

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

Charles Morse, Jr.

v.

Civil No. 14-cv-18-LM
Opinion No. 2015 DNH 055

Carolyn Colvin, Acting
Commissioner, Social
Security Administration

O R D E R

Pursuant to [42 U.S.C. § 405\(g\)](#), Charles Morse moves to reverse the Acting Commissioner's decision to deny his application for Social Security disability insurance benefits, or DIB, under Title II of the Social Security Act, [42 U.S.C. § 423](#), and for supplemental security income, or SSI, under Title XVI, [42 U.S.C. § 1382](#). The Acting Commissioner, in turn, moves for an order affirming her decision. For the reasons that follow, this matter is remanded to the Acting Commissioner for further proceedings consistent with this order.

Standard of Review

The applicable standard of review in this case provides, in pertinent part:

The [district] court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of

the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive

42 U.S.C. § 405(g) (setting out the standard of review for DIB decisions); see also 42 U.S.C. § 1383(c)(3) (establishing § 405(g) as the standard of review for SSI decisions). However, the court “must uphold a denial of social security . . . benefits unless ‘the [Acting Commissioner] has committed a legal or factual error in evaluating a particular claim.’” Manso-Pizarro v. Sec’y of HHS, 76 F.3d 15, 16 (1st Cir. 1996) (quoting Sullivan v. Hudson, 490 U.S. 877, 885 (1989)).

As for the statutory requirement that the Acting Commissioner’s findings of fact be supported by substantial evidence, “[t]he substantial evidence test applies not only to findings of basic evidentiary facts, but also to inferences and conclusions drawn from such facts.” Alexandrou v. Sullivan, 764 F. Supp. 916, 917-18 (S.D.N.Y. 1991) (citing Levine v. Gardner, 360 F.2d 727, 730 (2d Cir. 1966)). In turn, “[s]ubstantial evidence is ‘more than [a] mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” Currier v. Sec’y of HEW, 612 F.2d 594, 597 (1st Cir. 1980) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)). But, “[i]t is the responsibility of the [Acting Commissioner] to determine issues of credibility and to

draw inferences from the record evidence. Indeed, the resolution of conflicts in the evidence is for the [Acting Commissioner], not the courts.” [Irlanda Ortiz v. Sec’y of HHS](#), 955 F.2d 765, 769 (1st Cir 1991) (citations omitted). Moreover, the court “must uphold the [Acting Commissioner’s] conclusion, even if the record arguably could justify a different conclusion, so long as it is supported by substantial evidence.” [Tsarelka v. Sec’y of HHS](#), 842 F.2d 529, 535 (1st Cir. 1988). Finally, when determining whether a decision of the [Acting] Commissioner is supported by substantial evidence, the court must “review[] the evidence in the record as a whole.” [Irlanda Ortiz](#), 955 F.2d at 769 (quoting [Rodriguez v. Sec’y of HHS](#), 647 F.2d 218, 222 (1st Cir. 1981)).

Background

The parties have submitted a Joint Statement of Material Facts (document no. 19). That statement is part of the court’s record and will be summarized here, rather than repeated in full.

Over the years, Morse has received extensive medical treatment, resulting in diagnoses of both physical and mental conditions. Physically, he has been diagnosed with, among other things, degenerative disc disease of the lumbar spine,

uncontrolled diabetes mellitus, and “[s]evere complex sleep disordered breathing [i.e., sleep apnea] in the setting of morbid obesity,” Administrative Transcript (“Tr.”) 651.

Mentally, he has been diagnosed with major depression and panic disorder. In a disability report completed in conjunction with his application for social security benefits, Morse identified his impairments as: “Bipolar [disorder], mental health issues, [posttraumatic stress disorder], low back pain, breathing problems, obesity, [gastroesophageal reflux disease], gout, sleep apnea, diabetes, learning disability, memory loss, herniated disc, and degenerative disc [disease].” Tr. 378.

With regard to the interplay between Morse’s various conditions, the record includes the diagnosis quoted above, which links Morse’s obesity with his sleep apnea. In addition, Dr. Lawrence Jasper, a consulting psychologist, wrote a “Comprehensive Psych Profile - Adult” that includes the following relevant passage:

He reports that he will go to bed at 8:00 or 9:00 p.m.

. . . .

