

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| SCOTT BAUM, | : | |
| | : | |
| Plaintiff, | : | |
| | : | CIVIL ACTION |
| v. | : | |
| | : | |
| JO ANNE B. BARNHART, Commissioner | : | NO. 05-CV-2335 |
| of the Social Security Administration, | : | |
| | : | |
| Defendant. | : | |

MEMORANDUM

Baylson, J.

November 30, 2005

Plaintiff Scott Baum (“Plaintiff” or “Baum”) seeks judicial review of the decision of the Commissioner of the Social Security Administration denying his claim for disability benefits under Title II of the Social Security Act, 42 U.S.C. §§ 401-433 (“the Act”). Presently before this Court are the parties’ cross-motions for summary judgment.

I. Background and Procedural History

Plaintiff was born on March 8, 1963 and was thirty-nine years old when his insured status under the Act expired (R. at 67, 110, 165). Plaintiff is a high school graduate whose primary previous work experience is in the construction industry as a carpenter, although he has also worked in the music industry, as a maintenance worker and as a delivery person (R. at 47, 147-54, 157, 170-71).

Plaintiff filed an application for Disability Insurance Benefits (“DIB”) on May 16, 2003, claiming disability as of May 20, 2002 (R at 66, 110). He last met the insured status requirements set forth in the Social Security Act on June 30, 2002 (“date last insured”) (R. at 16).¹ He asserts he was

¹This fact is conceded by Plaintiff (R. at 292).

disabled under the meaning of the Act before the last date insured due to chronic pain resulting from his long-standing back injury, obesity, sleep disorder, fatigue, depression, memory loss due to medication and carpal tunnel syndrome (R. at 19). Following an initial denial by the Social Security Administration, Plaintiff timely requested a hearing before an Administrative Law Judge (“ALJ”) (R. at 71). A hearing was held before ALJ Janet R. Landesberg on September 14, 2004 (R. at 27-65), and on January 5, 2005, the ALJ issued a decision denying Plaintiff’s application (R. at 16-24). After the Appeals Council denied Plaintiff’s request for review, Plaintiff sought judicial review of the Commissioner’s decision in this Court. He filed a motion for summary judgment on July 15, 2005 (Doc. No. 5) and Defendant, the Commissioner of the Social Security Administration (“Commissioner”), filed a cross-motion for summary judgment on August 17, 2005 (Doc. No. 7).

A. History of Treatment for Physical Ailments

While working at Concern Professional Services in April 1992, Mr. Baum injured his back moving an 800 pound safe (R. at 214, 223, 272). In August 1993, after conservative therapy did not improve his symptoms, Plaintiff underwent an L4-5 decompressive laminectomy (R. at 214, 241, 272). He was able to return to work in April 1994, working four hours per day in a light duty position (R. at 270). On June 21, 1994, Plaintiff had a Functional Capacity Assessment (“FCA” or “the 1994 FCA”). This FCA indicated that while he was having difficulty completing the four-hour light-duty workday, Plaintiff also had the ability to perform work involving occasionally lifting five pounds and/or pushing/pulling sixty pounds (R. 264-91). A lumbar MRI in September 1994 showed Plaintiff had post-surgical changes at L5-6, but no evidence of a herniated disc (R. at 214). According to earnings records, Plaintiff did not work from 1995 through 1998, but returned to work from 1999 to, at least, mid-July

2001 (R. at 20, 108, 12-24, 157, 170).²

Progress notes by a Dr. George Wilson, D.O. of the Lehigh Valley Hospital and Health Network document Plaintiff's treatment from approximately June 15, 1998 until February 25, 1999 for back and leg pain originating from his workplace accident (R. at 235-243). During that time, he was treated approximately five times.³ Dr. Wilson prescribed Ultram, which at that time seemed to "control his pain," "taking away about 60 to 70% of [it]" (R. at 237, 239).

Further medical documentation in the record demonstrates that from January, 2001 through at least August 2003, Plaintiff consistently saw Dr. George E. Strobel, Jr., M.D. of Pain Management Services, P.C. (R. at 192-216, 223-232).⁴ During those visits, Plaintiff complained of chronic pain in the lumbar, thoracic and cervical spines with radiation to the left leg, modest neck pain and significant sleep disturbance (R. at 200, 210, 215, 223). In November 2000, Dr. Strobel ordered another lumbar MRI which, like the 1994 MRI, showed post-surgical changes at L5-6 with mild epidural fibrosis and no disc herniation (R. at 214). Examinations by Dr. Strobel on and before April 16, 2002 (his final visit before his date last insured) revealed that during that period, Dr. Strobel consistently prescribed Methadone for

²Although the parties do not agree when Plaintiff stopped working, they concur that he worked at least until July 2001. The Defendant asserts (and Plaintiff denies) that Plaintiff worked until approximately August 2002 (R. at 108, 157, 198, 200, 202, 204, 206, 208, 210, 212, 215, 217-22).

³Plaintiff normally saw Dr. Wilson, but was treated once by a Dr. Bruce Nicholson, M.D. (R. at 236).

