

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Christopher R. Fortin

v.

Civil No. 18-cv-636-JL
Opinion No. 2019 DNH 136

U.S. Social Security
Administration, Commissioner

ORDER ON APPEAL

Christopher Fortin has appealed the Social Security Administration's ("SSA") denial of his application for a period of disability, disability insurance benefits, child's insurance benefits, and supplemental security income. An administrative law judge ("ALJ") at the SSA ruled that although Fortin has several medically determinable impairments, his impairments are not severe individually or in combination, and thus he is not disabled. See [20 C.F.R. §§ 404.1505\(a\), 416.905\(a\)](#). The Appeals Council later denied Fortin's request for review, see id. [§§ 404.967, 416.1467](#), with the result that the ALJ's decision became the final decision on his application, see id. [§§ 404.981, 416.1481](#). Fortin then appealed the decision to this court, which has jurisdiction under [42 U.S.C. § 405\(g\)](#) (Social Security).

Fortin has moved to reverse the decision. See [LR 9.1\(b\)](#). The Commissioner of the SSA has cross-moved for an order affirming the ALJ's decision. See [LR 9.1\(c\)](#). After careful

consideration, the court denies Fortin's motion and grants the Commissioner's motion.

I. Applicable legal standard

The court limits its review of a final decision of the SSA "to determining whether the ALJ used the proper legal standards and found facts upon the proper quantum of evidence." [Ward v. Comm'r of Soc. Sec.](#), 211 F.3d 652, 655 (1st Cir. 2000). It "review[s] questions of law de novo, but defer[s] to the Commissioner's findings of fact, so long as they are supported by substantial evidence," [id.](#), that is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," [Richardson v. Perales](#), 402 U.S. 389, 401 (1971) (quotations omitted). Though the evidence in the record may support multiple conclusions, the court will still uphold the ALJ's findings "if a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support his conclusion." [Irlanda Ortiz v. Sec'y of Health & Human Servs.](#), 955 F.2d 765, 769 (1st Cir. 1991). The court therefore "must uphold a denial of social security . . . benefits unless 'the [Commissioner] has committed a legal or factual error in evaluating a particular claim.'" [Manso-Pizarro v. Sec'y of Health and Human Servs.](#), 76 F.3d 15, 16 (1st Cir. 1996) (per curiam) (quoting [Sullivan v. Hudson](#), 490 U.S. 877, 885 (1989)).

II. Background

The court recounts here only those facts relevant to the instant appeal. The parties' more complete recitations in their Statements of Material Facts¹ are incorporated by reference. The ALJ invoked the requisite five-step sequential evaluation process in assessing Fortin's request for a period of disability, disability insurance benefits, child's insurance benefits, and supplemental security income. See 20 C.F.R. §§ 404.1520, 416.920. After determining that Fortin had not engaged in substantial gainful activity after the earliest alleged onset of his disability, the ALJ analyzed the severity of his impairments. At this second step, the ALJ found that Fortin had several medically determinable impairments: personality disorder, hypertension, mild cervical spine degenerative disc disease, cyst, and foot injury.² But the ALJ determined that none of these impairments alone or in combination had significantly limited or was expected to significantly limit Fortin's ability to perform basic work-related activities for 12 consecutive months. Therefore, the ALJ concluded that Fortin does not have a severe impairment or

¹ Documents no. 8, 11.

² Admin. R. at 20.

combination of impairments.³ Given this step-two finding, the ALJ concluded his analysis and found that Fortin was not disabled within the meaning of the Social Security Act.⁴

III. Analysis

Fortin challenges the ALJ's decision on four grounds, arguing that the ALJ erred by: (1) misinterpreting the date of a medical evaluation; (2) failing to consider Fortin's subjective symptoms in determining severity; (3) improperly weighing medical opinion evidence; and (4) improperly evaluating Fortin's testimony. The court addresses each argument in turn.

