

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MARTIN BIRDSALL :
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 :
v. : CIV. NO. 3:03CV448 (WWE)
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 :
JO ANNE BARNHART, :
COMMISSIONER, SOCIAL SECURITY: :
ADMINISTRATION :
 :

RECOMMENDED RULING

Plaintiff Martin Birdsall seeks judicial review of a final decision by the Commissioner of Social Security denying his application for disability insurance benefits (DIB) under §§216 and 223 of the Social Security Act (42 U.S.C. §§416 and 423), and for supplemental security income (SSI) pursuant to §1631(c)(3) of the Social Security Act, 42 U.S.C. §§1383(c)(3). Plaintiff argues that the evidence in the record demonstrates that defendant's decision to deny DIB and SSI benefits was not supported by substantial evidence and the ALJ made many errors of law.

For the reasons that follow, plaintiff's Motion for Order Reversing the Decision of the Commissioner or, in the Alternative, Remand for a New Hearing [**doc. #8**] is **GRANTED**. Defendant's Motion for Order Affirming the Decision of the Commissioner [**doc. #11**] is **DENIED**.

Procedural History

Mr. Birdsall filed his applications for DIB and SSI on August 8, 2000, alleging disability commencing June 5, 2000. (R. 98-100, 267-69)¹. His applications were denied initially (R. 58, 60-63), and upon reconsideration (R. 59, 66-69, 211-48, 253, 275-79). On April 8, 2002, a hearing was held before Administrative Law Judge (ALJ) Ronald J. Thomas. (R. 20-57). Plaintiff, who was represented by counsel, appeared and testified. Id. On August 21, 2002, the ALJ denied his claims. (R. 7-18). A request for review of the hearing decision was filed on October 16, 2002. (R. 6). The Appeals Council denied plaintiff's request for review of the ALJ's decision on January 17, 2003 (R. 4-5). Birdsall then filed this action requesting judicial review pursuant to 42 U.S.C. §405(g). He alleges disability due to alcoholism, depression, anxiety, hip and back pain. (R. 29, 112).

Age, Education and Work History

Martin Birdsall was born on April 12, 1957 (See R. 98), graduated from high school (R. 26, 118) and has past relevant work experience as a sales representative (R. 113, 147).

¹The administrative record filed by the Commissioner shall be referred to as "R.".

Medical Evidence

Birdsall claims an onset date for his disability of June 5, 2000. Accordingly, the Court reviews the medical evidence in the record from 2000.

Treatment notes from Community Mental Health, June 21, 2000, indicate that plaintiff had undergone alcohol detoxification three weeks earlier and is "shaking badly." (R. 190-91). Plaintiff reported drinking one liter of vodka per day for the last twenty years. (R. 191). Plaintiff complained of loss of feeling in his legs and noted multiple falls with alcohol. (R. 191). A notation in the treatment notes of June 26, 2000, states "ETOH" [alcohol]. (R. 190).

A July 3, 2000 MRI of the lumbar spine was otherwise negative except for a mild midline disc bulge not significantly affecting the dural sac or neural foramina (R. 261). An August 8, 2000 x-ray of the left hip was negative. (R. 155). Physical therapy discharge notes dated October 10, 2000, indicated that therapy to treat plaintiff's lower back pain reduced his pain to a level less than five out of ten. (R. 156, see also 156-163).

On July 10, 2000, a psychiatric nurse, Holly Manini of Valley Mental Health Center, indicated that plaintiff's alcohol abuse had increased steadily since his divorce ten years earlier (R. 207) and he had become alcohol dependent in February 2000 (R. 209), lost his job, became isolated and began experiencing increased fearfulness (R.

205). Plaintiff appeared apprehensive, his mood was fearful and his affect was scared and sad (R. 208). He reported, "I think I hear people in the apartment sometimes," and reported difficulty leaving the apartment (R. 208). He reported abstinence from alcohol for three weeks. (R. 209).

On August 4, 2000, Nurse Manini reported that plaintiff was "still very fearful at night, can't sleep, fears 'someone in the other room.'" (R. 203). Plaintiff reported continued abstinence, "attempting sobriety alone, discussed A.A. 'too afraid to leave [his] house'" (R. 203). Nurse Manini noted improved focus and motivation on basic activities of daily living (ADL) and motivation to attend physical therapy for back pain three times a week." (R. 203-04). Nurse Manini writes, "He confided that he is unable to sleep due to 'feeling somebody is in my apartment at night' confided he has seen 'a woman at [his] bed, a shadow with long hair.' Fearful at night. Denied ETOH use Fearful of people." (R. 204). Nurse Manini recorded plaintiff's diagnosis as major depression with psychotic features, alcohol organic changes. (R. 204).

Treatment notes from August 23, 2000, indicate that plaintiff continued abstinence from alcohol. (R. 202). Nurse Manini wrote that plaintiff is "trying hard to complete basic ADL's and take care of his back problems. Sleep disturbed, sleep deprived, fearful at night." (R. 202).

On September 5, 2000, Nurse Manini reported that plaintiff was "doing what needs to be done," attending physical therapy three times a week, cleaning and shopping. (R. 200). Plaintiff continued abstinence from alcohol. (R. 200). Plaintiff reported "no further sightings of the lady;" however, he still heard people walking in his apartment. (R. 200). He denied any urges or cravings to drink. (R. 200). Plaintiff discussed trying to revive old interests such as the guitar and the beach. (R. 200).

The treatment notes from Hill Health Corp. dated September 5, 2000, stated that plaintiff presents with a very strong smell of ETOH from a distance. "Patient states he had a party on September 4. Discussed patient's past history with alcohol and the need for abstinence and A.A." (R. 187).

On September 19, 2000, Nurse Manini wrote that plaintiff reported feeling better emotionally, the Serazone helped to increase his activity and reported his agoraphobia was still present but decreased. (R. 198). Plaintiff reported continued abstinence from alcohol. (R. 198). "He continues to be disrupted by creaks, someone calling his name, but sleeping better." (R. 198).

On October 18, 2000, a relapse of alcohol abuse was reported. Plaintiff was hospitalized for severe intestinal bleeding. They discussed the possibility of a more intensive outpatient program. (R. 197).

On October 31, 2000, plaintiff reported no episodes of drinking. He continued to experience auditory hallucinations, floor creaking, whispering. (R. 196). Plaintiff was reportedly working on setting goals and projects around the house. (R. 196).

On November 21, 2000, Nurse Manini reported to the state disability determination services (DDS) agency that plaintiff was "generally well dressed in clean and casual clothes, speech is normal rate and flow." (R. 194). Plaintiff notes "audio hallucinations at night, hears people walking in his apartment, hears people whispering." (R. 194). He "forces" himself to attend to activities of daily living and does not like to leave his apartment but does, for necessary activities. (R. 198). Nurse Manini reported that plaintiff tried to avoid any unnecessary social interactions. (R. 194). She noted that plaintiff experienced back problems and had physical limitations to task performance. (R. 195). Nurse Manini opined that increased stress increased plaintiff's potential to relapse with alcohol and increased his audio hallucinations. (R. 195).

In February 2001, plaintiff was admitted for alcohol detox (R. 180-82). On March 13, 2001, Nurse Manini noted at the end of the DDS report dated November 21, 2000, that there was no change to plaintiff's condition since November. (R. 195).

On March 20, 2001, Dr. Paul Edelman, a state agency physician,

opined that plaintiff's physical impairments did not meet the durational requirements of the Act. (R. 253). "Long history of ETOH abuse may interfere with his compliance to treatment." (R. 253).

On March 21, 2001, Dr. Robert DeCarli, a state agency psychologist, completed a Residual Function Capacity form. (R. 211-14). He opined that with alcohol abuse, plaintiff would have numerous marked limitations (R. 211-12, 244), but that without alcohol abuse, he would only experience mild restrictions to activities of daily living, moderate difficulties maintaining social functioning and moderate difficulties maintaining concentration, persistence or pace and that he would experience one or two repeated episodes of decompensation. (Tr. 230). He opined that, without alcohol abuse, plaintiff was moderately limited in his ability to understand and remember detailed instructions, interact with the public, maintain attention and concentration for extended periods and complete a normal workday or workweek, but was not significantly limited in his ability to understand, remember and carry out short, simple instruction; perform activities within a schedule, maintain regular attendance, sustain an ordinary routine, work with others and make simple work-related decisions. (R. 216-17). In an entry dated September 19, 2001, Dr. DeCarli stated that with alcohol abuse:

A & B. This man is oriented and performs ADL's with difficulty. He could be affected with continued use of ETOH to be confused frequently and to have difficulty with simple memory as

well as complex memory as well as having frequent problems with following a schedule and maintaining pace. The impact of ETOH is especially important given his use of pain reducing drugs.

C. The T.P. and [patient] both note frequency problem in social interaction. Until this [patient's] alcoholism became marked he was able to work as a salesman.

D. The T.P. says that stress jeopardizes the [patient] sobriety. Certainly continued drinking will reduce this [man's] adaptation and judgment.

(R. 214).

Dr. DeCarli's entry dated March 21, 2001, states in relevant part that, without alcohol abuse:

A & B. this [patient] has no [] history and worked regularly prior to his alcoholism becoming out of control and his losing his job in 7/00. After detox and early in therapy he showed improvement but apparently he began drinking and was PEC'd in 2/19/01. Despite this his T.P. notes he can perform ADL's, is neat and oriented. Thus without D&AA he could be expected to have occasional problems with prolonged concentration and detailed memory. His pace could also be expected to be occasionally reduce 2" tp residual dysthymia and focus on pain.

C. This [male] had excellent social skills and early notes indicate that he was becoming more motivated to get out. He is able to socialize with his girlfriend, go out for appts. And talk with friends via phone. Without ETOH he could be expected to remain somewhat socially avoidant and therefore could occasionally have difficulty with strangers esp[ecially] crowds.

D. Without ETOH adaptation is seen as [within

normal limits] WNL.

(R. 218-19).

Hearing Testimony

Plaintiff appeared with counsel at a hearing before ALJ Ronald Thomas on April 8, 2002. (R. 20-57).

At the time of the hearing, plaintiff was 45 years old and a high school graduate. (R. 24). He had worked in various sales jobs for more than fifteen years. (R. 27-28). Plaintiff testified that he could not work because he was nervous, did not like leaving his home, had audio hallucinations at night and back pain. (R. 29). He testified that he was hospitalized for a bleeding stomach following alcohol abuse. (R. 29). He testified that he "tend[s] to fall off the wagon every now and then" (R. 30), abused alcohol every two or three months, (R. 34), and last drank during the week after St. Patrick's Day, which resulted in a hospitalization for a bleeding stomach. (R. 30, 33). He stated he does not attend A.A. meetings because he doesn't like to go "where there is a lot of people." (R. 30).

Plaintiff took Soma, Carisoprodol, Aleve and Celebrex and soaks in the tub for forty-five minutes for his back pain. (R. 30-31). He took Neurotin, Amitriptyline (Elavil), Fluphenazine (Prolixin) and Serzone for anxiety. (R. 31-32, 154).

Plaintiff testified that he did not want to drive because he did not like driving and had never bothered to renew his license after it was suspended three years earlier for driving under the influence. (R. 25). He testified that he had fallen off the wagon four times in the last year, the "[l]ast time I went in was the week of St. Patty's Day. It was just right afterwards because I was bleeding internally." (R. 33). "[W]hen I get really down I start to drink." (R. 34).

Plaintiff was seeing his psychiatrist, Dr. Glinbert, approximately once a month to monitor medications; and a therapist, psychiatric nurse Manini. (R. 34-35). He stated that he did all of his shopping in one day for the entire month because he did not like to leave his house and that his back got sore from walking around supermarkets all day. (R. 35). He prepared his daily meals (R. 36), engaged in no social activities (R. 36), played guitar and, on a good day, would do some cleaning (R. 37). He spent most of his day watching television. (R. 37). On a bad day, which usually followed a day of physical activity, he testified he can't and doesn't want to get out of bed and has to crawl to the bathroom to take a bath. (R. 38). Approximately two days a month his pain reaches a level of nine out of ten. (R. 50). Dr. Omatti prescribed a cane for his use. (R. 50). He stated he is more depressed when he hurts. (R. 38). He stated that he has two or three bad days a week, "days that I just

can't do anything and I don't want to go anywhere." (R. 39).

Plaintiff testified that people make him anxious. (R. 39) The only person he trusted was his mother and his lady friend. (R. 39). He testified he had difficulty sleeping and is prescribed Elavil. (R. 40). About two times a week he stayed awake all night, "and then when the sun breaks through I . . . because I hear things, see things. I won't go to sleep until the first light and then I'll sleep all day." (R. 40). "I hear people walking around. I think there's someone in my apartment. I hear the phone ring and no one is there. I hear the doorbell ring; no one is there. I hear voices. I can't make out what they're saying. It sounds like people talking in the next room." (R. 40). Plaintiff stated he sees a woman standing in his bedroom; "I see her head and her dress and the face is almost blank." (R. 41). He testified that this happens a couple of times a week, sometimes more than once a night. (R. 40-41).

Other than going to the therapist or occasionally going grocery shopping, he typically did not leave the apartment because he doesn't like to go where other people are, or go out in traffic or to crowded places. (R. 42). He testified that when he was working, he drank every day, "I mean I couldn't wait to get it done and just go home and drink, just the stress-to stop stressing out." (R. 43). Plaintiff testified that his appetite and weight fluctuates. (R. 43-44). "When I get really depressed I don't eat; I drink. And then if

I'm really sore I don't eat; I drink." (R. 44). He completes normal household activities at a slow pace. (R. 44). Two or three days a week he does nothing but lay on the couch or bed and watch television. (R. 45). Reading gives him a headache. (R. 45). He gets assistance filling out paperwork as it makes him anxious to write in "little small places." (R. 46). Plaintiff testified that he got anxious about paying his bills and hearing bad news; his heart starts to race, his hands and forehead sweat and he has difficulty breathing. (R. 46). He testified he had difficulty sleeping, even with medication, staying up all night and finally falling asleep at daylight to sleep through the morning. (Tr. 40-41, 47).

Plaintiff testified that he is unable to return to his former employment. (R. 51). "I just don't want to be dealing with the public and the customers." (R. 51). He doesn't like filling out paperwork. (R. 52-54).

Plaintiff sees a counselor to help with legal things like arrearage on child support and qualifying for Section 8. (R. 52). "I make all my appointments to go see my therapist, go see my caseworker and go see my psychiatrist all in the same day so this way I go one day, get it over with and get back home." (R. 52).

Disability and the Standard of Review

To be eligible for supplemental security income, Mr. Birdsall

must establish that he suffered from a disability within the meaning of the Social Security Act. The Act defines "disability" as an inability to engage in substantial gainful activity by reason of a medically determinable impairment that can be expected to cause death or to last for twelve continuous months. 42 U.S.C. §1382c(a)(3)(A). Mr. Birdsall was disabled if his impairments were of such severity that he was unable to perform work that he had previously done, and if, based on his age, education, and work experience, he could not engage in any other kind of substantial gainful work existing in the national economy. 42 U.S.C. §1382c(a)(3)(B).²

This standard is a stringent one. The Act does not contemplate degrees of disability or allow for an award based on partial disability. Stephens v. Heckler, 766 F.2d 284, 285 (7th Cir. 1985). "Disability" is defined as an "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 has lasted or expected to last for a continuous period of not less than 12 months." 42 U.S.C. §423(d)(1).

In evaluating Mr. Birdsall's case, the ALJ followed the familiar five-step analysis, set forth in 20 C.F.R. §416.920, to

²As part of the Contract with America Advancement Act of 1996, Congress amended this definition to exclude disability for which alcoholism or drug addiction as a material contributing factor. See 42 U.S.C. §1381c(a)(3)(J).

determine whether he was disabled under the Social Security Act. The steps are as follows:

(1) Is the claimant engaging in substantial gainful activity? 20 C.F.R. §§416.910(b), 416.972(b). If so, he or she is not disabled. 20 C.F.R. §416.920(b).

(2) If not, does the claimant have an impairment or combination of impairments that are severe? If not, he or she is not disabled. 20 C.F.R. §416.920(c).

(3) If so, does the impairment(s) meet or equal a listed impairment (the "Listings"), in the appendix to the regulations? If so, the claimant is disabled. 20 C.F.R. §416.920(d); Bowen v. Yuckert, 482 U.S. 137, 141 (1987); Balsamo v. Chater, 142 F.3d at 79-80.

(4) If not, can the claimant do his or her past relevant work? If so, he or she is not disabled. 20 C.F.R. §416.920(e).

(5) If not, can the claimant perform other work given his or her residual functional capacity, age, education, and experience? If so, then he or she is not disabled. A claimant is entitled to receive disability benefits only if he cannot perform any alternate gainful employment. See 20 C.F.R. §416.920(f).

When applying this test, the burden of proof is on the claimant for the first four steps and on the Commissioner for the fifth step, if the analysis proceeds that far. Balsamo v. Chater, 142 F.3d 75,

80 (2d Cir. 1998) (citing cases).

In applying the test to Mr. Birdsall's case, the ALJ found that the first step was satisfied. Mr. Birdsall "has not engaged in substantial gainful activity since the alleged onset of disability," June 5, 2000. (R. 16).

At step two, the ALJ also found that the medical evidence indicated that Mr. Birdsall has

a mildly bulging disc at L5-S1, depression and anxiety, impairments that are severe within the meaning of the Regulations but not severe enough to meet or medically equal one of the impairments listed in Appendix 1, Subpart P, Regulations No. 4. There is no medical evidence of record to suggest that a Listing is met or medically equaled in this case. The claimant also has a longstanding history of alcoholism, which will be discussed more fully below.

(R. 12 emphasis added).

At step three, the ALJ found that Mr. Birdsall's impairments did not meet or equal the severity of any impairment listed in the appendix to the regulations, leading to an automatic finding of disability without further analysis. Specifically, the ALJ concluded that, "[b]ased on the medical evidence as well as the claimant's testimony, it is concluded there that the claimant's disorders, when considering his alcoholism, equal the criteria for Listing 12.04 and 12.09. If he were to abstain from substance abuse, his disorders would not meet or equal the criteria for any Listing, nor would he be found to be "disabled"" (R. 12). Under Public Law 104-121,

§105, codified as 42 U.S.C. §423(dd)(2)(C), however, individuals may not be considered disabled if alcohol or drug abuse would be a materially contributing factor to a determination of disability.

The ALJ went on to determine whether plaintiff would still be disabled absent the effects of his alcoholism. 20 C.F.R. §§404.1535(b)(2), 416.935(b)(2). He determined that "the claimant's alcoholism is a contributing factor material to the finding of disability . . . [and] the medical evidence establishes that the claimant would not be disabled if he stopped using alcohol" (R. 17).

The ALJ then assessed Mr. Birdsall's residual functional capacity as required in step four. He found that but for plaintiff's alcohol use he retained the residual functional capacity to perform sedentary work in a supervised, low stress environment, defined as requiring few decisions (Tr. 17). He found that plaintiff was unable to perform any of his past relevant work. Claimant is a "younger individual", has a "high school education" and "has no transferable skills from any past relevant work and/or transferability of skills is not an issue in this case." (R. 17).

At step five, the ALJ concluded that, "although the claimant's exertional limitations do not allow him to perform the full range of sedentary work, using Medical-Vocational Rule 210.21 as a framework for decision-making, there are a significant number of jobs in the

national economy that he could perform." (R. 17).

Based on these findings, the ALJ determined that Mr. Birdsall was not disabled within the meaning of the Social Security Act and therefore was not entitled to receive supplemental security income and/or disability insurance benefits.

Standard of Review

The Social Security Act provides for judicial review of the Commissioner's denial of benefits. 42 U.S.C. §1383(c)(3). The scope of review of a social security disability determination involves two levels of inquiry. The court must first decide whether the Commissioner applied the correct legal principles in making the determination. Next, the court must decide whether the determination is supported by substantial evidence. See Balsamo v. Chater, 142 F.3d 75, 79 (2d Cir. 1998). Substantial evidence is evidence that a reasonable mind would accept as adequate to support a conclusion; it is more than a "mere scintilla." Richardson v. Perales, 402 U.S. 389, 401 (1971); Yancey v. Apfel, 145 F.3d 106, 110 (2d Cir. 1998). The substantial evidence rule also applies to inferences and conclusions that are drawn from findings of fact. See Gonzalez v. Apfel, 23 F. Supp. 2d 179, 189 (D. Conn. 1998); Rodriguez v. Califano, 431 F. Supp. 421, 423 (S.D.N.Y. 1977). The court may not decide facts, reweigh evidence or substitute its judgment for that of

the Commissioner. See Dotson v. Shalala, 1 F.3d 571, 577 (7th Cir. 1993). The court must scrutinize the entire record to determine the reasonableness of the ALJ's factual findings. Furthermore, "[w]here there is a reasonable basis for doubt whether the ALJ applied correct legal principles, application of the substantial evidence standard to uphold a finding of no disability creates an unacceptable risk that a claimant will be deprived of the right to have her disability determination made according to correct legal principles.'" Schaal v. Apfel, 134 F.3d 496, 504 (2d Cir. 1998) (quoting Johnson v. Bowen, 817 F.2d 983, 986 (2d Cir. 1987)).

DISCUSSION

Mr. Birdsall does not contest the ALJ's findings with respect to his alleged physical limitations. He asserts that the ALJ erred in two principal ways relevant to his mental impairments. First, plaintiff contends that the Commissioner erroneously found that alcoholism was a "contributing factor material to the finding of disability." Second, he argues that the ALJ erred in finding that he had the Residual Functional Capacity to work in a low stress environment.

1. Alcoholism Finding

Plaintiff first argues that there is no substantial evidence in

the record to support the ALJ's conclusion that alcoholism was a "contributing factor material to the finding of disability." 20 C.F.R. §404.1535³ [Doc. #9 at 14].

The Social Security Act establishes that "an individual shall not be considered to be disabled for purposes of this title [42 U.S.C. §§ 1381 et seq.] if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled." 42 U.S.C. §1382c(A)(3)(J). The regulations require that an inquiry be made as to "whether [the Agency] would still find [a claimant] disabled if [the claimant] stopped using drugs or alcohol." 20 C.F.R. §404.1535(a)(1). If the "remaining limitations," considered independently of any drug and alcohol abuse, would not be disabling,

³ The agency regulation provides:

- (1) The key factor we will examine in determining whether drug addiction or alcoholism is a contributing factor material to the determination of disability is whether we would still find you disabled if you stopped using drugs or alcohol.
 - (2) In making this determination, we will evaluate which of your current physical and mental limitations, upon which we based our current disability determination, would remain if you stopped using drugs or alcohol and then determine whether any or all of your remaining limitations would be disabling.
 - (i) If we determine that your remaining limitations would not be disabling, we will find that your drug addiction or alcoholism is a contributing factor material to the determination of disability.
 - (ii) If we determine that your remaining limitations are disabling, you are disabled independent of your drug addiction or alcoholism and we will find that your drug addiction or alcoholism is not a contributing factor material to the determination of disability.
- 20 C.F.R. § 404.1535(b)

then drug addiction and/or alcoholism is a contributing factor material to the determination of disability and the claimant is not disabled. Id. at §404.1535(a)(2)(I). If the claimant would be disabled regardless of the drug or alcohol use, then it is not a contributing factor. Id. at §404.1535(a)(2)(ii). The burden, however, is on the claimant to prove that substance abuse is not a contributing factor material to the disability determination. Doughty v. Apfel, 245 F.3d 1274, 1281 (2d. Cir. 2001). The ALJ applied the correct legal standard.

In the present matter, there is no dispute that plaintiff has a long-standing problem with alcohol; thus, the issue is what bearing those problems have on his disability determination. Considered as a whole, ALJ Thomas determined that plaintiff met several listings pertaining to affective disorders (12.04) and substance addiction (12.09). (R. 12). However, the ALJ also determined that "without alcohol, the claimant demonstrates no more than mild limitation in activities in daily living, moderate limitation in maintaining social functioning, and moderate difficulties in maintaining concentration, persistence, and pace, and one or two repeated episodes of deterioration or decompensation." (R. 12). The ALJ found that, with abstinence from alcohol, plaintiff's impairments no longer met the listings cited, "nor would he be found to be disabled." (R. 12). This finding is not supported by substantial evidence. Instead, the

medical evidence is fundamentally inconclusive on this point. It is impossible to say, based on the evidence presented, that the psychiatric impairments would disappear or lessen independent of the substance abuse.

The vast bulk of the medical record reports diagnose alcohol and major depressive disorder, with or without psychotic features, as well as agoraphobia. See e.g. R. 167, 172 (major depression--with psychotic features, alcohol dependence in remission), R. 176 (major depression, alcohol dependence, early full remission), R. 180-182 (detox for alcohol abuse), R. 189 (anxiety, alcohol), R. 190-91 (reported alcohol detox), R. 193 (major depression: simple, alcohol dependance: early remission), R. 196, 197 (depression with audio hallucinations, alcohol relapse), R. 198 (agoraphobia, depression with hallucinations, alcohol early remission), R. 200-03 (depression with hallucinations, alcohol early remission), R. 204 (major depression with psychotic features, alcohol organic changes), and R. 209 (major depression: severe, simple, alcohol dependency: early remission). This list is not exhaustive.

Defendant's argument that plaintiff's depression and anxiety symptoms are exacerbated by drinking and that, with abstinence, the severity level decreased "to the extent that the impairments were not disabling" [Doc. #9 at 9], is not well supported by the record, let alone by substantial evidence. Defendant cites, for example, the

treatment notes of July 10, 2000 (R. 208), referencing hallucinations, and notes of February 2000 (R. 205), referencing depression, fearfulness and isolative behaviors, concluding without further evidence, that "all of these symptoms were exacerbated by plaintiff's alcoholism." Id. . These treatment records are at best ambiguous and, at worst, contradictory, but in any event not substantially supportive. Indeed, page 205 of the record is not a treatment record of February 2000 but actually page 4 of the July 10, 2000 treatment notes of Nurse Marini (R. 205-10), and she notes that plaintiff is in alcohol remission three weeks. (R. 206). The August 4, 2000 treatment notes cited by defendant following a month of sobriety, showing "improved focus and motivation," also contain notations indicating that plaintiff continues to experience depression with psychotic features, with plaintiff confiding that "he has seen a woman at his bed, a shadow with long hair." (R. 204). This evidence of "improved focus and motivation on basic ADL's" is significantly eclipsed by evidence supportive of a contrary position. Indeed, on August 10, 2000, the same treater diagnosed him with "major depressive disorder with psychotic process," continued abstinence, night fears, auditory hallucinations and agoraphobia. (R. 203).

This Court's finding that plaintiff's psychiatric disorders and substance abuse problems are connected is the only conclusion

supported by the evidence and is based on the coincidence of diagnoses and treatment. It is impossible to tell, based on the record, whether the psychiatric disorders would disappear in the absence of the substance abuse, and it is also difficult to tell whether the substance abuse problems would disappear in the absence of the psychiatric problems. The latter position is supported by some evidence, but not substantial evidence see R. 29 (In response to the ALJ's question whether plaintiff was ever hospitalized for depression, he stated "Yeah, I don't know. It wasn't - I got really depressed and I started to drink heavily and it started to make my stomach bleed, . . . I guess they dried me out"), R. 34 ("when I get down I start to drink"), R. 35 (In response to the ALJ's question regarding therapy, "does it have to do with not drinking like they do at AA?," plaintiff responded, "Most part is trying to deal with my depression and me not wanting to go out and do things in the public."), R. 44 ("When I get really depressed I don't eat; I drink. And then if I'm really sore I don't eat; I drink."), and R. 43 ("I used to drink every day when I was doing that job. I mean I couldn't wait to get it done and just go home and drink, just the stress - just to stop stressing out.").

On remand, the ALJ will consider what finding is appropriate when the evidence does not suggest that the effects and causes of the disabling conditions are separable. The ALJ will also consider

defendant's argument that "plaintiff failed to establish that his alcoholism was in complete remission, so as to support his argument that his drinking was not at all material to disability." (R. 11).

Opinions of Consultative Psychologists

Plaintiff challenges the ALJ's use of the opinions of consultative psychologists. [Doc. #9 at 18]. He argues that the "opinion of the non-treating, non-examining Connecticut state agency physician" that when plaintiff did not abuse alcohol his condition improved was not supported by the evidence in the record. The Court agrees.

Any licensed medical doctor's opinion is a "medical opinion," even if the doctor merely consults, but does not treat, the claimant. See Diaz v. Shalala, 59 F.3d 307, 312, 313 (2d Cir. 1995); 20 C.F.R. §§ 404.1513(a)(1) & (e), 404.1527(a)(2)). "[I]n evaluating a claimant's disability, a consulting physician's opinions or report should be given limited weight. This is justified because 'consultative exams are often brief, are generally performed without benefit or review of claimant's medical history and, at best, only give a glimpse of the claimant on a single day. Often, consultative reports ignore or give only passing consideration to subjective symptoms without stated reasons.'" Simmons v. United States Railroad Retirement Board, 982 F.2d 49, 55 (2d Cir.1995) (citing Cruz v.

Sullivan, 912 F.2d 8, 13 (2d Cir.1990) (citations omitted)).

Specifically, SSR 96-6p provides:

Because State agency medical and psychological consultants and other program physicians and psychologists are experts in the Social Security disability programs, the rules...require administrative law judges and the Appeals Council to consider their findings of fact about the nature and severity of an individual's impairment(s) as opinions of nonexamining physicians and psychologists. Administrative law judges and the Appeals Council are not bound by findings made by State agency or other program physicians and psychologists, but they may not ignore these opinions and must explain the weight given to the opinions in their decisions.

1996 WL 274180, at *2 (S.S.A.).

This record is unusual because it contains minimal relevant opinion evidence from treating sources. Nevertheless, ALJ Thomas still should have complied with SSR 96-6p and indicated in his decision the weight afforded the consultative opinions. On remand, the ALJ should reconcile his reliance on these opinions with the other evidence in the record.

Assessment of Residual Functional Capacity

Plaintiff also argues that the ALJ erred by not considering his psychiatric issues as nonexertional limitations on his ability to work, by failing to consult a vocational expert on the question, and by relying solely on the Grids as opposed to a vocational expert.

[Doc. #9 at 21-24]. The "mere existence of a nonexertional impairment does not automatically require the production of a vocational expert nor preclude reliance on the guidelines." Bapp v. Bowen, 802 F.2d 601, 603 (2d Cir.1986). Rather, "when a claimant's nonexertional impairments significantly diminish his ability to work--over and above any incapacity caused solely from exertional limitations-- so that he is unable to perform the full range of employment indicated by the medical vocational guidelines, then the Secretary must introduce the testimony of a vocational expert (or other similar evidence) that jobs exist in the economy which claimant can obtain and perform." Id. The ALJ did not consider plaintiff's psychiatric issues as nonexertional limitations at all. This is apparently because the ALJ viewed these ailments to be caused by plaintiff's alcohol abuse and not subject to consideration as they would not meet any of the listings if plaintiff were not abusing alcohol. See R. 27 (Finding 4). Because the conclusion that the conditions are separable is not supported by substantial evidence, neither is this determination. On remand, the ALJ shall consider to what extent Plaintiff's psychiatric issues constitute nonexertional limitations that would "significantly diminish his ability to work" and, in the event that they do, should seek the counsel of a vocational expert. Cf. Bapp, 802 F.2d at 603.

Low Stress Environment

Plaintiff also argues that "[t]here is no medical basis in the record that Mr. Birdsall can work in a supervised low-stress environment, defined as requiring few decisions." [Doc. #9 at 21]. On remand, the ALJ should reconsider his finding that plaintiff could work in a "low stress environment" in light of plaintiff's arguments, social security ruling 85-5 (specifically addressing stress and mental illness), and supporting case law. See SSR 85-5 ("The basic mental demands of competitive, remunerative, unskilled work include the abilities (on a sustained basis) to understand, carry out, and remember simple instructions; to respond appropriately to supervision, coworkers, and unusual work situations and to deal with changes in a routine work setting."); Lancellotta v. Secretary of Health and Human Services 806 F.2d 284, 285 (1st Cir. 1986) ("Without an evaluation of claimants vocational abilities in light of [her diagnosis of bipolar disorder], there is no basis for the ALJ's conclusion that [she] can perform low stress work."); Dowty v. Barnhart, No. 02-7103, 2003 WL 21509142, *2 (10th Cir. July 2, 2003) (finding that the ALJ properly gave an individualized assessment of claimant's ability to deal with stress, where ALJ specifically found that claimant could not perform work that required understanding, remembering, and carrying out detailed or complex instruction, that required more than superficial contact with the public, or that was

categorized as stressful."); Durrett v. Apfel, No. IP 99-904-C H/G, 2000 WL 680430, *7 (S.D. Ind. Mar. 27. 2000) ("Both Lancellotta and Social Security Rule 85-15 require the ALJ to consider the effect of stress on the individual claimant and not to make unsupported conclusions regarding a claimant's ability to cope with stress."); Felver v. Barnhart, 243 F. Supp. 2d 895, 907 (N.D. Ind. 2003)(finding that "the ALJ made no findings about how the plaintiff's stress affects his ability to understand, carry out and remember instruction, respond appropriately to supervision, and coworkers, and deal with customary work pressures. Thus, not having fully painted this vocational picture, the ALJ failed to elicit testimony from the VE directed to the plaintiff's particular stress-causing condition or conditions.").

CONCLUSION

For the reasons stated above, plaintiff's Motion for Order Reversing the Decision of the Commissioner or, in the Alternative, Remand for a New Hearing [**doc. #8**] is **GRANTED**. Defendant's Motion for Order Affirming the Decision of the Commissioner [**doc. #11**] is **DENIED**.

The decision of the Commissioner is reversed and the case is remanded for further proceedings consistent with this decision.

Any objections to this recommended ruling must be filed with

the Clerk of the Court within ten (10) days of the receipt of this order. Failure to object within ten (10) days may preclude appellate review. See 28 U.S.C. § 636(b)(1); Rules 72, 6(a) and 6(e) of the Federal Rules of Civil Procedure; Rule 2 of the Local Rules for United States Magistrates; Small v. Secretary of H.H.S., 892 F.2d 15 (2d Cir. 1989)(per curiam); F.D.I.C. v. Hillcrest Assoc., 66 F.3d 566, 569 (2d Cir. 1995).

SO ORDERED at Bridgeport this 12th day of March 2004.

_____/s/_____
HOLLY B. FITZSIMMONS
UNITED STATES MAGISTRATE JUDGE