

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

DONALD DUANE OCHS,

Plaintiff,

vs.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

No. 3:07-cv-00102-JAJ

ORDER

This matter comes before the Court pursuant to briefs on the merits of this application for supplemental security income. This Court finds that the decision of the Social Security Administration is supported by substantial evidence. This case is dismissed.

I. PROCEDURAL BACKGROUND

Plaintiff Donald Duane Ochs (hereinafter "Ochs") filed an application for supplemental security income on October 18, 2004, alleging an inability to work from October 14, 2004 (Tr. 65-67). The Social Security Administration ("SSA") denied Och's application initially and again upon reconsideration (Tr. 14). Administrative Law Judge ("ALJ") George Gaffaney held a hearing on Och's claim on November 8, 2006 (Tr. 15). The ALJ denied Och's appeal on April 27, 2007 (Tr. 12). Ochs filed a request for review on May 14, 2007 (Tr. 9-11). The Appeals Council denied his request for review on September 9, 2007 (Tr. 6-8). Ochs filed this action for judicial review on October 8, 2007 (Dkt. 1).

II. FACTUAL BACKGROUND

At the time of the hearing, Ochs was 42 years old. He was 40 at the time of his alleged disability onset date. Ochs completed high school and one year of college. His prior relevant work experience includes working as a plasterer for four months in 1998.

Ochs was incarcerated for most of the time period between 1983 and 1998 (Tr. 268). His past crimes include forgery, burglary, theft, possession of burglary tools, kidnaping, robbery, and operating a vehicle while intoxicated (Tr. 156). Ochs is married, has one son and one stepdaughter, and resides with his wife and mother (Tr. 265).

Ochs claims he is unable to work due to “mental deficiencies” (Tr. 266). Ochs was diagnosed with rapid cycling bipolar disorder, personality disorder, and polysubstance abuse in partial remission in 2004 (Tr. 154). At hearing, he testified that he “hates people”, has a history of getting into physical altercations with others, and, as a result, avoids social interaction (Tr. 268-70). Ochs testified that he has suffered from auditory and visual hallucinations (Tr. 273-74). He testified that his conditions periodically worsen, causing him to become withdrawn (Tr. 273). Ochs was involuntarily committed to a hospital in Henry County, Iowa in January of 2006 after a suicide attempt (Tr. 206-21). Ochs reported that he has attempted suicide on four occasions (Tr. 153).

Prior to 2004, Ochs never sought mental health treatment for his conditions (Tr. 268). After his wife gave him an ultimatum, Ochs began treatment in October 2004 with Ann Porter, CS, ARNP, at ResCare, Inc. (Tr. 268). His treatment included monthly appointments with Porter or another staff member and a medication regimen. Ochs testified at hearing that the medications “help a great deal” but do not alleviate completely the symptoms associated with his conditions (Tr. 274). He testified that the medications eliminated the auditory and visual hallucinations and enabled him to better avoid confrontation with others in social interaction (Tr. 274-75). However, Ochs testified that he feels he is still unable to work, even while taking the medication, because he continues to suffer from anxiety and inability to get along with others in social interaction (Tr. 275). The level of improvement in Ochs’ condition while he is medicated was the subject of a factual dispute between Ochs and the Commissioner.

Ochs has continued with treatment of his conditions since 2004. Ochs was treated at ResCare from October of 2004 to March of 2005. He was treated at Dove Associates from April to March of 2005 (Tr. 193-202). From May 2005 to October 2005, Ochs received treatment from psychiatrist Josefina Hizon, M.D. (Tr. 239-50). In January 2006, Satyan Kantamneni, M.D, treated Ochs when he was involuntarily hospitalized. It appears from the record that Ochs had not been compliant with his medication regimen prior to his hospitalization. Dr. Kantamneni signed the affidavit for the involuntary commitment of Ochs. Dr. Kantamneni stated that “I feel that the patient would benefit from continued inpatient hospitalization for adjustment of his psychotropic medication. The patient did start taking his medication and has been showing improvement. After the patient is stabilized, the patient can be discharged and can be followed up as an outpatient.” (Tr. 220). After the January 2006 hospitalization, Ochs received treatment from psychiatrist Eric Straumanis, M.D., from January 2006 to August 2006. (Tr. 230-38). Ochs received treatment from Marjorie Gerber, LISW, from August 2006 to September 2006. (Tr. 230-38, 224-29).

