UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

BRIAN T. ETTY,

Plaintiff,

v. **Case No: 6:23-cv-2335-CEM-EJK**

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

REPORT AND RECOMMENDATION

This cause comes before the Court on Plaintiff's appeal of an administrative decision denying his application for Supplemental Security Income ("SSI"), alleging November 6, 2020, as the disability onset date. (Tr. 69, 150–153.) In a decision dated March 2, 2023, the Administrative Law Judge ("ALJ") found that Plaintiff was not disabled. (Tr. 7–17.) Plaintiff has exhausted his available administrative remedies, and the case is properly before the Court. The undersigned has reviewed the record, the parties' memoranda, (Docs. 19, 23, 24), and the applicable law. For the reasons stated below, the undersigned respectfully recommends that the Commissioner's final decision be reversed and remanded.

I. BACKGROUND

The ALJ found that Plaintiff suffers from the severe impairments of spine disorders and disorders to the right foot. (Tr. 12.) Aided by the testimony of a vocational expert ("VE"), the ALJ determined that Plaintiff, despite these

impairments, retains the residual functional capacity ("RFC") to perform a limited range of light work as defined in 20 C.F.R. § 416.967(b), with the following nonexertional limitations:

> lifting/carrying up to 10 pounds frequently and 20 pounds occasionally; sitting about six hours in an eight-hour workday; standing six hours in an eight-hour workday; with a need to alternate positions between sitting and standing every hour; no more than two hours of walking in an eight-hour workday with a need for a handheld assistive device for any walking; no more than occasional climbing ramps/stairs, balancing, stooping, kneeling, crouching, crawling; no climbing of ladders, ropes, and scaffolds; and no concentrated exposure to dangerous machinery or unprotected heights.

(Tr. 13.)

The ALJ found that, with this RFC, Plaintiff could work several jobs, such as an order caller, ticket seller, and cashier. (Tr. 16.) Therefore, the ALJ found that Plaintiff was not disabled. (Tr. 17.)

II. ISSUE ON APPEAL

Plaintiff's sole issue on appeal is whether the ALJ's RFC determination is supported by substantial evidence. (*See* Doc. 19.)

III. STANDARD

The Eleventh Circuit has stated:

> In Social Security appeals, we must determine whether the Commissioner's decision is supported by substantial evidence and based on proper legal standards. Substantial evidence is more than a scintilla and is such relevant evidence as a reasonable person would accept as adequate to support a conclusion. We may not decide the facts anew, reweigh the evidence, or substitute our judgment for that of the [Commissioner].

Winschel v. Comm'r of Soc. Sec., 631 F.3d 1176, 1178 (11th Cir. 2011) (citations and quotations omitted). "With respect to the Commissioner's legal conclusions, however, our review is de novo." *Lewis v. Barnhart*, 285 F.3d 1329, 1330 (11th Cir. 2002).

IV. ANALYSIS

Plaintiff argues that the ALJ's determination that Plaintiff had the RFC to perform light work with additional limitations was not supported by substantial evidence because the ALJ relied on "stale" opinion evidence and the ALJ failed to develop the record. (Doc. 19 at 7–13.) The Commissioner disagrees, contending that the ALJ was not required to develop the record further and that the ALJ's conclusions were supported by substantial evidence. (Doc. 23 at 6–14.)

The ALJ is tasked with assessing a claimant's RFC and ability to perform past relevant work. *Phillips v. Barnhart*, 357 F.3d 1232, 1238 (11th Cir. 2004). Social Security Regulation 96-8p provides that the "RFC is an assessment of an individual's ability to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis[,]" which "means 8 hours a day, for 5 days a week, or an equivalent work schedule." *See also Lewis v. Callahan*, 125 F.3d 1436, 1440 (11th Cir. 1997) (the RFC "is an assessment, based upon all of the relevant evidence, of a claimant's remaining ability to do work despite his impairments").

In determining the claimant's RFC, the ALJ must consider all relevant medical evidence and prior administrative medical findings. 20 C.F.R. §§ 416.920(c); *see also Rosario v. Comm'r of Soc. Sec.*, 877 F. Supp. 2d 1254, 1265 (M.D. Fla. 2012) ("Weighing

the opinions and findings of treating, examining, and non-examining physicians is an integral part of steps four and five of the ALJ's sequential evaluation process for determining disability."). Under the revised regulations,[1] the Commissioner no longer "defer[s] or give[s] any specific evidentiary weight, including controlling weight, to any medical opinion(s) or prior administrative medical finding(s), including those from [] medical sources." 20 C.F.R. §§ 1520c(a), 416.920c(a). Rather, the Commissioner must "consider" the "persuasiveness" of all medical opinions and prior administrative medical findings. *Id.*

Plaintiff argues that the ALJ's RFC determination that Plaintiff could perform light work with additional limitations lacked support from any medical opinion evidence from the relevant time period at issue—that is, starting from Plaintiff's disability onset date of November 6, 2020. (Doc. 19 at 7.) Plaintiff further argues that, despite the ALJ's finding that Plaintiff had severe physical impairments, the ALJ failed to adequately develop the record because the ALJ did not order a consultative examination. (*Id.* at 7–8.) Plaintiff notes that the only "physical functional opinion" in the relevant time period was from the state agency, but the state agency medical consultants claimed that there was insufficient evidence to provide an opinion on Plaintiff's alleged disability. (*Id.* at 8.) According to Plaintiff, since the ALJ did not have any medical opinion evidence to inform the ALJ's RFC determination, the ALJ's

[1] Plaintiff filed his application for SSI payments on November 6, 2020. (Doc. 19 at 1.) The revised regulations apply to any claim filed on or after March 27, 2017. 20 C.F.R. §§ 404.1520c, 416.920c.

RFC determination was not supported by substantial evidence. (*Id*. at 12.)

In response, the Commissioner argues that the record was sufficiently developed for the ALJ's RFC determination and no additional opinions or consultative examinations were warranted. (Doc. 23 at 6.) Moreover, the ALJ specifically asked Plaintiff's counsel if the record was complete at the administrative hearing, and Plaintiff's counsel confirmed that the record was complete without mentioning the need for a consultative examination. (*Id*. at 6; Tr. 86.) The Commissioner further contends that, in the ALJ's RFC determination, the ALJ considered Plaintiff's subjective complaints, evidence from the relevant time period, prior administrative medical findings, and opinion evidence from the state agency medical consultants. (Doc. 23 at 7–8.)

The ALJ has a basic duty to develop a full and fair record. *Graham v. Apfel*, 129 F.3d 1420, 1422 (11th Cir. 1997). This duty exists regardless of whether the plaintiff is represented. *Brown v. Shalala*, 44 F.3d 931, 934 (11th Cir. 1995). "This duty requires the ALJ to 'scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.'" *Cowart v. Schweiker*, 662 F.2d 731, 735 (11th Cir. 1981) (quoting *Cox v. Califano*, 587 F.2d 988, 991 (9th Cir. 1978)). The ALJ must be "especially diligent in ensuring that favorable as well as unfavorable facts and circumstances are elicited." *Cowart*, 662 F.2d at 735 (internal quotation marks omitted). To evaluate the necessity for a remand for further development of the record, courts are "guided by 'whether the record reveals evidentiary gaps which result in unfairness or clear prejudice.'" *Brown*, 44 F.3d at 935 (quoting *Smith v. Schweiker*, 677 F.2d 826, 830 (11th

Cir. 1982)).

Here, the undersigned recommends finding that the record was not sufficiently developed to allow the ALJ to make an informed RFC determination based on substantial evidence. Starting from Plaintiff's disability onset date in November 2020, Plaintiff was treated by Ashton Brinson, M.D., and state agency medical consultants. (Tr. 14–15.) When Plaintiff presented to Dr. Brinson for medication pill refills in 2021, Plaintiff stated that there were no concerns or complaints. (Tr. 14.) The state agency medical consultants did not render any opinions because there was insufficient evidence to do so, which the ALJ stated was "consistent with Plaintiff's lack of ongoing treatment." (Tr. 15.) The ALJ noted that Plaintiff received "no further treatment of record after this time." (Tr. 15.)

Moreover, concerning Plaintiff's 2014 and 2018 consultative examination opinions, the ALJ stated they were "too remote to be fully persuasive," but the "limitations that were identified were generally consistent with the assessed residual functional capacity." (Tr. 15.) The ALJ also considered Plaintiff's testimony about the intensity, persistence, and limiting effects of his symptoms before finding that Plaintiff's testimony was "inconsistent with the medical evidence." (Tr. 14.) In light of these findings, the ALJ concluded that Plaintiff's treatment had been conservative and minimal, and the evidence in the record did not establish that Plaintiff's impairments prevented Plaintiff from performing light work with additional limitations. (Tr. 15.)

The parties do not dispute that the ALJ did not consider any medical opinion evidence from the relevant time period, and the ALJ did not take any steps to fill this

evidentiary gap, such as by ordering a consultative examination. Accordingly, the undersigned cannot find that the ALJ's decision was based on substantial evidence. "It is reversible error for an ALJ not to order a consultative examination when such an evaluation is necessary for him to make an informed decision." *Reeves v. Heckler,* 734 F.2d 519, 522 n.1 (11th Cir. 1984) (citing *Ford v. Secretary of Health and Human Services,* 659 F.2d 66, 69 (5th Cir. Unit B Oct. 15, 1981)). In *Ford*, the court considered whether the ALJ fulfilled the duty to develop the record when the ALJ did not order a consultative examination on behalf of the claimant. *Ford*, 659 F.2d at 69. Given the record in *Ford*, the court held that a consultative examination was necessary for the ALJ to make an informed decision. *Id.*; *see also Brown*, 44 F.3d at 935–936 (reversing and remanding the judgment because the lack of medical documentation created an evidentiary gap in the record, resulting in unfairness and clear prejudice against the claimant). In this case, as in *Ford* and *Brown*, a consultative examination, or some other comparable development of the evidentiary record, would have allowed the ALJ to make an informed decision. Instead, there was a gap in the record due to the absence of medical opinion evidence during the relevant time period.

The Commissioner relies on two Eleventh Circuit cases to argue that the ALJ did not need to order a consultative examination despite the absence of relevant medical opinion evidence. The Commissioner cites *Ingram v. Comm'r of Soc. Sec. Admin.*, 496 F.3d 1253, 1269 (11th Cir. 2007), to argue that the ALJ need not order a consultative examination so long as the record contains sufficient evidence for the ALJ to make an informed decision. *Ingram,* 496 F.3d at 1269. However, in *Ingram*, the

Eleventh Circuit found that the record contained ample evidence to show that the claimant's depression was alleviated by medication. *Id*. Unlike *Ingram*, the record in this case does not contain ample evidence to support the ALJ's determination.

The Commissioner also relies on *Green v. Soc. Sec. Admin.*, 223 F. App'x 915, 923 (11th Cir. 2007), to argue that an ALJ's RFC determination need not be based on a physician's opinion. *Green,* 223 F. App'x at 923–924. While that may be true, the determination does need to be based on substantial evidence, and that is absent in this case. *See Cowart*, 662 F.2d at 735 (holding that the ALJ has a special duty to "scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts" (quoting *Cox*, 587 F.2d at 991 (9th Cir. 1978)); *McGarry v. Comm'r of Soc. Sec.,* No. 3:23-cv-288-DNF, 2024 WL 639200, at *5 (M.D. Fla. Feb. 15, 2024) (reversing and remanding the ALJ's final decision when the record revealed there was a medical opinion gap so that the record was insufficient to support the ALJ's RFC determination).

Finally, the Commissioner notes that the state agency medical consultants were unable to complete Plaintiff's medical assessment because Plaintiff never responded to their attempts to make contact. (Doc. 23 at 9–10.) Nevertheless, the ALJ has the basic duty to develop a full and fair record before making an RFC determination, and that was not done in this case. *Graham*, 129 F.3d at 1422.

V. RECOMMENDATION

Upon consideration of the foregoing, I **RESPECTFULLY RECOMMEND** that the Court:

1. **REVERSE** the Commissioner's decision and **REMAND** with instructions to the Commissioner to conduct further proceedings consistent with the findings of this Report and Recommendation.

2. **DIRECT** the Clerk of Court to enter judgment accordingly in favor of Plaintiff and **CLOSE** the file.

NOTICE TO PARTIES

The party has **fourteen days** from the date the party is served a copy of this report to file written objections to this report's proposed findings and recommendations or to seek an extension of the fourteen-day deadline to file written objections. 28 U.S.C. § 636(b)(1)(C). A party's failure to file written objections waives that party's right to challenge on appeal any unobjected-to factual finding or legal conclusion the district judge adopts from the Report and Recommendation. *See* 11th Cir. R. 3-1; 28 U.S.C. § 636(b)(1).

Recommended in Orlando, Florida on December 18, 2024.

EMBRY J. KIDD
UNITED STATES MAGISTRATE JUDGE