⁴Dr. Strobel, located in Reading, PA, first treated Plaintiff in 1994 (R. at 208, 214). The record suggests he saw Dr. Strobel for at least a couple years before Dr. Strobel referred him to Dr. Wilson, who was located in the Lehigh Valley area where Plaintiff opened a pizza business. When the pizza business failed, Plaintiff moved back to the Reading area and apparently began seeing Dr. Strobel again (R. at 235, 239). Between January 3, 2001 and April 15, 2003, Plaintiff saw Dr. Strobel no less than sixteen times (R. at 192-216, 223-232).

pain,⁵ as well as Flexeril, Topamax, Bextra and Zanaflex at different times (R. at 199, 201, 205, 207, 209, 211, 213, 216). Further, Plaintiff had normal range of motion in the neck and upper extremities, close to normal range in the lumbar spine, negative seated straight leg raising tests, normal lung and heart function and normal blood pressure (R. at 202, 205, 207, 208-09, 211, 212-13, 215).

On July 11, 2002, Plaintiff's first doctor's visit after both his alleged onset of disability (May 20, 2002) and his date last insured (June 30, 2002), Dr. Strobel noted there had been "no acute flare of pain." Physical examination revealed some "decreased left ankle reflex" but also near normal range of motion in the neck and upper extremities, essentially normal lumbar extension/flexion, negative seated straight leg raising tests, normal lung and heart function and normal blood pressure (R. at 201). Dr. Strobel renewed Plaintiff's prescription for Methadone (R. at 201). On October 15, 2002, Dr. Strobel noted Plaintiff "more recently [had] a gradual return of pain" and that "his pain has worsened" to the point that he had "been out of work for the last 2 months" (R. at 198). The doctor continued his Methadone, added Bextra and Zanaflex, and suggested that lumbar spine films were necessary (R. at 199).

Thereafter, on visits between November 8, 2002 and September 18, 2003, Dr. Strobel reported that Mr. Baum had "chronic pain syndrome" and documented pain in a number of areas that was "not significantly improved" and for which Methadone had proved less effective over time (R. at 192-97).

With regard to Plaintiff's alleged sleep problems, Dr. Strobel noted that for the ten years since his accident, Plaintiff has had "significant intermittent sleep disturbance" (R. at 200. See also R. at 207, 202, 200, 199, 196). For example, on December 3, 2001, he noted Plaintiff's "sleep is still significantly disrupted," and recommended adding Flexeril (R. at 207). On October 15, 2002, he stated Mr. Baum's

⁵Methadone replaced the OxyContin Dr. Strobel prescribed until Plaintiff's June 28, 2001 office visit.

“sleep has progressively worsened” and prescribed Zanaflex (R. at 199). Plaintiff himself testified that he can not sleep without medication and when he does sleep, he can only do so in a special chair and not in a bed (R. at 42, 53-54, 57).

Further, since his initial work injury in 1992, Plaintiff’s weight has steadily increased, reaching the point of obesity. According to Dr. Strobel’s records, Mr. Baum weighed approximately 250 pounds in 1994 (R. at 223). Since then, he has weighed as much as 340 pounds, although he has generally maintained a weight around 300 pounds (R. at 205, 207, 208, 215, 254).⁶ Dr. Strobel has indicated that Plaintiff “has significant obesity” (November 8, 2002), being at least sixty or seventy pounds overweight (R. at 194, 215).

Additionally, at the hearing before the ALJ, Plaintiff testified that he had been diagnosed with carpal tunnel syndrom in both hands about two years prior to the hearing (R. at 51-52). He indicated that he slept with a brace on his left hand for this problem (R. at 51-52).

On June 23, 2003, a state agency medical consultant, Dr. Candelaria G. Legaspi, M.D. (“Dr. Legaspi” or “state medical consultant”), reviewed the record in this case (R. at 217-22). She concluded that Plaintiff was able to perform sedentary work.⁷ She found that he retained the physical residual

⁶The record indicates Plaintiff is either six feet tall (R. at 155) or six feet, four inches tall (R. at 46) At 300 pounds, Plaintiff’s Body Mass Index (“BMI”) is 40.7 if he is six feet tall and 36.5 if he is 6 feet four inches tall. According to the Centers for Disease Control (“CDC”), persons who have a Body Mass Index (“BMI”) of 30 or higher are obese. *See CDC, Defining Overweight and Obesity, available at <http://www.cdc.gov/nccdphp/dnpa/obesity/defining.htm>.* Either way, Plaintiff is obese.

⁷“Sedentary work” is defined as that “involv[ing] lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.” 20 C.F.R. § 404.1567(a) (2004). Social Security Ruling 83-10 explains that the ability to perform the full range of

functional capacity (“RFC”) to occasionally lift ten pounds, frequently lift less than ten pounds, stand and/or walk for at least two hours in a eight-hour workday, and sit for the remaining six hours of the workday (R. at 217-22).

In September 2004, Plaintiff’s parents and children submitted letters regarding Baum’s condition. The letters explained that Plaintiff experienced severe back pain dating from his back injury, and that he was frustrated from not being able to work (R. at 181-84).