II. CONCLUSIONS OF LAW

A. Scope of Review

In order for the court to affirm the ALJ’s findings of fact, those findings must be supported by substantial evidence appearing in the record as a whole. See Baker v. Barnhart, 457 F.3d 882, 892 (8th Cir. 2006). “Substantial evidence is less than a preponderance, but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion.” McKinney v. Apfel, 228 F.3d 860, 863 (8th Cir. 2000). The court must take into account evidence that fairly detracts from the ALJ’s findings, as well as evidence that supports it. Id. (citing Craig v. Apfel, 212 F.3d 433, 436 (8th Cir. 2000)). The court must consider the weight of the evidence appearing in

the record and apply a balancing test to contradictory evidence. Gunnels v. Bowen, 867 F.2d 1121, 1124 (8th Cir. 1989); Gavin v. Heckler, 811 F.2d 1195, 1199 (8th Cir. 1987).

B. ALJ's Disability Determination

Determining whether a claimant is disabled involves a five-step evaluation. See 20C.F.R. § 404.1520(a)–(f); Bowen v. Yuckert, 482 U.S. 137, 140 (1987).

The five steps are:

- (1) If the claimant is engaged in substantial gainful activity, disability benefits are denied.
- (2) If the claimant is not engaged in substantial gainful activity, his medical condition is evaluated to determine whether her impairment, or combination of impairments, is medically severe. If the impairment is not severe, benefits are denied.
- (3) If the impairment is severe, it is compared with the listed impairments the Secretary acknowledges as precluding substantial gainful activity. If the impairment is equivalent to one of the listed impairments, the claimant is disabled.
- (4) If there is no conclusive determination of severe impairment, then the Secretary determines whether the claimant is prevented from performing the work he performed in the past. If the claimant is able to perform her previous work, he is not disabled.
- (5) If the claimant cannot do his previous work, the Secretary must determine whether he is able to

perform other work in the national economy
given his age, education, and work experience.

Trenary v. Bowen, 898 F.2d 1361, 1364 n.3 (8th Cir. 1990) (citing Yuckert, 482 U.S. at 140–42); 20 C.F.R. § 404.1520(a)–(f).

“To establish a disability claim, the claimant bears the initial burden of proof to show that he is unable to perform his past relevant work.” Frankl v. Shalala, 47 F.3d 935, 937 (8th Cir. 1995) (citing Reed v. Sullivan, 988 F.2d 812, 815 (8th Cir. 1993)). If the claimant meets this burden, the burden of proof then shifts to the Commissioner to demonstrate that the claimant retains the residual functional capacity (RFC) to perform a significant number of other jobs in the national economy that are consistent with the claimant’s impairments and vocational factors such as age, education and work experience. Id.

At the first step, the ALJ found that Ochs had not engaged in substantial gainful activity since his alleged onset date (Tr. 17). At the second step, the ALJ determined that Ochs had severe impairments, that being bipolar disorder and personality disorder (Tr. 17). At the third step, the ALJ determined that Ochs’s impairments did not meet or medically equal one of the listed impairments (Tr. 17). At the fourth step, the ALJ determined that Ochs could not perform his past relevant work as a plasterer (Tr. 21). At the fifth step, the ALJ determined that Ochs has the residual capacity to perform non-exertional work-related activities, except that he is limited to performing simple, routine tasks. The ALJ found Ochs can have occasional interaction with coworkers and supervisors and he cannot work in a position requiring interaction with the general public (Tr. 18). The ALJ found that Ochs had no exertional limitations (Tr. 18). Given Ochs’ age, education, and work experience, the ALJ determined that Ochs could perform jobs that exist in significant numbers in the national economy, those jobs being a poultry farm laborer, a milking machine laborer, and a landscape laborer (Tr. 22).

