

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

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)	
WALLACE H. WHITAKER,)	Civil Action No. 5:12cv00130
)	
<i>Plaintiff,</i>)	REPORT AND RECOMMENDATION
v.)	
)	
CAROLYN W. COLVIN, ¹)	By: Hon. James G. Welsh
Commissioner of Social Security,)	U. S. Magistrate Judge
)	
<i>Defendant.</i>)	
)	

The plaintiff, Wallace H. Whitaker, brings this action pursuant to 42 U.S.C. § 405(g) challenging the final decision of the Commissioner of the Social Security Administration (“the agency”) denying his claim for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act, as amended, 42 U.S.C. §§ 1381–1383f, and his claim for disability insurance benefits (“DIB”) under Title II, 42 U.S.C. §§ 461(i) and 423. This court has jurisdiction pursuant to 42 U.S.C. § 405(g) and § 1383(c)(3).

I. Administrative and Procedural History

The plaintiff filed claims for DIB and SSI on May 17, 2010, alleging a period of disability beginning on December 31, 2007. (R.41, 246) Initially denied, the claims were reconsidered on January 28, 2011 and again denied. (R. 100, 89) Following an administrative hearing on October 28, 2011 and a limited supplemental hearing on February 2, 2012 the ALJ

¹ Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2012. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Carolyn C. Colvin is substituted for Michael J. Astrue as the defendant in this suit. Under the Act, no further action is necessary to continue the suit. FED. R. CIV. P. 25(d); 42 U.S.C. § 405(g).

confirmed this denial in writing. (R. 17–29) The Appeals Council denial of plaintiff’s subsequent review request made the ALJ’s unfavorable written decision the Commissioner’s final decision. (R. 1) *See* 20 C.F.R. § 404.981.

Along with his Answer (docket #8) to the plaintiff’s Complaint (docket #2), the Commissioner filed a certified copy of the Administrative Record (“R.”) (docket #10), which includes the evidentiary basis for the Commissioner’s findings. Both parties have filed motions for summary judgment and supporting memoranda. (Docket #13, 18, 19, 22, 23) Oral argument on these motions occurred by telephone on October 17, 2013. By standing order this case is before the undersigned magistrate judge for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

II. ALJ Findings and Issues Presented on Appeal

After finding that the plaintiff met the Act’s insured status requirements through December 31, 2012, and had not engaged in substantial gainful activity² since his alleged onset date (R. 19), the ALJ found that the plaintiff’s several *severe*³ impairments included —alcohol abuse, monoclonal gammopathy,⁴ Waldenstrom’s macroglobulinemia,⁵ and degenerative disc

² Substantial gainful activity (“SGA”) is work for pay or profit that brings in over a certain dollar amount per month. 20 C.F.R. § 404.1572. For example, in 2010 that amount was \$1,000, and in 2000 it was \$700; income over this monthly amount (net of impairment-related work expenses) is ordinarily considered to be engaging in SGA, and the amount generally changes annually along with changes in the national average wage indexing series. *See* 20 C.F.R. § 404.1574.

³ Severe impairments significantly limit a claimant’s physical or mental ability to do basic work activities. *See* 20 C.F.R. § 404.1520(c). A single impairment may suffice, or several in combination might achieve the requisite severity. *Id.*

⁴ Monoclonal gammopathy is a blood condition that is marked by the disturbed synthesis of a monospecific immune system protein. *Dorland’s Illustrated Medical Dictionary*, 757, 1176, and 1093 (32nd ed. 2012).

⁵ Waldenstrom’s macroglobulinemia is a plasma cell abnormality resembling leukemia that affects the level of IgM immunoglobulins (antibodies) in the blood. *Dorland’s Illustrated Medical Dictionary* 1093 (32nd ed. 2012).

disease. He then found that none of these impairments met or equaled a listed impairment.⁶ (R. 21), and he further concluded that the plaintiff also had several *non-severe* impairments, including hypertension and atrial fibrillation (labeled by the ALJ as “various cardiac conditions”). (R. 20) Concluding the sequential analysis mandated by the Agency,⁷ the ALJ assessed the functional limitations caused by Mr. Whitaker’s impairments (R. 21-23), and concluded that the plaintiff retained the capacity to perform “light work . . . except he must avoid climbing ladders, ropes, or scaffolds, can occasionally climb ramps and stairs, can occasionally stoop, kneel, crouch and crawl, and must avoid moderate or greater hazards”⁸ (R. 23) In doing so, the ALJ neither relied on vocational testimony nor provided any representative examples; instead, relying solely on SSR 85-15 (a more than twenty-five year old agency ruling), he simply made the conclusory assertion that “approximately 1,600” of these jobs are available in the national economy. (R. 28)

The plaintiff challenges the ALJ’s decision as fraught with “serious” legal error and the product of an unfair hearing procedure. (Docket #13, pp 7-8) He argues that the ALJ conducted the supplemental hearing unfairly, failing either to allow or to address favorable third-party

⁶ The Listing of Impairments is appendix 1 of subpart P of 20 C.F.R. pt. 404. The appendix details impairments the agency considers severe enough to prevent gainful activity, regardless of an individual’s age, education, or work experience. 20 C.F.R. § 404.1525.

