

**In the United States District Court for the
Northern District of Georgia
Atlanta Division**

Charles R. Binion , Plaintiff, vs. Michael Astrue , Commissioner of Social Security, Defendant.
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Civil Action No.
1:09-cv-03028-TWT-GGB

Brief Of Plaintiff
in support of his
Social Security Appeal

Certificate of Interested Parties

The undersigned, counsel of record for the plaintiff, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

- 1) Michael J. Astrue, Commissioner of Social Security
- 2) Charles R. Binion, Appellant-Plaintiff
- 3) The Honorable Thomasine B. Carter, Administrative Appeals Judge
- 4) Kurt G. Ehrman, Appeals Officer
- 5) James A. Glenn Jr., Esq., Attorney for Plaintiff below
- 6) The Honorable Everna Gwynn-McCray, Administrative Appeals Judge
- 7) Charles L. Martin, Esq., Attorney For Plaintiff
- 8) The Honorable Dana E. McDonald, Administrative Law Judge
- 9) R. David Powell, Esq., Assistant United States Attorney
- 10) Roy Satterwhite, Esq., Assistant Regional Counsel;
- 11) Mary Ann Sloan, Esq., Chief Counsel, Region IV
- 12) John C. Stoner, Esq., Branch Chief;
- 13) Dennis R. Williams, Esq., Deputy Regional Chief Counsel
- 14) Lynn M. Winship, Esq., Attorney for Plaintiff below
- 15) Sally Quillian Yates, Esq., Acting United States Attorney

/s/ Charles L. Martin

Charles L. Martin, Attorney for Plaintiff

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1. Issues

The general issue is whether the decision of the Commissioner is supported by substantial evidence. The specific issues are as follows:

A. Extra-record evidence.

- The ALJ is required to issue a decision based on evidence in the hearing record. The ALJ here relies heavily on several documents which are not in the record. Did the ALJ commit error when he relied on evidence outside the record?

B. Mental limitations.

- The ALJ is required to state the weight he gave all medical opinions, and explain why. The ALJ here ignored Dr. Bach's finding of marked memory limitations, and many of the non-examining consultant's limitations. Where the ALJ fails to evaluate all the opinions of mental limitations, is his conclusion unsupported by substantial evidence?

C. Education.

- The ALJ may not rely on formal education where other evidence shows educational achievement was lower. The ALJ here cites evidence which does not exist, and would not contradict testing, giving no reason to doubt 5th grade test scores. Where the ALJ cites only evidence consistent with testing, does he err by ignoring the test results?

D. Frostbite.

- The ALJ is required to give great weight to a VA disability finding. The ALJ here acknowledged the VA disability finding, but ignored it claiming—without showing—that the standard is different. Where the ALJ fails to show why the VA disability decision is not entitled to great weight, has he erred?

E. Obesity.

- The ALJ is required to evaluate the effects of obesity on the claimant's other impairments. Here the ALJ made contradictory findings that obesity does, and does not, affect Binion's ability to work. Where the ALJ makes contradictory findings and fails to address how obesity impacts other impairments, has he erred?

2. Statement of the case

A. Procedural history

Charles Binion applied for Disability Insurance Benefits on June 30, 1999, which was denied initially on October 28, 1999, and after a hearing on April 6, 2001,

which decision became final after exhausting administrative remedies.¹ He filed the current claim October 22, 2002, claiming disability since August 28, 1998.² His date last insured is December 31, 2003.³ He requested reopening of his earlier decision based on new evidence, but the ALJ here declined to reopen it.⁴ He has panic attacks twice a week, but cannot afford to continue treatment for them.⁵

Binion's claim was denied after a hearing,⁶ but the Appeals Council reversed and remanded for a new hearing.⁷ The claim was again denied after a hearing.⁸ Binion has exhausted his administrative remedies,⁹ and this action is properly before the court for review under 42 U.S.C. § 405(g) pursuant to a timely-filed civil action.

B. Statement of the facts

(1). Age, education and work experience

Binion was born October 2, 1960, so he was 43 years old when last insured in 2003, and 48 when the ALJ decision was issued.¹⁰ He has a high-school diploma¹¹ in "lower level" classes,¹² but he reads at the fifth-grade level¹³ and has always worked as a maintenance laborer.¹⁴ Binion said he never had to pass a test to get his

¹ R14.

² R96.

³ R17.

⁴ R14.

⁵ R17-18.

⁶ R33.

⁷ R81.

⁸ R14.

⁹ R5.

¹⁰ R96, 11.

¹¹ R129.

¹² R1042.

¹³ R348.

¹⁴ R124.

driver's license.¹⁵ He also said he has never made change.¹⁶

(2). *Summary of impairments*

Binion said he was disabled due to the combination of his mental condition, including panic attacks; osteoarthritis in the back, left ankle, and neck; surgery on his right knee; sleep apnea; and high blood pressure. He can sit for about 30 minutes, walk 2–3 hours, and stand for about an hour before he starts “hurting and getting impatient.” His disability stemmed from an accident at work in which he injured his forehead, left ankle, neck, and back.¹⁷ He does not sleep well, and takes 15–20 minute naps.¹⁸ He has trouble bending, standing, walking, and with depression that makes him short tempered. He has no interest in people¹⁹ He has to take breaks every 40 minutes, gets impatient, has panic attacks, has no strength to finish things, and has no patience for written instructions.²⁰

Binion's wife said he walks around the house and garden, helping in the garden when his back and neck aren't hurting, watches a little TV, goes to a support group at church on Mondays, and may go with her to the Post Office, but he can't do labor as he did before, and he can't think well because of panic attacks, arthritis, and sleep problems. He needs help getting up and down the steps at the VA, as well as lifting, bending, and stooping, and he has trouble staying in one position. He

¹⁵ R1085.

¹⁶ R1130.

¹⁷ R123.

¹⁸ R139.

¹⁹ R141–42.

²⁰ R143.

tries to go out when he can, and sometimes drives. He eats most meals out, and helps “the baby” do laundry, but it takes them all day to do it. He goes shopping with help “very seldom.” He can’t remember to pay bills or take his medicine, and has panic attacks which causes him to visit other people or talk on the phone “very seldom.” He has no hobbies or interest, but spends most of his time watching TV, sleeping, or reading the Bible, but he forgets what he just read. He lives with his parents and family, but doesn’t communicate with them well. Sometimes he needs help fastening buttons.²¹

(3). *Medical evidence*

While the administrative record contains treatment records from July 1999 through 2008, the ALJ restricted his consideration to the period after the prior hearing denial of April 6, 2001, and prior to the December 31, 2003, date last insured.²² As only those records are legally relevant to the ALJ’s decision, the summary of the medical evidence will be restricted to that period unless relevant to the ALJ’s decision. Please note that the VA records are scattered all over the place, sometimes in bizarre and seemingly random order, sometimes in chronological order, sometimes reverse, sometimes random, and have numerous duplicates. They are presented here in chronological order regardless of their order in the record. An attempt is made to identify duplicates.

In September 1999, when Binion was evaluated at a VA facility, he had multiple

²¹ R132–38.

²² R14.

somatic complaints, and admitted to being depressed. He reported toe numbness due to frostbite, painful bunions for four years, chest discomfort, upper-lip numbness due to facial trauma in the Army, tinnitus, chronic neck pain, chronic back pain, and previous right knee surgery.²³ He returned two months later after a motor-vehicle accident complaining of numbness, discoordination, and tinnitus. A neurological exam was normal.²⁴ A week later he returned complaining of chest pain, though to be atypical for heart-related pain, and depression. A consultation with mental health was scheduled.²⁵ About a week later he called back complaining of continued back pain, and was given an appointment.²⁶ In December Binion was evaluated for back pain, and was thought to have musculoskeletal pain.²⁷

In January 2000, he was treated for pain in his feet. He had bunions and burning in his toes, which was diagnosed as neuropathy.²⁸ X-rays demonstrated moderately severe degenerative joint disease in his toes.²⁹ Later that month he submitted to a psychiatric evaluation. He was referred due to a depressed affect coupled with somatic complaints. He reported that he left work in 1998 due to pain in his back and knee. He said he stays home most of the time, and has gained 60 pounds. He has little energy. He said he has had memory problems since a motor-vehicle accident in 1987 in which he suffered a head injury, resulting in a 3-week

²³ R233.

²⁴ R231.

²⁵ R230.

²⁶ R164, duplicated at 204.

²⁷ R229.

²⁸ R227, duplicated at 322.

²⁹ R174, duplicated at 208.

hospitalization. Subsequently he was charged with domestic violence, and was drinking heavily. He was put on Elavil, but did not like the side effects. Currently he was appealing a Social Security denial. Dr. Mixon diagnosed a depressive disorder, no otherwise specified. She was considering obtaining a neuropsychological evaluation.³⁰ He also had a treadmill test that month, which revealed no abnormalities.³¹

In February Binion was treated for pain in his cervical and thoracic spine, chest discomfort, and depression.³² Anemia and depression were diagnosed,³³ and he was found to have a BMI of 35, and was given weight-loss counseling.³⁴ Chest x-rays were normal.³⁵ Late that month he was seen for tinnitus, and was advised to avoid exposure to noise.³⁶ Hearing testing was normal.³⁷

In March Binion was seen for hand pain, and diagnosed with arthritis. X-rays were normal.³⁸ He was seen several times in April for back pain, and educated on reducing back pain and on weight loss.³⁹ He saw his psychiatrist, Dr. Mixon, again that month complaining of insomnia, daytime sleepiness, and weight gain. She decided to order neuropsychological testing.⁴⁰

³⁰ R164, duplicated at 203.

³¹ R248.

³² R163, 162, 161.

³³ R162.

³⁴ R161.

³⁵ R173, duplicated at 208.

³⁶ R225, duplicated at 321.