**C. ALJ's Alleged Failure to Properly Consider if Ochs' Impairments
Met or Equaled a Listed Impairment**

Ochs argues that the ALJ failed to adequately consider whether his impairments met or medically equaled the severity requirements in Listings 12.04 (affective disorders) and 12.08 (personality disorders). “When a claimant meets all the requirements of a listing, he is entitled to benefits without further inquiry into his ability to perform other work.” Senne v. Apfel, 198 F.3d 1065, 1067 (8th Cir. 1999) (citing Sird v. Charter, 105 F.3d 401, 403 n. 6 (8th Cir. 1997)). To meet or medically equal Listings 12.04 or 12.08, a claimant must satisfy at least two of the following four “B” criteria:

1. Marked restriction of activities daily living; or
2. Marked difficulties in maintaining social functioning; or
3. Marked difficulties in maintaining concentration, persistence, or pace; or
4. Repeated episodes of decompensation, each of extended duration.

The ALJ found that Ochs' impairments of bipolar disorder and personality disorder resulted in mild restriction in the activities of daily living, moderate difficulties with social functioning, mild difficulties in maintaining concentration, persistence, and pace, and no episodes of decompensation (Tr. 18). Thus, the ALJ determined that Ochs' impairments did not meet or medically equal Listed Impairments 12.04 or 12.08 because Ochs does not satisfy two of the four “B” criteria.

Of the four “B” criteria, Ochs takes issue only with the ALJ's findings regarding the severity of his difficulties with social functioning and his episodes of decompensation. Ochs does not challenge the ALJ's findings regarding his level of restriction in daily activities or the severity of his difficulties with maintaining concentration, persistence, and pace. Ochs argues that the record demonstrates his difficulties with social functioning exceed a “moderate” categorization. He points to clinicians' notes documenting Ochs'

verbal expressions of rage, violence, and homicidal thoughts. Second, Ochs argues that the ALJ's finding that Ochs suffers from no episodes of decompensation is contrary to the record. Ochs points to his involuntary hospitalization in January of 2006 and his "several ups and downs" as evidence that he satisfies the episodes of decompensation criteria.

First, the Court will address the ALJ's finding that Ochs suffers from no episodes of decompensation. The regulations provide the following explanation of "episodes of decompensation":

Episodes of decompensation are exacerbations or temporary increases in symptoms or signs accompanied by a loss of adaptive functioning, as manifested by difficulties in performing activities of daily living, maintaining social relationships, or maintaining concentration, persistence or pace. Episodes of decompensation may be demonstrated by an exacerbation in symptoms or signs that would ordinarily require increased treatment or a less stressful situation (or a combination of the two). Episodes of decompensation may be inferred from medical records showing significant alteration in medication; or documentation of the need for a more structured psychological support system (e.g. hospitalizations, placement in a halfway house, or a highly structured and directing household); or other relevant information in the record about the existence, severity, and duration of the episode.

The term repeated episodes of decompensation, each of extended duration in these listings means three episodes within 1 year, or an average of once every 4 months, each lasting for at least 2 weeks. If you have experienced more frequent episodes of shorter duration or less frequent episodes of longer duration, we must use judgment to determine if the duration and functional effects of the episodes are of equal severity and may be used to substitute for the listed finding in a determination of equivalence.

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00C(4). The Court has considered Och's contentions that he meets the criteria for episodes of decompensation because "he has

several ups and downs” and was involuntarily hospitalized in January of 2006. However, such evidence does not satisfy the severity or frequency criteria as defined in the regulations for episodes of decompensation. Substantial evidence in the record supports the ALJ’s finding that Ochs does not suffer from “repeated episodes of decompensation, each of an extended duration.”

