Cir. 1980); King v. Califano, 599 F.2d 597, 599 (4th Cir. 1979)), superseded by amendment to statute, 42 U.S.C. § 405(g), as recognized in Wilkins v. Sec' y, Dep' t of Health & Human Servs., 925 F.2d 769, 774 (4th Cir. 1991). 3

With remand under sentence six, the parties must return to the court after remand to file modified findings of fact. Melkonyan, 501 U.S. at 98. The reviewing court retains jurisdiction pending remand and does not enter a final judgment until after the completion of remand proceedings. See Allen v. Chater, 67 F.3d 293 (4th Cir. 1995) (unpublished table decision) (holding that an order remanding a claim for Social Security benefits pursuant to sentence six of 42 U.S.C. § 405(g) is not a final order).

APPLICABLE LAW The Act provides that disability benefits shall be available to those persons insured for benefits, who are not of retirement age, who properly apply, and who are under a disability. 42 U.S.C. § 423(a). "Disability " is def ined as:

the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which

3

Though the court in Wilkins indicated in a parenthetical that the four-part test set forth in Borders had been superseded by an amendment to 42 U.S.C. § 405(g), courts in the Fourth Circuit have continued to cite the requirements outlined in Borders when evaluating a claim for remand based on new evidence. See, e.g., Brooks v. Astrue, No. 6:10-cv-152, 2010 WL 5478648, at *8 (D.S.C. Nov. 23, 2010); Ashton v. Astrue, No. TMD 09-1107, 2010 WL 3199345, at *3 (D. Md. Aug. 12, 2010); Washington v. Comm' r of Soc. Sec., No. 2:08-cv-93, 2009 WL 86737, at *5 (E.D. Va. Jan. 13, 2009); Brock v. Sec' y of Health & Human Servs., 807 F. Supp. 1248, 1250 n.3 (S.D.W. Va. 1992). Further, the Supreme Court of the United States has not suggested Borders' construction of § 405(g) is incorrect. See Sullivan v. Finkelstein, 496 U.S. 617, 626 n.6 (1990). Accordingly, the Court will apply the more stringent Borders inquiry.

7 8:20-cv-00191-BHH Date Filed 11/04/20 Entry Number 20 Page 7 of 21

has lasted or can be expected to last for a continuous period of not less than 12 consecutive months. Id. § 423(d)(1)(A). I. The Five-Step Evaluation

To facilitate uniform and efficient processing of disability claims, federal regulations have reduced the statutory definition of disability to a series of five sequential questions. See, e.g., Heckler v. Campbell, 461 U.S. 458, 461 n.2 (1983) (noting a "need for efficiency" in considering disability claims). The ALJ must consider whether (1) the claimant is

engaged in substantial gainful activity; (2) the claimant has a severe impairment; (3) the impairment meets or equals an impairment included in the Administration's Official Listings of Impairments found at 20 C.F.R. Pt. 404, Subpt. P, App. 1; (4) the impairment prevents the claimant from performing past relevant work; and (5) the impairment prevents the claimant from having substantial gainful employment. 20 C.F.R. § 404.1520. Through the fourth step, the burden of production and proof is on the claimant. Grant v. Schweiker, 699 F.2d 189, 191 (4th Cir. 1983). The claimant must prove disability on or before the last day of her insured status to receive disability benefits. Everett v. Sec' y of Health, Educ. & Welfare, 412 F.2d 842, 843 (4th Cir. 1969). If the inquiry reaches Step 5, the burden shifts to the Commissioner to produce evidence that other jobs exist in the national economy that the claimant can perform, considering the claimant's age, education, and work experience. Grant, 699 F.2d at 191. If at any step of the evaluation the ALJ can find an individual is disabled or not disabled, further inquiry is unnecessary. 20 C.F.R. § 404.1520(a); Hall v. Harris, 658 F.2d 260, 264 (4th Cir. 1981).

A. Substantial Gainful Activity

8 8:20-cv-00191-BHH Date Filed 11/04/20 Entry Number 20 Page 8 of 21

"Substantial gainful activity" must be both substantial—inv olves doing significant physical or mental activities, 20 C.F.R. § 404.1572(a)—and gainful—done for pay or profit, whether or not a profit is realized, id. § 404.1572(b). If an individual has earnings from employment or self-employment above a specific level set out in the regulations, he is generally presumed to be able to engage in substantial gainful activity. Id. § 404.1574–.1575.

B. Severe Impairment An impairment is "sev ere" if it significantly limits an individual's ability to perform basic work activities. See id. § 404.1521. When determining whether a claimant's physical and mental impairments are sufficiently severe, the ALJ must consider the combined effect of all of the claimant's impairments. 42 U.S.C. § 423(d)(2)(B). The ALJ must evaluate a disability claimant as a whole person and not in the abstract, having several hypothetical and isolated illnesses. Walker v. Bowen, 889 F.2d 47, 49–50 (4th Cir. 1989) (stating that, when evaluating the effect of a number of impairments on a disability claimant, "the [Commissioner] must consider the combined effect of a claimant's impairments and not fragmentize them"). Accordingly, the ALJ must make specific and well-articulated findings as to the effect of a combination of impairments when determining whether

an individual is disabled. Id. at 50 ("As a corollary to this rule, the ALJ must adequately explain his or her evaluation of the combined effects of the impairments."). If the ALJ finds a combination of impairments to be severe, "the combined impact of the impairments shall be considered throughout the disability determination process." 42 U.S.C. § 423(d)(2)(B).

C. Meets or Equals an Impairment Listed in the Listings of Impairments

9 8:20-cv-00191-BHH Date Filed 11/04/20 Entry Number 20 Page 9 of 21

If a claimant's impairment or combination of impairments meets or medically equals the criteria of a listing found at 20 C.F.R. Pt. 404, Subpt. P, App.1 and meets the duration requirement found at 20 C.F.R. § 404.1509, the ALJ will find the claimant disabled without considering the claimant's age, education, and work experience. 20 C.F.R. § 404.1520(d).

D. Past Relevant Work The assessment of a claimant's ability to perform past relevant work "ref lect[s] the statute's focus on the functional capacity retained by the claimant." Pass v. Chater, 65 F.3d 1200, 1204 (4th Cir. 1995). At this step of the evaluation, the ALJ compares the claimant's residual functional capacity 4

with the physical and mental demands of the kind of work he has done in the past to determine whether the claimant has the residual functional capacity to do her past work. 20 C.F.R. § 404.1560(b).

E. Other Work As previously stated, once the ALJ finds that a claimant cannot return to her prior work, the burden of proof shifts to the Commissioner to establish that the claimant could perform other work that exists in the national economy. See Hunter v. Sullivan, 993 F.2d 31, 35 (4th Cir. 1992); 20 C.F.R. § 404.1520(f)–(g). To meet this burden, the Commissioner may sometimes rely exclusively on the Medical-Vocational Guidelines (the "g rids"). Exclusive reliance on the " grids" is appropriate where the claimant suffers primarily from an exertional impairment, without significant nonexertional factors. 5

20

4 Residual functional capacity is "the most [a claimant] can still do despite [her] limitations." 20 C.F.R. § 404.1545(a). 5

An exertional limitation is one that affects the claimant's ability to meet the strength requirements of jobs. 20 C.F.R. § 404.1569a(a). A nonexertional limitation is one that affects the ability to meet the demands of the job other than the strength demands. Id.

10 8:20-cv-00191-BHH Date Filed 11/04/20 Entry Number 20 Page 10 of 21

C.F.R. Pt. 404, Subpt. P, App. 2, § 200.00(e); see also Gory v. Schweiker, 712 F.2d 929, 930–31 (4th Cir. 1983) (stating that exclusive reliance on the grids is appropriate in cases involving exertional limitations). When a claimant suffers from both exertional and nonexertional limitations, the grids may serve only as guidelines. Gory, 712 F.2d at 931. In such a case, the Commissioner must use a vocational expert to establish the claimant's ability to perform other work. 20 C.F.R. § 404.1569a; see Walker, 889 F.2d at 49–50 ("Because we have found that the grids cannot be relied upon to show conclusively that claimant is not disabled, when the case is remanded it will be incumbent upon the [Commissioner] to prove by expert vocational testimony that despite the combination of exertional and nonexertional impairments, the claimant retains the ability to perform specific jobs which exist in the national economy."). The purpose of using a vocational expert is "to assist the ALJ in determining whether there is work available in the national economy which this particular claimant can perform." Walker, 889 F.2d at 50. For the vocational expert's testimony to be relevant, "it must be based upon a consideration of all other evidence in the record, . . . and it must be in response to proper hypothetical questions which fairly set out all of claimant's im pairments." Id. (citations omitted). II. Developing the Record