³⁷ R159.

³⁸ R157; 158; 197; 172, duplicated at 207.

³⁹ R158, duplicated at 253; 193.

⁴⁰ R313.

In May 2000, Binion underwent neuropsychological testing by Fredric E. Rose, Ph.D., although records which appear to be part of the same evaluation are dated in July.⁴¹ Even assuming the different-dated pages are part of the same examination, the report is incomplete. In the clinical interview, Binion attributed most of his problems to a 1987 motor-vehicle accident. He thought he may have lost consciousness for eight hours in the hospital, and believes he was in the hospital three weeks. After his release he was unable to do his previous work. Three years ago, he re-injured his back. He complained of memory problems for six years. He said he had been taking medication to treat depression for two years. He has longstanding irritability and rages. He described vague auditory hallucinations, but denied paranoia. He reports some anxiety while driving, but no other symptoms of PTSD. He has facial numbness, and problems with his knee and back. He has a history of drug and alcohol abuse, but none recently. He said his knee problems prevent doing his past work. His cognitive functioning was consistently borderline.⁴²

The discussion of the test results is missing except for some references to scores in the 1st percentile, but after the report resumes, Dr. Rose concludes that the results of testing were invalid due to what appeared to be poor effort. The results of

⁴¹ R192, 312, 311. One possible explanation for part of this report being dated in July, when it appears the testing was in May, is that Dr. Mixon reviewed the report when she saw Binion on July 31, 2000. R192. The VA seemed to be confused about the dates, too, as one note says the neuropsych was performed May 31, 2001, a year after the testing. R293.

⁴² R312.

the TOMM were so low they would be rare except where primary progressive dementia is present. He concluded the rest results “are judged uninterpretable.” If test results were valid, which is doubtful, it would indicate severe impairment. Biased responses were thought more likely, but Dr. Rose added that this “does not necessarily rule out the existence of bona fide deficits or psychiatric disturbance, nor does it mean all of his complaints (e.g., psychological difficulties) are invalid. It does render the identification of deficits assessed in this evaluation impossible.” He suggested considering the testing might be “over-communication of true difficulties in an attempt to be ‘heard’ versus exaggeration or fabrication.”⁴³

Binion was again treated in May at the VA for foot pain and bunions in May. Orthotics were prescribed.⁴⁴ In July 2000, Dr. Mixon saw Binion, who reported his medication improved his sleep but makes it hard for him to wake up. She reviewed the neuropsych testing with him. A copy was to be sent to Social Security.⁴⁵ In August he returned to the VA complaining of right upper quadrant abdominal pain, low back spasms, and sex drive suppression due to medications. He was diagnosed with lumbago.⁴⁶ X-rays were abnormal due to the presence of multiple cysts.⁴⁷ A CT was ordered, and multiple renal cysts were found.⁴⁸ On examination he had abdominal pain, neck pain, spine tenderness, and pain turning his head. He was

⁴³ R311.

⁴⁴ R223, duplicated at 291.

⁴⁵ R192, duplicated at 310.

⁴⁶ R310, continued on 191.

⁴⁷ R171, duplicated at 207.

⁴⁸ R170, duplicated at 206 and 245.

diagnosed with polycystic kidneys, and neck pain likely due to mild degenerative disc disease.⁴⁹ X-rays confirmed cervical degenerative disc disease.⁵⁰ He was notified to call for an appointment if his neck pain continued, and he called to say he was still having neck pain.⁵¹

When Binion came in to the VA in January 2001, he was having burning low back pain,⁵² and it was noted that he was obese, with a BMI of 35.⁵³ Lumbar x-rays were normal.⁵⁴ He received orthotics for his feet, but continued to have occasional pain and swelling.⁵⁵ He also had a cervical CT scan, which showed mild to moderate degenerative disc disease without central spinal stenosis.⁵⁶ The next month he continued to have pain and swelling of his feet.⁵⁷ In March a CT of his neck was normal.⁵⁸

In April 2001, Binion again saw Dr. Mixon, who noted he was directed by a nurse from his lawyer's office to go to see his psychiatrist.⁵⁹ His speech was vague and rambling, and it was unclear what he wanted other than to get benefits. He was mildly anxious. Dr. Mixon commented that the neuropsych tests indicated a strong malingering component.⁶⁰ Later that month Binion reported that his medications

⁴⁹ R187, duplicated on 306; continued on 305.

⁵⁰ R169, duplicated at 205 and 244.

⁵¹ R186.

⁵² R184, duplicated at 302.

⁵³ R185, 184.

⁵⁴ R168, duplicated at 205.

⁵⁵ R218.

⁵⁶ R166, duplicated at 204 and 241.

⁵⁷ R288.

⁵⁸ R165.

⁵⁹ R300.