The Court need not consider Ochs’ contention that he experiences marked difficulties in maintaining social functioning. Even if Ochs experienced marked difficulties in maintaining social functioning, he would satisfy only one, not two, of the “B” criteria. Accordingly, the Court finds that the ALJ appropriately determined that Ochs does not meet or medically equal Listed Impairments 12.04 or 12.08.

D. ALJ’s Alleged Failure to Accord Appropriate Weight to Medical Opinions of Treating Physicians and Other Sources

Ochs argues that the ALJ did not properly consider the opinion evidence in determining Ochs’ residual functional capacity. Specifically, Ochs argues that the ALJ failed to give controlling weight to his treating physician’s medical opinions and failed to give appropriate weight to the opinions of “other sources.” The opinion evidence in this matter is summarized as follows:

Licensed psychologist Timothy Wahl, Ph.D., performed a mental status examination of Ochs on January 27, 2005 (Tr. 156-59). Dr. Wahl diagnosed Ochs with bipolar disorder, polysubstance dependence in partial remission, and antisocial personality disorder (Tr. 159). Dr. Wahl opined,

Donald appears suited to a variety of unskilled occupations, however, accommodations may be required depending on the stability of his moods. He is likely of average intelligence (not formally tested), and he should be able to understand basic instructions and procedures.

Interpersonally, Donald likely will have trouble relating with coworkers and supervisors per his own admission that “I pretty much don’t like anybody.” He appears to be a very irritable individual, with the propensity to “act out” being likely. He seems to be someone that is always on guard, and while he probably does not search for problems with others, he likely is overly reactive to sometimes benign events in his environment. Having said that, there were enough small little glimpses of a softer side to him, that would suggest that he has the potential for positive interpersonal relations. Judgment obviously has been poor by history, and if based on that alone, he inevitably would have trouble responding appropriately to changes in the workplace. With medication however, he appears to be using some increasingly sound judgment. Even so, considering his mental illness, continued drug use, maladaptive personality features, as well as sporadic work history, he probably will continue to have at least some trouble responding appropriately.

(Tr. 159).

Ann Porter, CS, ARNP, treated Ochs between October of 2004 to March of 2005 at ResCare, Inc (Tr. 175-92). Porter treated Ochs for rapid cycling bipolar disorder (Tr. 154). On February 2, 2005, Porter opined, “I do feel this individual would not be capable of work at this stage of his [illegible] related to very poor work history; numerous incarcerations; difficulty being around other people; his ‘short fuse;’ and poor insight.” (Tr. 175).

David Christianson, Ph.D., performed a Mental Residual Functional Capacity Assessment (“Mental RFC”) and a Psychiatric Review Technique (“PRTF”) of Ochs on February 9, 2005. On the PRTF, Dr. Christianson reported that Ochs suffered from Bipolar I Disorder, a personality disorder, and polysubstance dependence in partial remission (Tr. 163, 167-68). Dr. Christianson opined:

Referring [sic] to Dr. Wahl’s report, Mr. Ochs will probably have difficulty sustaining a normal period of work without interference from either manic or depressive symptoms, and

his tendency to be impulsive and unthinking in this behavior as the result of the personality disorder. He will also have problems interacting with others. The current medication is moderating these problems and he would be able to sustain at least unskilled work.

(Tr. 151).

Licensed psychiatrist Ronald McPike, D.O., of Dove Associates, performed a psychiatric evaluation of Ochs on April 20, 2005 (Tr. 203-05). Dr. McPike diagnosed Ochs with Bipolar I Disorder, generalized anxiety disorder, and anti-social personality disorder (Tr. 204). Dr. McPike opined, “The patient does appear to be permanently disabled due to his chronic mental illness and inability to get along with others in society.” (Tr. 205).

Marjorie Gerber, LISW, treated Ochs at ResCare Mental Health Service between January 2006 and October 2006. Gerber treated Ochs for Bipolar Affective Disorder, Polysubstance Dependence, and antisocial personality traits (Tr. 222). On October 5, 2006, Gerber opined, “I believe Donald would not be able to maintain 40 hours per week employment.” (Tr. 222).