Asked about the reasons [why] he cannot get to sleep until 3:00 in the morning even though he goes to bed at 8:00 or 9:00 he reports that he is awake because “I’m afraid to go to sleep because I’m afraid I’m going to stop breathing in my sleep.” Despite this report of a high degree of fear he reports that he

will not wear a face mask designed to alleviate sleep apnea because it dries up his mouth excessively.

Tr. 791.¹

Morse applied for DIB and SSI in May 2009. His claim worked its way through the administrative process, which concluded with an unfavorable decision from an administrative law judge ("ALJ"). See Tr. 99-107.

Thereafter, the Decision Review Board ("DRB") remanded Morse's claim to the ALJ with a set of instructions including the following: "Further evaluate the nature and severity of all of the claimant's impairments at step 2 of the sequential evaluation process and beyond."² Tr. 116 (emphasis added).

On remand, the ALJ conducted a second hearing. After that hearing, the ALJ issued a decision that includes the following relevant findings of fact and conclusions of law:

3. The claimant has the following severe impairments: degenerative disc disease of the lumbar spine, obesity and diabetes mellitus, uncontrolled (20 CFR 404.1520(c) and 416.920(c)).

. . . .

¹ At his hearing, Morse testified that he was then using a breathing machine at night, but also testified that it did not help him much with respect to sleepiness during the day. See Tr. 44.

² The sequential evaluation process to which the DRB remand order refers is described in the section that follows.

4. The claimant does not have an impairment or combination impairments that meets or medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and 416.926).

. . . .

5. After careful consideration of the entire record, I find that the claimant has the residual functional capacity to perform sedentary work as defined in 20 CFR 404.1567(a) and 416.967(a) except he can lift ten pounds frequently and can stand or walk for two hours in an eight-hour workday and sit for six hours in an eight-hour workday. The claimant has unlimited use of the feet and hands to operate controls and to push and pull. He requires the opportunity to change positions as need[ed] to alleviate discomfort and pain, which may include brief standing or walking. He can occasionally, balance, stoop, kneel[,] crouch, crawl and climb ramps and stairs, but must never climb ladders, ropes and scaffolds. He must avoid exposure to extreme temperatures, vibrations and hazards. He should avoid concentrated exposure to humidity and respiratory irritants.

Tr. 21, 24. Based upon his assessment of Morse's residual functional capacity,³ and in reliance upon testimony from a vocational expert ["VE"] at Morse's first hearing,⁴ the ALJ

³ "Residual functional capacity," or "RFC," is a term of art that means "the most [a claimant] can still do despite [his] limitations." 20 C.F.R. §§ 404.1545(a)(1) & 416.945(a)(1).

⁴ Given the analysis and disposition that follows, the court need not address the matter of the ALJ's reliance upon VE testimony from Morse's first hearing when issuing a decision after his second hearing.

determined that Morse was able to perform the job of charge-account clerk.⁵

Discussion

According to Morse, the ALJ's decision should be reversed, and the case remanded, because the ALJ did not: (1) properly consider his major depressive disorder, panic disorder, and sleep apnea; (2) properly weigh the expert opinions in the record; or (3) carry his burden of establishing that there are jobs that exist in significant numbers in the national economy that Morse can perform despite his impairments. Morse's first argument is persuasive and dispositive.

A. The Legal Framework

To be eligible for disability insurance benefits, a person must: (1) be insured for such benefits; (2) not have reached retirement age; (3) have filed an application; and (4) be under a disability. 42 U.S.C. §§ 423(a)(1)(A)-(D). To be eligible for supplemental security income, a person must be aged, blind, or disabled, and must meet certain requirements pertaining to income and assets. 42 U.S.C. § 1382(a). The question in this case is whether Morse was under a disability.

⁵ That job was the only job the VE was able to identify that could be performed by a person with the RFC included in the ALJ's hypothetical question to the VE. See Tr. 89.

For the purpose of determining eligibility for disability insurance benefits,

[t]he term "disability" means . . . 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 can be expected to last for a continuous period of not less than 12 months.

[42 U.S.C. § 423\(d\)\(1\)\(A\)](#); see also [42 U.S.C. § 1382c\(a\)\(3\)\(A\)](#)

(setting out a similar definition of disability for determining eligibility for SSI benefits). Moreover,

[a]n individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. . . .

