IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOHN KARL DALLAS S.,[1]	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 19-1119-JWL**
ANDREW M. SAUL,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM AND ORDER

Plaintiff seeks review of a decision of the Commissioner of Social Security denying Supplemental Security Income (SSI) benefits pursuant to sections 1602 and 1614 of the Social Security Act, 42 U.S.C. §§ 1381a and 1382c (hereinafter the Act). Finding no error in the Administrative Law Judge's (ALJ) residual functional capacity (RFC) assessment, the court ORDERS that judgment shall be entered pursuant to the fourth sentence of 42 U.S.C. § 405(g) AFFIRMING the Commissioner's final decision.

I. Background

Plaintiff filed an application for SSI on October 6, 2015. (R. 268). After exhausting administrative remedies before the Social Security Administration (SSA),

[1] The court makes all its "Memorandum and Order[s]" available online. Therefore, in the interest of protecting the privacy interests of Social Security disability claimants, it has determined to caption such opinions using only the initial of the Plaintiff's last name.

Plaintiff filed this case seeking judicial review of the Commissioner's decision pursuant to 42 U.S.C. § 405(g). Plaintiff claims the ALJ's RFC is unsupported by the record evidence. (Pl. Br. 18-23).

The court's review is guided by the Act. Wall v. Astrue, 561 F.3d 1048, 1052 (10th Cir. 2009). Section 405(g) of the Act provides that in judicial review "[t]he findings of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). The court must determine whether the ALJ's factual findings are supported by substantial evidence in the record and whether she applied the correct legal standard. Lax v. Astrue, 489 F.3d 1080, 1084 (10th Cir. 2007); accord, White v. Barnhart, 287 F.3d 903, 905 (10th Cir. 2001). "Substantial evidence" refers to the weight, not the amount, of the evidence. It requires more than a scintilla, but less than a preponderance; it 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); see also, Wall, 561 F.3d at 1052; Gossett v. Bowen, 862 F.2d 802, 804 (10th Cir. 1988). Consequently, to overturn an agency's finding of fact the court "must find that the evidence not only supports [a contrary] conclusion, but compels it." I.N.S. v. Elias-Zacarias, 502 U.S. 478, 481, n.1 (1992) (emphases in original).

The court may "neither reweigh the evidence nor substitute [its] judgment for that of the agency." Bowman v. Astrue, 511 F.3d 1270, 1272 (10th Cir. 2008) (quoting Casias v. Sec'y of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991)); accord, Hackett v. Barnhart, 395 F.3d 1168, 1172 (10th Cir. 2005); see also, Bowling v. Shalala, 36 F.3d 431, 434 (5th Cir. 1994) (The court "may not reweigh the evidence in the record,

nor try the issues de novo, nor substitute [the Court's] judgment for the [Commissioner's], even if the evidence preponderates against the [Commissioner's] decision.") (quoting Harrell v. Bowen, 862 F.2d 471, 475 (5th Cir. 1988)). Nonetheless, the determination whether substantial evidence supports the Commissioner's decision is not simply a quantitative exercise, for evidence is not substantial if it is overwhelmed by other evidence or if it constitutes mere conclusion. Gossett, 862 F.2d at 804-05; Ray v. Bowen, 865 F.2d 222, 224 (10th Cir. 1989).

The Commissioner uses the familiar five-step sequential process to evaluate a claim for disability. 20 C.F.R. § 416.920; Wilson v. Astrue, 602 F.3d 1136, 1139 (10th Cir. 2010) (citing Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988)). "If a determination can be made at any of the steps that a claimant is or is not disabled, evaluation under a subsequent step is not necessary." Wilson, 602 F.3d at 1139 (quoting Lax, 489 F.3d at 1084). In the first three steps, the Commissioner determines whether claimant has engaged in substantial gainful activity since the alleged onset, whether he has a severe impairment(s), and whether the severity of his impairment(s) meets or equals the severity of any impairment in the Listing of Impairments (20 C.F.R., Pt. 404, Subpt. P, App. 1). Williams, 844 F.2d at 750-51. After evaluating step three, the Commissioner assesses claimant's RFC. 20 C.F.R. § 404.1520(e). This assessment is used at both step four and step five of the sequential evaluation process. Id.