B. History of Treatment for Mental Illness

Plaintiff also claims a history of feeling depressed, and has regularly been prescribed anti-depressant medications (R. 53, 205, 223, 261). Over the course of treatment, Dr. Strobel’s records frequently comment on Plaintiff’s outlook and demeanor. Although he acknowledged Plaintiff’s pain had the effect of frustrating and discouraging him, Dr. Strobel stated on more than one occasion that Plaintiff “does not seem truly depressed.” (R. at 199, 228). In February 2002, Dr. Strobel noted that Plaintiff Baum was “outgoing and cheerful” (R. at 205) and reported a “good” and “excellent” mood and outlook in December 2001 and July 2002, respectively (R. at 207, 200-01). Finally, on a questionnaire dated June 5, 2003, Plaintiff reported that he was never referred to a psychologist or psychiatrist for help coping with pain (R. at 144). During testimony before the ALJ, he stated he resisted the label of “depressed” but did not feel “himself” (R. at 53).

II. Contentions of the Parties

sedentary work requires the ability to sit approximately six-hours of an eight-hour workday. Also, being on one’s feet is required “occasionally” (zero to one-third of the workday) at the sedentary exertional level; periods of standing or walking should generally total no more than two hours of an eight-hour workday. S.S.R. 83-10, 1983-1991 Soc.Sec.Rep.Serv. 24, 1983 WL 31251 at *5. The Ruling also states that most unskilled sedentary jobs require good use of the hands and fingers for repetitive hand-finger action. Id.

A. Did the ALJ Fail to Adequately Evaluate the Plaintiff's Mental Impairment?

In his Motion for Summary Judgment, Plaintiff asserts that the ALJ erred in failing to adequately evaluate his mental impairment and resulting functional limitations as required by 20 C.F.R. § 404.1520a. Specifically, he argues that when there is evidence of a mental impairment, the ALJ's written decision must include a detailed, step-by-step analysis, which she failed to do in his case. Id. (Pl.'s Mot. Summ. J. at 11-12). The Commissioner counters that there is no evidence whatsoever suggesting Plaintiff had a "severe" mental impairment. Defendant argues the alleged depression did not limit Plaintiff's ability to work, that Dr. Strobel repeatedly referenced Plaintiff's positive mood and outlook and that Plaintiff never was treated by a mental health professional. (Def.'s Mot. Summ. J. at 26-29).

B. Is there Substantial Evidence to Support the ALJ's Conclusion that Plaintiff has the Residual Functional Capacity to Perform Sedentary Work?

Plaintiff also contends that the ALJ's opinion that he can perform a limited range of sedentary work is not supported by the record. Specifically, Plaintiff notes that the ALJ gave significant weight to the state medical consultant's report because she believed it consistent with the FCA performed on Plaintiff in 1994. Plaintiff asserts this is problematic for three reasons. First, Plaintiff contends the state assessment, which concluded he could occasionally lift ten pounds, is inconsistent with the 1994 FCA, which found that he could only perform work with a five pound lifting limit (R. at 270). Second, Plaintiff urges that the ALJ gave too much weight to the state doctor's opinion, because it was rendered by a non-treating source. Third, Plaintiff complains that regardless of the 1994 FCA findings, the ALJ failed to properly account for (1) his testimony and medical records showing his condition had significantly worsened and (2) the effect of his increasing obesity on his RFC. (Pl.'s Mot. Summ. J. at

7-9). Further, Plaintiff contends that the reasons provided by the ALJ for discounting his credibility (R. at 17-18) were inadequate and that to the extent that the ALJ considered that Plaintiff was gainfully employed in 2002, this was in error. (Pl.'s Mot. Summ. J. at 10-11, 13).

The Commissioner counters that the ALJ carefully considered the "entire record" before concluding that Plaintiff, as of his date last insured, retained the residual functional capacity to undertake a limited range of sedentary work (R. at 19-22). First, Defendant contends that state agency medical consultants' are considered valid, and thus it was proper for the ALJ to afford Dr. Legaspi's RFC assessment significant weight. Second, Defendant contends that the ALJ considered Plaintiff's subjective complaints, but discounted his characterization of the pain as totally disabling because the allegations were inconsistent with extensive evidence in the record. (Def.'s Mot. Summ. J. at 17-25).

C. Was the ALJ's Hypothetical Question to the Vocational Expert Sufficient?

Finally, Plaintiff contends that the ALJ's hypothetical question to the vocational expert ("VE") was legally insufficient, failing to account for all of the Plaintiff's functional limitations. Consequently, argues Plaintiff, the VE's response did not constitute substantial evidence upon which the ALJ could rely in making the determination that there were a significant number of other jobs that Plaintiff could perform despite his impairments. (Pl.'s Mot. Summ. J. at 10). Defendant argues that the hypothetical question posed to the VE was sufficient because the ALJ was careful to include all of Plaintiff's significant limitations that were supported by the record. (Def.'s Mot. Summ. J. at 26)

III. Legal Standard

The standard of review of an ALJ's decision is plenary for all legal issues. Schaudeck v. Comm'r of Soc. Sec. Admin., 181 F.3d 429, 421 (3d Cir. 1999). The scope of the review of determinations of fact, however, is limited to determining whether or not substantial evidence exists in

the record to support the Commissioner's decision. Id. As such, "[t]his Court is bound by the ALJ's finding of fact if they are supported by substantial evidence on the record." Plummer v. Apfel, 186 F.3d 422, 427 (3d Cir. 1999). Where "an agency's fact finding is supported by substantial evidence, reviewing courts lack power to reverse . . . those findings." Monsour Med. Ctr. v. Heckler, 806 F.2d 1185, 1191 (3d Cir. 1986). "Substantial evidence does not mean a large or considerable amount of evidence but rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1999).