Satyan Kantamneni, M.D., treated Ochs when he was involuntarily hospitalized in January of 2006. Dr. Kantamneni opined that Ochs was likely to physically injure himself or others due to a suicide attempt immediately prior to hospitalization (Tr. 220). He stated, “I feel that the patient would benefit from continued inpatient hospitalization for adjustment of his psychotropic medication. The patient did start taking his medication and has been showing improvement. After the patient is stabilized, the patient can be discharged and can be followed up as an outpatient.” (Tr. 220).

A review of the opinion evidence in this matter reveals that none of the providers who treated Ochs constitutes a “treating source” whose medical opinion may be entitled to controlling weight under the regulations. “A ‘treating source’ is defined as a ‘physician, psychologist, or other acceptable medical source’ who treats the claimant.” Lacroix v.

Barnhart, 465 F.3d 881, 885 (8th Cir. 2006) (citations omitted). “Acceptable medical sources” are licensed physicians, licensed or certified psychologists, licensed optometrists, licensed podiatrists, and qualified speech-language pathologists. SSR 06-03p (2006) (citations omitted). “[O]nly ‘acceptable medical sources’ can be considered treating sources, as defined in 20 CFR 404.1502 and 416.902, whose medical opinions may be entitled to controlling weight.” SSR 06-03p (2006) (citations omitted). Dr. Wahl, Dr. Christianson, Dr. McPike, and Dr. Kantamneni are “acceptable medical sources,” however, the record shows that none of these physicians established a treating relationship with Ochs. Gerber and Porter established a treating relationship with Ochs, however, neither are “acceptable medical sources” whose opinions are entitled to controlling weight.

Furthermore, the opinions of Dr. McPike, Porter, and Gerber that Ochs is disabled or unable to work are not “medical opinions.” “Medical opinions are statements from physicians and psychologists or other acceptable medical sources that reflect judgments about the nature and severity of your impairment(s), including you symptoms, diagnosis and prognosis, what you can still do despite impairment(s), and your physical or mental restrictions.” 20 CFR § 404.1527(a)(2). Opinions of whether or not a claimant is disabled are not medical opinions, but are opinions on issues reserved to the Commissioner. See 20 CFR § 404.1527(e)(1). Thus, for the reasons stated above, none of the opinions rendered by Ochs’ providers are entitled to controlling weight.

The Court finds that substantial evidence in the record supports the ALJ’s weighing of the opinion evidence in this matter. In his decision, the ALJ discussed the opinions rendered by Dr. Wahl, Dr. McPike, Dr. Christianson, and Gerber. He explained that he rejected the opinions of Dr. McPike and Gerber because they are “simply not supported by a careful and prudent review of the medical evidence,” “there is simply no evidence that the claimant is incapable of performing work[.]” and Dr. McPike and Gerber failed

to provide a basis for their opinions that Ochs was disabled (Tr. 21). Accordingly, the Court will not disturb the ALJ's weighing of the opinion evidence in this matter.

E. ALJ's Alleged Improper Discrediting of Plaintiff's Subjective Complaints

In his decision, the ALJ concluded that "the claimant's medically determinable impairments could reasonably be expected to produce the alleged symptoms, but that his claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely credible." (Tr. 20). Ochs argues the ALJ failed to sufficiently analyze the credibility of Ochs' subjective complaints. Ochs contends the ALJ improperly relied on Ochs' desire to be found disabled to summarily conclude that Ochs' subjective complaints were not credible.

Where an ALJ seriously considers but for good reasons explicitly discredits a plaintiff's subjective complaints, the court will not disturb the ALJ's credibility determination. Johnson v. Apfel, 240 F.3d 1145, 1147 (8th Cir. 2001). "An ALJ who rejects such [subjective] complaints must make an express credibility determination explaining the reasons for discrediting the complaints." Wagner v. Astrue, 499 F.3d 842, 851 (8th Cir. 2007) (quoting Singh v. Apfel, 222 F.3d 448, 452 (8th Cir. 2000)). "The [ALJ] is not free to accept or reject the claimant's subjective complaints solely on the basis of personal observations. Subjective complaints may be discounted if there are inconsistencies in the evidence as a whole." Polaski v. Heckler, 739 F.2d 1320, 1322 (8th Cir. 1984). In evaluating claimant's subjective impairment, the following factors are considered: (1) the applicant's daily activities; (2) the duration, frequency and intensity of pain; (3) precipitating and aggravating factors; (4) dosage, effectiveness and side effects of medication; and (5) functional restrictions. Id. at 1321-22. "The credibility of a claimant's subjective testimony is primarily for the ALJ to decide, not the courts." Pearsall v. Massanari, 274 F.3d 1211, 1218 (8th Cir. 2001).

The ALJ made an express credibility determination and explained in his decision the reasons he discredited Ochs' subjective complaints concerning the intensity, persistence, and limiting effects of his condition. The ALJ considered Ochs' daily activities, the precipitating and aggravating factors, the dosage and effectiveness of medication, and Ochs' functional limitations (Tr. 19-20). The ALJ stated:

Once he began treatment in 2004, his condition improved substantially and his mood was noted to be generally stable. While he has incidences of spikes in anxiety and anger, it appears to coincide with times when he is not compliant in his medicine regimen. In short, there is simply no evidence that the claimant is incapable of performing work.

(Tr. 21). Ochs' contention that he is not capable of employment while adhering to a course of treatment are inconsistent with the evidence in the record. Substantial evidence in the record, including providers' notes and the testimony of Ochs and his wife, support the ALJ's finding that Ochs' "condition improved substantially and his mood was noted to be generally stable[.]" once he began treatment that included medication and counseling. For that reason, the Court finds the ALJ properly assessed Ochs' credibility.

F. Alleged Inadequacy and Inaccuracy of ALJ's Hypothetical Question

Ochs' alleges that the hypothetical question posed by the ALJ to the vocational expert failed to comprehensively describe and relate with precision Ochs' functional limitations because the hypothetical did not contain an accommodation for Ochs' mood stability or take into account his difficulties with social interaction. The RFC propounded to the VE by the ALJ in the second hypothetical question, and ultimately adopted by the ALJ in his written decision, was to limit work to simple, routine tasks with only occasional interaction with coworkers and supervisors, and no interaction with the public (Tr. 289). The VE testified that an individual with that RFC who is the same age and has the same education and work experience as Ochs could perform medium, unskilled work as a poultry farm laborer, a milking machine operator, and a landscape laborer.

A vocational expert's opinion is only relevant if the ALJ "accurately characterizes a claimant's medical conditions in the hypothetical questions posed to the vocational expert." Howe v. Astrue, 499 F.3d 835, 842 (8th Cir. 2007) (citing Smith v. Shalala, 31 F.3d 715, 717 (8th Cir. 1994)). "A hypothetical, however, need only include impairments that are supported by the record and the ALJ accepts as valid." Id. (citing Prosch v. Apfel, 201 F.3d 1010, 1015 (8th Cir. 2000); Clay v. Barnhart, 417 F.3d 922, 931 (8th Cir. 2005)).

The Court finds that the ALJ's hypothetical question accurately characterized his medical condition. Substantial evidence in the record supports the ALJ's omission from his hypothetical of an accommodation for Ochs' mood stability and a more restrictive limitation on interaction with others. In the hypothetical, the ALJ limited the amount of social interaction by restricting interaction with supervisor and coworkers to occasional and restricting his interaction with the public to none. These restrictions mirror the symptoms of Ochs' condition that are supported in the record. Thus, the Court finds that ALJ's hypothetical comprehensively described and related with precision Ochs' functional limitations.

Upon the foregoing,

IT IS ORDERED that the decision of the Commissioner of Social Security is hereby affirmed. This matter is dismissed. The Clerk of Court shall enter judgment accordingly.

DATED this 9th day of December, 2008.



JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA