

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

PAUL G. UNDERWOOD, JR.,)

Plaintiff,)

vs.)

No. 03-2237 BV

JO ANNE B. BARNHART,)
Commissioner of)
Social Security,)

Defendant.)

ORDER DENYING PLAINTIFF'S APPEAL

The plaintiff, Paul G. Underwood, Jr., appeals from a decision of the Commissioner of Social Security ("Commissioner"), denying Underwood's application for disability security income under Title II of the Social Security Act, 42 U.S.C. §§ 401 et seq. The case is before the United States Magistrate Judge pursuant to 28 U.S.C. § 636(c) and the parties' consent. For the reasons stated below, the decision of the Commissioner is affirmed.

FINDINGS OF FACT

A. Procedural History

Underwood first applied for Social Security disability benefits on June 28, 2000, citing disability due to psoriasis causing "patches of red dry skin that itches, burns, and stings immensely." (R. at 197.) His claimed date of onset was January 1, 1999, which was later amended to reflect an onset date of November 11, 1997. (R. at 17, 192-94.) His application was denied initially and upon reconsideration. In a reconsideration disability report, Underwood indicated that he had become very depressed. (R. at 223.) Underwood then filed a request for a

hearing which was duly held on September 4, 2002, before Administrative Law Judge Anthony Fava ("ALJ"). (R. at 30.) The ALJ denied Underwood's application for benefits on November 19, 2002. (R. at 24.) Underwood appealed to the Appeals Council of the Social Security Administration, which denied Underwood's request for review and left the ALJ's decision as the final decision of the Commissioner of Social Security. (R. at 6-7.) Underwood filed suit in federal district court on April 14, 2003, pursuant to 42 U.S.C. § 405(g), to review the Commissioner's final decision. His suit alleges that the ALJ's decision was not based on substantial evidence and that the ALJ applied incorrect legal standards.

B. The Hearing before the ALJ

Underwood was born on June 30, 1956. At the time of the ALJ hearing, Underwood was 46 years old. (R. at 32.) He is a high school graduate and completed three years of college at Christian Brother's College. (R. at 33.) He left college in 1977 to work for his father's machinery business as an inside sales representative. (R. at 33-36.) He was employed there until 1997 and has been unemployed since that date. (*Id.*)

As an inside sales representative, Underwood sold all types of metal working machinery, which required him to remain informed of changes in technology and to make recommendations to customers. (R. at 41-42.) While most of his work was performed inside an air conditioned office, his duties occasionally would require him to work in a warehouse. (R. at 35-36.) Underwood testified that he left his position because of psoriasis and difficulty concentrating

because of lack of sleep. (R. at 41.) He claimed that he was unable to do the quality of work his father expected. (R. at 41.) His father sold the family business in 1998. (R. at 52.) Underwood has not worked since that date. (R. at 36.)

Underwood testified as to his daily activities. He has never been married and has no children. (R. at 33.) His father has provided him with a house in which he has lived alone for the past 20 years. (*Id.*) Underwood testified that he is able to do his own grocery shopping, laundry, and most of his housekeeping.¹ Although he is able to cook, he regularly dines at restaurants. (R. at 47.) He spends most of his mornings and part of the afternoon sleeping because he claims he is unable to sleep at night due to discomfort from his psoriasis. (R. at 46.) The rest of his day is spent watching television and riding around in his car. (R. at 46-47.) In the winter, Underwood spends three months in Florida with his parents to escape the "cold air." (R. at 47.) He is not under any doctor's restrictions. (*Id.*)

Underwood also testified about his medical problems and symptoms. He takes steroid injections approximately every three weeks, which provide him with temporary relief for his psoriasis. (R. at 37.) As a side effect of the steroids, he has experienced weight gain. (*Id.*) He described his psoriasis as being "more irritating" at night; therefore, the burning and itching keeps him awake until approximately three, four, or five o'clock in the morning. (R. at 38.) As a result, he takes naps in the

¹ Underwood has a housekeeper that comes to clean once a month. (R. at 46.)

afternoons. (*Id.*)

In closing, Underwood testified that his skin inflammation is "unbearable." (R. at 49.) He stated that his psoriasis effects his entire body, especially his scalp and eyes. (R. at 39.) He claimed that sometimes he could "hardly see." (*Id.*) Additionally, he testified that he was embarrassed by the outbreaks on his face and was depressed. (R. at 43.) Although he complained of depression, Underwood had not been treated by a psychiatrist or psychologist in the preceeding four or five years.²

Underwood's father, Paul Underwood, Sr., also testified. (R. at 49.) Mr. Underwood testified that his son had been a good worker until he started having pain and inability to sleep due to his psoriasis. (R. at 52.) He stated that he had sold his business four years earlier and that his son had not worked since. (*Id.*) Mr. Underwood said that his son's only friends were his family and that Underwood was embarrassed to be around a lot of people in public. (R. at 49, 54.) Mr. Underwood also described his son's activities during their family's three month vacation each winter in Florida. Underwood's activities would include sitting on the beach in the sun, staying inside the hotel, and riding around. (R. at 57.) Underwood, however, would not go in the water. (*Id.*)

The ALJ heard testimony from Underwood's mother, Joyce Underwood, who said that her son came over to eat or visit

² Underwood's testimony was unclear. He indicated that he had received treatment in the past, but could not recall the psychiatrist's name. (R. at 44-45.) As part of his treatment, he was prescribed Lithium and Zoloft; however, he discontinued the use of the medication. (R. at 44.)

approximately three to four times a week. (R. at 58,59.) She testified that her son had trouble relating to people. (R. at 59.) She said that Underwood had trouble sleeping at night and, therefore, slept some during the day. (R. at 60.)

Underwood's brother, Gary Underwood, testified that he had worked with his brother approximately eight or nine years before his father sold the machinery business and that Underwood had a desire to work. (R. at 68-69.) Since Underwood stopped working, his brother has seen him once every two or three weeks. (R. at 63.) When Underwood's psoriasis was at its worst, his brother stated, Underwood would "hide out" because he would not want anyone, including his family, to see him. (R. at 67.)

At the hearing, a vocational expert, Greg Cates, evaluated Underwood's past work and present functional capacities. Cates testified that Underwood's previous job as an inside phone sales representative was classified as "skilled," due to the knowledge required to sell equipment and the ability to perform phone sales, and "sedentary." (R. at 73.) The ALJ proposed two hypothetical questions to Cates. (R. at 73-74.) First, the ALJ proposed a hypothetical asking the vocational expert whether a claimant of the same age, education, and occupational experience would be able to perform his past relevant work if full credibility was given to the testimony heard in the hearing. Cates responded that a claimant would not and that such a claimant would be vocationally limited due to an inability to concentrate and the distraction caused by the psoriasis. (R. at 73.) Cates went on to state that such vocational limitations would prevent a claimant from performing any

work due to an inability to "sustain pace, concentration, and work task location." (R. at 74.)

Second, the ALJ proposed a hypothetical asking the vocational expert whether there were jobs available in the national and local economy for a claimant of the same age, education, and occupational experience and whom the ALJ determined could perform work that would require a low level of concentration, would avoid extremes of temperature, and could be performed in relative isolation. (R. at 74.) Cates responded that such an individual could perform work which existed in significant numbers in the national and local economy, including jobs as an assembler, inspector, and security guard. (R. at 74.)

In response to questioning from claimant's counsel, Cates testified that if Underwood's testimony regarding his inability to sleep well at night was considered along with his schedule of sleeping a few hours in the morning and an hour in the afternoon, his opinion would be that Underwood could not sustain employment. (R. at 75.)

C. Longitudinal Medical History According to the Records

The medical records contain various reports, statements, and letters from Underwood's dermatologist, Dr. Robert Kaplan; a psychological evaluation of Underwood conducted by Thomas Richardson, M.A. and Allen Battle, Ph.D.; and the assessments of state agency medical consultants. Underwood has been under the care of Dr. Kaplan since 1994 for severe generalized psoriasis. (R. at 266.) In a sworn statement elicited by Underwood's attorney on June 27, 2000, Dr. Kaplan stated that the Underwood has severe

involvement of his face, scalp, arms, and legs; however, his hands and feet are spared of involvement. (*Id.*) Dr. Kaplan stated that Underwood's condition has lasted twelve months and is anticipated to last twelve months in the future because psoriasis is presently incurable. (R. at 266-67.) Additionally, Dr. Kaplan noted that Underwood was "a little intimidated in public" due to his severe facial involvement. (R. at 267.) Although Underwood's psoriasis responds to treatment, Dr. Kaplan stated that continuous treatment was necessary. (*Id.*) Dr. Kaplan believes that Underwood's condition has affected his ability to work since 1994. (*Id.*) Some medical evidence indicates, however, that Underwood had generalized psoriasis for approximately three years before seeing Dr. Kaplan. (R. at 394.)

Since 1994, Dr. Kaplan has treated Underwood's psoriasis with topical steroids, shampoos, and occasional antibiotics for secondary infection. (R. at 442.) When the psoriasis is severe, Dr. Kaplan gives Underwood injections of intralesional Triamcinolone into the most infiltrated areas. (*Id.*) In a letter written to claimant's attorney on June 17, 2002, Dr. Kaplan stated that Underwood has hemochromatosis, which limits the systemic treatment that can be used to treat psoriasis. (*Id.*) Underwood's treatment regimen requires him to visit Dr. Kaplan approximately every three to four weeks except during the winter when Underwood is on vacation in Florida. (*Id.*) Dr. Kaplan also noted that "[s]ignificant weather changes" cause Underwood's psoriasis to flare and that the severity of the psoriasis causes "functional limitations." (*Id.*)

Although Dr. Kaplan's handwritten notes are difficult to read, his notes indicate that Underwood resisted complying with his treatment recommendations. On March 30, 2000, Dr. Kaplan noted that Underwood "refuses" to use medications and had seen an attorney. (R. at 285.) During Underwood's April 24, 2000 visit, Dr. Kaplan noted that Underwood was not using his medication and refused to see a doctor to whom he had been referred. (R. at 284.) Underwood refused to see another physician for special psoriasis therapy on May 15 and June 5, 2000. (R. at 282-83.) Underwood's first and only complaints to Dr. Kaplan of depression and lack of sleep occurred on June 5, 2000. (R. at 282.) Nevertheless, in a letter written to the claimant's attorney on April 1, 2002, Dr. Kaplan offered his opinion that Underwood was disabled as a result of his psoriasis. (R. at 440.)