IV. Discussion

To determine whether an individual is disabled, the regulations proscribe a five-step analysis. 20 C.F.R. § 404.1520(a); Ramirez v. Barnhart, 372 F.3d 546, 550-51 (3d Cir. 2004). The fact-finder must determine: (1) if the claimant currently is engaged in substantial gainful employment; (2) if not, whether the claimant suffers from a "severe impairment;" (3) if the claimant has a "severe impairment," whether that impairment meets or equals those listed in 20 C.F.R. Part 404, Subpart P, Appendix 1, and thus are presumed to be severe enough to preclude gainful work; (4) whether the claimant can still perform work he has done in the past ("past relevant work") despite the severe impairment; and (5) if not, whether the claimant is capable of performing other jobs existing in significant numbers in the national economy in view of the claimant's age, education, work experience and RFC. Id. If there is an affirmative finding at any of steps one, two, four or five, the claimant will be found "not disabled." 20 C.F.R. § 404.1520(b)-(f). See also Brown v. Yuckert, 482, U.S. 137, 140-42 (1987). The Plaintiff carries the initial burden of demonstrating by medical evidence that he is unable to return to his former occupation. Dobrowolsky v. Califano, 606 F.2d 403, 406 (3d Cir. 1979). Once the Plaintiff has done so, the burden shifts to the Commissioner to show the existence of substantial gainful employment the claimant could perform. Id.

In reviewing the evidence in this case, the ALJ made the following twelve findings in concluding that Plaintiff was “not disabled” (R. at 22-23):

1. Plaintiff last met the insured status requirements on June 30, 2002;
2. Plaintiff had not engaged in substantial gainful activity at any time relevant to the ALJ’s decision;
3. Through the last date insured, Plaintiff had an impairment or combination of impairments considered “severe” pursuant to 20 C.F.R. § 404.1520(c);
4. Through the last date insured, Plaintiff did not have an impairment or combination of impairments that met or equaled an impairment listed in Appendix 1, subpart P, Regulations No. 4;
5. Plaintiff’s allegations regarding symptoms and limitations were not entirely credible;
6. Through the last date insured, Plaintiff had the RFC to do a limited range of sedentary work (lift, carry, push and/or pull less than ten pounds frequently and ten pounds occasionally; stand and/or walk for two hours; and sit for six hours) with a stand/sit option;
7. Through the last date insured, Plaintiff was unable to perform any past relevant work, 20 C.F.R. § 404.1565;
8. As of the last date insured, Plaintiff was a “younger individual,” 20 C.F.R. § 404.1563;
9. Plaintiff has a high school equivalent education;
10. Plaintiff had not acquired work skills that are transferable to other occupations within the above-defined RFC;
11. Through the last date insured, although unable to perform the full range of sedentary work due to limitations, considering the Plaintiff’s age, education and work experience, there were significant numbers of jobs in the national economy that Plaintiff could have performed. Thus, a finding of “not disabled” was found within the framework fo Medical-Vocational Rule 201.28; and
12. Plaintiff was not under a “disability” as defined in the Social Security Act, at any time through the date last insured, 20 C.F.R. § 404.1520(g).

In making these findings, the ALJ concluded that Plaintiff’s chronic pain syndrome and obesity were his only “severe” impairments and that evidence failed to establish that he has a severe mental impairment or carpal tunnel syndrome (R. at 17-18). She found that his pain and obesity were severe

enough to keep him from doing his job as a construction worker, but that Plaintiff's complaints that these conditions were totally disabling were "not entirely credible" (R. at 19-21). Instead, the ALJ found that he still had the ability to do a limited range of sedentary work (R. at 19). Further, she concluded that based on this RFC, as well as his age, education and work experience, Baum is capable of performing other less strenuous jobs existing in significant numbers in the national economy (R. at 22).

In reviewing the ALJ's decision, the Court holds that at least with regard to the ALJ's conclusion that the Plaintiff is capable of performing certain sedentary jobs, the ALJ's findings were based on substantial evidence. However, the Court finds that the record was not sufficient as to step five. Therefore, we remand the case for further proceedings.

A. The ALJ Adequately Evaluated the Plaintiff's Mental Impairments

Plaintiff challenges the ALJ's determinations at the second, fourth, and fifth steps of the analysis. As to the second step, the ALJ found that Baum had two severe impairments—chronic pain syndrome status post lumbar laminectomy and obesity. (R. at 17). Plaintiff contends that the ALJ erred by failing to adequately evaluate his mental impairment and resulting functional limitations, and seemingly by not classifying his depression as a "severe" impairment. Specifically, Plaintiff argues that when there is evidence of a mental impairment, the ALJ must include a specific finding as to the degree of limitation in each of four designated functional areas and include significant history, examination, laboratory findings and functional limitations that were considered in reaching her conclusion. (Pl.'s Mot. Summ. J. at 11-12). The Commissioner argues that the ALJ properly determined that Plaintiff's alleged depression was not severe because it had no more than a minimal effect on Plaintiff's ability to perform basic work activities. (Def.'s Mot. Summ. J. at 26-29).