A. Date of Dr. Hess's evaluation

Dr. Elizabeth P. Hess, a state examining psychologist, evaluated Fortin on March 15, 2016 and issued a report on March 22, 2016.⁵ Each page of the report bears a stamp with the date November 1, 2012, apparently representing the date on which the form used for the report was approved by the state.⁶ Fortin's counsel raised this potential source of confusion with the ALJ at the hearing and the ALJ indicated that he understood that

³ Id. at 23.

⁴ Id. at 28.

⁵ Id. at 457.

⁶ Id. at 38-39, 453-58.

Dr. Hess's evaluation took place in 2016.⁷ But the ALJ referred to it in his decision to the "November 2012 opinion" of Dr. Hess and gave that opinion little weight in part because he believed it was "remote in time."

The parties agree that the ALJ erred by misinterpreting the date of Dr. Hess's opinion, but dispute whether this error was harmful.⁸ Fortin argues that he was prejudiced because the ALJ might have reached a result favorable to him with a proper understanding of Dr. Hess's opinion.⁹ But the ALJ provided alternative reasons for giving Dr. Hess's opinion little weight, explaining that it "is based on the claimant's subjective symptoms and self-reported medical history" and that he gave greater weight to "Dr. Jackson's more recent evaluation that is based on objective diagnostic testing and observed medical signs."¹⁰ These reasons echo the analysis of state psychologist Dr. Nicholas Kalfas, who understood the correct date of Dr. Hess's evaluation. Dr. Kalfas gave "more weight . . . to Dr. Jackson's findings" and little weight to "the findings

⁷ Id. at 38-39.

⁸ See Mem. of Law in Supp. of Mot. to Reverse (doc. no. 7-1) at 1-2; Mem. of Law in Supp. of Mot. to Affirm (doc. no. 10-1) at 10-11.

⁹ Mem. of Law in Supp. of Mot. to Reverse (doc. no. 7-1) at 2.

¹⁰ Admin R. at 27. Dr. Trina Jackson evaluated Fortin later in 2016.

presented by Dr. Hess . . . as they appear to be biased by the claimant based upon his perception of the setting and persona involved” as evidenced by later interactions.¹¹ The ALJ gave Dr. Kalfas’s opinion great weight and specifically noted his assessment of the relative weight of the opinions of Dr. Hess and Dr. Jackson.¹²

The ALJ’s error is certainly unfortunate, especially since Fortin’s counsel specifically raised the issue at the hearing, but it is also harmless. The ALJ gave independent reasons besides temporal remoteness for giving Dr. Hess’s opinion little weight that are sufficient on their own to support that determination. See [McNelley v. Colvin](#), No. 15-1871, 2016 WL 2941714 at *1 (1st Cir. Apr. 28, 2016) (finding ALJ’s misreading of record harmless after review of entire record); [Perez Torres v. Sec’y of Health & Human Servs.](#), 890 F.2d 1251, 1255 (1st Cir. 1989) (same). It is also clear that the ALJ was guided by Dr. Kalfas’s assessment of the psychological opinions, which was not tainted by the error. The ALJ erred in misinterpreting the date of Dr. Hess’s opinion, but the error did not prejudice Fortin. Remand is not warranted.

¹¹ Id. at 128.

¹² Id. at 25-26.

B. Consideration of subjective symptoms

Fortin argues that the ALJ must not have appropriately considered his subjective symptoms because Fortin testified that he receives assistance from state agencies and it might be inferred that one requiring assistance from such agencies is incapacitated.¹³ Fortin submitted no evidence beyond his own testimony regarding his participation in these programs. And the standards for participation in these programs may well differ in important ways from the definition of disability under the Social Security Act. At most, Fortin's receipt of assistance is evidence that might support an alternative conclusion. Fortin has not shown that the ALJ's decision is not supported by substantial evidence, and it is not legal error to conclude that a recipient of state assistance is not severely impaired.