⁷ By regulation the statutory definition of “disability” is reduced to five sequential questions. An examiner must consider: whether the claimant (1) is engaged in substantial gainful activity; (2) has a severe impairment; (3) has an impairment which equals an illness contained in the Social Security Administration’s Listings of impairments found at 20 C.F.R. Part 4, Subpt. P, Appx. 1; (4) has an impairment which prevents the claimant from performing past relevant work; and (5) has an impairment which prevents the claimant from doing substantial gainful employment. 20 C.F.R. § 404.1520. If an individual is found not disabled at any step, further inquiry is unnecessary. 20 C.F.R. § 404.1503(a). *Hall v. Harris*, 658 F.2^d 260 (4th Cir. 1981).

⁸ Light work activity involves lifting no more than twenty (20) pounds with frequent lifting or carrying objects weighing up to ten (10) pounds, and a job in this exertional category generally also requires a good deal of walking or standing or, when it involves sitting most of the time, some pushing and pulling of arm or leg controls. 20 C.F.R. § 404.1567(b).

testimony, making an unsupported credibility finding with regard to Mr. Whitaker's testimony, and failing to consider Mr. Whitaker's severe ailments in combination.

III. Summary Recommendation

Based on a thorough review of the administrative record, and for the reasons herein set forth, it is **RECOMMENDED** that the plaintiff's motion for summary judgment be **DENIED**, that the Commissioner's motion for summary judgment be **DENIED**, that the Commissioner's final judgment be **VACATED**, that this matter be **REMANDED** for further administrative proceedings **pursuant to sentence four of 42 U.S.C. § 405(g)**, and that this matter be **STRICKEN** from the court's active docket.

With the **remand** of this case and any resulting award of benefits, pursuant herewith, plaintiff's counsel should be granted an extension of time pursuant to **Rule 54(d)(2)(B)** within which to file a petition for authorization of attorney's fees under 42 U.S.C. § 406(b) until thirty (30) days subsequent to the receipt of a notice of award of benefits from the agency; provided, however, any such extension of time **would not extend the time limits for filing a motion for attorney's fees under the Equal Access to Justice Act.**

No opinion is offered as to what result should emerge on remand, but the procedure that produces that result should be fair, and the reasoning that underpins it should be consistent with articulated legal standards.

IV. Standard of Review

The court's review in this case is limited to determining whether there is substantial evidence to support the Commissioner's conclusion that the plaintiff failed to meet the statutory conditions for entitlement to DIB or SSI. "Under the . . . Act, [a reviewing court] must uphold

the factual findings of the [Commissioner], if they are supported by substantial evidence and were reached through application of the correct legal standard.” *Mastro v. Apfel*, 270 F.3^d 171, 176 (4th Cir. 2001) (quoting *Craig v. Chater*, 76 F.3^d 585, 589 (4th Cir. 1996)). Substantial evidence “consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance.” *Mastro*, 270 F.3^d at 176 (quoting *Laws v. Celebrezze*, 368 F.2^d 640, 642 (4th Cir. 1966)). “In reviewing for substantial evidence, [the court should not] undertake to re-weigh conflicting evidence, make credibility determinations, or substitute [its] judgment for that of the [Commissioner].” *Id.* (quoting *Craig v. Chater*, 76 F.3^d at 589). This standard of review is more deferential than *de novo*. The Commissioner’s conclusions of law are, however, not subject to the same deferential standard and are subject to plenary review. *See Island Creek Coal Company v. Compton*, 211 F.3^d 203, 208 (4th Cir. 2000); 42 U.S.C. § 405(g).

V. Facts

A. Age, Educational, and Vocational Profile

In December 2007, when he alleges his disability began, Mr. Whitaker was 48⁹ years of age. (R. 37) He has a high-school education and a year and a half of college (R. 37-38). His past relevant work included jobs as a trash truck loader, warehouse and mailroom worker, and stocker (R. 40-43, 317, 326). This work as performed by the plaintiff required a medium or greater level of exertion. (R. 27, 318-323, 327-332)

B. Medical Record and Medical Opinion

⁹ At this age the plaintiff was classified as a “younger individual,” but he became an “individual who is closely approaching advanced age” as of his fiftieth birthday. *See* 20 C.F.R. §404.1563.

With a history of hepatitis C, hypertension, elevated liver function studies and ethanol use, during 2007 and 2008 the plaintiff's medical records show that he sought treatment on various occasions at Winchester Medical Center for alcohol withdrawal with abnormal liver function studies, a swollen right knee, and acute gastroenteritis. (R. 442-562)

In contrast, during 2009 Mr. Whitaker sought medical treatment only once, when he was found to have "fairly significant degenerative changes of the cervical spine" and was diagnosed to have degenerative disc disease with significant cervical disc displacement ("grade 1 spondylosis"). (R. 408-415, 432-441) At the time it was also recorded that Mr. Whitaker's pain was exacerbated by both movement and flexion. (R. 434) Significant for disability purposes, the examining physician also noted Mr. Whitaker statement that he had done "a lot of heavy lifting" and that the onset of acute pain had occurred without injury. (R. 437)

Believing that he was suffering from a seizure, in June 2010 the plaintiff returned to the hospital for treatment. (R.419-432) On examination, his condition was diagnosed as acute alcohol withdrawal; and after treatment he was released the following day as "improved." (*Id.*) The results of cardiac and blood testing at this time were "consistent with myocardial injury" (R. 427); the result of a CT head scan demonstrated "mild[ly] diffuse cortical cerebral atrophy (R.430), and the result of a chest radiograph was remarkable for lymph node calcification (R. 431.).