An impairment is "severe" at step two of the sequential evaluation process if it significantly

limits an individual's physical or mental ability to do "basic work activities." 20 C.F.R. §§ 404.1520(c), 404.1521(a). See also S.S.R. 85-28, 1983-1991 Soc.Sec.Rep.Serv. 390, 1985 WL 56856 at*3. To make this determination, the ALJ must perform "a careful evaluation of the medical findings which describe the impairment(s) and an informed judgment about its (their) limiting effects on the individual's physical and mental ability(ies) to perform basic work activities." Id.

With regard to mental impairments in particular, 20 C.F.R. §§ 404.1520a and 416.920a (2000) dictate that the ALJ must examine the claimant's functioning in four broad functional areas: activities of daily living; social functioning; concentration, persistence, or pace; and episodes of decompensation. Allen v. Barnhart, 417 F.3d 396, 400 (3d Cir. 2005); Ramirez, 372 F.3d at 551. When rating the degree of limitation in the first three functional areas, the ALJ is to use a five-point scale: none, mild, moderate, marked, and extreme. When considering the fourth functional area, the ALJ should apply a four-point scale: none, one or two, three, and four or more. 20 C.F.R. §§ 404.1520a(c)(3)-(4) and 416.920a(c)(3)-(4). However, if the ALJ rates the first three functional areas as "none" or "mild" and "none" in the fourth area, the ALJ will generally conclude that the alleged impairment is not severe. Id. at §§ 404.1520a(d)(1) and 416.920a(d)(1). In making these determinations, the ALJ has a duty to consider carefully all evidence of mental health impairment in the record. Fouch v. Barnhart, 80 Fed.Appx. 181, 185 (3d Cir. 2003) (non-precedential opinion). Finally, the ALJ's written decision must show the significant history and the functional limitations that were considered in reaching a conclusion about the severity of the mental impairment(s) and must include a specific finding as to the degree of limitation in each of the functional areas. 20 C.F.R. at §§ 404.1520a(e)(2) and 416.920a(e)(2);

Here, substantial evidence supports the ALJ's decision that Plaintiff did not have a severe mental impairment prior to the date last insured. Further, her written decision adequately details the significant

history and the functional limitations that were considered in reaching her conclusion. First, contrary to Plaintiff's assertion, the ALJ's decision included a specific finding as to the degree of limitation in each of the functional areas. The ALJ considered the evidence on record and Plaintiff's testimony at the hearing, and found that Plaintiff's alleged depressive syndrome resulted in no more than "mild" limitation of his activities of daily living, social functioning, and concentration, persistence and pace and found no episodes of decompensation (R. at 18). Second, there is simply nothing in the record suggesting Plaintiff's alleged depression limited his ability to cope with the rigors of the work environment. In this regard, the ALJ discussed numerous records of Drs. Strobel and Wilson supporting the conclusion that while Plaintiff has been prescribed anti-depressant medications, he did not have a limitation interfering with basic work activities (R. at 18, referencing R. at 199, 200-01, 205, 207, 228). For example, during a visit on July 11, 2002, which was near the time that Plaintiff alleges onset of his disability, the ALJ noted that the claimant reported his mood and outlook as "good" to Dr. Strobel and the doctor found them to be "excellent." (R. at 200-01). Moreover, the ALJ noted that there was no indication that the Plaintiff had ever required hospitalization or been referred to psychiatric evaluation or mental health counseling (R. at 18, referencing R. at 144).

In sum, this Court concludes that ALJ's findings were supported by substantial evidence and did not require a finding that Plaintiff's mental impairment was severe.

B. Substantial Evidence Supports the ALJ's Determination that Plaintiff has the Residual Functional Capacity to Perform Sedentary Work

At the fourth step of the analysis, Plaintiff challenges the ALJ's finding that Plaintiff has the residual functional capacity to perform a limited range of sedentary work. Specifically, Plaintiff argues the ALJ improperly gave significant weight to the state agency physician's report concluding he could

perform sedentary work. Moreover, Plaintiff contends that the reasons provided by the ALJ for discounting his credibility were inadequate. (Pl.'s Mot. Summ. J. at 7-11). The Commissioner counters that the ALJ properly considered the entire record before concluding that Plaintiff had the residual functional capacity to undertake certain sedentary work. (Def.'s Mot. Summ. J. at 18). The court agrees with the Defendant.

Plaintiff first argues that the ALJ heavily relied on the state agency doctor's conclusion, which was improper to do because that opinion (1) was rendered by a non-treating physician and (2) in any event, was inconsistent with the record. He asserts that although the ALJ found the state report "consistent with the [1994] functional capacity assessment," in fact it is not. He contends the 1994 FCA limited Plaintiff's working ability to those jobs with a five pound lifting limit (R. at 270), whereas the full range of sedentary work requires the ability to push and/or pull ten pounds. Moreover, Plaintiff complains that even if the eight year old FCA supported the view that he could perform sedentary work in 1994, the ALJ, in relying on the FCA, failed to properly account for (1) evidence showing his condition had significantly worsened (prior to the expiration of his insured status), and (2) the effect of his increasing obesity on his RFC. (Pl.'s Mot. Summ. J. at 7-9). The Commissioner rejects the assertion that the ALJ relied primarily on either the state medical consultant or the 1994 FCA and instead argues that the ALJ comprehensively reviewed all the evidence. Further, the Commissioner contends that pursuant to 20 C.F.R. § 404.1527(f)(2)(I), it was proper for the ALJ to afford Dr. Legaspi's RFC assessment significant weight. (Def.'s Mot. Summ. J. at 17-22, 25 n.17).