C. Weight of medical opinion evidence

Fortin argues that the ALJ improperly weighed the medical opinions provided by Dr. Donald Catino, who Fortin identifies as his treating physician, and Dr. Hess.¹⁴ As discussed supra, the ALJ gave well-supported reasons for giving Dr. Hess's opinion little weight. The ALJ did not ignore Dr. Hess's opinion, but

¹³ Mem. of Law in Supp. of Mot. to Reverse (doc. no. 7-1) at 2-3.

¹⁴ Mem. of Law in Supp. of Mot. to Reverse (doc. no. 7-1) at 3-5.

instead was persuaded by contrary medical opinion. He did not suggest that psychological evidence was valueless, but instead gave greater weight to a different set of psychological evidence. The ALJ did not err in assigning Dr. Hess's opinion little weight.

The ALJ also adequately justified his decision to give Dr. Catino's evidence little weight. Dr. Catino "opined that the claimant cannot work due to neck trauma sustained in multiple motor vehicle accidents since 1992, and due to arthritis of the cervical spine, with worsening in the last 12 months."¹⁵ The ALJ explained that he gave the opinion little weight because "Dr. Catino did not examine the witness over the past 12 months, he had not treated the claimant since 1992, and because the opinion is conclusory and does not identify and quantify work-related functional limitations."¹⁶ The ALJ's assessment appropriately applies the factors used to assess the opinion of a treating source. See [20 C.F.R. § 404.1527\(c\)\(2\)-\(6\)](#). The record reflects that Dr. Catino examined Fortin twice in the weeks immediately prior to issuing his opinion letter.¹⁷ But Dr. Catino was "not familiar" with Fortin's case prior to

¹⁵ Admin. R. at 27.

¹⁶ Id.

¹⁷ Id. at 578-80, 585-89, 617.

being asked to opine, did “not know anything about him except his neck pain,” and scheduled the second examination because he did not immediately feel comfortable opining that Fortin’s condition had “severely deteriorated over the past 12 months.”¹⁸ Substantial evidence thus supports the ALJ’s assessment that the very limited treating relationship between Dr. Catino and Fortin, among other factors, justified giving limited weight to Dr. Catino’s opinion.

D. Evaluation of Fortin’s testimony

Finally, Fortin argues that the ALJ failed to properly evaluate Fortin’s own testimony. After citing numerous authorities on the standards by which an ALJ should assess a claimant’s subjective testimony, Fortin only directly challenges the ALJ’s assessment on the basis that “the jumbled nature and content of Mr. Fortin’s testimony would lead even a layperson to believe that he is impaired in accordance with Dr. Hess’s opinion.”¹⁹ The ALJ found that Fortin’s “statements concerning the intensity, persistence and limiting effects of [Fortin’s]

¹⁸ Id. at 587-88. The record arguably leaves open the possibility that Dr. Catino had examined Fortin an additional one or two times before 2017. See id. at 570, 585-94. But Dr. Catino clearly did not have a continuous treatment relationship with Fortin throughout the 12 months prior to issuing the opinion letter.

¹⁹ Mem. of Law in Supp. of Mot. to Reverse (doc. no. [7-1](#)) at 6-7.

symptoms are not consistent with the medical evidence and other evidence in the record for the reasons explained in this decision." Even if the record might support a different conclusion, Fortin has not developed any argument that the ALJ's finding is not supported by substantial evidence. See [United States v. Zannino](#), 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

IV. Conclusion

For these reasons, the Commissioner's motion to affirm²⁰ is GRANTED and Fortin's motion to reverse the Commissioner's decision²¹ is DENIED. The Clerk of Court shall enter judgment in accordance with this order and close the case.

SO ORDERED.



Joseph N. Laplante
United States District Judge

Dated: August 27, 2019

cc: Brenda M. Golden Hallisey, Esq.
Jessica Tucker, Esq.

²⁰ Doc. no. [10](#).

²¹ Doc. no. [7](#).