At the request of the claimant's attorney, Underwood underwent a psychological evaluation on August 7, 2000. (R. at 399-402.) Psychological examiners Thomas F. Richardson, Jr., M.A. and Allen O. Battle, Ph.D. conducted the exam. During the evaluation, Underwood denied any current treatment from a mental health professional. (R. at 400.) He complained of depression, which was evidenced by his overeating, weight gain, inability to sleep, lethargy, social withdrawal, and embarrassment due to his appearance. (*Id.*) Underwood stated that he had trouble concentrating and remembering but denied having problems with task completion, even though the examiners noted that he was "extremely preoccupied" with thoughts about his appearance and psoriasis. (*Id.*) Underwood would divert to talking about his condition

regardless of what was being discussed in the evaluation. (*Id.*)

During the evaluation, the examiners noted that Underwood was "somewhat distractible," that his affect was flat, and that his mood was dysphoric. (R. at 401.) Underwood impressed the examiner as suffering from clinically significant major depression and evidenced signs of a personality disorder. (*Id.*) Underwood had no difficulty understanding the instructions and made no inordinate requests for test items to be repeated. (*Id.*) However, he had to be returned to task on several occasions. (*Id.*)

The examiners administered the Rorschach protocol, and Underwood's results were consistent with aberrant personality development and poorly developed cognitive controls over his feelings and urges. (R. at 402.) His Rorschach record described a depressed and anxious individual who has relatively normal mental ability. (*Id.*)

Mr. Richardson and Dr. Battle diagnosed Underwood with recurrent major depressive disorder, moderate, without psychotic features; and personality disorder, not otherwise specified. (*Id.*) The examiners stated that Underwood retained the intellectual capacity to understand detailed instructions, with occasional restriction in his capacity to sustain concentration and demonstrate adequate persistence. (*Id.*) However, Underwood appeared to suffer frequent restriction in his social interactions and fairly frequent restriction in the area of adaptation with regard to his capacity to adapt to change and stress in a "normal" work environment. (*Id.*)

In addition to his psychological evaluation, Underwood was

assessed by three non-treating sources for Tennessee Disability Determination Services. (R. at 404-23.)³ On August 9, 2000, non-treating, non-examining physician James Lester, M.D. completed a residual physical functional capacity assessment and opined that Underwood could lift and carry fifty pounds occasionally and twenty-five pounds frequently; stand, walk, and sit six hours in an eight-hour workday; and had no limitations on pushing or pulling with the hands or feet. (R. at 405.) Dr. Lester found no other limitations except that Underwood should "avoid concentrated exposure" to extreme heat and avoid "even moderate exposure" to humidity and noise. (R. at 408.)

On December 13, 2000, non-treating, non-examining physician Robert E. Burr, M.D. completed a physical assessment and found Underwood capable of work at any exertional level. (R. at 417.) However, Dr. Burr did indicate that Underwood should "avoid concentrated exposure" to extreme heat and wetness. (R. at 420.)

A mental functional capacity report was completed on December 7, 2000 by George Livingston, Ph.D, a non-treating, non-examining psychologist. (R.at 414.) He indicated that Underwood was moderately limited in his ability to understand and remember detailed instructions; maintain attention and concentration for extended periods; and perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances. (R. at 412.) Livingston noted that Underwood was markedly limited in his ability to carry out detailed instructions

³ Dr. Kaplan, Underwood's treating physician, did not complete a RFC assessment.

but could do one to three simple tasks with normal supervision.
(R. at 412, 414.)

Additionally, Livingston noted that Underwood was moderately limited in his ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods. (R. at 413.) He opined that Underwood should not be asked to deal directly with the general public and would work best in a solitary or small group setting. (R. at 414.) Underwood was moderately limited in his ability to respond appropriately to changes in the work setting. (R. at 413.) Finally, Livingston noted that Underwood was markedly limited in his ability to interact appropriately with the general public. (*Id.*)

Livingston also completed a psychiatric review technique form on December 17, 2000. (R. at 424.) He found moderate restriction of activities of daily living, moderate difficulties in maintaining social functioning, and moderate difficulties in maintaining concentration, persistence, or pace. (R. at 434.) He did not, however, find evidence of decompensation. (*Id.*)

D. The ALJ's Decision

Using the five-step disability analysis,⁴ the ALJ in this case

⁴ Entitlement to Social Security benefits is determined by a five-step sequential analysis set forth in the Social Security Regulations. 20 C.F.R. §§ 404.1520, 416.920. First, the claimant must not be engaged in substantial gainful activity for a period of not less than twelve months. 20 C.F.R. § 404.1520(c). Second, a finding must be made that the claimant suffers from a severe impairment. *Id.* Third, the ALJ determines whether the impairment meets or equals the severity criteria set forth in the Listing of Impairments contained in the Social

found, as the first step in the evaluation, that Underwood had not engaged in any substantial gainful activity since his claimed onset date of November 11, 1997. (R. at 18.) At the second step in the analysis, the ALJ found that Underwood's psoriasis and personality disorder were "severe" conditions based on the requirements in the regulatory definition. (R. at 18, 23.)

At the third step, the ALJ found that although Underwood's impairments were severe, Underwood did not have an impairment or combination of impairments that would meet or medically equal the level of severity described for any listed impairment contained in 20 C.F.R. Part 404, Subpart P, Appendix 1. (R. at 23.)

At the fourth step in the analysis, the ALJ determined that Underwood retained the residual functional capacity for work at any exertional level avoiding exposure to extreme heat and over-exposure to humidity. (R. at 23.) From a mental standpoint, the ALJ determined that Underwood was limited to work requiring a low level of concentration and work performed in relative isolation. (*Id.*) The ALJ prefaced his findings with a summary of Underwood's medical history and a description of his subjective pains (R. at 18-21.) He found that since 1994 Dr. Kaplan's treatment of

Security Regulations. 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526. If the impairment satisfies the criteria for a listed impairment, the claimant is considered to be disabled. If the claimant's impairment does not meet or equal a listed impairment, the ALJ must undertake the fourth step in the analysis and determine whether the claimant has the residual functional capacity to return to any past relevant work. 20 C.F.R. § 404.1520(e). If the ALJ finds the claimant unable to perform past relevant work, then, at the fifth step, the ALJ must discuss whether the claimant can perform other work which exists in significant numbers in the national economy. 20 C.F.R. § 404.1520(f).