While it is true that generally ALJs are to give more weight to opinions from treating sources, 20 C.F.R. § 404.1527(d)(2), an ALJ is not forbidden from affording weight to non-treating state agency medical consultants' opinions. Moody v. Barnhart, 114 Fed. Appx. 495, 501 (3d Cir. 2004) (non-

precedential opinion); Garcia v. Barnhart, 2005 U.S. Dist. LEXIS 19579, at *3 (E.D. Pa. Sept. 6, 2005); S.S.R. 96-2P, 1996 WL 374188 at *2. In fact, such doctors are considered “highly qualified physicians . . . who are also experts in Social Security disability evaluation” and ALJ’s “must consider [their] findings . . . as opinion evidence.” 20 C.F.R. § 404.1527(f)(2)(I) (emphasis added). Moreover, while the ALJ’s decision considered and relied in part upon Dr. Legaspi’s report (and indirectly, on the 1994 FCA), she considered them in conjunction with other evidence. Specifically, the ALJ reviewed (1) the November 2000 MRI showing no spinal stenosis or herniated disc (R. at 18), (2) extensive records from Dr. Strobel’s — Plaintiff’s treating physician — evincing “benign” physical examination results before and even after the last insured date (R. at 20, referencing 192-216; 223-232), (3) Plaintiff’s subjective complaints (R. at 19), and (4) Plaintiff’s family’s input (R. at 20). After discussing Dr. Strobel’s records in some depth (which contrary to Plaintiff’s assertion specifically referenced his increasing obesity), the ALJ specifically found that they showed Plaintiff’s condition did not worsen until approximately August 2002, after his date last insured.⁸ She also indicated that Plaintiff’s treatment had been routine and conservative and that he did not visit Dr. Strobel on or near the alleged onset date, May 30, 2002 (R. at 20).⁹ In short, while Dr. Strobel’s records document Plaintiff’s chronic pain, they contain nothing

⁸The ALJ discussed Dr. Strobel’s treatment notes, which in February 2002 indicated that despite “moderate sacroiliac tenderness,” Plaintiff had normal range of motion in the neck and upper extremities and normal lumbar extension, negative straight leg raises, no abnormalities in reflexes or sensation and normal ability to walk no hills and toes and lumbar flexion lacked “just an inch or two.” She then noted that in April 2002 (the last exam before Plaintiff’s insured date expired), “physical examination was unchanged.” In July 2002, after the last insured date, the ALJ indicated Plaintiff still reported that he was “feeling physically well.” The ALJ found that it was not until the October 15, 2002 exam that Plaintiff reported to Dr. Strobel that he had been out of work for two months due to increased pain. Thus, she concluded that his condition worsened in approximately August 2002 (R. at 20).

⁹Plaintiff saw Dr. Strobel on April 16, 2002; his next appointment thereafter was July 11, 2002 (R. at 200-203).

contrary to Dr. Legaspi's conclusion that Plaintiff could undertake certain sedentary work at the time he was last insured. Finally, to the extent that the ALJ found the state medical consultant's report consistent with the 1994 FCA (which included a five pound lifting limit), this was not improper. Both reports support the impression that Plaintiff could perform certain "sedentary work," which with regard to weight is defined as that "involv[ing] lifting *no more than* 10 pounds." 20 C.F.R. § 404.1567(a) (emphasis added). Further, the state doctor explained she concluded Plaintiff could occasionally lift ten pounds because he self-reported that he was able to lift up to twenty pounds (R. at 221, referencing R. at 140). When considered in conjunction with Dr. Strobel's opinion, as well as other evidence in the record, the court finds no error in the ALJ's having afforded Dr. Legaspi's RFC assessment significant weight.

Additionally, before concluding that Plaintiff had the RFC to undertake a limited range of sedentary work, the ALJ also considered Plaintiff's subjective complaints. When evaluating residual functional capacity, an ALJ must consider a claimant's subjective symptoms, including pain, but only to the "extent to which your symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence." 20 C.F.R. § 404.1529. It is the ALJ's responsibility to resolve conflicts in the evidence and to determine credibility and the relative weights to be given to the evidence. Apfel, 186 F.3d at 429; Mason v. Shalala, 99 F.2d 1058, 1066 (3d Cir. 1993). The ALJ's conclusions must be accepted unless they are without basis in the record. Torres v. Harris, 494 F. Supp. 297, 301 (E.D. Pa. 1980). Hence, an ALJ's credibility determinations are entitled to great deference and should not be discarded lightly, given her opportunity to observe an individual's demeanor. See Reefer v. Barnhart, 326 F.3d 376, 380 (3d Cir. 2003). Ultimately, the ALJ's "determination or decision must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be

sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight." Schwartz v. Halter, 134 F. Supp. 2d 640, 654 (E.D. Pa. 2001) (quoting Schaudeck v. Comm'r of Soc. Sec. Admin., 181 F. 3d 429, 433 (3d Cir. 1999); S.S.R. 96-7P, 1996 WL 374186)).

Here, before concluding that Plaintiff had the RFC to undertake a limited range of sedentary work, the ALJ also considered Plaintiff's subjective complaints of pain, sleep problems, irritability, fatigue, and memory loss due to medications. The ALJ concluded that Plaintiff's "medically determined impairments could reasonably be expected to produce the alleged symptoms," but found Plaintiff's assertions concerning the intensity, duration and limiting effects of his symptoms "not entirely credible" (R. at 17). Plaintiff urges this finding is neither supported by the record nor adequately explained by the ALJ. He also takes issue with any conclusion by the ALJ that he was gainfully employed in 2002.¹⁰ (Pl.'s Mot. Summ. J. at 10-11, 13). Defendant argues there is substantial evidence that the ALJ considered Plaintiff's subjective complaints but found they were not entitled to full credence, pointing in part to evidence that Plaintiff was working in 2002. (Def.'s Mot. Summ. J. at 22-25).

The ALJ's decision clearly identifies inconsistencies between Plaintiff's representations and other the facts in the record. These include numerous notations in Dr. Strobel's record that Plaintiff was physically active and working in the construction industry until approximately August 2002. Specifically, Plaintiff himself told the doctor multiple times that he was working full-time work in the

¹⁰Although Plaintiff admits his testimony was somewhat unclear as to his last date of employment, he noted this was clarified when he submitted tax returns showing he did not work in 2002. Plaintiff contends therefore, that it was error to consider that he worked in 2002 when in fact he last worked in July of 2001.

construction industry through at least July 2002, well past the last-insured date.¹¹ Additionally, the ALJ noted that in a questionnaire submitted shortly after he applied for benefits, Plaintiff asserted he was able to prepare simple meals, vacuum, clean counter tops, dust, shop and carry up to four lightweight bags of groceries one at a time, and took medication that “partially” relieved his pain (R. at 20, referencing R. 139-44). Additionally, as discussed *infra*, the ALJ identified inconsistencies between Plaintiff’s representations and (1) Dr. Strobel’s treatment records suggesting benign findings and a conservative course of treatment, and (2) Dr. Legaspi’s opinion (R. at 20-21). These inconsistencies constitute substantial evidence on which the ALJ properly relied in discounting Plaintiff’s credibility. Thus, there was no error in the ALJ’s credibility determination.

Accordingly, this Court finds that substantial evidence exists in the record to support the ALJ’s conclusion that Plaintiff has the residual functional capacity to perform a limited range of sedentary work.

C. The ALJ’s Hypothetical Question to the Vocational Expert Failed to Account for All of the Plaintiff’s Functional Limitations

At the fifth and final step of the analysis, Plaintiff challenges the sufficiency of the ALJ’s hypothetical to the vocational expert (“VE”). Baum asserts the question was insufficient because it did not encompass all of his functional limitations, which were documented in the 1994 FCA as well as by

¹¹For example, the ALJ noted that in December 2001, Plaintiff told Dr. Strobel he was self-employed, having “deferred to the physical work [of construction] rather than a managerial position” (R. at 20, referencing R. at 206). He further stated he was engaged in full physical activity and was currently moving household contents into a new home. *Id.* On July 11, 2002, shortly after his last insured date of June 30, 2002 and seven weeks after the alleged onset of disability, Plaintiff again reported that he was “working full time . . . doing reasonably well with his contracting business” (R. at 200). Accordingly, the court finds Plaintiff’s argument that it was in error for the ALJ to have considered that Plaintiff was gainfully employed in 2002 is without merit.

his subjective complaints, and argues the VE's answer therefore could not be considered substantial evidence. (Pl.'s Mot. Summ. J. at 10). Defendant contends the hypothetical, which included all of Baum's significant limitations that were supported by the record, was sufficient. (Def.'s Mot. Summ. J. at 26).

Testimony of a VE constitutes substantial evidence for purposes of judicial review only where the hypothetical question posed by the ALJ fairly encompasses *all* of an individual's significant limitations that are supported by the record. Ramirez, 372 F.3d at 552; Chrupcala v. Heckler, 829 F.2d 1269, 1276 (3d Cir. 1987). In fact, in Ramirez, decided just three months before the hearing on this case, the Third Circuit reversed a judgment for defendant because of an insufficiently detailed hypothetical question to a VE. Ramirez, 372 F.3d at 552. Further, "great specificity" is required when an ALJ incorporates a claimant's limitations into a hypothetical. Ramirez, 372 F.3d at 554-55 (citing Burns v. Barnhart, 312 F.3d 113, 122 (3d Cir. 2002)). For example, in Chrupcala, the Third Circuit held a VE's opinion deficient because it was in response to a hypothetical that did not reflect the fact of constant and severe pain which the claimant testified to and which was supported by the record. Chrupcala, 829 F.2d at 1276. Thus, it could not be considered substantial evidence. Id. See also Ramirez, 372 F.3d at 554 (VE's opinion could not be considered substantial evidence where hypothetical did not account for plaintiff's deficiencies in concentration, persistence or pace); Burns, 312 F.3d at 122 (VE's opinion deficient where hypothetical limited inquiry to "simple repetitive one, two-step tasks" because it failed to sufficiently incorporate claimant's borderline intellectual functioning).

Here, after discussing with the VE the fact that the 1994 FCA was "very general," and even "obtuse" with regard to what exertion level they were recommending, the ALJ's hypothetical was as follows:

I think [from] what the Claimant testified and what it looks like in [the 1994 FCA], it looks like they thought he could do sedentary work. So why don't we assume sedentary with a sit/stand option. Are there jobs with that?

(R. at 58). In short, the Court is not satisfied that this question adequately takes into account all of Plaintiff's limitations that are supported by the record. First, we note at the outset that we find it troubling that both the ALJ and the VE found the 1994 FCA to be "very general" and "obtuse" with regard to what exertion level they were recommending. Second, the hypothetical fails to account for the claimant's age, education, and work experience, as the fifth step of the disability analysis requires. 20 C.F.R. § 404.1520. Third, the question does not specifically encompass Plaintiff's specific functional limitations. The ALJ's own opinion notes that Plaintiff had the RFC for a "limited range of sedentary work" and his ability to engage in the full range of sedentary work was "impeded by additional limitations," yet the hypothetical does not account for such restrictions (R. at 19, 22, 23). In fact, she does not even identify these limitations, although she did state that Plaintiff's "medically determined impairments [of chronic pain syndrome and obesity] could reasonably be expected to produce the alleged symptoms [of pain, sleep problems, irritability, fatigue, and memory loss due to medications]." (R. at 17, 19). While the ALJ's inclusion of the sit/stand option may be seen as an indirect accommodate for Plaintiff's pain, it does not do so with the "great specificity" required by the Third Circuit. Ramirez, 372 F.3d at 554-55; Burns, 312 F.3d at 122. Further, the question certainly did not reflect the "fact of constant . . . pain" which the Chrupcala court dictated must be included in a hypothetical. Certainly, Plaintiff's constant pain is amply supported by the record and acknowledged by the ALJ in her decision, even if she did not believe the intensity alleged by Plaintiff. Chrupcala, 829 F.2d at 1276. Moreover, Plaintiff's related sleep problems, fatigue, and irritability also find uncontested

support in the record and yet also were not included in the hypothetical question posed by the ALJ.¹² Finally, we note that the 1994 FCA, upon which the VE relied in making his recommendation,¹³ limited Plaintiff's lifting capacity to five pounds. While it is possible that the ALJ found the state agency doctor's assessment that Plaintiff could carry ten pounds more credible, we believe that given this conflicting evidence, an appropriate hypothetical question would have incorporated the ALJ's findings as to the amount of weight Plaintiff can carry. In sum, the Court finds the VE's opinion deficient because the ALJ's hypothetical question did not reflect all of Plaintiff's functional limitations which were supported by the record. Therefore, it cannot be considered substantial evidence.

It is not clear whether a limitation encompassing pain, sleep problems, fatigue, irritability, memory loss and maximum weight-lifting capacity within the hypothetical would have changed the vocational expert's response. Accordingly, this case will be remanded.

V. Conclusion

For the foregoing reasons, this Court concludes that the ALJ adequately evaluated the Plaintiff's mental impairments and that substantial evidence supports the ALJ's determination that Plaintiff has the residual functional capacity to perform a limited range of sedentary work. However, with regard to the ALJ's conclusion that the Plaintiff is capable of performing certain sedentary jobs existing in significant

¹²We note that the ALJ declined to specifically assess whether any conditions were medically determinable, and if so whether they were severe. However, uncontested medical documentation in the record certainly substantiates that Plaintiff had significant sleep problems, related fatigue, and irritability and therefore these impairments should have been reflected in the hypothetical (R. at 196, 199, 207, 202, 200, 228). Plaintiff also reports memory loss due to medications (R. at 34, 37, 171), although this court's review of the record revealed no medical documentation substantiating this claim.

¹³This is demonstrated by the ALJ's first question to the VE, which was "The piece of paper that I gave you from the '94 evaluation, can you get enough information about that to see what kind of work they were recommending? Or its not - - it's too obtuse?" (R. at 58).

numbers in the national economy, the ALJ's findings were based on a hypothetical question to the VE that was insufficient under Third Circuit law. Accordingly, the Commissioner's Motion for Summary Judgment will be granted in part and denied in part. Similarly, Plaintiff's Motion for Summary Judgment will be will be granted in part and denied in part and we will remand the case for further proceedings.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|--|---|----------------|
| SCOTT BAUM, | : | |
| | : | |
| Plaintiff, | : | |
| | : | CIVIL ACTION |
| v. | : | |
| | : | |
| JO ANNE B. BARNHART, Commissioner | : | NO. 05-CV-2335 |
| of the Social Security Administration, | : | |
| | : | |
| Defendant. | : | |

ORDER

AND NOW, this 30th day of November, 2005, after careful and independent consideration of the parties' cross-motions for summary judgment, and review of the record, it is hereby ORDERED that:

1. The Commissioner's Motion for Summary Judgment (Doc. No. 7) is GRANTED IN PART AND DENIED IN PART;
2. The Plaintiff's Motion for Summary Judgment (Doc. No. 5) is GRANTED IN PART AND DENIED IN PART; and
3. The case is REMANDED to the Commissioner for an evidentiary hearing in accordance with the foregoing Memorandum. This remand is ORDERED pursuant to the fourth sentence of 42 U.S.C. § 405(g).
4. The Clerk shall mark this case CLOSED.

BY THE COURT:

/s/ Michael M. Baylson

MICHAEL M. BAYLSON, U.S.D.J.