The ALJ has a duty to fully and fairly develop the record. See Cook v. Heckler, 783 F.2d 1168, 1173 (4th Cir. 1986). The ALJ is required to inquire fully into each relevant issue. Snyder, 307 F.2d at 520. The performance of this duty is particularly important

Examples of nonexertional limitations include but are not limited to difficulty functioning because of being nervous, anxious, or depressed; difficulty maintaining attention or concentrating; difficulty understanding or remembering detailed instructions; difficulty seeing or hearing. § 404.1569a(c)(1).

11 8:20-cv-00191-BHH Date Filed 11/04/20 Entry Number 20 Page 11 of 21

when a claimant appears without counsel. Marsh v. Harris, 632 F.2d 296, 299 (4th Cir. 1980). In such circumstances, "the ALJ should scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts, . . . being especially diligent in ensuring that favorable as well as unfavorable facts and circumstances are elicited." Id. (internal quotations and citations omitted). III. Treating Physicians

If a treating physician' s opinion on the nature and severity of a claimant's impairments is " well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence" in the record, the ALJ must give it controlling weight. 20 C.F.R. § 404.1527(c)(2); see Mastro v. Apfel, 270 F.3d 171, 178 (4th Cir. 2001). The ALJ may discount a treating physician's opinion if it is unsupported or inconsistent with other evidence, i.e., when the treating physician's opinion does not warrant controlling weight, Craig, 76 F.3d at 590, but the ALJ must nevertheless assign a weight to the medical opinion based on the 1) length of the treatment relationship and the frequency of examination; 2) nature and extent of the treatment relationship; 3) supportability of the opinion; 4) consistency of the opinion with the record a whole; 5)

specialization of the physician; and 6) other factors which tend to support or contradict the opinion, 20 C.F.R. § 404.1527(c). Similarly, where a treating physician has merely made conclusory statements, the ALJ may afford the opinion such weight as is supported by clinical or laboratory findings and other consistent evidence of a claimant's im pairments. See Craig, 76 F.3d at 590 (holding there was sufficient evidence for the ALJ to reject the treating physician's conclusory opinion where the record contained contradictory evidence).

12 8:20-cv-00191-BHH Date Filed 11/04/20 Entry Number 20 Page 12 of 21

In any instance, a treating physician's opinion is generally entitled to more weight than a consulting physician's opinion. See Mitchell v. Schweiker, 699 F.2d 185, 187 (4th Cir. 1983) (stating that treating physician's opinion must be accorded great weight because "it reflects an expert judgment based on a continuing observation of the patient's condition for a prolonged period of time"); 20 C.F.R. § 404.1527(c)(2). An ALJ determination coming down on the side of a non-examining, non-treating physician's opinion can stand only if the medical testimony of examining and treating physicians goes both ways. Smith v. Schweiker, 795 F.2d 343, 346 (4th Cir. 1986). Further, the ALJ is required to review all of the medical findings and other evidence that support a medical source's statement that a claimant is disabled. 20 C.F.R. § 404.1527(d). However, the ALJ is responsible for making the ultimate determination about whether a claimant meets the statutory definition of disability. Id. IV. Medical Tests and Examinations

The ALJ is required to order additional medical tests and exams only when a claimant's medical sources do not give sufficient medical evidence about an impairment to determine whether the claimant is disabled. 20 C.F.R. § 404.1517; see also Conley v. Bowen, 781 F.2d 143, 146 (8th Cir. 1986). The regulations are clear: a consultative examination is not required when there is sufficient medical evidence to make a determination on a claimant's disability. 20 C.F.R. § 404.1517. Under the regulations, however, the ALJ may determine that a consultative examination or other medical tests are necessary. Id. V. Pain

13 8:20-cv-00191-BHH Date Filed 11/04/20 Entry Number 20 Page 13 of 21

Congress has determined that a claimant will not be considered disabled unless he furnishes medical and other evidence (e.g., medical signs and laboratory findings) showing the existence of a medical impairment that could reasonably be expected to produce the pain or symptoms alleged. 42 U.S.C. § 423(d)(5)(A). Social Security Ruling ("SSR") 16-3p provides, "[i]n considering the intensity, persistence, and limiting effects of an individual's symptoms, we examine the entire case record, including the objective medical evidence; an individual's statements about the intensity, persistence, and limiting effects of symptoms; statements and other information provided by medical sources and other persons; and any other relevant evidence in the individual's case record." Social Security Ruling 16-3p Titles II and XVI: Evaluation of Symptoms In Disability Claims, 82 Fed. Reg. 49,462-03, 49,464 (Oct. 25, 2017); see also 20 C.F.R. § 404.1529(c)(1)–(c)(2) (outlining evaluation of pain).

In evaluating claims of disabling pain, the ALJ must proceed in a two-part analysis. Morgan v. Barnhart, 142 F. App'x 716, 723 (4th Cir. 2005) (unpublished opinion); see also SSR 16-3p, 82 Fed. Reg. at 49,463. First, "the ALJ must determine whether the claimant has produced medical evidence of a 'm edically determinable impairment which could reasonably be expected to produce" the alleged symptoms. Id. (quoting Craig, 76 F.3d at 594); see SSR 16-3p, 82 Fed. Reg. at 49,463. Second, the ALJ must evaluate "the intensity and persistence of an individual's symptoms such as pain and determine the extent to which an individual's symptoms limit his or her ability to perform work-related activities . . . or to function independently." SSR 16-3p, 82 Fed. Reg. at 49,464; see 20 C.F.R. § 404.1528 (noting that the ALJ must consider all of a claimant's statements about

his symptoms, including pain, and determine the extent to which the symptoms can reasonably be accepted as consistent with the objective medical evidence).

APPLICATION AND ANALYSIS Plaintiff argues that the ALJ erred in his evaluation of Dr. Patel's opinions. [Doc. 14 at 6–9.] T he Court agrees.

Social Security Ruling 96-2p requires that when an ALJ assesses medical opinions, her decision " must contain specific reasons for the weight given to the treating source's medical opinion, supported by the evidence in the case record, and . . . be sufficiently specific to make clear to any subsequent reviewers the weight the adjudicator gave to the treating source' s medical opinion and the reasons for that weight." 1996 WL 374188. Moreover, ALJs are instructed to apply the factors provided in 20 C.F.R. § 404.1527—including the length and nature of the source's treatment relationship with the claimant, the supportability of the opinion, the opinion's consistency with the other evidence in the record, whether the source is a specialist, and any other factors that may support or contradict the opinion—to all medical opinions. 20 C.F.R. § 404.1527(c), (f). More weight is generally given to the opinions of examining sources than to non-examining ones. Id. Additionally, more weight is generally given to opinions of treating sources than is given to opinions of non-treating sources, such as consultative examiners. Id. And, "if a physician's opinion is not supported by clinical evidence or if it is inconsistent with other substantial evidence, it should be accorded significantly less weight." Mastro v. Apfel, 270 F.3d 171, 178 (4th Cir. 2001) (internal quotation marks omitted). Furthermore, the determination of whether a claimant is disabled under the Act is a legal determination and ultimately one

for the Commissioner, and not a medical source, to make. 20 C.F.R. § 404.1527(d)(1) (stating "[a] statement by a medical source that you are 'disabled' or 'unable to work' does not mean that we will determine that you are disabled"). A medical source opinion on that issue is not entitled to any special weight. 20 C.F.R. § 404.1527(d)(3). ALJs are further prohibited from substituting their medical

opinions for those of medical providers, which the Fourth Circuit recently referred to as the prohibited practice of the ALJ " playing doctor." Lewis v. Berryhill, 858 F.3d 858, 869 (4th Cir. 2017).
Relevant Facts

The ALJ summarized the facts concerning Dr. Patel's treatment of Plaintiff as follows:

Regarding the claimant's back disorder, treatment notes dated May 2016 and June 2016 from Lowcountry Orthopaedics revealed that the claimant had previously been diagnosed with lower back pain with bilateral radiation to the legs and feet as well as numbness/tingling with muscle cramping. It was noted that steroid injections had been significantly effective in providing reduction in symptomatology. [Dr. Patel] noted that imaging records showed moderate disc protrusion at L4-S1. He noted decreased sensation on the lateral leg and dorsum of the foot bilaterally. He assessed the claimant with degenerative disc diseases of the lumbar spine. Later in June 2016, Dr. Patel expanded the claimant's diagnoses to include spondylolisthesis and spinal stenosis of the lumbar region (Exhibits 17F/2-4 and 20F/13-16). Dr. Patel administered bilateral L5-S1 transforaminal epidural steroid injections secondary to diagnoses of lumbar radiculopathy, sciatica, and spondylosis in May 2016 and June 2016 (Exhibit 19F/5, 14) and in July 2017 and June 2018. An MRI of the lumbar spine performed in May 2018 showed disc herniation at L4-L5, which encroached on the left L5 nerve root and moderate bilateral L4 neural foraminal stenosis as well as grade I spondylolisthesis of L5 on S1 due to L5 pars defect with severe biforaminal stenosis greater on the left (Exhibit 27F/13, 15, 19, 20). [R. 21.]

16 8:20-cv-00191-BHH Date Filed 11/04/20 Entry Number 20 Page 16 of 21

The opinion of Dr. Patel at issue here was included in a letter dated July 17, 2018, and it stated in relevant part:

[Plaintiff] has been under my care since May 2016 for lumbar disc disease and bilateral lower extremity radiculopathy. He has been compl[ia]nt with treatment recommendations, but epidural injections and medications only provide short term relief of his symptoms. As notated during physical exams, [Plaintiff] has diminished reflexes of the bilateral knees and ankles, and decreased sensation of the bilateral lower extremities, which impact his ability to walk and stand. It is my opinion that [Plaintiff] would be unable to use his lower extremities to operate foot controls or stand and/or walk for more than a total of 2-3 hours out of an 8 hour day. I am not able to speak to his ability to perform sedentary work, but he would be unable to work at a light exertional level due to the standing and walking required. He remains under my care and was most recently referred for an updated MRI due to an increase in lumbar and lower extremity pain. Please feel free to contact my office. [R. 731.]

The ALJ evaluated the opinion as follows:

The report completed by Dr. Patel in July 2018 stating that the claimant could not perform light exertional work due to the standing/walking requirements is given little weight as it is not supported by treatment records and it is not clear that any such limitation would last twelve months. The above [RFC] supports his conclusion regarding light exertional work. [R. 22.] In contrast to the little weight the ALJ afforded this opinion of Plaintiff's treating physician, the ALJ found "strong ly persuasive" the opinions of non-examining state agency consultants who concluded that Plaintiff could perform light work. [R. 22.]

17 8:20-cv-00191-BHH Date Filed 11/04/20 Entry Number 20 Page 17 of 21

Discussion

Plaintiff argues that, for a number of reasons, the ALJ erred in giving only "little weight" to Dr. Patel's opinion on the basis that "it is not supported by treatment records and it is not clear that any such limitation would last twelve months." [Doc. 14 at 6–9.] First, Plaintiff contends that the ALJ's statement that Dr. Patel's opinion is not supported by clinical findings is simply incorrect because "f indings on neurologic exams regularly documented diminished reflexes of the bilateral knees and ankles, paresthesia of the bilateral lower extremities, and severe aching and burning in both feet" [id. at 7 (citing R. 589, 592, 596, 600, 627, 628, 630, 680, 681, 686)] and because "radiolog y reports showing a moderate disc protrusion at L4-5 and L5-S1 encroaching on the left L5 nerve root are consistent with Dr. Patel's opinion regarding the etiology of Plaintiff's symptoms [id. (citing R. 600, 609)].

Plaintiff also argues that "[t]h e ALJ' s additional notation that he did not feel the limitations assigned by Dr. Patel would last 12 months is purely speculation and contrary to the ALJ's own statement that the Plaintiff became more symptomatic in May 2018." [Id. (citing R. 21).] Plaintiff further notes that "records dating back to 2016 document abnormal findings on neurologic exams of the Plaintiff's lower extremities and are [supportive] of Plaintiff's longstanding problems with walking and standing." [Id.] And Plaintiff points out that Dr. Patel had noted that he had recently referred Plaintiff for an MRI due to an increase in his lumbar and lower extremity pain. [Id. at 7–8.]

Plaintiff additionally argues that the ALJ did not adequately explain his decision to rely on the opinions of the non-examining state agency doctors and give little weight to

18 8:20-cv-00191-BHH Date Filed 11/04/20 Entry Number 20 Page 18 of 21

Plaintiff's treating physician, who was an orthopedic specialist and who based his opinion on more than three years of orthopedic exams. [Id. at 8.] Plaintiff maintains that even assuming that his treating physician's opinion was not entitled to controlling weight under the Treating Physician Rule, the ALJ was required to evaluate the opinion under the factors set out in 20 C.F.R. § 404.1527(c). [Id. at 8–9.] W hile recognizing that the ALJ need not explicitly mention each factor, Plaintiff argues that one cannot discern from the decision how the ALJ decided that those factors supported the

result here, and that remand is therefore needed. [Id.]

In response to Plaintiff's arg uments regarding the ALJ's assessment of Dr. Patel's opinion, the Commissioner offers post hoc justifications for how the ALJ could have reasonably analyzed the evidence in the record to reach the result that he did. [Doc. 16 at 17–19.] But this is simply an empty exercise and, frankly, a waste of the resources of all involved given the well established principle that " [t]he court cannot look to post-hoc offerings to support the Commissioner's decision." Canady v. Colvin, No. 5:12-2507-KDW, 2014 WL 4063155, at *3 (D.S.C. Aug. 14, 2014); see Grisom v. Comm' r of Soc. Sec., No. 8:19-cv-02443-BHH-JDA, 2020 WL 3848227, at *11 (D.S.C. June 29, 2020) ("[B]ecause the ALJ has not given any indication in the current decision that she discounted [the physician's] decision based on [the facts identified by the Commissioner on appeal], neither of [the Commissioner's] new justifications would be a proper basis for affirmance."), Report and Recommendation adopted by 2020 WL 3843564 (D.S.C. July 8, 2020). Nothing in the ALJ's decision shows—or even suggests—that he employed the reasoning that the Commissioner now identifies.

19 8:20-cv-00191-BHH Date Filed 11/04/20 Entry Number 20 Page 19 of 21

Considering the decision that the ALJ actually produced, the Court concludes that the ALJ's analysis regarding the weight he gave Dr. Patel's medical opinion is not in compliance with the applicable rules. For the Court to be able to conduct meaningful judicial review of the ALJ's decision, including the ALJ's evaluation of Dr. Patel's opinion, the ALJ must construct a "log ical bridge" explaining his analysis. Monroe v. Colvin, 826 F.3d 176, 189 (4th Cir. 2016) (internal quotation marks omitted). Because the ALJ here not has not explained how the applicable rules support his findings, the undersigned recommends reversing the ALJ's decision and rem anding for further proceedings.
Remaining Allegations of Error

Because the Court finds that the ALJ's analysis of Dr. Patel's opinion is a sufficient basis to remand this matter for further consideration, the Court declines to address Plaintiff's rem aining allegations. See Hancock v. Barnhart, 206 F. Supp. 2d 757, 763 n.3 (W.D. Va. 2002). However, on remand, the ALJ should consider Plaintiff' s remaining allegations of error.

CONCLUSION AND RECOMMENDATION Wherefore, based upon the foregoing, the Court recommends that the Commissioner's decision be REVERSED pursuant to sentence four of 42 U.S.C. § 405(g), and the case be REMANDED to the Commissioner for further administrative action consistent with this Report and Recommendation.

IT IS SO RECOMMENDED.

s/Jacquelyn D. Austin United States Magistrate Judge November 4, 2020

20 8:20-cv-00191-BHH Date Filed 11/04/20 Entry Number 20 Page 20 of 21

Greenville, South Carolina

21 8:20-cv-00191-BHH Date Filed 11/04/20 Entry Number 20 Page 21 of 21