⁶⁰ R299.

caused mood swings. He continued to have back and neck pain, but his current medications for that were adequate.⁶¹ His arthritis was felt to be stable. He was tender in the cervical, thoracic, and lumbar spine, but a straight leg raising was negative and his neurological testing was normal.⁶² A week later he returned complaining of low back pain.⁶³

In November 2001, Binion reported that orthotics helped his foot pain, but that he now had hip pain. Some mild spur formation was noted, and he was instructed in conservative treatment.⁶⁴ Later that month he reported to a new VA facility being depressed two and half years, but was not taking medication. The note incorrectly states that the neuropsych exam was done May 31, 2001, somewhat misrepresenting the conclusion by stating that malingering was suspected. The next month Binion reported low-grade depression for eight months. He was a poor historian, and had a vague presentation. He had been sober 8-9 years. He had no “previous” admissions. He endorsed anhedonia, reversed sleep, and crying spells.⁶⁵ He was diagnosed with depression due to his medical condition.⁶⁶

In February 2002 Binion was assessed at his new VA facility, and was diagnosed with obesity, sleep apnea, plantar fasciitis, mild to moderate cervical degenerative disc disease, low back pain, status/post right knee surgery, and arthralgias.

⁶¹ R298.

⁶² R297.

⁶³ R287.

⁶⁴ R283.

⁶⁵ R293.

⁶⁶ R292.

Screening for dementia was negative, but screening for PTSD and major depressive disorder were positive. His BMI was 35.⁶⁷ He denied significant cognitive impairment.⁶⁸ Weight loss was recommended. Injection for plantar fasciitis was helpful only for an hour. It was thought he may have a mild cognitive impairment.⁶⁹

In March his mood was modestly improved, but he was still depressed. He admitted relapse of alcohol and cocaine use two months ago.⁷⁰ He saw a counselor for substance abuse therapy. He reported that he did not like 12-step programs because of the number of people in meetings. He also wanted help dealing with anger.⁷¹ About a week later he attended his first therapy group session. The nurse reported he made inconsistent statements about his last substance use, which she said suggested “issues” surrounding honesty. He was referred to AA.⁷² When he returned to the VA psychiatrist three months later he had not used again, but because he was helping his wife with their new baby he could not currently attend sessions.⁷³ In September he was about the same, with occasional depression and violent thoughts. He denied “sa” (probably meant “SI” for suicidal ideation), but his self-report was suspect.⁷⁴

In November 2002, Binion continued to have foot pain. He had been having pain

⁶⁷ R405.

⁶⁸ R404.

⁶⁹ R403.

⁷⁰ R419.

⁷¹ R418.

⁷² R417.

⁷³ R411.

⁷⁴ R410.

on the bottom of his feet a couple months. He had pain on palpation, and Tinel's sign. Plantar Fasciitis was diagnosed. An injection gave immediate relief.⁷⁵

Vint Wilson, M.D., performed a consultative physical examination in November 2002 for the Social Security Administration.⁷⁶ He found that Binion has low back pain due to degenerative disc disease, which he noted can be severe and debilitating. He found reduced range of motion in all planes. He was not impressed with Binion's foot pain. He felt that "in a motivated patient that some physically, low impact work would be appropriate."⁷⁷ He noted that Binion needs treatment, but he says he can't afford it. A chest x-ray was essentially normal, as was an x-ray of the right knee.⁷⁸ A cervical x-ray showed mild degenerative disc disease.⁷⁹

In December 2002, Michael Bach, Ph.D., performed a consultative mental examination for the Social Security Administration. He found the consistency of allegations and presentation was good. Binion reports panic attacks weekly since 2000. He has one or two crying spells a month.⁸⁰ There were no indications of psychosis or organicity. The Wide-Range Achievement Test-III revealed Binion reads at the 5th grade level, and does arithmetic at the 2nd grade level. The Weschler Adult Intelligence Test-III demonstrated a verbal IQ of 70, performance IQ of 73, and a full-scale IQ of 70. The results of the WAIS were internally

⁷⁵ R408.

⁷⁶ R334.

⁷⁷ R337.

⁷⁸ R338, 339.

⁷⁹ R340.

⁸⁰ R347.

consistent, and consistent with the WRAT.⁸¹ Binion was motivated to do well, and Dr. Bach found the test results were valid.⁸² He diagnosed panic disorder with agoraphobia, borderline intellectual functioning, and developmental arithmetic disorder. He noted his ability to interact with the public and or coworkers was limited due to impulsivity and anxiety.⁸³ He noted that short-term memory is markedly impaired.⁸⁴

In December 2002, Binion was treated at the VA after he injured his hand with a drill.⁸⁵

A non-examining state-agency consultant reviewed the file, and opined that Binion could perform medium exertion with occasional postural movements, occasional overhead reaching, and limited exposure to hazards.⁸⁶

A non-examining state-agency consultant concluded that Binion is moderately limited in the ability to maintain regular attendance, and to be punctual within customary tolerances.⁸⁷ He would have difficulty with detailed tasks or sustained concentration. She also found he may have interruptions to a normal workweek due to psychologically-based symptoms. Finally, she found he may have episodic difficulty for social relations with coworkers and the general public, and in dealing with criticism from supervisors. She said none of these limitations were

⁸¹ R348.

⁸² R349.

⁸³ R349.

⁸⁴ R347.

⁸⁵ R398, 397.

⁸⁶ R428.

⁸⁷ R358.

“substantial,” but did not define the term.⁸⁸ In reaching these conclusions, she did not consider depression or borderline intellectual functioning which the ALJ accepted,⁸⁹ but gave her restrictions based solely based on the panic disorder.⁹⁰

In April 2003 Binion was treated at the VA for depression, anxiety, and panic attacks.⁹¹ He was having daily panic attacks.⁹² He had frequent social withdrawal, was uncomfortable in crowds or in public. He reported restless sleep and chronic neck and back pain. He was cooperative.⁹³ Later that month a psychiatric assessment found that anxiety was his main issue. He was having a panic attack twice a week, including extreme anxiety with a feeling he needs to flee, palpitations, light-headedness, and feeling sweaty and nauseus.⁹⁴ Panic attacks keep him from going some places. He avoids crowded places. He is tired, has restless sleep, has no appetite but eats when he is stressed. He has poor energy, low motivation, poor concentration, few interests. He is anhedonic. He denies suicidal or homicidal ideation. He is often very irritable.⁹⁵ He quit smoking and drinking 10 years ago. He has had six motor vehicle accidents, the first four involving alcohol. His medication was changed from Zoloft to Paxil.⁹⁶ On mental status exam he was casually dressed and groomed. He was pleasant and cooperative, with good eye

⁸⁸ R362.

⁸⁹ R17.

⁹⁰ R364.

⁹¹ R500.

⁹² R501.

⁹³ R502.

⁹⁴ R504, continued on 506.

⁹⁵ R506.

⁹⁶ R504.

contact. He was oriented. His speech was in a monotone. His affect was anxious and blunted. His thoughts were organized, and he denied psychotic symptoms. Insight and judgment were fair. Memory and concentration were intact.⁹⁷

The Veteran's Administration found that Binion's degenerative disc disease of the low back and neck constituted a 30% disability as of his application of February 16, 2001.⁹⁸ The VA found that Binion's depression, panic attacks, and anxiety, constituted a 30% disability as of May 13, 2003, and that his overall disability rating was increased to 80%.⁹⁹

(4). Vocational evidence

At the 2005 hearing, John Blakeman testified as a vocational witness that Binion's past work was janitorial.¹⁰⁰ He was asked to consider an individual who was able to lift 20 pounds, frequently lift 10 pounds, who could occasionally perform postural activities, who needed to avoid hazards, and who—due to anxiety—would be limited to simple instructions.¹⁰¹ He first testified that the hypothetical individual could not do Binion's past work, but that he could perform other work only as a cashier 2 or a table or bench worker.¹⁰² If the person had panic attacks lasting an hour, twice a week, it would preclude all work.¹⁰³ If the person had the arithmetic limitation found by Dr. Bach, he was unsure if he could do the jobs, but

⁹⁷ R505.

⁹⁸ R420.

⁹⁹ R114–15.

¹⁰⁰ R1077–78.

¹⁰¹ R1078–79.

¹⁰² R1079–80.

¹⁰³ R1080.

it would cause a problem.¹⁰⁴

At the second hearing, Doug Brooks testified as a vocational witness.¹⁰⁵ He was not given a new hypothetical question, but was asked whether the limitations on public contact noted by Dr. Bach would affect the ability to do the jobs identified at the prior hearing. Mr. Brooks said that there was public contact, of a relatively low level, in the cashier job, but none in the table or bench worker job.¹⁰⁶ An individual who cannot make change could not work as a cashier.¹⁰⁷ Based on Binion's WRAT score (inaccurately transcribed as "ROTH"), he would be unable to make change.¹⁰⁸ The bench worker job would involve some contact with coworkers, but not the public. Panic attacks twice a week would probably preclude work.¹⁰⁹ If he had a couple panic attacks a month, he probably could not work.¹¹⁰

(5). 2005 ALJ decision

ALJ Dana E. McDonald declined Binion's request to reopen his 1999 application.¹¹¹ He found that Binion was not working, that he had severe impairments of back pain, obesity, borderline intellectual which limit him to light-exertion work which does not involve hazards, and involves only simple instructions.¹¹² He found these impairments prevent him from doing any past

¹⁰⁴ R1083.

¹⁰⁵ R1122.

¹⁰⁶ R1124.

¹⁰⁷ R1126.

¹⁰⁸ R1127.

¹⁰⁹ R1128.

¹¹⁰ R1128–29.

¹¹¹ R33.

¹¹² R41.

relevant work,¹¹³ but that he is still capable of doing jobs such as cashier II and table/bench worker.¹¹⁴

(6). *Appeals Council remand*

After Binion requested that the Appeals Council review ALJ McDonald's decision, the Appeals Council found that no substantial evidence supported the ALJ's first decision denying benefits, and remanded Binion's claim for a new hearing. The Council pointed out that the ALJ did not state the weight given to the 70% disability rating by the VA, or Dr. Bach's opinion that Binion needs limited contact with coworkers and the public, and that the ALJ gave no specific reasons for giving them no weight.¹¹⁵

(7). *2008 ALJ decision*

On remand from the Appeals Council, ALJ Dana E. McDonald repeated much of his first decision. He added anxiety to Binion's severe impairments,¹¹⁶ and added some detail to his residual functional capacity finding, specifying Binion can lift 10 pounds frequently and 20 pounds occasionally.¹¹⁷ The ALJ again found he could not do his past relevant work,¹¹⁸ but that Binion could do the same other work.¹¹⁹

In response to the order of the Appeals Council to specify the weight he gave Dr. Bach's opinion that Binion needs limited contact with coworkers and the public,

¹¹³ R43.

¹¹⁴ R44.

¹¹⁵ R82.

¹¹⁶ R17.

¹¹⁷ R20.

¹¹⁸ R23.

¹¹⁹ R24.

the ALJ stated that his mental RFC finding:

is consistent with and accepts in large part both the consultative examiner's opinion [Dr. Bach's] that [Binion] is able to follow simple instructions well but with his ability to interact with the public and co-workers "limited" due to impulsivity and some anxiety (Exhibit B-8F), and the state agency's finding that these limitations are not substantial limitations (Exhibit B-10F).¹²⁰

3. Standard and scope of review

The scope of judicial review is limited to determining whether the findings of the Commissioner are supported by substantial evidence taking the record as a whole.¹²¹ To be supported by substantial evidence, the court must be satisfied that the decision of the Secretary is grounded in the proper application of the appropriate legal standards.¹²² The court must scrutinize the record in its entirety to determine the reasonableness of the Secretary's decision,¹²³ including evidence favorable as well as unfavorable to the ALJ's decision.¹²⁴

4. Argument and citation of authorities

A. Extra-record evidence. The ALJ is required to issue a decision based on evidence in the hearing record. The ALJ here relies heavily on several documents which are not in the record. The ALJ committed error when he relied on evidence outside the record.

The ALJ relied on evidence not included in the record. He says he adopts the opinion of Thomas Price, M.D., given in August 1998, citing "Exhibit B-2F."¹²⁵

While the document he refers to, Exhibit B-2F, is in the record, that document does not contain any records from August 1998, nor any records from Dr. Price.¹²⁶ The

¹²⁰ R21.

¹²¹ *Tieniber v. Heckler*, 720 F.2d 1251 (11th Cir. 1983).

¹²² *Bridges v. Bowen*, 815 F.2d 629 (11th Cir. 1984).

¹²³ *Owens v. Heckler*, 748 F.2d 1511 (11th Cir. 1984).

¹²⁴ *Swindle v. Sullivan*, 914 F.2d 222, 225 (11th Cir. 1990).

¹²⁵ R20.

¹²⁶ R240-53.

ALJ cites, and apparently adopts, records from Gilbert Chandler, M.D., from September 1998 through April 1999,¹²⁷ but the document he refers to, Exhibit B-5F, contains records dated from December 2000 through April 2002, and do not contain any records from a Dr. Chandler.¹²⁸ The ALJ refers to records from Dr. Chandler (no date given),¹²⁹ but the document he refers to contains records from Ralph Hopkins from 2001.¹³⁰ The ALJ refers to records from John Hemmer, M.D., from 1994 through July 1999,¹³¹ but the document he refers to, Exhibit B-6F, is a November 2002 weight measurement by Morgan County Health Department.¹³²

A claimant for Social Security benefits has an absolute right to confront the evidence adverse to his claim.¹³³ The failure to include evidence the ALJ relied on in the record violates this fundamental principle of administrative law.

B. Mental limitations. The ALJ is required to state the weight he gave all medical opinions, and explain why. The ALJ here ignored Dr. Bach's finding of marked memory limitations, and many of the non-examining consultant's limitations. Where the ALJ fails to evaluate all the opinions of mental limitations, his conclusion is unsupported by substantial evidence.

The ALJ fails to state the weight he gave to several opinions of mental limitations by examining and non-examining sources. First, Dr. Bach found that Binion's short-term memory is markedly impaired.¹³⁴ The ALJ's decision does not mention that finding. As there is no other specific testing for memory in the record,

¹²⁷ R20-22.

¹²⁸ R258-332.

¹²⁹ R22.

¹³⁰ R256-57.

¹³¹ R21.

¹³² R333.

¹³³ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

¹³⁴ R347.

the limitation stands uncontradicted.

Second, the Appeals Council directed the ALJ to state the weight he gave Dr. Bach's opinion that Binion needs limited contact with coworkers and the public.¹³⁵ But the ALJ failed to make clear the weight he gave the opinion, or state what evidence would permit him to ignore it. The ALJ acknowledges this limitation, but doesn't explain what weight he gave it or why. The ALJ says he accepts Dr. Bach's opinion,¹³⁶ yet he includes no limitation on interaction with coworkers or the public in his residual functional capacity finding.¹³⁷ There was discussion at the 2008 hearing about the limitations on interaction with the public,¹³⁸ but the ALJ fails to address any restriction regarding contact with coworkers.

Third, a state-agency consultant found that Binion is moderately limited in the ability to maintain regular attendance, and to be punctual within customary tolerances. She also found he may have interruptions to a normal workweek due to psychologically-based symptoms. Finally, she found he may have episodic difficulty for social relations with coworkers and the general public, and in dealing with criticism from supervisors.¹³⁹ While the ALJ pointed out that she said none of these limitations were "substantial,"¹⁴⁰ but neither the consultant nor the ALJ defined the term.¹⁴¹ So there is no finding that specifies the weight he gave the

¹³⁵ R82.

¹³⁶ R21.

¹³⁷ R21.

¹³⁸ R1123–24.

¹³⁹ R358.

¹⁴⁰ R21.

¹⁴¹ R362.

limitations noted by the consultant, or the reasons for assigning that weight.

Fourth, in reaching her conclusions, the state-agency consultant did not consider depression or borderline intellectual functioning which the ALJ accepted.¹⁴² She gave her restrictions based solely based on the panic disorder.¹⁴³ But since the ALJ found additional severe impairments, but failed to explain how there could be additional severe impairments without additional work-related limitations, his decision remains insufficient to provide Binion with a clear explanation for its conclusions.

The ALJ may not ignore uncontroverted medical evidence.¹⁴⁴ Nor may he substitute his opinion for that of a medical doctor.¹⁴⁵ Here there were medical opinions which the ALJ did not evaluate, so his decision is unsupported by substantial evidence.

C. Education. The ALJ may not rely on formal education where other evidence shows educational achievement was lower. The ALJ here cites evidence which does not exist, and would not contradict testing, giving no reason to doubt 5th grade test scores. Where the ALJ cites only evidence consistent with testing, he errs by ignoring the test results?

The ALJ bases his conclusion that Binion has a high school education on the fact that he said reading was one of his “leisure activities,” that he completed twelve grades of school, and that he was not in special education.¹⁴⁶ In support of these claims, the ALJ cites Exhibit B-1E/8 and Exhibit B-2E/9. But the first document

¹⁴² R17.

¹⁴³ R364.

¹⁴⁴ *Flowers v. Harris*, 616 F.2d 776 (5th Cir. 1980).

¹⁴⁵ *Freeman v. Schweiker*, 681 F.2d 727 (11th Cir. 1982).

¹⁴⁶ R23.

cited, Exhibit B-1E, has only five pages, and says nothing about any of these allegations.¹⁴⁷ Page 9 of Exhibit B-2E is blank.¹⁴⁸ While a form completed by Binion's wife says he sometimes reads the Bible,¹⁴⁹ it also says he forgets what he just read. When completing a form asking him if he has problems following written instructions he wrote "can't stay force om it."¹⁵⁰ Even if the ALJ had cited evidence which exists, and even if it showed that he reads as a "leisure activity," it would not show that he reads at a higher level than the 5th grade level revealed by the Social Security Administration's own consultant's testing.¹⁵¹

The ALJ asked the vocational witness to assume "the same age, education and work experience as the claimant,"¹⁵² but testing showed that he had only 5th grade reading and 2nd grade arithmetic achievement.¹⁵³ And Binion testified that he has a high-school diploma.¹⁵⁴ But this did not inform the vocational witness of Binion's actual educational functioning. The ALJ's finding that Binion has a high school education is unsupported by any evidence.¹⁵⁵

Because Binion demonstrated he cannot perform his past work,¹⁵⁶ the burden of showing jobs the claimant can perform is on the Government.¹⁵⁷

¹⁴⁷ R117.

¹⁴⁸ R130.

¹⁴⁹ R136.

¹⁵⁰ R143.

¹⁵¹ R348.

¹⁵² R1078.

¹⁵³ R348.

¹⁵⁴ R1042.

¹⁵⁵ R23.

¹⁵⁶ R23.

¹⁵⁷ *Cannon v. Bowen*, 858 F.2d 1541, 1544 (11th Cir. 1988).

[T]here are four elements of proof to be considered in determining whether a claimant is disabled within the meaning of the Social Security Act, and these are: (1) objective medical facts or clinical findings; (2) diagnoses of examining physicians; (3) subjective evidence of pain and disability as testified to by the claimant and corroborated by his wife, other members of his family, his neighbors and others who have observed him; and (4) the claimant's age, education and work history.¹⁵⁸

A decision based on a vocational witness's response to a hypothetical ignoring one of these factors is not based on substantial evidence.¹⁵⁹ The ALJ here failed to ask a hypothetical question positing an accurate educational level, so the vocational witness's response does not constitute substantial evidence.

D. Frostbite. The ALJ is required to give great weight to a VA disability finding. The ALJ here acknowledged the VA disability finding, but ignored it claiming—without showing—that the standard is different. Where the ALJ fails to show why the VA disability decision is not entitled to great weight, he has erred.

The ALJ stated he did not give significant weight to the 80% disability rating by the Veteran's Administration, saying that the VA disability definition is different from the Social Security definition. He also said that an earlier VA disability rating focused exclusively on frostbite, and that since Binion worked after the frostbite injury, it is not relevant.¹⁶⁰ The reasons the ALJ gave for giving the VA determination no weight are legally incorrect and unsupported.

First, the ALJ cites only one of several VA disability findings. The VA also found that Binion's degenerative disc disease of the low back and neck constituted a 30% disability as of his application of February 16, 2001.¹⁶¹ And the VA found that Binion's depression, panic attacks, and anxiety, constituted a 30% disability as of

¹⁵⁸ *DePaepe v. Richardson*, 464 F.2d 92 (5th Cir. 1972).

¹⁵⁹ *Freeman v. Schweiker*, 681 F.2d 727 (11th Cir. 1982).

¹⁶⁰ R21, referring to the VA rating decision at R483.

¹⁶¹ R420.

May 13, 2003, and that his overall disability rating was increased to 80%.¹⁶² While frostbite may have constituted the earliest basis of VA disability, it was neither the only nor the most significant limitation.

Second, it is error for the ALJ to ignore an impairment solely because the impairment is not individually disabling. The ALJ must consider all impairments—including those which are not severe—in combination at each step of sequential evaluation.¹⁶³ Even if frostbite was not disabling alone when Binion was working, now that Binion has additional impairments the ALJ must consider the frostbite and associated neuropathy in combination with Binion’s other impairments.

Third, the ALJ merely states that the VA disability definition is different from the Social Security definition, but he does not acknowledge that the two definitions overlap. Under the VA disability ratings “each disability must be considered from the point of view of the veteran working or seeking work.”¹⁶⁴ As the Social Security definition also focuses on the ability to work, a VA finding is relevant even if not binding. So it was error to ignore it. While a VA rating of disability is not binding on the ALJ, it is entitled to great weight.¹⁶⁵

¹⁶² R114–15.

¹⁶³ *Hudson v. Sec’y of Health and Human Servs.*, 839 F.2d 1453, 1454 (11th Cir. 1988).

¹⁶⁴ 38 C.F.R. § 4.2. See also VA notice at R471.

¹⁶⁵ *Olsen v. Schweiker*, 663 F.2d 593 (5th Cir. 1981); *Falcon v. Heckler*, 732 F.2d 827 (11th Cir. 1984).

E. Obesity. The ALJ is required to evaluate the effects of obesity on the claimant's other impairments. Here the ALJ made contradictory findings that obesity does, and does not, affect Binion's ability to work. Where the ALJ makes contradictory findings and fails to address how obesity impacts other impairments, he has erred.

The Appeals Council's remand order found that the ALJ had failed to specify the extent to which obesity exacerbates Binion's musculoskeletal impairments.¹⁶⁶ In response, the ALJ stated that "obesity has not interfered with the claimant's ability to perform routine movement and the physical activity necessary to perform" light work as the ALJ described.¹⁶⁷ But it is insufficient to just state the conclusion. The ALJ does not discuss any of the evidence or explain how he arrived at the contradictory conclusions that Obesity is a severe impairment,¹⁶⁸ but it does not cause any restrictions whatsoever.¹⁶⁹

The record does not support a conclusion that Binion's obesity does not exacerbate his other impairments, as his physicians repeatedly observed his BMI was 35, recommended weight loss, and counseled him on weight loss.¹⁷⁰ The Commissioner also recognizes that obesity can exacerbate depression.¹⁷¹ The ALJ does not discuss any of the evidence reflecting Binion's obesity affects his other impairments, nor does it discuss obesity when evaluating Binion's other impairments. The ALJ has failed to properly evaluate Binion's obesity.

¹⁶⁶ R82.

¹⁶⁷ R21.

¹⁶⁸ R17.

¹⁶⁹ R21.

¹⁷⁰ E.g.: R161, 193, 184, 185, 405.

¹⁷¹ SSR 02-1p.

5. Conclusion

This 15th day of March, 2010.

/s/ Charles L. Martin

Charles L. Martin, Attorney for Plaintiff

Georgia Bar No. 472525

123 N. McDonough Street

Decatur, Georgia 30030

(404) 373-3116

FAX (404) 373-4110

Email for service: service@martinandjones.us

Personal email: clmartin@ssappeals.com

On the brief:

yournamehere

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Social Security Regional Administrator - NEF Only atl.ogc.cmecf.ndga@ssa.gov,
ODAR.OAO.COURT.3@ssa.gov

Robert David Powell R.David.Powell@usdoj.gov, Maletha.Lemons@usdoj.gov

I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

None

This 15th day of March, 2010.

/s/ Charles L. Martin

Charles L. Martin, Attorney for Plaintiff