The Commissioner next evaluates steps four and five of the process—determining at step four whether, considering the RFC assessed, claimant can perform his past relevant work; and at step five whether, when also considering the vocational factors of

age, education, and work experience, he is able to perform other work in the economy. Wilson, 602 F.3d at 1139 (quoting Lax, 489 F.3d at 1084). In steps one through four the burden is on Plaintiff to prove a disability that prevents performance of past relevant work. Blea v. Barnhart, 466 F.3d 903, 907 (10th Cir. 2006); accord, Dikeman v. Halter, 245 F.3d 1182, 1184 (10th Cir. 2001); Williams, 844 F.2d at 751 n.2. At step five, the burden shifts to the Commissioner to show that there are jobs in the economy which are within the RFC previously assessed. Id.; Haddock v. Apfel, 196 F.3d 1084, 1088 (10th Cir. 1999).

II. Discussion

Plaintiff bases his argument that the RFC is unsupported by the record evidence upon several distinct claims of error. With regard to the physical RFC assessed, he points out the case was remanded by the Appeals Council to consider his carpal tunnel syndrome after the ALJ's first decision and argues the second decision was erroneous because it did not include additional limitations to account for carpal tunnel syndrome beyond the limitation to only frequent handling which had been included in the first decision. (Pl. Br. 18). He argues further error because this limitation was based on Dr. Tawadros's stale opinion. Id. at 19 (citing without pinpoint citation Chapo v. Astrue, 682 F.3d 1285 (10th Cir. 2012) (the court was troubled because the consultants' opinions were stale)). He argues Dr. Knoll's opinion was erroneously discounted and "[i]n any event, Dr. Knoll's opinions are stale as they were issued in 2015 – almost 3 years prior to the ALJ's decision and without review of the bulk of the medical evidence." Id. at 20.

Finally, Plaintiff argues the ALJ should have addressed his right shoulder impairment diagnosed by Dr. Knoll and assessed by physical therapist, Mr. Ford. (Pl. Br. 21).

Plaintiff also claims error in the ALJ's Mental RFC assessment. Plaintiff claims error in the ALJ's assessment because she failed to discuss an observation on a Field Office Disability Report, "Poor writing, spelling, and grammar skills," and did not discuss the testimony of his friend at the ALJ's hearing. (Pl. Br. 21). He argues the RFC limitation to simple instructions is insufficient to account for the moderate limitation in concentration, persistence, or pace the ALJ found in her step three discussion. Id. at 22. He argues that two of the representative jobs relied upon by the ALJ require the ability to carry out detailed instructions but the RFC limits Plaintiff to simple instructions. Id. Finally, he argues the ALJ erred in discounting the opinion of Dr. Romereim and Ms. Woolsey. Id. at 23.

The Commissioner argues that substantial evidence supports the ALJ's findings. He argues the state agency physician opinions were not stale because the physicians accounted for Dr. Knoll's report and Plaintiff's allegations of symptoms and the mere subsequent diagnosis of carpal tunnel syndrome does not establish disability or greater symptoms. (Comm'r Br. 9). He argues the ALJ properly weighed the opinions and accorded greater weight to the state agency physicians than to Dr. Knoll or Mr. Ford. Id. at 10-11. The Commissioner argues any error in failing to discuss the lay opinion evidence was harmless. Id. at 11 (citing Best-Willie v. Colvin, 514 F. App'x 728, 736 (10th Cir. Mar. 26, 2013)). He argues that it was appropriate for the ALJ to account for moderate limitations in the broad mental functional area of concentration, persistence, or

maintaining pace by limiting Plaintiff to simple instructions. (Comm'r Br. 11-12). He suggests that the ALJ's finding that Plaintiff can perform representative jobs requiring greater than simple instructions (calling them "detailed, albeit uninvolved" instructions) is harmless error because the remaining representative job, cleaner, by itself exists in significant numbers in the national economy. Id. at 12. Finally, he argues that the ALJ properly discounted the opinion of Dr. Romereim and Ms. Woolsey. Id.

The court addresses each error alleged by Plaintiff.

