

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

November 29, 2013

Elisabeth A. Shumaker  
Clerk of Court

DAVID VITITOE,

Plaintiff-Appellant,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant-Appellee.

No. 12-1484  
(D.C. No. 1:11-CV-02996-LTB)  
(D. Colo.)

**ORDER AND JUDGMENT\***

Before **LUCERO**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and  
**BACHARACH**, Circuit Judge.

David Vititoe appeals from the district court's judgment affirming the Commissioner of Social Security's decision to deny his application for disability insurance benefits. Exercising jurisdiction under 42 U.S.C. § 405(g) and 28 U.S.C. § 1291, we affirm.

\* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

## I. BACKGROUND

### A. Medical evidence

Mr. Vititoe was born in June 1971. He applied for disability insurance benefits in December 2007, and his date last insured (DLI) was June 30, 2008. He based his disability claim on memory loss due to injuries sustained on October 26, 2007, when his motorcycle collided with a large truck. He suffered multiple facial and cranial fractures and a traumatic brain injury. He was in a coma for nearly a month, had a number of surgeries, and received in- and out-patient rehabilitative therapy at Spalding Rehabilitation Hospital.

On January 7, 2008, after his time at Spalding ended, Mr. Vititoe saw a rehabilitation physician, Dr. David Mulica, who opined that “he has limited insight into his deficits” and “is probably more impaired than he appears today.” Tr. at 355.<sup>1</sup> Mr. Vititoe was emotionally labile but could recall recent presidents back to Gerald Ford, knew that Dick Cheney was then Vice President, correctly performed single calculations and explained similarities for two objects, and was able to recall one out of three objects at three minutes. Physically, Mr. Vititoe’s cranial nerves were intact; his strength, bulk, and tone were normal; his reflexes were symmetric; his finger-to-nose and heel-to-shin tests were normal; he could perform tandem walking;

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<sup>1</sup> We cite to the agency transcript page number for all citations to the agency’s record because the parties do so. However, we cite to our record page number when referring to documents not part of the agency record, such as documents filed only in the district court.

and his gait was grossly normal. Dr. Mulica increased Mr. Vititoe's trazodone (an antidepressant), continued him on Aracept (for memory), and recommended speech therapy from Ellen Minick. He asked Mr. Vititoe to follow up with him in April.

Mr. Vititoe saw Ms. Minick for speech therapy several times between January 8 and February 19, 2008. In the progress note from the last visit, Ms. Minick stated that Mr. Vititoe "exhibited excellent planning, self-monitoring and self-correction. He was able to stay on task even with numerous distracters. He was able to complete the task accurately and timely." *Id.* at 345.

Mr. Vititoe saw Dr. Mulica again on April 21, 2008, complaining about anger and temper problems and some ankle pain, but he stated that he "seems to be getting better." *Id.* at 484. Dr. Mulica suggested anger management and prescribed Celexa for depression. Mr. Vititoe followed up by telephone on May 21, 2008, stating that he was "less emotionally labile on Celexa" and that his leg buckled under him. *Id.* at 769. Mr. Vititoe next saw Dr. Mulica on June 12, 2008, complaining of left ankle pain and left thigh numbness. Dr. Mulica noted that Mr. Vititoe scored "moderate on dep[ression] screen" and increased the dosage of Celexa. *Id.* at 764. Dr. Mulica's telephone follow-up with Mr. Vititoe on July 10, 2008, showed he was doing well on the increased dosage. Dr. Mulica next saw Mr. Vititoe on August 13, 2008, when Mr. Vititoe complained that his "depression hits harder at times," he was "experiencing word finding issues," and he "[n]eeds to make lists." *Id.* at 761. Dr. Vititoe thought these complaints were "not surprising" but "consistent with [the]

original injury.” *Id.* He increased the Celexa and asked Mr. Vititoe to call him in a week. Mr. Vititoe’s next contact with Dr. Mulica was by telephone on December 29, 2008, when he said he was “[s]till having problems with memory and cognition.” *Id.* at 732. Dr. Mulica “[e]ncouraged” Mr. Vititoe to “contact speech[]” and prescribed Amantadine for memory and cognition. *Id.*

Dr. Mulica did not hear from or see Mr. Vititoe again until an office visit on March 24, 2010. Mr. Vititoe stated he had been in prison for much of the preceding year due to a parole violation and was “now developing increased anger.” *Id.* at 714. Dr. Mulica prescribed Ativan for anxiety and asked Mr. Vititoe to follow up by phone in three weeks. During that follow-up, on April 14, 2010, Dr. Mulica increased the dosage of Ativan. *Id.* at 712.

On April 22, 2010, Dr. Mulica completed a Functional Capacity Questionnaire (FCQ) reflecting his opinion that, due to the brain injury and impaired cognition, Mr. Vititoe had severe physical and mental limitations and would miss more than four days of work each month. Those limitations included rarely lifting no more than ten pounds; standing/walking two hours and sitting four hours per eight-hour workday; marked restrictions in maintaining concentration, persistence, and pace; and repeated episodes of decompensation within a twelve-month period, each of at least two weeks’ duration. *Id.* at 679-80.

Mr. Vititoe was also examined, at the Commissioner’s request, by Brett Valette, Ph.D., and Dr. Laura Moran, M.D. Dr. Valette performed a psychological

examination on April 21, 2008, administering tests on which Mr. Vititoe performed in the average range for most memory functions but above average in visual immediate memory. He had a full-scale IQ of 98 and a GAF (Global Assessment of Functioning) score of 70-75.<sup>2</sup> Dr. Valette diagnosed him with a nonspecific cognitive disorder and stated that although Mr. Vititoe's memory function may have been higher before his accident, it was still in the average range.

Dr. Moran performed a physical examination of Mr. Vititoe on May 19, 2008. Mr. Vititoe exhibited an inability to walk on his toes, decreased right hip strength, and numbness of his right anterior thigh. Dr. Moran noted that although Mr. Vititoe complained of some ankle and lower back pain, the examination findings of those areas were normal. She stated that she would not limit his physical activities.<sup>3</sup>

## **B. The agency's decision**

After Mr. Vititoe's disability application was denied initially and on review, an Administrative Law Judge (ALJ) held a hearing at which Mr. Vititoe was

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<sup>2</sup> A GAF score of 61-70 indicates: "Some mild symptoms (e.g., depressed mood and mild insomnia), OR some difficulty in social, occupational, or school functioning (e.g., occasional truancy, or theft within the household), but generally functioning pretty well, has some meaningful interpersonal relationships." Am. Psychiatric Ass'n Diagnostic & Statistical Manual of Mental Disorders 34 (Text Revision 4th ed. 2000). A GAF score of 71-80 indicates: "If symptoms are present, they are transient and expectable reactions to psychosocial stressors (e.g., difficulty concentrating after family argument); no more than slight impairment in social, occupational, or school functioning (e.g., temporarily falling behind in schoolwork)." *Id.*

<sup>3</sup> We will discuss any additional relevant medical evidence in connection with our analysis of the issues raised in this appeal.

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