Following a fainting episode two months later, Mr. Whitaker again sought treatment through the emergency room; during which time he began to experience alcohol withdrawal, and was kept in the hospital between August 22 and August 24. (R. 680-84) Blood work and another CT scan once again demonstrated lymph node calcification. (R. 692-693)

Following a traumatic head injury and attendant loss of consciousness, Mr. Whitaker was once again hospitalized in December 2010. (R. 605-661) A cervical spine CT scan demonstrated loss of cervical curvature and “fairly significant” degenerative disc disease at C3/4, C5/6 and C6/7. (R.643-644) As Dr. Nicholas Gamma noted in his later consultation report, blood work on this occasion also demonstrated markedly elevated protein levels. (R. 747)

Less than a month later, on January 5, 2011, Mr. Whitaker returned to Winchester Medical Center with complaints of chest pain and shortness of breath. (R. 572) Tests at that time demonstrated an abnormal EKG requiring a left heart catheterization. (R. 571-73)

Pursuant to an oncology referral, the plaintiff was seen for the first time on February 25, 2011 by Dr. Gamma. A bone scan at that time demonstrated “advanced degenerative changes in the cervical spine for a person of the patient’s age.” (R. 721) A battery of other tests followed, including electrophoresis, a monoclonal protein study, extensive blood work, a bone marrow biopsy, a CT scan and an MRI. (R. 724-34, 740-742, 780-783) On March 21, 2011 Dr. Gamma then made the diagnoses of Waldenstrom’s macroglobulinemia with a 2010 diagnostic onset date and monoclonal gammopathy of unknown significance with a January 2011 diagnosis date. (R. 743) He was, however, unsure whether Mr. Whitaker’s back pain was related to the macroglobulinemia. (R. 803) Utilizing the Kamofsky Performance Scale Index to quantify the plaintiff’s general well-being and to determine whether he could safely receive chemotherapy, Dr. Gamma classified the plaintiff’s functional impairment at 60, indicating that he required occasional assistance but was able to care for most of his personal needs. (R. 747-749) Based on the results of these extensive diagnostic studies and his clinical diagnoses, Dr. Gamma further opined that as of February 25, 2011 and for an “indefinite” subsequent period Mr. Whitaker was

and would be functionally unable to engage in work activity on a regular and sustained basis. (R. 797, 845)

Inter alia, during this diagnostic process, numerous nonfunctioning immune system and nonfunctioning mediastinal lymph glands were identified; the presence of several small gall stones were noted, and extensive, multi-level, degenerative disc disease with “developing radicular pain symptoms” and “obvious low back pain [on motion]” was also objectively demonstrated. (R. 739-748, 783, 803-808, 817-820, 823-827)

Mr. Whitaker was started on his first cycle of R-CVP¹⁰ chemotherapy in March, and on April 3 he was admitted to the hospital in atrial fibrillation¹¹ with a rapid ventricular response rate. (R. 707-712, 757, 781, 803-804) On admission Mr. Whitaker’s heart condition was treated with orally administered Cipro and amoxicillin, and after subsequently developing a Methicillin-resistant *Staphylococcus aureus* (“MRSA”) infection he was placed on intravenously administered vancomycin. (R.757) Based on consultive cardiology findings on April 3, treatment of the plaintiff’s heart arrhythmia was revised to provide for IV administration of Cardizem, with the duration of treatment to be dependent on the results of future renal ultrasound studies and whether any myocardial abscess was found. (R. 757-761) This treatment regime scheduled “for a minimum of 2 weeks” was affirmed on April 6 (R. 713-718, 789), and by April 8, 2011 the plaintiff’s heart arrhythmia and his MRSA-related fevers, chills, malaise and painful urination had abated to a degree sufficient to permit him to be discharged with IV vancomycin

¹⁰ R-CVP is named after the initials of the gout drugs used to treat E-cell non-Hodgkin lymphoma: rituxima (a monoclonal antibody), cyclophosphamide (a chemotherapy drug), vincristine (a chemotherapy drug), and prednisolone (a steroid). (See R. 762)

¹¹ Atrial fibrillation is “an arrhythmia in which minute areas of the atrial myocardium are . . . uncoordinated . . . causing a totally irregular, often rapid ventricular rate.” *Dorland’s Illustrated Medical Dictionary*, 701 (32nd ed. 2012).

treatment for the MRSA infection to continue on an outpatient basis for two weeks. (R. 762-763, 773-774, 781-782, 811-815) Although the plaintiff's lymphoma was essentially unchanged (R. 781), the oncologist deferred the next cycle of chemotherapy until completion of the plaintiff's treatment of the MRSA infection. (*Id.*)

On April 19, 2011 the plaintiff returned to the oncologist for follow-up office visit in connection with his cancer treatment. (R. 801-802) Dr. Gemma noted the plaintiff had made only a "partial response" to chemotherapy. (R.801) The medical record during ensuing months documents both Mr. Whitaker's significant cancer and other health-related conditions.

For example, on May 2 Dr. Gemma described the plaintiff's malignancy as "slowly improving" with chemotherapy. (R. 796) On June 3 he recorded the fact that the plaintiff was "tolerating [chemotherapy] well" (R. 834-835), and when seen at the time of his final chemotherapy injection on July 15, Dr. Gemma found Mr. Whitaker to show "substantial improvement, but with incomplete resolution" of his "underling incurable hematologic malignancy." (R. 831-832) At the same time Dr. Gemma additionally took note of the fact that the plaintiff was "continuing to struggle with his chronic lumbar pain [of uncertain etiology] . . . which ha[d] not responded well to analgesics" and of the fact that Mr. Whitaker was also experiencing episodes of "chest uneasiness" and exercise-related shortness of breath. (*Id.*)

In response to an inquiry by plaintiff's attorney, on October 6, 2011 Dr. Gemma reported that the plaintiff's incurable hematologic malignancy met the requirements of listing 13.11D (R. 839), and less than one month later Dr. Gemma amplified his opinion by noting that the plaintiff's incomplete response to chemotherapy indicated that his life expectancy would be on the short-end of five/ten year longevity spectrum. (R. 842, 845).

When Mr. Whitaker's back issues did not improve with therapy, on November 1 Dr. Gamma concluded that the condition was due to severe degenerative disease; he additionally concluded that Mr. Whitaker appeared to have an atypical seizure/syncope disorder, and he deferred the institution of a maintenance therapy regime for Mr. Whitaker's lymphoma, despite his "partial response" to chemotherapy, "when" his Mr. Whitaker's IgM level again started to increase. (R. 843)

C. State Agency Evaluations

Although in August 2010 the initial state agency medical reviewer took note of the plaintiff's "severe" hepatitis C, "minor motor seizures," high blood pressure, "non-severe" alcohol addiction disorder and diffuse cortical cerebral atrophy, his assessment of the plaintiff's residual functional capacity focused on Mr. Whitaker's lumbo-sacral disc disease and attendant back pain complaints. (R. 100-109, 122-132) In his opinion the plaintiff was capable of performing a full range of light work. (R.108, 118) Five months later, on reconsideration a second medical reviewer affirmed the same residual functional capacity. (R. 89-99, 122-1320) Both opinions, however, predate the diagnoses of monoclonal gammopathy and Waldenstrom's macroglobulinemia; therefore, neither of these medical reviewers made any assessment of their impact on the plaintiff's residual functional capacity.

D. Testimony

At the initial administrative hearing, only Mr. Whitaker testified. Therein, he described his leukemia-like plasma cell abnormality as "a kind of cancer," and he discussed the adverse impact of chemotherapy and pain medication (hydrocodone) on his functional ability. (R.45-46, 54-57, 59-61) Discussing his pain, he noted that he has never been prescribed any assistive device, but walked with a cane that he purchased for himself. (R.46) Although doctors had

prescribed physical therapy to help with his pain, Mr. Whitaker explained that he has been unable to afford the treatment. (R. 48) He described his “body” pain as “mostly in [his] spine,” severe enough to interfere with his ability to sleep, to make gripping difficult, and to be debilitating to the extent that he must rely on others to perform most household chores (R. 48, 59, 61-62). Asked about the effects of his treatment for the leukemia-like plasma cell abnormality, Mr. Whitaker explained its effects on his daily life, including the vomiting, dizziness, falls, appetite loss, blurred vision and bleeding gums that result from the chemotherapy treatment. (R. 54-57, 60)

Although Mr. Whitaker had available and offered the supporting testimony of Ms. Debbie Massiah, contrary to the agency’s regulations specifically permitting witnesses to appear “at a hearing in person” and the claimant to “present evidence,” the ALJ refused to hear her testimony and allowed only the written “submit[tion] of a third party statement” (R. 62) 20 C.F.R. § 404.950(a)-(c) and § 416.1450(a)-(c). In her subsequently submitted statement under oath, Ms. Messiah detailed Mr. Whitaker’s difficulty sleeping, difficulty standing for any extended period, difficulty moving around the house, inability to afford medical care, and shortness of breath. (R. 363-733) In addition, she affirmed the fact that the plaintiff’s care in large part is undertaken by Ms. Massiah, including cooking, cleaning, shopping, and running the household. (*Id.*)

Several weeks following the October 2010 administrative hearing, the ALJ submitted certain written questions to Dr. Robert Sklaroff, a designated “medical expert,” seeking his yes/no responses to seven questions “related solely to malignant neoplastic diseases.”¹² (R. 856-859) In his only partially legible handwritten response, which makes no reference to any specific

¹² Quotation is bolded, capitalized and underlined in the original. (R.857, 858)

listing, this non-treating, non-examining, physician opined that Mr. Whitaker's neoplastic disease condition was not of listing-level severity because "he is not dying." (R. 857-858, 861, 865-866)

Pursuant to a request by plaintiff's counsel for the opportunity to cross examine, the ALJ scheduled a telephonic hearing for February 27, 2012 "limited pursuant to HALLEX I-2-6-70."¹³ In other words, the ALJ "limited" the supplemental hearing to the single question as to "whether or not [the plaintiff's condition] meets or equals the listing for malignant neoplastic disease," irrespective of the obvious fact that this medical witness' response to the sixth numbered interrogatory reports approximately twenty additional diagnoses which in combination could meet or equal an impairment enumerated in the listings. (R.400, 69-70, 76-79)

In accord with the ALJ's narrow inquiry limitation, Dr. Sklaroff opined that the plaintiff's malignant neoplastic disease was not of listing-level severity, because he deemed Mr. Whitaker's incomplete response to chemotherapy not to be unusual and because the disease process was stable. (R. 85-87) As plaintiff's counsel cogently noted in his post-hearing brief, there were appropriate questions for the ALJ to consider concerning Dr. Sklaroff's credibility and about the basis for Dr. Sklaroff's testimony which failed to consider *inter alia* either listing 13.05 (Lymphoma), the side effects of chemotherapy or the interrelated nature of the plaintiff's many diagnosed conditions. (R. 861-863) None of these issues was discussed in the ALJ's later written decision.

¹³ HALLEX, the SSA's "Hearings, Appeals, and Litigation Law Manual," is a set of internal guidelines for processing and adjudicating claims under the Social Security Act. *Soc. Sec. Law Ctr., LLC v. Colvin*, 2013 U.S. App. LEXIS 21236, *5, n. 3.

VI. Analysis

In his brief and during oral argument, Mr. Whitaker's attorney raised multiple substantive and procedural issues, arguing in essence that the ALJ's credibility determination was made without evidentiary support, that the ALJ failed to accord Mr. Whitaker a fundamentally fair hearing process, and that these errors warrant a **sentence four** remand.

A. Plaintiff's Credibility

Essentially, the plaintiff's first contention on appeal is that the ALJ's adverse credibility determination (R. 23-27, 48), concerning the nature and extent of his subjective complaints, was based on an incomplete and mischaracterized reading of the evidence, most specifically the limited improvement of his condition following six rounds of chemotherapy. *Inter alia*, he also points to the ALJ's failure either to mention or consider proffered corroborative third-party testimony, the fully supportive statements of the plaintiff's treating oncologist, the incurable nature of the plaintiff's lymphoma, the ALJ's chastisement of the plaintiff for not being on pain medication despite the plaintiff's inability to pay for insurance or for any pain management or other treatment,¹⁴ and the ALJ's failure to acknowledge the objective medical evidence that demonstrated the nature and extent of the plaintiff's degenerative back condition. (Docket #13, pp 20-24; *see e.g.*, R. 25, 48, 289, 363-373, 391, 441, 745, 747-748, 800-801, 831, 843, 858)

Without question, this court is bound to accept the ALJ's credibility determinations absent "exceptional circumstances." *Eldeco v. NLRB*, 132 F.3^d 1007, 1011 (4th Cir. 1997) "When factual findings rest upon credibility determinations, they should be accepted by the reviewing court absent exceptional circumstances." *Id.* (internal citations omitted). And exceptional

¹⁴ *See* Social Security Regulation ("SSR") 96-7p ("the adjudicator must not draw any inference about an individual's symptoms and their functional effects from a failure to seek or pursue regular medical treatment without first considering any explanation that the individual may provide, or other information in the case record that may explain infrequent or irregular medical visits or failure to seek medical treatment"); *see also Lovejoy v. Heckler*, 790 F.2^d 114, 117 (4th Cir. 1986).

circumstances come into play only “where a credibility determination is unreasonable, contradicts other findings of fact, or is based on an inadequate reason or no reason at all.” *Id.* (internal citations omitted).

Therefore, despite the fact that this court may have weighed the evidence differently, on review one is constrained to conclude that no “exceptional circumstance” has been shown to justify remand on the basis of a flawed credibility determination.

Credibility is evaluated using a required two-step process, and that process was followed by the ALJ. *See Craig v. Chater*, 76 F.3^d 858, 594 (4th Cir. 1996). He acknowledged that the medical evidence of record shows impairments that would create the symptoms about which the plaintiff complained, and he evaluated their intensity and effect. (R. 16) In doing so, the ALJ concluded that plaintiff’s description of his symptoms clashed with the medical record. He discussed Mr. Whitaker’s testimony; he evaluated the various medical reports, and he provided a logical basis for his conclusions. Therefore, “as long as substantial evidence in the record supports the conclusion, this court must give great deference to the ALJ’s credibility determinations.” *Caudle v. Colvin*, 2013 U.S. Dist. LEXIS 155962, *42 (EDVa. Oct. 15, 2013) (citing *Eldeco, Inc. v. NLRB*, 132 F.3^d 1007, 1011 (4th Cir. 1997)).

In considering the plaintiff’s broad claim of error by the ALJ in making his credibility assessment, a couple of additional points merit mention as part of this court’s response to the plaintiff’s claim. Although the plaintiff correctly notes that the ALJ failed to address specifically the testimony of certain third-parties, the ALJ affirmatively represented that he considered opinion evidence (R. 23), and as the Commissioner argues, the ALJ is not obligated to discuss every piece of evidence in making his determination. *See Diaz v. Chater*, 55 F.3^d 300, 307-308 (7th Cir. 1995). He is decisionally obligated only to “build an accurate and logical bridge from

the evidence to [his] conclusions so that [the court] may afford [the plaintiff] a meaningful review of the [Commissioner's] ultimate findings.” *Blakes ex rel. Wolfe v. Barnhart*, 331 F.3^d 565, 569 (7th Cir. 2003). On review, the ALJ's decision meets this minimum standard.