A. RFC Limitations to Account for Carpal Tunnel Syndrome

Plaintiff points out the case was remanded by the Appeals Council after the ALJ's first decision to consider his carpal tunnel syndrome and argues the second decision was erroneous because it did not include additional limitations to account for carpal tunnel syndrome beyond the limitation to only frequent handling which had been included in the first decision. (Pl. Br. 18). This argument misunderstands the court's jurisdiction in judicial review of a Social Security decision. The court's jurisdiction is limited to a review of the Commissioner's final decision—in this case that is the ALJ's second decision. Here, the ALJ found that Plaintiff's carpal tunnel syndrome is a "severe" impairment, meaning it has more than a minimal effect on his ability to perform basic work activities. Williams, 844 F.2d at 751. But Plaintiff must show more than the mere presence of a condition or ailment. Hinkle v. Apfel, 132 F.3d 1349, 1352 (10th Cir. 1997) (citing Bowen v. Yuckert, 482 U.S. 137, 153 (1987)).

Here, the ALJ assessed two limitations arguably attributable, at least in part, to Plaintiff's carpal tunnel syndrome. "He can handle frequently [but not constantly, and

h]e can tolerate occasional exposure to vibration." (R. 17). The ALJ discussed the evidence relating to Plaintiff's upper extremities:

> The claimant has broken multiple fingers on his right hand over the years (Exhibit 6F at 71, 99). All indications are that these fractures healed normally, but it would not be unexpected for the claimant to have some traumatic arthritis in his right hand. The claimant also has peripheral neuropathy, thought to be due to excessive alcohol consumption, in both his hands and his feet (Exhibits 2F at 2; 3F at 2). Finally, electrodiagnostic testing has found evidence of severe bilateral carpal tunnel syndrome, right worse than left (Exhibit 11F at 2). Despite his finger fractures, carpal tunnel syndrome, and neuropathy, however, the claimant has normal range of motion in his hands, and preserved fine and gross manual dexterity (Exhibit 9F at 5, 6). He has normal strength in both his upper and lower extremities (Exhibit 11F at 1).

(R. 19).

The ALJ's explanation of the RFC she assessed in this regard is supported by the record evidence she cited, and Plaintiff's only argument is that this is the same RFC she assessed in the decision remanded by the Appeals Council and the ALJ should "at least explain why a 'severe' impairment at step two would result in no limitations at step four." (Pl. Br. 19) (citing Givens v. Astrue, 251 F. App'x 561, 567 (10th Cir. Oct. 18, 2007)). However, the ALJ assessed limitations attributable to carpal tunnel syndrome and explained that normal strength, normal range of motion, and preserved fine and gross manual dexterity justify assessing no greater limitations. Plaintiff has shown no error.

B. Evaluation of Medical Source Opinions

Plaintiff raises several allegations of error relating to the ALJ's evaluation of the medical source opinions. He argues that it was error for the ALJ to rely on the opinions of Dr. Tawadros and Dr. Knoll because they were stale, having been formulated more

than two years before the ALJ's decision. (Pl. Br. 19, 20). He argues Dr. Tawadros is a non-examining source whose opinion is not substantial evidence to support the ALJ's decision and the ALJ misinterpreted Dr. Knoll's opinion in affording it only some weight. Id. He argues the ALJ should have addressed his right shoulder impairment diagnosed by Dr. Knoll and assessed by physical therapist, Mr. Ford. (Pl. Br. 21). Finally, he argues the ALJ erred in discounting the opinion of Dr. Romereim and Ms. Woolsey. Id. at 23. Because there is one standard (the treating physician rule) applicable here, the court finds it appropriate to address the ALJ's evaluation of the opinions of all the healthcare providers at one place in this decision.

1. The Treating Physician Rule

For claims filed before March 17, 2017, "[m]edical opinions are statements from physicians and psychologists or other acceptable medical sources[2] that reflect judgments about the nature and severity of [a claimant's] impairment(s) including [claimant's] symptoms, diagnosis and prognosis." 20 C.F.R. §§ 404.1527(a)(2), 416.927(a)(2). Such opinions may not be ignored and, unless a treating source opinion is given controlling

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[2]The regulations define three types of "acceptable medical sources:"

"Treating source:" an "acceptable medical source" who has provided the claimant with medical treatment or evaluation in an ongoing treatment relationship. 20 C.F.R. §§ 404.1502, 416.902 (2016).

"Nontreating source:" an "acceptable medical source" who has examined the claimant, but never had a treatment relationship. Id.

"Nonexamining source:" an "acceptable medical source" who has not examined the claimant, but provides a medical opinion. Id.

weight, all medical opinions will be evaluated by the Commissioner in accordance with factors contained in the regulations. Id. §§ 404.1527(c), 416.927(c); Soc. Sec. Ruling (SSR) 96-5p, West's Soc. Sec. Reporting Serv., Rulings 123-24 (Supp. 2019). A physician who has treated a patient frequently over an extended period (a treating source) is expected to have greater insight into the patient's medical condition, and his opinion is generally entitled to "particular weight." Doyal v. Barnhart, 331 F.3d 758, 762 (10th Cir. 2003). But, "the opinion of an examining physician [(a nontreating source)] who only saw the claimant once is not entitled to the sort of deferential treatment accorded to a treating physician's opinion." Id. at 763 (citing Reid v. Chater, 71 F.3d 372, 374 (10th Cir. 1995)). However, opinions of nontreating sources are generally given more weight than the opinions of nonexamining sources who have merely reviewed the medical record. Robinson v. Barnhart, 366 F.3d 1078, 1084 (10th Cir. 2004); Talbot v. Heckler, 814 F.2d 1456, 1463 (10th Cir. 1987) (citing Broadbent v. Harris, 698 F.2d 407, 412 (10th Cir. 1983), Whitney v. Schweiker, 695 F.2d 784, 789 (7th Cir. 1982), and Wier ex rel. Wier v. Heckler, 734 F.2d 955, 963 (3d Cir. 1984)).

"If [the Commissioner] find[s] that a treating source's opinion on the issue(s) of the nature and severity of [the claimant's] impairment(s) [(1)] is well-supported by medically acceptable clinical and laboratory diagnostic techniques and [(2)] is not inconsistent with the other substantial evidence in [claimant's] case record, [the Commissioner] will give it controlling weight." 20 C.F.R. §§ 404.1527(c)(2), 416.927(c)(2); see also, SSR 96-2p, West's Soc. Sec. Reporting Serv., Rulings 111-15 (Supp. 2018) ("Giving Controlling Weight to Treating Source Medical Opinions").

The Tenth Circuit has explained the nature of the inquiry regarding a treating source's medical opinion. Watkins v. Barnhart, 350 F.3d 1297, 1300-01 (10th Cir. 2003) (citing SSR 96-2p). The ALJ first determines "whether the opinion is 'well-supported by medically acceptable clinical and laboratory diagnostic techniques.'" Id. at 1300 (quoting SSR 96-2p). If the opinion is well-supported, the ALJ must confirm that the opinion is also consistent with other substantial evidence in the record. Id. "[I]f the opinion is deficient in either of these respects, then it is not entitled to controlling weight." Id.

If the treating source opinion is not given controlling weight, the inquiry does not end. Id. A treating source opinion is "still entitled to deference and must be weighed using all of the factors provided in 20 C.F.R. § 404.1527 and 416.927." Id. Those factors are: (1) length of treatment relationship and frequency of examination; (2) the nature and extent of the treatment relationship, including the treatment provided and the kind of examination or testing performed; (3) the degree to which the physician's opinion is supported by relevant evidence; (4) consistency between the opinion and the record as a whole; (5) whether or not the physician is a specialist in the area upon which an opinion is rendered; and (6) other factors brought to the ALJ's attention which tend to support or contradict the opinion. Id. at 1301; 20 C.F.R. §§ 404.1527(c)(2-6), 416.927(c)(2-6); see also Drapeau v. Massanari, 255 F.3d 1211, 1213 (10th Cir. 2001) (citing Goatcher v. Dep't of Health & Human Servs., 52 F.3d 288, 290 (10th Cir. 1995)).

After considering the factors, the ALJ must give reasons in the decision for the weight he gives the opinions. Id. 350 F.3d at 1301. "Finally, if the ALJ rejects the

opinion completely, he must then give 'specific, legitimate reasons' for doing so." Id. (citing Miller v. Chater, 99 F.3d 972, 976 (10th Cir. 1996) (quoting Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987)).

Recognizing the reality that an increasing number of claimants have their medical care provided by health care providers who are not "acceptable medical sources"--nurse practitioners, physician's assistants, social workers, and therapists, the Commissioner promulgated Social Security Ruling (SSR) 06-3p. West's Soc. Sec. Reporting Serv., Rulings 327-34 (Supp. 2019). In that ruling, the Commissioner noted:

> With the growth of managed health care in recent years and the emphasis on containing medical costs, medical sources who are not "acceptable medical sources," such as nurse practitioners, physician assistants, and licensed clinical social workers, have increasingly assumed a greater percentage of the treatment and evaluation functions previously handled primarily by physicians and psychologists. Opinions from these medical sources, who are not technically deemed "acceptable medical sources" under our rules, are important and should be evaluated on key issues such as impairment severity and functional effects, along with the other relevant evidence in the file.

Id. Rulings, 330-31.

SSR 06-3p explains that such opinions will be evaluated using the regulatory factors for evaluating medical opinions; id. at 331-32 (citing 20 C.F.R. §§ 404.1527, 416.927); and explains that the ALJ "generally should explain the weight given to opinions from these 'other sources,' or otherwise ensure that the discussion of the evidence in the ... decision allows a claimant or subsequent reviewer to follow the adjudicator's reasoning, when such opinions may have an effect on the outcome of the

case." Id. at 333; see also Frantz v. Astrue, 509 F.3d 1299, 1302 (10th Cir. 2007) (remanding for consideration of a nurse-practitioner's opinions in light of SSR 06-3p).

2. The ALJ's Evaluation

In her discussion of her RFC assessment, the ALJ explained that she had considered Plaintiff's allegation of symptoms in accordance with 20 C.F.R. § 416.929 and SSR 16-3p and had considered the opinion evidence in accordance with 20 C.F.R. § 416.927. (R. 17). She summarized Plaintiff's allegations of symptoms and summarized the record evidence including Plaintiff's treatment and the agency's evaluation of Plaintiff's condition. Id. at 18-20. She then stated her finding that Plaintiff can perform a range of light work and explained her evaluation of the opinions of the medical sources noted above:

> In making this finding, the undersigned has given great weight to the opinion of State agency medical consultant Mary Tawadros, M.D. (Exhibit 3A). Dr. Tawadros' opinion is well-explained, and is well-supported by the evidence discussed above.
>
> The undersigned has given some weight to the opinion of consulting physician Tonya Knoll, DO., who opined that the claimant has the capacity for light exertional lifting (Exhibit 9F at 8). Dr. Knoll did state that the claimant might have some problems with sustained standing or walking, but did not indicate the claimant's total capacity for these activities over the course of a workday. It is also somewhat unclear the extent to which these limits are the result of the claimant's own subjective statements to Dr. Knoll, as opposed to her own assessment.
>
> The claimant's nurse practitioner, Ronald Williams, APRN completed a medical source statement which is somewhat vague and internally contradictory (Exhibit 12F). Nurse Williams opines that the claimant's lumbar degenerative disc disease would prevent him from engaging in gainful employment (which is a determination reserved to the Commissioner), but then proceeds to opine that the claimant can lift 25 pounds, and can stand for 2 to 4 hours. It is unclear from the statement

> whether Nurse Williams intended to opine that this is how long the claimant can stand at one time, or in total over the course of a work day. It also seems that these restrictions may have been opined to in the expectation that the claimant was going to undergo spinal surgery, which has not, as yet, been scheduled or performed. For these reasons, Nurse Williams' opinion has been given little weight in assessing the claimant's physical functional abilities.
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> In assessing the claimant's mental functional abilities, the undersigned has given great weight to the opinion of consulting psychologist Michael Schwartz, Ph.D., who opined that the claimant, despite his cognitive deficits, could perform simple work (Exhibits 16F, 17F). This opinion is well-supported by the evidence, and is consistent with the record as a whole, including the claimant's own testimony that it is primarily his physical impairments which he feels prevent him from being able to work.
>
> Mark Romereim, M.D., a psychiatrist at High Plains Mental Health Center, and Rebecca Woolsey, APRN, a nurse practitioner at the same organization, completed a medical source statement in which they opined that the claimant has marked limitations in a number of his mental functional abilities (Exhibit 18Fat 3-5). This opinion has been given little weight, as it is not consistent with the evidence as a whole, and appears to be based, in large part, on the claimant's own reporting regarding his anger and irritability, which is inconsistent with what he has told other examiners, such as Dr. Schwartz (Exhibits 16F at 1; 18F at 7).
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> The undersigned notes that the claimant underwent an evaluation performed by a physical therapist on July 21, 2017 (Exhibit 15F). The undersigned has given little weight to the results and conclusions of this testing, as the examiner noted that the claimant responses [sic] were inconsistent, and that he may not have put forth a full effort during testing.

(R. 20-21).

3. Analysis

Plaintiff's arguments of error in the ALJ's evaluation of the opinions attempt to show the alleged error in the ALJ's evaluation in only the most general of terms. He argues that Dr. Tawadros's and Dr. Knoll's opinions are "stale" because they were produced "more than 2 years" (Pl. Br. 19), or "almost 3 years," id. at 20, before the ALJ's

decision and without review of most of the medical evidence, but he does not explain what changed about his condition in the interim to make the opinions stale or why the ALJ's evaluation of the opinions is not correct. Plaintiff cites the Chapo court's being "troubled" about a stale opinion in that case, to suggest that the mere age of an opinion makes it stale and unreliable in every case. (Pl. Br. 19). However, that court's discussion of the stale opinion was dicta, unnecessary to the decision because the court did "not make a definitive determination on this question." 682 F.3d at 1293. Moreover, the Chapo court was concerned with a "patently stale opinion," id., because the "relevant medical record obviously underwent material changes in the twenty months between [the doctor's] report and the ALJ's decision." Id., 682 F.3d at 1292. Here, while it was over two years between Dr. Tawadros's and Dr. Knoll's opinions and the ALJ's decision, Plaintiff has not shown, and the court does not find, material changes in the medical record during that time.

Plaintiff argues that Dr. Tawadros's and Dr. Knoll's "opinions are not substantial evidence to support the ALJ's decision" (Pl. Br. 19, 20), but without explanation he appears to suggest consultant opinions are never substantial evidence. Plaintiff cites Jenkins v. Apfel, 196 F.3d 922, 925 (8th Cir. 1999) and Robinson, 366 F.3d at 1084 in support of her argument. (Pl. Br. 19-20). Jenkins is an Eighth Circuit case, not binding on this court, and Robinson explains, "the ALJ erred in rejecting the treating-physician opinion of Dr. Baca in favor of the non-examining, consulting-physician opinion of Dr. Walker absent a legally sufficient explanation for doing so." 366 F.3d at 1084. Here, the ALJ explained her reasons for according great weight to Dr. Tawadros's opinion and for

discounting the opinions of Dr. Knoll, Mr. Williams, and the physical therapist, Mr. Ford (R. 19-20) and Plaintiff does not even acknowledge the reasons given, or attempt to explain why they are not legally sufficient.

As quoted above, the ALJ discounted the opinion of Dr. Romereim and Ms. Woolsey because it is not consistent with the evidence as a whole; appears based, in large part, on the claimant's own reporting regarding his anger and irritability; which is inconsistent with what he has told other examiners such as Dr. Schwartz. Plaintiff points to Ms. Woolsey's treatment notes wherein she recorded that Plaintiff appeared as agitated and his mood was irritable (Pl. Br. 23) (citing R. 739, 742) and argues this is consistent with evidence of emergency room treatment after injuries Plaintiff sustained in alleged fights. Id. (citing R. 440, 447). Plaintiff is correct that in two of her treatment notes Ms. Woolsey recorded in the results of her mental status examination the Plaintiff "appeared as alert, agitated, and stated age," and his "Mood was irritated" or "irritable." (R. 739, 740). Moreover, as Plaintiff argues there are emergency room records dated February 18, 2007 and September 20, 2007 wherein Plaintiff reported, respectively, that he had an altercation at a local tavern and that he was in a fight with a man that weighed approximately 380 pounds. (R. 440, 447).

Both of the emergency room incidents occurred about a year before Plaintiff's alleged onset of disability, and are based upon Plaintiff's report of what had happened and in one case what had reportedly happened 2 and ½ weeks earlier. Moreover, while Ms. Woolsey's notation of agitation and irritability are some evidence that her opinion was formed independently of Plaintiff's subjective reports, the ALJ cited evidence (R.

737) which contains an extensive "History of Present Illness" wherein Ms. Woolsey cited numerous examples of Plaintiff's allegations of long-standing anger and irritability. And, Plaintiff makes no argument regarding the ALJ's reliance upon Dr. Schwartz's report that Plaintiff reported his mood is normal (R. 715) and Dr. Schwartz "did not note any problems which would interfere with him being able to maintain social interactions with coworkers, supervisors, and the general public." (R. 717). While the evidence is equivocal, that is usually true in a Social Security case and it is the responsibility of the ALJ to resolve the ambiguities and make the findings of fact. Here, she has done so, and the record evidence supports her findings. Plaintiff has not shown that the evidence compels a different finding.

C. Testimony of Lay Witnesses

Plaintiff claims error because the ALJ did not discuss an observation on a Field Office Disability Report stating, "Poor writing, spelling, and grammar skills," and did not discuss the testimony of his friend at the ALJ's hearing. (Pl. Br. 21). The Commissioner argues the ALJ's error in failing to discuss this evidence was harmless, but the court wonders if there was even error.

As Plaintiff argues, an employee of the SSA recorded an observation of "Poor writing, spelling, and grammar skills" relating to the claimant. (R. 324). And, Plaintiff's friend testified at the first ALJ hearing. However, that testimony reveals little, if anything, about Plaintiff's condition. She testified that Plaintiff "had numbness a lot in his hands and his feet" (R. 83), that the friend "had to take care of the house and stuff like that," and that Plaintiff "went to get his prescriptions for pain and stuff like that, to his

doctors." (R. 84). None of the evidence to which Plaintiff appeals says anything about Plaintiff's ability to perform basic work activities. The friend's testimony that Plaintiff has numbness cannot be based on her personal knowledge of the numbness. There is nothing in this evidence helpful to the ALJ in deciding the extent of Plaintiff's abilities or limitations. While this is clearly lay witness testimony, it can be viewed as opinion evidence only by the use of mental gymnastics. To the extent there is error in the ALJ's failure to mention this evidence, it is harmless because the court can confidently say that no reasonable administrative factfinder, following the correct analysis, could have resolved the factual matter in any other way based upon this evidence. Allen v. Barnhart, 357 F.3d 1140, 1145 (10th Cir. 2004).

D. Moderate Limitation in Concentration, Persistence, or Pace

Plaintiff argues that the ALJ found he has a moderate limitation in concentrating, persisting, or maintaining pace, but failed to account for that limitation when she assessed his mental RFC and limited him only to simple instructions. This is so in Plaintiff's view because concentrating, persisting, or maintaining pace relate to ability to complete tasks in a timely manner and a "limitation to simple instructions is insufficient to account for the limitations in concentration, persistence, or pace." (Pl. Br. 22) (citing Wiederholt v. Barnhart, 121 F. App'x 833, 839 (10th Cir. 2005); and Chambers v. Barnhart, 2003 WL 22512073 (10th Cir. 2003)).

Plaintiff's argument misses the significance of the ALJ's decision. In her step three discussion the ALJ found Plaintiff has no limitation in two broad mental functional areas, interacting with others, and adapting or managing oneself. She found Plaintiff has

moderate limitation in the remaining two areas, understanding, remembering, or applying information; and concentrating, persisting, or maintaining pace. (R. 16-17). She also specifically noted:

> The limitations identified in the "paragraph B" criteria [(the four broad mental functional areas)] are not a residual functional capacity assessment but are used to rate the severity of mental impairments at steps 2 and 3 of the sequential evaluation process. The mental residual functional capacity assessment used at steps 4 and 5 of the sequential evaluation process requires a more detailed assessment. The following residual functional capacity assessment reflects the degree of limitation the undersigned has found in the "paragraph B" mental function analysis.

(R. 17).

In her RFC assessment, the ALJ summarized Dr. Schwartz's testing of Plaintiff and recognized that Plaintiff "has impaired cognition." Id. at 19. She went on to explain:

> Dr. Schwartz found that the claimant's intellectual functioning is within the mild mentally disabled range, and the undersigned does not question those results. The undersigned does note, however, that Dr. Schwartz found the claimant's memory abilities to be somewhat higher than his intelligence testing would suggest, falling mostly in the borderline to low average range. He did find, however, some weaknesses in the claimant's visual and delayed memory (Exhibit 26F at 3). Interestingly, the claimant's current mental health treatment providers have not noted any significant cognitive deficits, and have found his attention, concentration, and memory abilities to be intact (Exhibit 18F at 12). A restriction to simple, unskilled, work, as indicated by Dr. Schwartz, is certainly appropriate given the claimant's cognitive deficits. No further restrictions, however, are warranted by the evidence.

(R. 20). The ALJ explained her evaluation and Plaintiff has shown no error or that a different finding is compelled. The cases cited by Plaintiff do not require a different conclusion. Each is an unpublished, non-binding opinion resting on different facts.

E. Inability to Carry Out Detailed Instructions

In his remaining argument, Plaintiff claims the ALJ limited him to simple instructions but the Dictionary of Occupational Titles (DOT) definition for two of the jobs relied upon by the ALJ "require the ability to carry out detailed instructions." (Pl. Br. 22). He argues Dr. Schwartz's opinion that Plaintiff can "understand and follow only very simple instructions" further supports a finding that he cannot carry out detailed instructions. Id.

Plaintiff's argument relies upon the DOT's definition of General Educational Development definition of Reasoning Development level 2 as requiring the ability to "[a]pply commonsense understanding to carry out detailed but uninvolved written or oral instructions." DOT, App'x C, Pt. III, available at https://www.dol.gov/agencies/oalj/PUBLIC/DOT/REFERENCES/DOTAPPC (last visited July 24, 2020). Plaintiff apparently assumes that requirement is greater than the ability to "understand, remember, and complete simple instructions" as the ALJ assessed in this case. However, Plaintiff cites no authority for that assumption beyond his mere assertion that the ALJ limited him to "simple instructions" and that two of the representative jobs relied upon by the ALJ "require the ability to carry out detailed instructions." (Pl. Br. 22). But the ALJ included her identical limitation in her hypothetical question of the vocational expert (VE) (R. 59), and the VE responded that such an individual would be able to perform all three jobs relied upon in this case. (R. 60).

The DOT explains that

> General Educational Development embraces those aspects of education (formal and informal) which are required of the worker for satisfactory job performance. This is education of a general nature which does not have a

> recognized, fairly specific occupational objective. Ordinarily, such education is obtained in elementary school, high school, or college. However, it may be obtained from experience and self-study.
>
> The GED Scale is composed of three divisions: Reasoning Development, Mathematical Development, and Language Development.

(DOT, App'x C, Pt. III) available at: https://occupationalinfo.org/appendxc_1.html#III (last visited July 24, 2020).

Thus, GED deals with the amount of education (formal or informal) an occupation requires, "reasoning development" is one of three divisions of educational development, and "02 level reasoning development" is the second least demanding of 6 reasoning development levels. While it might be reasonable for a layman, an attorney, or a court to conclude from the DOT definition of 02 level reasoning development that the educational development necessary "to carry out detailed but uninvolved written or oral instructions" is greater than the mental ability "to understand, remember, and carry out simple instructions," which the ALJ found, Plaintiff cites no authority requiring it. Reasoning level in the DOT relates to the educational background a particular occupation requires whereas mental abilities in a Mental Residual Functional Capacity Assessment represent 20 mental functional abilities grouped in 4 categories—Understanding and Memory, Sustained Concentration and Persistence, Social Interaction, and Adaptation. POMS DI 24510.060(B)(2), available at https://secure.ssa.gov/apps10/poms.nsf/lnx/0424510060 (last visited July 24, 2020). The ability to understand and remember instructions and the ability to carry out instructions fall within the categories of Understanding and Memory, and of Sustained Concentration and Persistence, respectively. POMS

DI 24510.060(B)(2) available at https://secure.ssa.gov/apps10/poms.nsf/lnx/0424510060 (last visited July 24, 2020). While educational requirements and mental abilities intuitively appear to be related, Plaintiff has shown no direct correlation and the VE stated that an individual with the Mental RFC assessed by the ALJ would be able to perform the representative jobs relied upon by the ALJ and testified that his testimony was consistent with the DOT. (R. 60). Plaintiff may not create a conflict based upon his or his attorney's lay reading of the DOT in opposition to a vocational expert, and the court may not impose its lay view of the vocational evidence over that of the VE nor its evaluation of the evidence over that of the ALJ. "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. We may not displace the agency's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." Lax v. Astrue, 489 F.3d at 1084 (citations, quotations, and bracket omitted); see also, Consolo v. Fed. Maritime Comm'n, 383 U.S. 607, 620 (1966). Plaintiff has shown no error.

IT IS THEREFORE ORDERED that judgment shall be entered pursuant to the fourth sentence of 42 U.S.C. § 405(g) AFFIRMING the Commissioner's final decision.

Dated July 27, 2020, at Kansas City, Kansas.

s:/ *John W. Lungstrum*
John W. Lungstrum
United States District Judge