Underwood's "recalcitrant generalized psoriasis" has included the use of topical steroids, intralesional injections as needed, occasional antibiotics for secondary infections, a shampoo regimen, and dermatologist visits every three to four weeks. (*Id.*) The ALJ found that Underwood's psoriasis did not generally affect his hands and feet, but due to the extent that it affected his face, Underwood was "a little intimidated in public" and "somewhat depressed." (*Id.*)

Additionally, the ALJ took into consideration a letter dated April 1, 2002, in which Dr. Kaplan offered his opinion that Underwood was disabled because of his psoriasis (R. at 19.) The ALJ, however, did not adopt the dermatologist's opinion as controlling and noted that the issue of Underwood's disability was an administrative matter reserved to the Commissioner. (*Id.*)

As part of the medical evidence, the ALJ relied on the psychological evaluations of Richardson and Battle and found that Underwood could "understand, remember, and follow simple instructions" and that no evidence existed that Underwood was unable "to interact appropriately on a superficial level." (R. at 21.) On the other hand, the ALJ did find that Underwood's preoccupation with physiological concerns resulted in "moderate difficulty in maintaining concentration, persistence, or pace." (*Id.*) The ALJ found that no mental health professional had⁵ or was currently treating Underwood for his depressive symptoms. (*Id.*)

⁵ Underwood claimed that he had tried treatment by a mental health professional, but he could not recall who treated him and had not received any treatment for his depression in the past four or five years. (R. at 44-45.)

In determining Underwood's exertional limitations, the ALJ relied on Underwood's own testimony and that of his father, mother, and brother. (R. at 20.) The ALJ found Underwood's subjective statements concerning the effects of his impairments to be not entirely credible, that evidence existed that Underwood stopped working for reasons not related to his alleged disabling impairments, and that Underwood lacked motivation to work. (R. at 21.) The ALJ also found that Underwood complained to Dr. Kaplan of sleep difficulty only on one occasion, refused to use medications, and refused to see other physicians. (*Id.*)

The ALJ noted that a finding that Underwood retained functional capacity was consistent with that of the state agency medical consultant who reviewed the evidence at the reconsideration level of the administrative review process. (*Id.*) In assessing functional limitations attributable to the claimant's mental impairment, the ALJ found that Underwood had "no restriction of activities of daily living" and that any restrictions in the mental functioning area appeared to be due to Underwood's "physical complaints." (*Id.*) The ALJ concluded that no evidence in the record indicated that Underwood was unable to interact appropriately in a social setting on a "superficial level." (*Id.*) Additionally, the ALJ found that Underwood could "understand, remember, and follow simple instructions." (*Id.*) The ALJ found no evidence of repeated episodes of decompensation. (*Id.*)

After determining that Underwood retained residual functional capacity, the ALJ found that Underwood could not perform his past

relevant work as an inside phone salesperson⁶ because of the skill level required. (R. at 22.) Thus, the burden of proof shifted to the Commissioner to show that, considering Underwood's age, education, past work experience, together with his residual functional capacity, he could perform other work which exists in significant numbers in the national economy. (R. at 22.)

To meet the Commissioner's burden of proof, the ALJ relied upon the medical-vocational guidelines, otherwise known as the Grid. (*Id.*) The ALJ noted that the Grid does not direct conclusions of disabled or not disabled if the claimant's residual functional capacity consists only of nonexertional limitations. (*Id.*) Therefore, the ALJ could only use the Grid as a framework due to Underwood's nonexertional limitations that prevented him from performing a full range of work at all exertional levels. (R. at 24.) The ALJ used section 204.00, Appendix 2, Subpart P, Regulations No. 4 together with Social Security Rulings 85-15 and 96-9p as a guide to determine that unskilled jobs at all levels of exertion constituted the potential occupational base for a person who could meet the mental demands of unskilled work. (*Id.*) With the aid of vocational expert, Dr. Cates, the ALJ determined that Underwood could perform other work existing in significant numbers in the national economy. (R. at 22, 24.) Examples included work as an assembler, inspector, and security guard. (*Id.*) Therefore, the ALJ found that Underwood was not under a "disability" as defined in the Social Security Act. (*Id.*)

⁶ The vocational expert who testified at the hearing identified Underwood's former job as an inside salesperson, as sedentary skilled work. (R. at 22.)

ANALYSIS

On appeal, Underwood contends that the Commissioner's decision should be reversed because the ALJ committed legal error by not finding that Underwood's impairments met the requirements of Listing 8.05 of 20 C.F.R. pt. 404, Subpart P, Appendix 1, failed to consider Underwood's impairments in combination, gave improper weight to the opinion of Underwood's treating physician, did not properly evaluate the opinion of the psychological examiner, improperly discredited Underwood's subjective testimony, failed to give proper weight to the testimony of lay witnesses, made findings as to Underwood's residual functional capacity that were not supported by substantial evidence, improperly relied upon the medical-vocational guidelines as a framework due to Underwood's nonexertional limitations, and posed an inaccurate hypothetical question to the vocational expert, thereby failing to rely on substantial evidence in concluding that Underwood could perform work existing in significant numbers in the national economy.