[42 U.S.C. § 423\(d\)\(2\)\(A\)](#) (pertaining to DIB benefits); see also

[42 U.S.C. § 1382c\(a\)\(3\)\(B\)](#) (setting out a similar standard for determining eligibility for SSI benefits).

To decide whether a claimant is disabled for the purpose of determining eligibility for either DIB or SSI benefits, an ALJ is required to employ a five-step process. See [20 C.F.R. §§ 404.1520](#) (DIB) and [416.920](#) (SSI).

The steps are: 1) if the [claimant] is engaged in substantial gainful work activity, the application is

denied; 2) if the [claimant] does not have, or has not had within the relevant time period, a severe impairment or combination of impairments, the application is denied; 3) if the impairment meets the conditions for one of the "listed" impairments in the Social Security regulations, then the application is granted; 4) if the [claimant's] "residual functional capacity" is such that he or she can still perform past relevant work, then the application is denied; 5) if the [claimant], given his or her residual functional capacity, education, work experience, and age, is unable to do any other work, the application is granted.

[Seavey v. Barnhart](#), 276 F.3d 1, 5 (1st Cir. 2001) (citing 20 C.F.R. § 416.920).

The claimant bears the burden of proving that he is disabled. See [Bowen v. Yuckert](#), 482 U.S. 137, 146 (1987). He must do so by a preponderance of the evidence. See [Mandziej v. Chater](#), 944 F. Supp. 121, 129 (D.N.H. 1996) (citing [Paone v. Schweiker](#), 530 F. Supp. 808, 810-11) (D. Mass. 1982)). Finally,

[i]n assessing a disability claim, the [Acting Commissioner] considers objective and subjective factors, including: (1) objective medical facts; (2) [claimant]'s subjective claims of pain and disability as supported by the testimony of the [claimant] or other witness; and (3) the [claimant]'s educational background, age, and work experience.

[Mandziej](#), 944 F. Supp. at 129 (citing [Avery v. Sec'y of HHS](#), 797 F.2d 19, 23 (1st Cir. 1986); [Goodermote v. Sec'y of HHS](#), 690 F.2d 5, 6 (1st Cir. 1982)).

B. Morse's Argument

Morse makes a series of interconnected arguments concerning the manner in which the ALJ handled three of his impairments, i.e., major depressive disorder, panic disorder, and sleep apnea. Specifically, he argues that the ALJ erred at step two of the sequential evaluation process by finding that none of those three impairments was severe, and also erred at the RFC stage by: (1) failing to expressly mention any of those impairments in his RFC discussion; (2) failing to consider the combined effects of all of his impairments; (3) failing to evaluate the credibility of statements he made about the effects of his mental impairments and his sleep apnea; and (4) fashioning an RFC that does not include any mental limitations flowing from his mental impairments and his sleep apnea. Morse is entitled to a remand because the ALJ did not adequately consider the combined effects of all of Morse's impairments.

Morse frames his argument on that point in the following way:

Morse has co-occurring physical and mental impairments with overlapping symptoms which affect mental work abilities. Morse's uncontrolled diabetes, morbid obesity, severe sleep apnea, depression and anxiety are co-existing conditions in his case. These co-existing impairments affect mental work abilities, and when combined, the limiting effects are greater than when considered individually.

Clm't's Mem. of Law (doc. no. 14-1) 11 (emphasis in the original). Based upon that argument, Morse goes on to describe the manner in which his physical impairments, i.e., diabetes, obesity, and sleep apnea can affect the mental functioning of a person suffering from them.

Morse's argument is based upon the following provision drawn from the relevant regulations:

In determining whether your physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under the law, we will consider the combined effect of all of your impairments without regard to whether any such impairment, if considered separately, would be of sufficient severity. If we do find a medically severe combination of impairments, the combined impact of the impairments will be considered throughout the disability determination process.

20 C.F.R. §§ 404.1523 & 416.923; see also 42 U.S.C. §

423(d)(2)(B). Morse, however, identifies no case law explaining how, precisely, an ALJ is supposed to demonstrate his or her compliance with that provision. Neither does the Acting Commissioner identify such a standard. Rather, she relies upon the principles articulated in Coppola v. Colvin, that an ALJ:

(1) need not "expressly address each of a claimant's diagnoses," No. 12-cv-492-JL, 2014 WL 677138, at *2 (D.N.H. Feb. 21, 2014) (emphasis in the original); and (2) is only required "to consider 'the limiting effects of all of the claimant's

impairments,' both severe and non-severe," id. (citation omitted, emphasis added by Coppola).