It also merits mention that contrary to the plaintiff's argument (docket #13, p 20) the ALJ's decision nowhere states that Mr. Whitaker's subjective complaints are “unsupported by the evidence of record.” In point of fact, he disputes only that portion pertaining to the “intensity, persistence, and limiting effects” of his symptoms, not the underlying existence of his complaints. (R. 24) Similarly, the assertion that the ALJ chastised Mr. Whitaker for failing to take pain medication regularly is a significant overstatement. (Docket #13, pp 20-22) The ALJ in fact focused not on what Mr. Whitaker was taking or not taking, but on what treating physicians had recommended or prescribed for back issues, and it is on this evidence that the ALJ concluded Mr. Whitaker had a “generally conservative treatment history.” (R. 26) Likewise, the ALJ's characterization of Mr. Whitaker's improvement following chemotherapy as “substantial” may exaggerate the issue; however, consistent with his obligation to evaluate credibility the ALJ provides a logical basis for his credibility assessment, and it is consistent with his other findings. *See Hatcher v. Sec'y, Dep't of Health & Human Servs.*, 898 F.2^d 21, 23 (4th Cir. 1989) (noting that proper credibility determinations “refer specifically to the evidence informing the ALJ's conclusion”).

B. “Legal Error” Claim

On appeal, Mr. Whitaker separately assigns “legal error” requiring remand on the basis of the ALJ's hearing-related irregularities and attendant failure to consider all of the evidence. In support of this claim the plaintiff argues that the ALJ erred by denying his request during the first hearing to present favorable third party testimonial evidence in violation of HALLEX I-2-6-

60, by failing to conduct the supplemental hearing fairly or even in rudimentary conformity with HALLEX I-2-6-70 and HALLEX I-2-5-39, and by failing to evaluate the combined impact of Mr. Whitaker's impairments or disabilities on his ability to function, rather than assess separately.

Outlining the ALJ's obligation to hear and consider the testimony of claimants and witnesses, HALLEX I-2-6-60 in relevant part provides,

The ALJ determines the subject and scope of claimants' and witnesses' testimony, and how and when they will testify at the hearing (e.g., the ALJ may decide to use the question and answer method or allow the claimant or witness to testify in his or her own way). If a claimant or witness requests to testify in a particular way, or at a particular time during the hearing, and has a good reason for making the request, the ALJ should make a reasonable effort to accommodate the person. If the ALJ does not grant the request of a claimant or witness to testify in a particular time or way, the ALJ shall state on the record the reasons the request is being denied.

HALLEX I-2-6-60, Testimony of Claimants & Witnesses. Outlining the use of medical expert testimony at the administrative hearing, HALLEX I-2-6-60, section C, provides in relevant part,

The ALJ will ask the ME questions designed to elicit clear and complete information. The claimant and the representative have the right to question the ME fully on any pertinent matter within the ME's area of expertise.

HALLEX I-2-6-70.C, Testimony of a Medical Expert. And outlining the procedural issues relevant to the receipt of medical expert testimony HALLEX I-2-5-39, section A. provides in relevant part,

Before the [medical expert] testifies, the ALJ must . . . give the claimant and the representative an opportunity to ask the ME questions about his or her professional qualifications.

HALLEX I-2-5-39.A. The Medical Expert's Testimony.

Before addressing this claim of error, a caveat regarding the plaintiff's reliance on HALLEX guidelines is in order. The Fourth Circuit "has not addressed the meaning and effect

of HALLEX, and circuits are split with respect to whether the agency must follow its HALLEX guidelines.” *Hoy v. Colvin*, 2013 LEXIS 109612, *13-14 (WDVa. Aug. 5, 2013). Compare e.g., *McCoy v. Barnhart*, 309 F. Supp.2^d 1281, 1284–1285 (DKan. 2004) (HALLEX held to be nonbinding on the Commissioner); with *Newton v. Apfel*, 209 F.3^d 448, 459 (5th Cir. 2000) (holding that HALLEX violations can be grounds for relief when a claimant shows prejudice as a result of the violation).

Irrespective of whether these guidelines have or do not have some binding regulatory effect, they contain policy statements and procedures from the Appeals Council that are intended to provide direction as to how the administrative hearing process should be conducted by the presiding ALJ. In short, at the very least, they are statements of “best practices” and a thoughtfully considered articulation of appropriate due process protections attendant to the agency’s administrative hearing process. As such, they are patently relevant for the court to consider as part of the plaintiff’s claim of legal error by the ALJ.

Moreover, in support of this claim of error, Mr. Whitaker also points to case-law. For example, as decisional support for his contention of ALJ error as the result of his refusal to allow third-party witness Debbie Massiah to testify and his attendant explicit failure to consider her testimony, he cites the court to *Burnett v. Comm’r of Soc. Sec. Admin.*, 220 F.3^d 112, 122 (3rd Cir. 2000) (holding that “the ALJ must also consider and weigh all of the non-medical evidence before him);” accord *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3^d 1050, 1053 (9th Cir. 2006) (“[T]he ALJ was required to consider and comment upon the uncontradicted lay testimony, as it concerned how [the plaintiff’s] impairments impact his ability to work.”). At least one court within this circuit has agreed, remanding because the ALJ’s negative credibility finding failed to

account for the testimony of lay witnesses. *See Young v. Barnhart*, 284 F. Supp.2^d 343, 355 (WDNC. 2003).