A. Standard of Review

Judicial review of the Commissioner's decision is limited to whether there is substantial evidence to support the decision, and whether the Commissioner used the proper legal criteria in making the decision. 42 U.S.C. § 405(g); *Barker v. Shalala*, 40 F.3d 789, 794 (6th Cir. 1994); *Abbott v. Sullivan*, 905 F.2d 918, 922 (6th Cir. 1990). Substantial evidence is more than a scintilla of evidence but less than a preponderance and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Kirk v. Sec'y of Health and Human Servs.*, 667 F.2d

524, 535 (6th Cir. 1981) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In determining whether substantial evidence exists, the reviewing court must examine the evidence in the record taken as a whole and must take into account whatever in the record fairly detracts from its weight. *Abbott*, 905 F.2d at 923. If substantial evidence is found to support the Commissioner's decision, however, the court must affirm that decision and "may not even inquire whether the record could support a decision the other way." *Barker*, 40 F.3d at 794 (quoting *Smith v. Sec'y of Health and Human Servs.*, 893 F.2d 106, 108 (6th Cir. 1989)). Similarly, the court may not try the case *de novo*, resolve conflicts in the evidence, or decide questions of credibility. *Cutlip v. Sec'y of Health and Human Servs.*, 25 F.3d 284, 286 (6th Cir. 1994).

B. Equivalency to Listing 8.05

Underwood contends that the Commissioner's decision should be reversed because the ALJ committed legal error by not finding that Underwood's impairments meet the requirements of Listing section 8.05 of 20 C.F.R. § 404, Subpart P, Appendix 1. To satisfy the regulatory listing for presumptive disability on the basis of psoriasis, a claimant must be diagnosed with psoriasis and also suffer from ". . . extensive lesions, including involvement of the hands or feet which impose a marked limitation of function and which are not responding to prescribed treatment." 20 C.F.R. § 404, Subpt. P, App. 1. A claimant is considered disabled per se if the listings criteria are met. See 20 C.F.R. § 404.1520(d); *Gambill v. Bowen*, 823 F.2d 1009, 1011 (6th Cir. 1987). However,

the claimant has the burden of establishing that he meets a listed impairment, and an impairment meets a listing only when it manifests the specific findings described in the medical criteria for the particular impairment. See 20 C.F.R. § 404.1525(d); *Evans v. Sec'y of Health and Human Servs.*, 820 F.2d 161, 164 (6th Cir. 1987).

It is clear from the testimony of Dr. Kaplan and objective medical evidence available to the ALJ in this case, however, that Underwood is unable to meet the listings criteria because his hands and feet have been spared from severe psoriasis and his impairment responds to a degree to treatment. (See R. at 267.)

Underwood asserts that the ALJ erred because he did not consider his impairments in combination, which is required under the "whole person" doctrine. When an ALJ makes a disability determination after "a thorough review of the medical evidence of record" and specifically refers to "a combination of impairments" in deciding that a claimant does not meet a listed impairment, a "more elaborate articulation" is not required. *Gooch v. Sec'y of Health & Human Servs.*, 833 F.2d 589, 592 (6th Cir. 1987); see also *Loy v. Sec'y of Health & Human Servs.*, 901 F.2d 1306, 1310 (6th Cir. 1990) (finding that an ALJ's individual discussion of multiple impairments does not imply that he failed to consider effect of impairments in combination where ALJ specifically refers to "combination of impairments" in finding that claimant does not meet a listed impairment). In this case, the ALJ based his findings on "consideration of the entire record" and specifically found that Underwood "has an impairment or a combination of impairments

considered 'severe.'" (R. at 23.) Additionally, the ALJ found that those "medically determinable impairments" did not meet or medically equal a listed impairment. (*Id.*) (emphasis added). Therefore, the record reveals that the ALJ properly considered Underwood's impairments in combination.

Next, Underwood argues that his impairment is medically equivalent to Listing 8.05. In order to show medical equivalency, the objective medical findings pertaining to plaintiff's impairment must at least be equal in severity and duration to the findings for a listed impairment. See 20 C.F.R. § 416.926(a). To determine medical equivalence, the ALJ must compare the symptoms, signs, and laboratory findings of a particular impairment with the medical criteria for the listing which is most like plaintiff's impairment. See *id.* Additionally, the Commissioner will not substitute allegations of pain or other symptoms for a missing or deficient sign or laboratory finding to raise the severity of an impairment to that of a listed impairment. See 20 C.F.R. §404.1529(d)(3).

Underwood asserts that a combination of severe generalized psoriasis, depression, frequent restriction in social interaction, and drowsiness is medically equivalent to the requirements of Listing 8.05. This court disagrees. Listing 8.05 specifically requires psoriasis involving the use of the hands and feet "which impose a marked limitation of function." A marked limitation in the ability to use one's hands and feet is entirely different than psychological limitations, and Underwood has failed to prove otherwise. No doctor is of the opinion that Underwood meets or equals any listed impairment, including the state agency physicians

who considered the issue at the initial and reconsideration disability determinations. Underwood argues that the ALJ should have given deference to Dr. Kaplan's statement regarding Listing 8.05. However, according to Dr. Kaplan's sworn testimony, he never found that Underwood's impairments met or equaled the requirements of Listing 8.05. (R. at 267.) Furthermore, Dr. Kaplan noted that Underwood had some psoriasis on his feet, but "he can certainly walk and that's not a problem." (*Id.*) Although Dr. Kaplan stated that Underwood was "a little intimidated in public" due to severe facial involvement, Dr. Kaplan never testified that the intimidation was a marked limitation equaling the same severity as a marked limitation in the use of the hands and feet. (*Id.*)

Underwood argues that even if Listing 8.05 is not met, the ALJ committed legal error in failing to identify which listed impairment was not established and in failing to explain why listing 8.05 was not met in his decision. However, substantial evidence supporting the ALJ's finding that Underwood does not meet a listed impairment is contained in the record, and the ALJ specifically considered the sworn testimony of Underwood's treating physician in his decision. The record contained no inconsistencies which the ALJ was required to address. Accordingly, substantial evidence in the record supports the finding that Underwood's condition does not meet or equal an impairment found in the Listing of Impairments.

C. Weight Given to Medical Evidence

Underwood argues that the ALJ erred in rejecting his primary treating physician's opinion regarding his disability and

limitations. Specifically, in a letter dated April 1, 2002, Dr. Kaplan offered his opinion that Underwood is disabled as a result of his psoriasis. (R. at 440.) A brief, conclusory letter from a treating physician stating that the applicant is disabled is not binding on the Commissioner. *Houston v. Sec'y of Health & Human Servs.*, 736 F.2d 365, 367 (6th Cir. 1984) (holding that the determination of disability is the "prerogative of the Secretary, not the treating physician"). Although the treating physician's diagnosis is entitled to greater weight than that of the government's physician, the ultimate issue of whether an individual is under a disability must be decided by the Commissioner. *Kirk*, 667 F.2d at 538 (citing 20 C.F.R. § 404.1527); see also Soc. Sec. Rul. 96-5p (July 2, 1996) (opinions that a person is "disabled" or "unable to work" are not medical opinions but are administrative findings on issues reserved to the Commissioner).

Although the ALJ considered Dr. Kaplan's opinion in making his decision, he did not give the opinion controlling weight and was not required to do so under the Social Security Act. Dr. Kaplan's letter merely concluded that Underwood was disabled without the support of detailed, clinical, and diagnostic evidence. Additionally, Dr. Kaplan never completed a residual functioning capacity assessment of Underwood to explain his determination that Underwood was disabled. According to the record, Dr. Kaplan was Underwood's only treating physician, and he never placed Underwood under any type of restriction over the course of treatment. (R. at 47.) Therefore, the ALJ did not err in not giving Dr. Kaplan's opinion controlling weight.

Underwood also asserts that the ALJ "played doctor" by substituting his own opinion for that of the treating physician and psychological examiner. (Br. Supp. Pl.'s Mot. J. at 15.) In his decision, the ALJ recognized that he was required to consider any medical opinions which reflect judgments about the nature and severity of Underwood's impairments and resulting limitations. (R. at 19) (citing 20 C.F.R. § 404.1527 and Soc. Sec. Rul. 96-2p (July 2, 1996); Soc. Sec. Rul. 96-6p (July 2, 1996)). Although the ALJ did not give Dr. Kaplan's opinion regarding Underwood's disability controlling weight, he did give Dr. Kaplan's diagnosis and treatment consideration in his decision. Specifically, the ALJ found that Underwood's impairment was severe as diagnosed by Dr. Kaplan. (R. at 18, 23, 267.) Consistent with Dr. Kaplan's diagnosis that Underwood's psoriasis did cause functional limitations and would flare with significant weather changes, the ALJ found that Underwood needed work that would avoid exposure to extreme heat and over-exposure to humidity. (R. at 442.)

Furthermore, Underwood argues that the ALJ committed legal error by not considering and totally rejecting the opinion of the psychological examiner, Thomas Richardson. Underwood asserts that the ALJ did not consider his psychological limitations and failed to consider that his social contacts were limited to his family members. (Br. Supp. Pl.'s Mot. J. at 13-16, 25.) He also contends that the ALJ did not give proper weight to Richardson's opinion that Underwood appeared to suffer frequent restrictions in the area of adaptation with respect to his capacity to adapt to changes and deal with the sort of stress inherent in a "normal work

environment" and that he had difficulty in maintaining concentration, persistence, and pace. (*Id.*)

The ALJ's decision, however, reflects that he did consider the psychological limitations noted by Richardson. He summarized Underwood's psychological evaluation in his opinion and included all of Richardson's findings that claimant asserts were not considered and totally rejected. (R. at 19.) After considering Richardson's evaluation, the ALJ concluded that Underwood was limited to work requiring a low level of concentration and performed in relative isolation. (R. at 21, 23.) The ALJ noted that Underwood had "moderate" difficulties in maintaining social functioning; however, he found no evidence that Underwood was unable to interact appropriately on a superficial level. (*Id.*) His conclusions were not inconsistent with Richardson's findings. The ALJ's findings properly captured the "concrete consequences" that flow from Underwood's conditions. See *Roe V. Chater*, 92 F.3d 672 676-77 (8th Cir. 1996) (holding that an ALJ's hypothetical question does not have to include "specific diagnostic or symptomatic terms where other descriptive terms can adequately define the claimant's impairments"). Accordingly, the ALJ properly credited both Dr. Kaplan and Richardson's opinions and substantial evidence supports his determination.

D. The ALJ's Credibility Determinations

Underwood next argues that the ALJ improperly found his testimony lacking in credibility, failed to consider the side effects of his psoriasis medication, and failed to give perceptible weight to the lay testimony of Underwood's parents and brother. An

ALJ's credibility determination is given great deference because the fact finder has the unique opportunity to observe and evaluate the witness, and his assessment need only be supported by substantial evidence. See *Walters v. Comm'r of Soc. Sec.*, 127 F.3d 525, 531 (6th Cir. 1997); *Gooch*, 833 F.2d at 592. An ALJ may discount credibility "to a certain degree" where he finds "contradictions among the medical reports, claimant's testimony, and other evidence." *Walters*, 127 F.3d at 531. Furthermore, a claimant's household and social activities may be considered in evaluating a claimant's assertions of pain or ailments. *Id.* An ALJ may also take a claimant's consistency into account to determine credibility by comparing "statements made by the individual in connection with his or her claim for disability benefits with statements he or she made under other circumstances . . . [e]specially . . . statements made to treating or examining medical sources." Soc. Sec. R. 96-7p (1996).