The court of appeals for this circuit has yet to set a standard for how an ALJ is to carry out his or her responsibilities under 20 C.F.R. §§ 404.1523 & 416.923. However, a panel of the Fifth Circuit has recently explained that "an ALJ must 'adequately explain his or her evaluation of the combined effects of [a claimant's] impairments.'" Tanner v. Comm'r of Soc. Sec., --- F. App'x ---, ---, No. 14-1271, 2015 WL 574222, at *4 (4th Cir. Feb. 12, 2015) (per curiam) (emphasis added) (quoting Reid v. Comm'r of Soc. Sec., 769 F.3d 861, 865 (4th Cir. 2014); citing Walker v. Bowen, 889 F.2d 47, 50 (4th Cir. 1989)).

According to the Tanner court, the ALJ in that case provided an adequate explanation by: (1) describing the claimant's non-severe impairments; (2) stating "that her obesity 'combined with her musculoskeletal impairments does not result in impairments that meet or equal listing severity,"⁶ id. at *4 (quoting the record, emphasis omitted); (3) described the claimant's severe impairments; and (4) "concluded that, '[t]he

⁶ It is not clear from the opinion whether the claimant's obesity or her musculoskeletal impairments were severe or non-severe impairments.

claimant does not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments," id. In other words, the Tanner court appears to have held that it was sufficient for the ALJ merely to proclaim that the claimant did not have a combination of impairments that met or equaled the severity of a listed impairment without describing the analysis that led him to that conclusion.

In Tuggerson-Brown v. Commissioner of Social Security, a panel of the Eleventh Circuit provided the following analysis of a claim that an ALJ failed to consider all of the claimant's impairments in combination:

While the ALJ did not need to determine whether every alleged impairment was "severe," he was required to consider all impairments, regardless of severity, in conjunction with one another in performing the latter steps of the sequential evaluation. Despite Tuggerson-Brown's arguments to the contrary, it is apparent from the face of the ALJ's decision and the RFC report relied upon by the ALJ that the ALJ did, in fact, consider all medical evidence in combination in concluding that Tuggerson-Brown was not disabled. In performing his analysis, the ALJ stated that he evaluated whether Tuggerson-Brown had an "impairment or combination of impairments" that met a listing and that he considered "all symptoms" in determining her RFC. Under our precedent, those statements are enough to demonstrate that the ALJ considered all necessary evidence. See Wilson [v. Barnhart], 284 F.3d [1219,] 1224-25 [(11th Cir. 2002)].

572 F. App'x 949, 951-52 (11th Cir. 2014).

Under the ALJ-friendly standard set out in [Tanner](#) and [Tuggerson-Brown](#), the decision by the ALJ in this case might possibly be sufficient to satisfy the requirement imposed by 20 C.F.R. §§ 404.1523 & 416.923. In the section of his decision in which he outlined the relevant law, the ALJ acknowledged that when assessing Morse's RFC, he was obligated to "consider all of the claimant's impairments, including impairments that are not severe." Tr. 20. At step three, the ALJ found that Morse did "not have an impairment or combination of impairments that [met] or medically equal[ed] the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1," Tr. 24. However, in the discussion that followed that finding, the ALJ mentioned only Morse's three severe impairments. See Tr. 24. At the end of his discussion of Morse's RFC, the ALJ wrote:

Notably, claimant's obesity has been considered in conjunction with the claimant's other severe impairments in assessing the claimant's residual functional capacity. I find that the records do not indicate that his obesity limits his ability to function further than the exertional capacity noted above.

Based upon the totality of the evidence, I find the claimant's impairments, in combination, comport with the residual functional capacity [stated] above.

Tr. 27. However, those conclusions follow a discussion in which the ALJ did not even mention Morse's non-severe impairments, and in the first of the two paragraphs quoted above, the ALJ

considered a combination that consisted only of Morse's three severe impairments.

Beyond that, the ALJ evaluated several expert opinions that mentioned Morse's non-severe impairments, which could be taken to show that the ALJ did consider those impairments in combination with Morse's other impairments. See Tuggerson-Brown, 572 F. App'x at 951. Specifically, the ALJ evaluated: (1) Dr. Hugh Fairley's "Physical Residual Functional Capacity Assessment," in which he acknowledged Morse's allegations that he suffered from bipolar disorder, posttraumatic stress disorder, obesity, sleep apnea, and diabetes, see Tr. 26, 841; (2) Dr. Riccio's "Physician/Clinician Statement of Capabilities," in which he acknowledged Morse's diagnoses of morbid obesity, moderate-severe back pain, lumbar disc disease, diabetes, and depression, see Tr. 26-27, 904; (3) Dr. Lawrence Jasper's "Comprehensive Psych Profile - Adult," in which he acknowledged Morse's diagnoses of dysthymic disorder⁷ and probable generalized anxiety disorder and his reports of obesity, hypertension, high cholesterol, gastroesophageal reflux disease, type II diabetes and sleep apnea, see Tr. 23, 788, 793;

⁷ Dysthymia is "[a] chronic mood disorder manifested by depression for most of the day, more days than not" Stedman's Medical Dictionary 602 (28th ed. 2006).

and (4) Dr. Dennis Becotte's "Comprehensive Psych Profile - Adult," in which he acknowledged Morse's diagnoses of depressive disorder, herniated discs, degenerative disc disease, diabetes, high blood pressure, and asthma, see Tr. 23, 831. While these expert opinions identified co-occurring impairments, none of them includes any analysis or discussion of the limiting effects of those impairments in combination with each other.

Turning from the law of the Fifth and Eleventh Circuits to law developed in this circuit, several decisions from judges in this district appear to employ a standard for applying §§ [404.1523](#) & [416.923](#) that is more faithful to the "adequate-explanation" requirement stated in [Tanner](#) than the standard actually used in [Tanner](#) and [Tuggerson-Brown](#). For example, in [Forni v. Barnhart](#), Judge Barbadoro reversed the ALJ's decision and remanded "for consideration of whether, in light of Forni's combined mental and physical impairments, his RFC would allow him to perform jobs that exist in significant numbers in the economy," [No. 05-cv-406-PB, 2006 WL 2956293, at *9 \(D.N.H. Oct. 17, 2006\)](#). Judge Barbadoro explained his ruling that the ALJ failed to consider the combined effect of all the claimant's impairments this way:

[I]n assessing a claimant's ability to work, the ALJ should not disregard individual, non-severe

impairments where the claimant's collective impairments are severe.

Here, the ALJ did just that. Upon reviewing each impairment individually, he determined that Forni's mental impairment was not severe but that his asthma and carpal tunnel syndrome were severe. He then completely (and improperly) dropped Forni's depression from his analysis, thereafter analysing only the effects of asthma and carpal tunnel on Forni's RFC. See [Loza v. Apfel](#), 219 F.3d 378, 392-93 (5th Cir. 2000) (remanding for reconsideration where ALJ erred by only evaluating consequences of claimant's mental and physical impairments individually and by not considering their combined effects); [Dunn v. Apfel](#), No. 98-591-B, 1999 WL 1327399, at *8 (D.N.H. Dec. 10, 1999) (finding improper analysis at severity stage may have caused failure to properly consider the total limiting effects of claimant's mental and physical impairments when determining her RFC); [MacLean v. Sec'y of Health & Human Servs.](#), No. 93-384-SD, 1994 WL 328792, at *2 (D.N.H. July 7, 1994) (remanding in part to determine whether claimant had more than one impairment, and if so, to consider combination of all impairments at each step of disability evaluation process); [Edmond v. Sec'y of Health & Human Servs.](#), No. 88-360-D, 1989 WL 281943, at *5 (D.N.H. Mar. 15, 1989) ("ALJ failed to properly consider whether the combination of plaintiff's impairments rendered him disabled").

Because [t]he ALJ failed to analyse Forni's impairments in combination throughout the sequential analysis, I find that his decision was not supported by substantial evidence.

[Forni](#), 2006 WL 2956293, at *8-9; see also [Stephenson v. Halter](#), No. CIV. 00-391-M, 2001 WL 951580, at *2 (D.N.H. Aug. 20, 2001) (ruling that ALJ does not meet requirement of 20 C.F.R. § 1523 merely by finding that impairment is not severe either alone or in combination with other impairments, but must actually address

non-severe impairment when assessing RFC). Under the standard employed in [Forni](#) and [Stephenson](#), the decision by the ALJ in this case falls short of satisfying the requirement imposed by 20 C.F.R. §§ 404.1523 & 416.923.

Like the ALJ in [Forni](#), the ALJ in this case discussed Morse's impairments individually at step two, but did not discuss them in combination. Then, at step three, the ALJ explained how none of Morse's three severe impairments individually met or equaled the severity of a listed impairment, but did not address the combination of those three impairments or even mention Morse's non-severe impairments. And, like the ALJ in [Forni](#), the ALJ in this case said nothing at all about Morse's non-severe impairments in his discussion of Morse's RFC. In sum, the most that can be said about the ALJ's consideration of Morse's impairments in combination is that he explained why Morse's severe impairment of obesity did not result in any limitations beyond those resulting from his severe impairments of degenerative disc disease and diabetes. Moreover, while the ALJ's RFC assessment includes an assessment of the credibility of Morse's statements about the symptoms of his severe impairments, that discussion does not mention Morse's statements about: (1) symptoms resulting from sleep apnea such as daytime sleepiness, see Tr. 44; (2) symptoms resulting from depression,

such as loss of concentration, see Tr. 50; or (3) symptoms resulting from panic disorder, see Tr. 51-52.

Finally, the ALJ's discussion of the weight he assigned to expert opinions, which concludes his RFC assessment, refers only to the opinions concerning Morse's physical condition. The ALJ weighed the opinions of the mental-health experts earlier in the opinion, in conjunction with his determination that Morse's mental impairments were not severe. That, in turn, supports an inference that the ALJ believed that opinions on Morse's non-severe mental impairments were irrelevant to his analysis beyond step two. This inference is strengthened by the ALJ's failure to mention those impairments in either his discussion of step three or his RFC assessment.

Based upon the foregoing, it is difficult to escape the conclusion that the ALJ in this case, like the ALJ in [Forni](#), completely dropped Morse's non-severe impairment from his analysis at step two. Thus, the only question that remains is whether this court should adopt the standard Judge Barbadoro applied in [Forni](#) or adopt the standard from [Tanner](#) and [Tuggerson-Brown](#). Judge Barbadoro's is the better approach.

In [Browning v. Colvin](#), Judge Posner referred to a phrase from the ALJ's credibility assessment as "a pernicious bit of boilerplate to which the Social Security Administration

nevertheless clings,” 766 F.3d 702, 707 (7th Cir. 2014) (citing [Goins v. Colvin](#), 764 F.3d 677, 681 (7th Cir. 2014)). While the issue here is not the ALJ’s credibility assessment, the court is concerned that by adopting the standard from [Tanner](#) and [Tuggerson-Brown](#), an ALJ could meet his or her responsibility under 20 C.F.R. §§ 404.1523 & 416.923 by doing nothing more than reciting boilerplate assertions that he or she considered a claimant’s impairments in combination without describing any actual analysis. As a practical matter, if the court were to apply [Tanner](#) and [Tuggerson-Brown](#), the ALJ would be allowed to meet his responsibility under §§ 404.1523 & 416.923 by providing less analysis on the rather complex issue of impairments in combination than he provided when explaining his determinations that several of Morse’s impairments, individually, were not severe. Judge Barbadoro’s standard avoids that counter-intuitive result.

In addition, while [Tanner](#) appears to apply a very relaxed definition of “adequate explanation,” which allows conclusory statements to stand in for analysis, one of the cases the [Tanner](#) court cited in its opinion describes the adequate-explanation requirement in terms that are similar to the rule Judge Barbadoro applied in [Forni](#):

The ALJ found that although claimant suffered from numerous ailments, he did not have an impairment or combination of impairments listed in, or medically equal to, one listed in Appendix 1, Subpart P, Reg. No. 4. This finding in itself, however, is not sufficient to foreclose disability. Congress explicitly requires that "the combined effect of all the individual's impairments" be considered, "without regard to whether any such impairment if considered separately" would be sufficiently severe, [42 U.S.C. § 423\(d\)\(2\)\(c\)](#), [Hines v. Bowen](#), 872 F.2d 56, 59 (4th Cir. 1989). Therefore, a failure to establish disability under the listings by reference to a single, separate impairment does not prevent a disability award.

After finding that claimant failed to meet a listing, the ALJ went on to discuss each of claimant's impairments but failed to analyze the cumulative effect the impairments had on the claimant's ability to work. . . . It is axiomatic that disability may result from a number of impairments which, taken separately, might not be disabling, but whose total effect, taken together, is to render claimant unable to engage in substantial gainful activity. In recognizing this principle, this Court has on numerous occasions held that in evaluating the effect[s] of various impairments upon a disability benefit claimant, the Secretary must consider the combined effect of a claimant's impairments and not fragmentize them. . . .

As a corollary to this rule, the ALJ must adequately explain his or her evaluation of the combined effects of the impairments.

[Walker](#), 889 F.2d at 49-50 (4th Cir. 1989) (emphasis added).

Plainly, according to the [Walker](#) court, adequate explanation consists of analysis, not just conclusory findings. [Walker](#), in turn, cites [Reichenbach v. Heckler](#), which remanded a case because the ALJ "failed to provide adequate explanation to show

that he had considered the combined effect of the impairments so as to allow proper judicial review," 808 F.2d 309, 312 (4th Cir. 1985) (emphasis added). It is difficult to see how the mere recitation of boilerplate phrases, which is acceptable under Tanner, allows proper judicial review. In sum, as between the approaches employed in Tanner and Forni, Judge Barbadoro's is the better one, and this court adopts it.

Because the ALJ's discussion of Morse's impairments in combination falls short of the standard articulated in Forni, the ALJ's decision is not supported by substantial evidence. See 2006 WL 2956293, at *9. Consequently, this case must be remanded, see id., for a further evaluation of all of Morse's impairments, in combination, at step two of the sequential evaluation process, and beyond.

While the court need say no more, it offers the following observation, which may be useful on remand. As the court has already noted, Morse argues that the ALJ erred at the RFC stage by failing to evaluate the credibility of statements he made about the effects of three of his non-severe impairments: depression, anxiety, and sleep apnea. The Acting Commissioner does not appear to address that argument directly. But, in her argument that the ALJ properly considered the combined effects of Morse's impairments, she states that "[t]he ALJ recognized

that Plaintiff alleged that his impairments resulted in fatigue, dizziness, and an inability to complete tasks, beyond the physically limiting effects of the conditions." Resp't's Mem. of Law (doc. no. 16-1) 12. In support of that argument, the Acting Commissioner cites the following passage from the ALJ's decision:

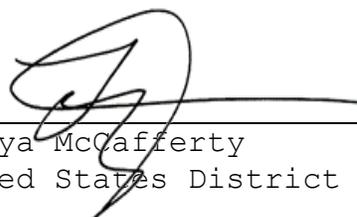
He states his obesity results in fatigue. The claimant testifies that his blood sugars fluctuate, which causes him to get dizzy and use the bathroom frequently. The claimant alleges that his impairments inhibit his ability to complete tasks such that he is disabled.

Tr. 25 (citations to the record omitted). Because the symptoms of fatigue and dizziness are clearly linked to two of Morse's severe impairments, and the symptom related to task completion is not linked to any particular impairment, those statements in the ALJ's decision do not demonstrate that he considered any of the symptoms that Morse attributed to his non-severe impairments, such as sleepiness resulting from sleep apnea, see Tr. 44, loss of concentration resulting from depression, see Tr. 50, and various symptoms resulting from panic disorder, see Tr. 51-52. Accordingly, on remand, the ALJ should consider the full range of Morse's symptoms, not just those that are linked to his severe impairments.

Conclusion

For the reasons detailed above, the Acting Commissioner's motion for an order affirming her decision, document no. 16, is denied, and Morse's motion to reverse the decision of the Acting Commissioner, document no. 14, is granted to the extent that the case is remanded to the Acting Commissioner for further proceedings, pursuant to sentence four of 42 U.S.C. § 405(g). The clerk of the court shall enter judgment in accordance with this order and close the case.

SO ORDERED.



Landya McCafferty
United States District Judge

March 17, 2015

cc: Janine Gawryl, Esq.
Robert J. Rabuck, Esq.