Given the ALJ's dismissive rejection of the proffered testimony of the third-party witness and his abject failure to follow either relevant HALLEX guidelines or decisional authorities, one is compelled to conclude in the instant case the ALJ failed to perform his fundamental judicial duty to insure that the plaintiff's individual interests were protected. This error is fatal regardless of the Commissioner's contention that an ALJ is not required to "address every piece of evidence in the record." (Docket 13, p 14)

Ms. Massiah's later third-party submission clearly bolsters Mr. Whitaker's testimony. (R. 24, 363-73) Moreover, it is strongly bolstered by the much earlier May 28, 2010 Disability Report prepared by an agency field office interviewer, wherein D. Adams specifically records that "from the moment I saw him . . . it was obvious that [Mr. Whitaker] was in a great deal of discomfort standing and walking" due to his acute back pain. (R. 289) Therefore, regardless of whether the HALLEX regulations were violated by the ALJ's refusal to allow Ms. Massiah's live testimony, the ALJ's failure to consider the relevant evidence from lay witnesses constitutes reversible error. *See Gordon v. Schweiker*, 725 F.2^d 231, 235 (4th Cir. 1984) ("We cannot determine if findings are unsupported by substantial evidence unless the Secretary explicitly indicates the weight given to all of the relevant evidence.").

The ALJ's failure to conduct the supplemental hearing in conformity with HALLEX I-2-6-70 similarly warrants reversal and remand. Irrespective of what force the HALLEX should receive, the ALJ in this case explicitly informed plaintiff's counsel that HALLEX I-2-6-70 would govern the supplemental hearing. (R. 68, 400) Thus, the Commissioner cannot now argue the contrary. With the ALJ's explicit adoption of the HALLEX guideline, it became his

affirmative duty to “summarize the testimony for the [medical expert] on the record,” . . . to “qualify [him or her] by eliciting information regarding his or her impartiality, expertise, professional qualifications, etc.,” and to “ask the claimant and the representative if they have any objections” or “rule on any objections.” HALLEX I-2-6-70.

However, when plaintiff’s counsel attempted to question the medical witness about his credentials, the ALJ immediately cut-off the inquiry on the grounds that “it doesn’t matter because here’s the bottom line. The Commissioner decides who are the medical experts.” (R. 71) Similarly, when plaintiff’s counsel tried to raise questions concerning the effects of Mr. Whitaker’s medical treatment on his ability to work, asking “Can you form an opinion as to what symptoms . . . the claimant [is] exhibiting from these diagnoses?” (a line of inquiry specifically permitted by the regulation), the ALJ refused to allow the questioning, telling plaintiff’s attorney, “Well, Counsel, he wasn’t asked that.” (R. 79)

Having definitively said HALLEX would govern the supplemental hearing, simple fairness demands that the ALJ keep his promise, and having failed to do so, the case should be remanded. *See, e.g., Marsh v. Harris*, 632 F.2^d 296, 299 (4th Cir. 1980) (remand held to be required where the ALJ promised to obtain further evidence from a claimant’s physician and then failed to do so).

Even more clearly, the ALJ erred in failing to consider all of Mr. Whitaker’s impairments in combination. The ALJ never discussed whether Mr. Whitaker’s severe impairments, in conjunction, rendered him unable to work. (R. 17-28) In fact, significant medical and opinion evidence upon which he relied, most glaringly the state agency medical assessments, are dated prior to the incurable lymphoma diagnosis. (R. 17–28)

Despite Dr. Gemma's specialized knowledge of Mr. Whitaker's battle with this disease, his familiarity with Mr. Whitaker's multiple other chronic medical issues and his participation in the extensive and well-documented diagnostic work-up leading to the diagnoses of an incurable hematologic malignancy and significant degenerative disc disease, the ALJ dismissively accorded "little weight" to the opinion of this treating oncologist, because he deemed it inappropriate for Dr. Gemma to discuss the "ultimate conclusion as to disability" and because the opinion itself was "not accompanied by any detailed clinical findings," was (without any explanation) "inconsistent with his treatment notes," and was "inconsistent" with the absence of any vertebral percussive tenderness on one occasion in March 2011. (R. 26-27)

Choosing instead, the ALJ gave "great weight" to the opinion of Dr. Sklaroff, a non-treating, non-examining internist. And on the basis of his opinion that Mr. Whitaker's incurable hematologic malignancy was not of listing-level severity, the ALJ made his non-disability conclusion. By doing so, the ALJ in effect decisionally considered Mr. Whitaker's neoplastic disease alone and made no assessment of the combined effects of the plaintiff's impairments. (R. 22)

Although the Commissioner correctly argues that the ALJ addressed each of Mr. Whitaker's severe impairments in turn, as plaintiff's counsel also correctly observed, the ALJ "only paid lip service" to evaluating these in combination. *See Evans v. Sullivan*, 928 F.2d 109, 111 (4th Cir. 1991); *see* 20 C.F.R. § 404.1523 and § 416.923 ("[W]e 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.").

Simply reciting that no treating or examining source had reported Mr. Whitaker's disability on the basis of a combination of impairment without any meaningful explanation is

inconsistent with the ALJ's duty to articulate the underlying basis for his decision. *See Cook v. Heckler*, 783 F.2d 1168, 1174 (4th Cir. 1986) ("the [Commissioner] must make a specific and well-articulated finding as to the effect of the combination of impairments"). Likewise, the ALJ's conclusory statement that he had considered all of the claimant's impairments in combination does not constitute a decisionally consideration of the combined effects of all of the plaintiff's impairments and disabilities. *Id.* As the Fourth Circuit held in *Walker v. Bowen*, 889 F.2d 47, 50 (4th Cir. 1985), when considering a claimant with multiple impairments, the ALJ "must consider the combined effect of [his] impairments and not fragmentize them."

This failure along with the ALJ's failure to address bolstering evidence in formulating his credibility analysis and failure to follow the very regulations he represented would call the Commissioner's final decision in to serious question, which warrant remand.

C. Fundamental Fairness Denial

Although the legal errors discussed above suffice to remand the case, the serious issues of procedural fairness raised by this appeal merit discussion. Throughout the two hearings the ALJ's words fairly dripped with sarcasm. He was continually patronizing and dismissive. He belittled a man battling a rare and incurable cancer. And beginning almost immediately with his, "sir, you need to be quiet and just listen" and with his refusal to allow supporting witnesses, the ALJ created an atmosphere totally lacking in sympathy, understanding, or personal attention.

In the supplemental hearing, the same unprofessional attitude was equally, if not more, evident from the outset. He continually referenced the supposed neutral medical expert as "Dr. Bob" and repeatedly intervened to prevent the plaintiff's attorney from questioning "Dr. Bob" either about past medical embarrassments or about his basic qualifications. (R. 71-75) When

plaintiff's counsel subsequently submitted these arguments in writing (R.389-390), including allegations that the witness had perjured himself, the ALJ dismissively dealt with them *sub silentio*. In addition, throughout the supplemental hearing the ALJ intervened on multiple occasions to provide the doctor with answers—finding helpful quotations in the record (R. 87) and cutting off questioning (R. 82). And when plaintiff's attorney undertook to question "Dr. Bob" about the plaintiff's life expectancy given the incurable nature of his lymphoma, the ALJ interjected saying, "the comment of he's not dying, I take that with a grain of salt. Your client's not going to live forever, neither are you, neither am I, neither is (*sic*) Dr. Bob, nor Mary Ann." (R. 83)

One may argue that this condescending, overly familiar, dismissive and unprofessional tone may not achieve the high bar necessary to require remand or reversal on the basis of ALJ bias; however, it patently demonstrates behavior by the ALJ that is inconsistent with his obligation to render a fair and impartial judgment. *See Card v. Astrue*, 752 F. Supp. 2^d 190, 191 (DCConn. 2010) ("To prove bias, the plaintiff must "show that the ALJ's behavior, in the context of the whole case, was 'so extreme as to display clear inability to render fair judgment.'") (quoting *Liteky v. United States*, 510 U.S. 540, 551 (1994)).

"Due process requires that a Social Security disability claimant be offered a "full and fair" hearing." *Davenport v. Astrue*, 417 Fed. Appx. 544, 546 (7th Cir. 2011) (citing *Ventura v. Shalala*, 55 F.3^d 900, 902 (3rd Cir. 1995)). *See Richardson v. Perales*, 402 U.S. 389, 401-402 (1971) ("the extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss") (quoting *Goldberg v. Kelly*, 397 U.S. 254, 262-263 (1970) (internal quotation marks omitted).

“This standard is violated if a claimant is not offered a chance to present evidence or where the ALJ exhibits bias or animus against the claimant during a hearing.” *Davenport*, 417 Fed. Appx. at 547-547). And it was in the case now before the court.

Since the ALJ in this case is no longer with the agency, this court need not address whether his conduct achieves the lesser bar needed to remand to another judge. *See, e.g., Sutherland v. Barnhart*, 322 F. Supp.2^d 282, 291 (EDNY. 2004) (cataloging how other courts have decided this issue). Nevertheless, on remand the agency should remember that “[o]ne of the very objects of law is the impartiality of its judges in fact and appearance.” *Liteky v. United States*, 510 U.S. 540, 558 (1994)

VII. Proposed Findings

As supplemented by the above summary and analysis and on the basis of a careful examination of the full administrative record, the undersigned submits the following formal findings, conclusions and recommendations:

1. The plaintiff’s past relevant work included jobs as a trash truck loader, warehouse and mailroom worker, and stocker;
2. This past relevant work was all exertionally medium or heavier;
3. The plaintiff has not engaged in substantial gainful activity since his alleged disability onset date of December 11, 2007;
4. At a minimum the plaintiff’s *severe* impairments include alcohol abuse, monoclonal gammopathy, waldenstrom’s macroglobulinemia, and degenerative disc disease;
5. The Commissioner’s final decision is plagued by legal error;
6. Exceptional circumstances have not been shown by the plaintiff to justify a remand on the basis of a flawed credibility determination;
7. The ALJ failed to account for the uncontradicted evidence of a third-party witness;

8. The ALJ erred by failing to hear the testimony of the third-party witness;
9. The ALJ failed to comply with his self-imposed procedural demands of HALLEX I-2-6-70;
10. The ALJ failed to consider the plaintiff's impairments and disabilities in combination;
11. The ALJ's hearing behavior was inconsistent with his duty and obligation to afford the plaintiff a fair and hearing and an impartial judgment; and
12. The Commissioner's final decision should be vacated and remanded pursuant to **sentence four** of 42 U.S.C. § 405(g) for further consideration consistent herewith.

VIII. Transmittal of the Record

The clerk is directed to transmit the record in this case immediately to the presiding United States district judge and to transmit a copy of this Report and Recommendation to all counsel of record.

IX. Notice to the Parties

Both sides are reminded that, pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, they are entitled to note objections, if any they may have, to this Report and Recommendation within fourteen (14) days hereof. **Any adjudication of fact or conclusion of law rendered herein by the undersigned to which an objection is not specifically made within the period prescribed by law may become conclusive upon the parties.** Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1) as to factual recitals or findings as well as

to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objections.

DATED: This 8th day of January 2014.

SI James G. Welsh
United States Magistrate Judge