In this case, the ALJ discredited Underwood's subjective complaints and limitations because of inconsistencies in the testimony and in the underlying medical records. The ALJ supported his finding by referring to specific examples "set forth in the body of the decision." (R. at 23.) Underwood argues that the ALJ's explanation in the findings violated Social Security Ruling 96-7p, which requires the ALJ to provide "specific reasons" for a particular credibility finding. (Pl.'s Reply Br. at 3.) Underwood cites the Seventh Circuit Court of Appeals case, *Golembiewski v. Barnhart*, 322 F. 3d 912, 915 (7th Cir. 2003) to support his argument. In *Golembiewski*, the ALJ concluded that the claimant's

testimony was "less than credible 'for the reasons set forth in the body of the decision.'" *Id.* The court of appeals held that such an explanation was unacceptable because the body of the decision contained insufficient reasoning for finding the claimant's testimony unbelievable. This case is distinguishable from *Golembiewski* because the ALJ did state reasons in the body of his decision as to why he found Underwood's allegations not totally credible.

For instance, the ALJ found that Underwood stopped working for his father for reasons unrelated to his claims of pain, itching, and lack of sleep. (R. at 21.) Underwood's psoriasis had been present since at least 1994, but he continued to work with the impairment until his father sold the family-owned business. (*Id.*) After that date, Underwood never applied for another job. (*Id.*) The record suggested Underwood lacked "motivation" to work because his father provided the means for his livelihood. (*Id.*) According to Dr. Kaplan's notes, it appeared that Underwood was not complying with treatment recommendations and would not see other physicians. (*Id.*) Underwood only complained to Dr. Kaplan one time about his difficulty sleeping. (*Id.*) He never requested any medication to help him sleep at night. Additionally, Underwood claims that he is depressed; however, he refused to seek help from a mental health professional and will not take medication to alleviate his depression. (R. at 44-45.) Accordingly, substantial evidence supports the ALJ's credibility finding.

Underwood next argues that the ALJ did not consider the side effects of his medication, including injections, which he indicated

caused him not to be able to sleep for 2 or 3 days and caused weight gain. The ALJ, however, did consider these side effects and specifically found in the body of his decision that they were not totally credible. When a claimant claims disability and fails to seek treatment for the ailments giving rise to the claim, his failure to seek treatment is significant to a credibility determination. See *Key v. Callahan*, 109 F.3d 270, 274 (6th Cir. 1997) (finding plaintiff's failure to seek medical assistance for any mental impairment prior to the expiration of insured status is significant to disability determination when plaintiff had previously sought medical assistance for physical complaints when he felt the need). In all of the years that Dr. Kaplan treated Underwood, Underwood never complained of the side effects of the medication and continued to receive the same treatment. (R. at 281-398.) Again, Underwood complained to Dr. Kaplan of lack of sleep only once since 1994. (R. at 21.) Therefore, the ALJ gave correct weight to the side effects of Underwood's medication.

Finally, Underwood asserts that the ALJ did not give proper weight to the lay testimony of Underwood's parents and brother concerning Underwood's reasons for not working and his need to sleep during the day. "Perceptible weight must be given to lay testimony where . . . it is *fully* supported by the reports of the treating physicians." *Lashley v. Sec'y of Health & Human Servs.*, 708 F.2d 1048, 1054 (6th Cir. 1983) (emphasis added). However, the record did not reflect that Underwood's parents' and brother's testimony was "fully" supported by Dr. Kaplan's records. For example, Underwood's parents and brother indicated that Underwood

does not sleep well, but Dr. Kaplan's notes reflect that Underwood only complained of inability to sleep on one occasion. (R. at 52, 60, 63.) Moreover, the parents' and brother's testimony indicated that Underwood's condition deteriorated to a point that he could not work, when in fact, as the Commissioner's Memorandum notes, Underwood's earnings increased significantly in his last years of working. (Mem. Supp. Comm'r at 14) (citing R. at 52, 60, 63, 195.) Therefore, the ALJ did not err in failing to give perceptible weight to the testimony of the lay witnesses.

E. The ALJ's Use of the Medical-Vocational Guidelines

In addition to challenging the ALJ's credibility determination, Underwood argues that the ALJ cannot rely upon the medical-vocational guidelines as a framework due to his nonexertional limitations, such as the inability to sleep at night, taking naps during the daytime, and severe itching and pain affecting his concentration. "Where a claimant suffers from an impairment that significantly diminishes his capacity to work, but does not manifest itself as a limitation on strength, . . . rote application of the grid is inappropriate." *Abbott*, 905 F.2d at 926. However, the Grid may be used as a framework for guidance as long as the Commissioner relies on other evidence to carry his burden at step five of the disability determination process. See *id.* at 927; *Burton v. Sec'y of Health & Human Servs.*, 893 F.2d 821, 822 (6th Cir. 1990). In this case, the ALJ did not rely solely on the medical-vocational guidelines but also took Underwood's nonexertional limitations into account. (R. at 22, 24.) Along with section 204.00 of the guidelines and Social Security Rulings

85-15 and 96-9p, he relied upon a vocational expert to determine whether there were a significant number of jobs in the national economy that the claimant could perform given his residual functional capacity. (R. at 22.)

Underwood argues that the ALJ's decision was flawed because he failed to discuss the vocational expert's testimony in his findings. Underwood proposes that "[o]ne cannot go back to the body of the ruling" to support the ALJ's burden of proof at step five in the disability determination process. (Pl.'s Reply Br. at 11.) (citing *Golembiewski*, 322 F.3d at 915-16. However, *Golembiewski* only applies to cases where the body of the ALJ's decision only "implicitly" supplies reasons supporting the ALJ's findings. See *id.* at 916. Although the ALJ did not specifically refer to the use of the vocational expert in his findings, he did include the vocational expert's opinion that Underwood could perform the jobs of an assembler, inspector, or security guard. Furthermore, he addressed the vocational expert's opinion in the body of his decision and included the hypothetical question propounded. The ALJ did support his decision that Underwood was not disabled by using the medical-vocational guidelines as a framework combined with vocational expert testimony.

F. The Hypothetical and the Vocational Expert's Testimony

Finally, Underwood asserts that the vocational expert's testimony was based on a hypothetical that did not fairly reflect Underwood's nonexertional limitations and that the ALJ's residual functional capacity ("RFC") finding did not include all of his limitations. In this case, the ALJ determined that Underwood had

the physical residual functional capacity "for work at any exertional level avoiding exposure to extreme heat and over-exposure to humidity." (R. at 23.) From a mental standpoint, Underwood was "limited to work requiring a low level of concentration and performed in relative isolation." (*Id.*) The second hypothetical posed to Dr. Cates included the RFC as determined by the ALJ, and the ALJ relied on Dr. Cates response in concluding that a significant number of jobs in the national economy existed that Underwood could perform.⁷ (R. at 22.)

Underwood asserts that the ALJ's RFC finding did not include all of his limitations, such as severe itching and pain, inability to sleep at night, and the need to take naps in the morning and afternoon. (Br. Supp. Pl.'s Mot. J at 26.) An ALJ's RFC determination should focus on what a claimant "can and cannot do" and not what he "does and does not suffer from." See *Howard v. Comm'r of Soc. Sec.*, 276 F.3d 235, 239 (6th Cir. 2002). On the

⁷ In this case, the ALJ posed two hypothetical questions. The first is the following hypothetical: "[A]ssume a claimant same age, education, and occupational experience. Further assume full credibility of the testimony you heard today. Would such a claimant be able to perform his past relevant work?" (R. at 73.) The second hypothetical propounded to Dr. Cates was as follows:

Assume a claimant the same age, education, and occupational experience. Further assume that I find such a claimant would be able to perform work that would require a low level of concentration and would need to avoid extremes of temperature. And further would need to work in relative isolation. Would there be jobs available in the national economy for such a

claimant with that profile? If so, what are they and how many?

(R. at 74.)

other hand, the hypothetical question posed to a vocational expert "should be a more complete assessment of h[is] physical and mental state and should include an 'accurate[] portray[al] [of his] individual physical and mental impairment[s].'" *Id.* (quoting *Varley v. Sec'y of Health & Human Servs.*, 820 F.2d 777, 779 (6th Cir. 1987)). If, however, an ALJ's description of a claimant's RFC accurately reflects a claimant's abilities, "the ALJ's conclusion, inasmuch as it relies upon the RFC, is supported by substantial evidence." *Id.*; see also *Davis v. Sec'y of Health & Human Servs.*, 915 F.2d 186, 189 (6th Cir. 1990).

In determining RFC, the ALJ must base his assessment upon all relevant evidence, which may include claimant's own description of limitations, medical records, and observations of treating physicians and others. See 20 C.F.R. § 404.1545(a). In this case, the ALJ took Dr. Kaplan's restriction that Underwood should avoid significant changes in the weather and included it in his RFC finding. (R. at 21, 23, 444.) The ALJ also relied upon the state agency medical consultants at the reconsideration level of the administrative review process who determined that Underwood should avoid exposure to extreme heat and over-exposure to humidity. (R. at 21.) Underwood argues that the ALJ failed to consider his psychological limitations; however, the ALJ took Richardson's opinion that Underwood could understand detailed instructions, with occasional restriction in his capacity to sustain concentration and demonstrate adequate persistence, and determined that Underwood was limited to work "requiring a low level of concentration." (R. at 23.) Furthermore, the ALJ considered Underwood's embarrassment and

limited social interaction and determined that he was limited to work "performed in relative isolation." (*Id.*)

As for Underwood's need to take naps in the mornings and afternoons and the side effects of medications, the ALJ found that the claimant's subjective testimony was not totally credible; therefore, the ALJ was not required to include such restrictions in his RFC and hypothetical question. See *Casey v. Sec'y of Health & Human Servs.*, 987 F.2d 1230, 1235 (6th Cir. 1993). Moreover, the ALJ's RFC took into consideration Underwood's pain and itching when he determined that Underwood had environmental limitations and a need to work in a job requiring a low level of concentration. Underwood argues that the ALJ failed to consider that he had only had one job in the past. The record reflects, however, that the ALJ specifically considered Underwood's past relevant work as part of his evaluation and asked Dr. Cates about someone who had a work history similar to Underwood. (R. at 22, 74.) Accordingly, the ALJ's determination as to Underwood's residual functional capacity is based on substantial evidence and a vocational expert's testimony in response to a hypothetical question that accurately reflects the claimant's conditions provides substantial evidence to support the Commissioner's decision.

CONCLUSION

The totality of the record indicates that the ALJ's decision was supported by substantial evidence at each step of the decision-making process. Accordingly, the Commissioner's decision is affirmed.

IT IS SO ORDERED this 25th day of September, 2003.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE