

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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LATRICIA L. TAYLOR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 2:16-cv-2195-TMP
	)	
CAROLYN W. COLVIN,	)	
ACTING COMMISSIONER OF SOCIAL	)	
SECURITY,	)	
	)	
Defendant.	)	
	)	

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**ORDER AFFIRMING THE COMMISSIONER'S DECISION**

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Before the court is plaintiff Latricia Taylor's appeal from a final decision of the Commissioner of Social Security ("Commissioner") denying her application for disability insurance benefits and supplemental security income under Title II and Title XVI of the Social Security Act ("Act"), 42 U.S.C. §§ 401 *et seq.* The parties have consented to the jurisdiction of the United States magistrate judge pursuant to 28 U.S.C. § 636(c). (ECF No. 13.) For the reasons set forth below, the decision of the Commissioner is affirmed.

**I. FINDINGS OF FACT**

On August 9, 2012, Taylor applied for disability insurance benefits under Title II of the Act. (R. 210.) On August 13, 2012, Taylor also applied for supplemental security income under Title

XVI of the Act. (R. 212.) In both applications, Taylor alleged disability beginning on March 15, 2011, due to neuropathy, diabetes, high blood pressure, and carpal tunnel syndrome. (R. 19, 240.) Taylor's applications were denied initially and upon reconsideration by the Social Security Administration ("SSA"). (R. 19.) At Taylor's request, a hearing was held before an Administrative Law Judge ("ALJ") on July 2, 2014. (Id.) On September 5, 2014, the ALJ issued a decision denying Taylor's request for benefits after finding that Taylor was not under a disability because she retained the residual functional capacity ("RFC") to perform jobs that exist in significant numbers in the national economy. (R. 19-36.) On February 4, 2016, the SSA's Appeals Council denied Taylor's request for review. (R. 1.) Therefore, the ALJ's decision became the final decision of the Commissioner. (Id.) Subsequently, on March 28, 2016, Taylor filed the instant action. (ECF No. 1.) Taylor argues that: (1) the ALJ erred by improperly weighing the opinion of Taylor's treating nurse practitioner, Jamie Covington; and (2) the ALJ's finding regarding Taylor's credibility is not supported by substantial evidence. (ECF No. 14.)

## **II. CONCLUSIONS OF LAW**

### **A. Standard of Review**

Under 42 U.S.C. § 405(g), a claimant may obtain judicial review of any final decision made by the Commissioner after a hearing to which he or she was a party. "The court shall have

power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). Judicial review of the Commissioner's decision is limited to whether there is substantial evidence to support the decision and whether the Commissioner used the proper legal criteria in making the decision. Id.; Winn v. Comm'r of Soc. Sec., 615 F. App'x 315, 320 (6th Cir. 2015); Cole v. Astrue, 661 F.3d 931, 937 (6th Cir. 2011); Rogers v. Comm'r of Soc. Sec., 486 F.3d 234, 241 (6th Cir. 2007). Substantial evidence is more than a scintilla of evidence but less than a preponderance, and is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Kirk v. Sec'y of Health & Human Servs., 667 F.2d 524, 535 (6th Cir. 1981) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)).

In determining whether substantial evidence exists, the reviewing court must examine the evidence in the record as a whole and "must 'take into account whatever in the record fairly detracts from its weight.'" Abbott v. Sullivan, 905 F.2d 918, 923 (6th Cir. 1990) (quoting Garner v. Heckler, 745 F.2d 383, 388 (6th Cir. 1984)). If substantial evidence is found to support the Commissioner's decision, however, the court must affirm that decision and "may not even inquire whether the record could support a decision the other way." Barker v. Shalala, 40 F.3d 789, 794 (6th Cir. 1994) (quoting Smith v. Sec'y of Health & Human Servs.,

893 F.2d 106, 108 (6th Cir. 1989)). Similarly, the court may not try the case *de novo* or resolve conflicts in the evidence. Ulman v. Comm'r of Soc. Sec., 693 F.3d 709, 713 (6th Cir. 2012) (citing Bass v. McMahon, 499 F.3d 506, 509 (6th Cir. 2007)). The Commissioner, not the court, is charged with the duty to weigh the evidence and to resolve material conflicts in the testimony. Walters v. Comm'r of Soc. Sec., 127 F.3d 525, 528 (6th Cir. 1997); Crum v. Sullivan, 921 F.2d 642, 644 (6th Cir. 1990); Kiner v. Colvin, No. 12-2254-JDT, 2015 WL 1295675, at \*1 (W.D. Tenn. Mar. 23, 2015).

#### **B. The Five-Step Analysis**

The Act defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1). Additionally, section 423(d)(2) of the Act states that:

An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

Under the Act, the claimant bears the ultimate burden of establishing an entitlement to benefits. Oliver v. Comm'r of Soc. Sec., 415 F. App'x 681, 682 (6th Cir. 2011). The initial burden is on the claimant to prove she has a disability as defined by the Act. Siebert v. Comm'r of Soc. Sec., 105 F. App'x 744, 746 (6th Cir. 2004) (citing Walters, 127 F.3d at 529); see also Born v. Sec'y of Health & Human Servs., 923 F.2d 1168, 1173 (6th Cir. 1990). If the claimant is able to do so, the burden then shifts to the Commissioner to demonstrate the existence of available employment compatible with the claimant's disability and background. Born, 923 F.2d at 1173; see also Griffith v. Comm'r of Soc. Sec., 582 F. App'x 555, 559 (6th Cir. 2014).

Entitlement to social security benefits is determined by a five-step sequential analysis set forth in the Social Security Regulations. See 20 C.F.R. §§ 404.1520 & 416.920. First, the claimant must not be engaged in substantial gainful activity. See 20 C.F.R. §§ 404.1520(b) & 416.920(b). Second, a finding must be made that the claimant suffers from a severe impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii) & 416.920(a)(5)(ii). In the third step, the ALJ determines whether the impairment meets or equals the severity criteria set forth in the Listing of Impairments contained in the Social Security Regulations. See 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526. If the impairment satisfies the criteria for a listed impairment, the claimant is considered to be disabled. On

the other hand, if the claimant's impairment does not meet or equal a listed impairment, the ALJ must undertake the fourth step in the analysis and determine whether the claimant has the RFC to return to any past relevant work. See 20 C.F.R. §§ 404.1520(a)(4)(iv) & 404.1520(e). If the ALJ determines that the claimant can return to past relevant work, then a finding of not disabled must be entered. Id. But if the ALJ finds the claimant unable to perform past relevant work, then at the fifth step the ALJ must determine whether the claimant can perform other work existing in significant numbers in the national economy. See 20 C.F.R. §§ 404.1520(a)(4)(v), 404.1520(g)(1), 416.960(c)(1)-(2). Further review is not necessary if it is determined that an individual is not disabled at any point in this sequential analysis. 20 C.F.R. § 404.1520(a)(4).

**C. The ALJ Properly Weighed the Opinion of Taylor's Nurse Practitioner**

Taylor's first argument is that the ALJ improperly weighed the opinion of her nurse practitioner, Jamie Covington. In determining a claimant's RFC, "the ALJ evaluates all relevant medical and other evidence and considers what weight to assign to treating, consultative, and examining physicians' opinions." Eslinger v. Comm'r of Soc. Sec., 476 F. App'x 618, 621 (6th Cir. 2012). 20 C.F.R. §§ 404.1513 and 416.913 "establish[] two categories of medical evidence, 'acceptable medical sources' and 'other sources.'" Noto v. Comm'r of Social Sec., 632 F. App'x 243, 248

(6th Cir. 2015). "Acceptable medical sources" are licensed physicians and psychologists, while "other sources" include nurse practitioners, physicians' assistants and therapists. See id. ("[N]urse practitioners, therapists, and the like are non-acceptable medical sources.") (citing § 404.1513(d)(1) (internal quotation marks omitted)).

While the ALJ must consider all relevant medical evidence in the record, only acceptable medical sources as defined in §§ 404.1513(a) and 416.913(a) can give medical opinions within the meaning of §§ 404.1527(a)(2) and 416.927(a)(2) and be considered treating sources within the meaning of §§ 404.1502 and 416.902. See SSR 06-03p, 2006 WL 2329939, at \*2 (Aug. 9, 2006). Sections 404.1527(c) and 416.927(c) set out the factors the ALJ must consider in weighing medical opinions from acceptable medical sources, including the examining relationship between the claimant and the source, the treatment relationship between the claimant and the source, the degree to which the opinion is supported by relevant evidence, consistency with the record as a whole, and whether the source is a specialist. §§ 404.1527(c) & 416.927(c).

Although the weighing factors set out in §§ 404.1527 and 416.927 explicitly apply only to medical opinions provided by acceptable medical sources, "these factors represent basic principles that apply to the consideration of all opinions who are not acceptable medical sources." Gayheart v. Comm'r of Soc. Sec., 710 F.3d 365, 378 (6th Cir. 2013) (quoting SSR 06-03p, 2006 WL

2329939, at \*4). "The opinion of a 'non-acceptable medical source' is not entitled to any particular weight or deference—the ALJ has discretion to assign it any weight he feels appropriate based on the evidence of record." Noto, 632 F. App'x at 248-49; see also Engebrecht v. Comm'r of Soc. Sec., 572 F. App'x 392, 399 (6th Cir. 2014) (noting that an "other source opinion . . . is not entitled to controlling weight, nor is the ALJ required to give reasons for failing to assign it controlling weight.").

In a Medical Source Statement dated February 13, 2013, Covington opined that Taylor could not lift more than ten pounds, could walk or stand for less than two hours and sit for less than six hours in an eight-hour workday, and could not push or pull. (R. 1261-62.) Covington further stated that Taylor could not climb, balance, kneel, crouch, crawl, or stoop, could only occasionally reach, handle, finger, or feel, and that her vision was limited. (R. 1262-63.)

In a letter dated March 9, 2014, Covington wrote that Taylor's medical history

"includes malignant hypertension, uncontrolled diabetes mellitus type 2, diabetic neuropathy, diabetic retinopathy, gastro paresis, proteinuria, chronic kidney disease, anemia, hyperlipidemia, and migraine headaches . . . Ms. Taylor suffers from severe headaches due to her blood pressure and superimposed health conditions. She has persistent nausea, which causes problems with taking her medications and keeping her blood pressure and blood sugar levels under control.

Due to her multiple and complicated medical problems, Ms. Taylor is not able to work. She is not able to function in a full time job because of her weakness, dizziness,



nausea, and headaches.

(R. 1252.)

The ALJ considered Covington's opinion that Taylor's symptoms prevent her from working, but assigned it "minimal weight." (R. 33.) The ALJ noted that Covington, as a nurse practitioner, is not an acceptable medical source under 20 C.F.R. §§ 404.1513 and 416.913.<sup>1</sup> He also stated that while Covington "suggested that [Taylor's] nausea causes problems with her taking her medications as prescribed . . . the evidence shows few complaints of nausea and further shows that [Taylor] simply did not take Metformin for three months, with noncompliance the more likely culprit for any suboptimally controlled condition." (R. 33.) The ALJ also found Covington's statement that Taylor was unable to finger or handle to be inconsistent with other evidence in the record, including with Taylor's own testimony at the hearing. The ALJ ultimately concluded that

[t]he medical evidence of record does not support not being able to work a full day. For instance, the alleged frequency of headache and other manifestations of claimant's multiple impairments are not substantiated by the evidence, which shows only intermittent edema, few dates of treatment for headache, rare report of nausea, good response to bilateral carpal tunnel release, and equivocal findings for neuropathy with no clinical findings of disturbance in gait or manipulative abilities.

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<sup>1</sup>In her hearing testimony, Taylor referred to Covington as "my primary physician." (R. 70.) The record shows that Covington is a nurse practitioner, and thus not an acceptable medical source. (R. at 1252; ECF No. 14 at 11, 14-15.)

(Id.)

The ALJ's decision to give minimal weight to Covington's opinion is supported by substantial evidence. Taylor is correct that "the mere fact that Nurse Covington was not a physician was not a valid basis for disregarding her opinion." (ECF No. 14 at 15.) However, because Covington is not an acceptable medical source, the ALJ had the discretion to assign her opinion "any weight he fe[lt] appropriate based on the evidence of record." Noto, 632 F. App'x at 248.

Taylor argues that "the ALJ should have given great weight to the opinions of Nurse Covington" because "her assessment is well-supported by her own examinations and other evidence in the record." (ECF No. 14 at 16.) Taylor asserts that she "has displayed symptoms of nausea during multiple examinations," and "this has been noted to be a chronic condition." (Id. at 13.) She further contends that her "treatment notes show that she has migraines on almost a daily basis" and "her doctors noted edema in April 2010, May 2010, March 2011, August 2011, January 2014, February 2014 and March 2014." (Id. at 13-14.)

The ALJ cited to specific objective medical evidence and opinion evidence in the record which he found inconsistent with Covington's opinion that Taylor's impairments prevent her from working. As to headaches, the ALJ found it significant that multiple CT scans of Taylor's head showed no acute intracranial findings. He also considered it significant that Taylor was only

noted to have a "severe" headache by treating medical providers on two occasions, and on one occasion where Taylor reported headache pain on a scale of seven out of ten, she was also described as "comfortable." (R. 28.)

The ALJ acknowledged that while multiple examining medical providers noted bilateral lower extremity edema, "at all other times no edema was observed." (R. 29.) Specifically, he noted an October 2012 consultative examination by Dr. Roxanne Villalobos which revealed no edema. This evidence is sufficient to support the ALJ's decision to discount Covington's opinions that Taylor's headaches and edema were sufficiently frequent and severe to prevent her from working.

Taylor further contends that the ALJ was wrong to characterize Covington's opinions about Taylor's inability to reach, finger, feel, and handle as inconsistent with Taylor's hearing testimony (that she was able to make a fist and had only occasional swelling in her hands) because "Taylor also testified that the pain makes it difficult for her to lift objects and that her hands start to shake if she holds items for too long." (ECF No. 14 at 14.) Accordingly, Taylor argues that "her testimony fully supports Nurse Covington's finding that [Taylor] would have difficulty with a job that requires frequent use of the hands." (Id.)

In addition to relying on Taylor's hearing testimony that she is able to make a fist, the ALJ agreed with the Tennessee Disability Determination Services' opinion that Taylor was capable

of frequent handling and fingering. He also noted that Taylor had undergone left and right carpal tunnel release surgery in June and July 2011, and that a consultative examination by Dr. Kamal Mohan in August 2011 showed normal range of motion in her hands and wrists. The ALJ also credited Dr. Mohan's finding that Taylor's gait was entirely normal, as well as his observation at the examination that Taylor was able to climb up on the exam table and demonstrated normal range of motion in her knees and hips. This evidence substantially supports the ALJ's decision to discount Covington's opinion that Taylor's inability to finger, handle, and reach prevent her from performing sedentary work.

Taylor also argues that the ALJ should have given greater weight to Covington's opinion because Covington was a "long-term treating provider." (ECF No. 14 at 15.) The length of the treatment relationship between Covington and Taylor was certainly a factor the ALJ considered, but in weighing Covington's opinion the ALJ chose to place more emphasis on the consistency and supportability of Covington's opinion in light of the entire record. See §§ 404.1527(c) & 416.927(c). This choice was within the ALJ's discretion in weighing the medical and opinion evidence, particularly in light of the fact Covington is not an acceptable medical source within the meaning of §§ 404.1513 and 416.913.

The nub of Taylor's argument appears to be that there is evidence in the record supporting Covington's opinion, and that the ALJ should have weighed the evidence differently. Taylor asserts

"it was reasonable for Nurse Covington to conclude that Taylor could not return to full-time work," that Taylor's testimony "fully supports Nurse Covington's finding that she would have difficulty with a job that requires frequent use of the hands," and Covington's assessment "is well-supported by her own examinations and other evidence in the record." (ECF No. 14 at 13, 14, 15.) These would be valid arguments to make to the ALJ, but under the Act the court does not have the authority to re-weigh the evidence. If the court finds substantial evidence in the record supporting the ALJ's determination, that determination must be upheld even if there is evidence in the record that could support a different conclusion. Because the ALJ's decision to give minimal weight to Covington's opinion is supported by substantial evidence, the court affirms it.

**D. The ALJ's Determination That Taylor's Statements About Her Symptoms are Not Consistent With the Evidence in the Record is Supported by Substantial Evidence**

Taylor also argues that the ALJ erred in finding her statements about her symptoms not fully credible. While the ALJ must consider all of a claimant's symptoms, including pain, an individual's statements about her symptoms cannot establish that she is disabled unless the individual is found to have a medically determinable impairment which can reasonably be expected to produce the symptoms.<sup>2</sup> 20 C.F.R. §§ 404.1529(a) & 416.929(a). "If the ALJ

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<sup>2</sup>A symptom is an individual's own description of her physical or

finds that a claimant has a medically determinable impairment [] that could reasonably be expected to produce [his or her] symptoms . . . [the ALJ] must then evaluate the intensity and persistence of [those] symptoms . . . [to] determine how [the] symptoms limit [the claimant's] capacity for work." Keeton v. Comm'r of Soc. Sec., 583 F. App'x 515, 531-32 (6th Cir. 2014) (alterations in original). The ALJ must consider all relevant evidence, including objective medical evidence, the individual's statements, and "other evidence such as (1) the claimant's daily activities; (2) the location, duration, frequency, and intensity of the claimant's pain or other symptoms; (3) precipitating and aggravating factors; (4) '[t]he type, dosage, effectiveness, and side effects of any medication;' (5) forms of treatment other than medication that the claimant receives to relieve his or her symptoms; and (6) other measures used to relieve the pain." Id. at 532 (citing 20 C.F.R. §§ 404.1529(a) & 416.929(a)).

An individual's symptoms, including pain, "will be determined to diminish [her] capacity for basic work activities to the extent that [her] alleged functional limitations and restrictions due to symptoms, such as pain, can reasonably be accepted as consistent with the objective medical evidence and other evidence." §§ 404.1529(c)(4) & 416.929(c)(4).

Social Security Ruling 96-7p provides that:

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mental impairment. 20 C.F.R. §§ 404.1528 & 416.928.

whenever the individual's statements about the intensity, persistence, or functionally limiting effects of pain or other symptoms are not substantiated by objective medical evidence, the adjudicator must make a finding on the credibility of the individual's statements based on a consideration of the entire case record. This includes the medical signs and laboratory findings, the individual's own statements about the symptoms, any statements and other information provided by treating or examining physicians or psychologists and other persons about the symptoms and how they affect the individual, and any other relevant evidence in the case record.

SSR 96-7p, 1996 WL 374186, at \*2 (July 2, 1996). SSR 96-7p was in effect at the time of the ALJ's decision, and at the time when the ALJ's decision became the final decision of the Commissioner. However, on March 16, 2016, the SSA issued SSR 16-3p, which supersedes and rescinds SSR 96-7p.<sup>3</sup> SSR 16-3p, 2016 WL 1119029 (March 16, 2016). The SSA's stated purpose for issuing SSR 16-3p was eliminating the term "credibility" from its sub-regulatory policy and to "clarify that subjective symptom evaluation is not an examination of an individual's character." Id. at \*1. Furthermore, the regulations governing the SSA's process for evaluating symptoms do not use the term credibility. Id.; see 20 C.F.R. §§ 404.1529 & 416.929.

Instead of determining the credibility of an individual's statements about her symptoms, SSR 16-3p instructs the ALJ to "consider an individual's statements about the intensity persistence, and limiting effects of symptoms, and . . . evaluate

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<sup>3</sup>On March 24, 2016, the SSA changed the effective date of SSR 16-3p to March 28, 2016. See 2016 WL 1237954.

whether the statements are consistent with the objective medical evidence and the other evidence.” SSR 16-3, 2016 WL 1119029 at \*4.

If:

an individual's statements about the intensity, persistence, and limiting effects of symptoms are consistent with the objective medical evidence and the other evidence of record, [the ALJ] will determine that the individual's symptoms are more likely to reduce his or her capacities to perform work-related activities . . . . In contrast, if an individual's statements about the intensity, persistence, and limiting effects of symptoms are inconsistent with the objective medical evidence and the other evidence, [the ALJ] will determine that the individual's symptoms are less likely to reduce his or her capacities to perform work-related activities.

Id. at \*7.

Although the parties do not raise it, the court will *sua sponte* address the issue of whether SSR 16-3p should be applied to final decisions of the Commissioner rendered before the ruling was issued.<sup>4</sup> The Sixth Circuit has not yet addressed this issue of retroactivity. See Dooley v. Comm'r of Soc. Sec., No. 16-5146, 2016 WL 4046777, at \*5 n.1 (6th Cir. July 28, 2016) (“[W]e need not reach the issue of whether this ruling applies retroactively.”). Other Courts of Appeals have cited to SSR 16-3p without expressly discussing the issue of retroactivity. See, e.g., Cole v. Colvin, 831 F.3d 411, 415 (7th Cir. 2016); Paulsen v. Colvin, No. 15-1277, 2016 WL 6440368, at \*1 (10th Cir. Nov. 1, 2016); Webber v. Colvin, No. 14-35312, 2016 WL 6247126, at \*3 (9th Cir. Oct. 26, 2016);

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<sup>4</sup>42 U.S.C. §405(g) allows for judicial review of “any final decision of the Commissioner of Social Security.”



Paulek v. Colvin, No. 16-1007, 2016 WL 5723860, at \*4 (10th Cir. Oct. 3, 2016); Shuttles v. Colvin, No. 15-3803, 2016 WL 3573468, at \*1 (2d Cir. June 30, 2016); Snyder v. Colvin, No. 15-3502, 2016 WL 3570107, at \*2 (2d Cir. June 30, 2016).

Multiple district courts within the Sixth Circuit have held that SSR 16-3p should not be applied to final decisions of the Commissioner made before the ruling went into effect. For example, in Cameron v. Colvin, No. 1:15-CV-169, 2016 WL 4094884 (E.D. Tenn. Aug. 2, 2016), the court held that:

It is well-established that, absent explicit language to the contrary, administrative rules do not apply retroactively. See, e.g., Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."); Cruse v. Comm'r of Soc. Sec., 502 F.3d 532, 541-42 (6th Cir. 2007) ("We are not aware of any constitutional or statutory requirement that the Administration apply its [newly effective] policy interpretation rulings to appeals then-pending in federal courts, absent, of course, ex post facto or due process concerns not present here."); Combs v. Comm'r of Soc. Sec., 459 F.3d 640, 642 (6th Cir. 2006) ("The Act does not generally give the SSA the power to promulgate retroactive regulations."). Because the text of SSR 16-3p does not indicate the SSA's intent to apply it retroactively, the Court declines to do so.

Id. at \*2; see Davis v. Astrue, No. 1:13-CV-1264-CGC, 2016 WL 5957616, at \*6 n.2 (W.D. Tenn. Oct. 14, 2016) (concluding the same and collecting cases from district courts within the Sixth Circuit); see also Strode v. Colvin, No. 3:12-0378, 2016 WL 3580832, at \*7 n.3 (M.D. Tenn. June 28, 2016) ("SSR 96-7p has been superseded by SSR 16-3p, which became effective on March 28, 2016.

Plaintiff's complaint was filed in April of 2012, however, and thus SSR 96-7p applies to the Court's analysis of this claim.").

Several district courts in other circuits, on the other hand, have held that because SSR 16-3p *clarifies* rather than *changes* the SSA's regulatory policy as to symptom evaluation, it should be applied to prior decisions of the Commissioner. See Qualls v. Colvin, No. 14 CV 2526, 2016 WL 1392320, at \*6 (N.D. Ill. Apr. 8, 2016); see also Mesecher v. Colvin, No. 6:14-CV-01578-JE, 2016 WL 6666800, at \*4-5 (D. Or. Nov. 10, 2016); Holbert v. Colvin, No. 2:15-CV-11550, 2016 WL 4939114, at \*13 (S.D.W. Va. June 9, 2016), report and recommendation adopted, No. 2:15-CV-11550, 2016 WL 4942026 (S.D.W. Va. Sept. 15, 2016); Skirnack v. Colvin, No. 3:15-CV-239-JEM, 2016 WL 4709058, at \*7 n.1 (N.D. Ind. Sept. 9, 2016). The courts favoring application of SSR 16-3p to previously rendered decisions of the Commissioner have relied largely on Pope v. Shalala, 998 F.2d 473, 482-85 (7th Cir. 1993), overruled on other grounds by Johnson v. Apfel, 189 F.3d 561 (7th Cir. 1999). In Pope, the Seventh Circuit held that although retroactivity is disfavored in the law, retrospective application of a Social Security rule that clarifies rather than changes existing law "is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand." Pope, 998 F.2d at 483 (quoting Manhattan General Equip. Co. v. Commissioner, 297 U.S. 129, 135 (1936)); see also Crow Tribal Hous. Auth. v. U.S. Dep't of Hous. & Urban Dev., 781 F.3d 1095, 1101 (9th

Cir. 2015); Beller v. Health & Hosp. Corp. of Marion Cnty., Indiana, 703 F.3d 388, 391 (7th Cir. 2012); Levy v. Sterling Holding Co., LLC, 544 F.3d 493, 506 (3d Cir. 2008); Brown v. Thompson, 374 F.3d 253, 258-59 (4th Cir. 2004); Heimmermann v. First Union Mortg. Corp., 305 F.3d 1257, 1260 (11th Cir. 2002); Orr v. Hawk, 156 F.3d 651, 654 (6th Cir. 1998). But see Princess Cruises, Inc. v. United States, 397 F.3d 1358, 1363 (Fed. Cir. 2005) (finding the "binary" distinction between rules that clarify rather than change the law "largely unhelpful").

The court finds that SSR 16-3p simply clarifies the SSA's process for evaluating symptoms, and thus its application in appeals of final decisions of the Commissioner rendered before the ruling was issued does not result in the type of retroactivity disfavored by cases such as Bowen. This finding is supported by the textually stated purpose of SSR 16-3p: "to clarify that subjective symptom evaluation is not an examination of an individual's character." SSR 16-3p, 2016 WL 1119029, at \*1. The SSA issued SSR 16-3p in part on the recommendation of a report it commissioned from the Administrative Conference of the United States, which stated:

Some commentators have raised serious concerns regarding the potential for bias in the evaluation of a claimant's credibility, including in cases where an ALJ fails to develop the record . . . or relies on extraneous information in decisionmaking . . . . We are concerned that the current description of subjective symptom evaluation, though not wrong, may invite adjudicators to examine a claimant's character or inquire into other matters that are not essential - and indeed are

irrelevant - to the evidentiary determination of whether the nature, intensity, frequency, or severity of those symptoms impacts the claimant's ability to work.

Administrative Conference of the United States, *Evaluating Subjective Symptoms in Disability Claims*, 53 (2015), <https://www.acus.gov/publication/evaluating-subjective-symptoms-disability-claims>. While the stated purpose of the ruling and the language in the Administrative Conference report are not controlling, they support the court's finding that the rule is a clarification of the SSA's existing regulatory policy. See Pope, 998 F.2d at 483.

SSR 16-3p is consistent with both SSR 96-7p and the SSA's regulations as to symptom evaluation. SSR 96-7p instructed the ALJ to "make a finding on the credibility of the individual's statements based on a consideration of the entire case record." SSR 96-7P, 1996 WL 374186, at \*2.<sup>5</sup> It required the ALJ to give specific reasons for the weight given to the individual's statements, and prohibited the ALJ from making a conclusory statement that the individual's statements were considered and found not entirely credible. Id. at \*4. Also, "the findings on the credibility of the individual's statements cannot be based on an intangible or intuitive notion about an individual's credibility." Id. Nothing in the text of SSR 96-7p suggests that

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<sup>5</sup>Credibility was defined as the extent to which the individual's statements about her pain and other symptoms "can be believed and accepted as true." Id. at \*4.

the ALJ should consider an individual's character for truthfulness in evaluating her statements about her symptoms. See Cole, 831 F.3d at 412 ("The change in wording is meant to clarify that administrative law judges aren't in the business of impeaching claimants' character; obviously administrative law judges will continue to assess the credibility of pain assertions by applicants.").

SSR 16-3p clarifies that 20 C.F.R. §§ 404.1529 and 416.929 require the ALJ to evaluate an individual's statements about the intensity, persistence, and limiting effect of her symptoms in relation to all the evidence, and that the individual's symptoms be determined to diminish her capacity for basic work to the extent that her "alleged functional limitations and restrictions due to symptoms . . . can reasonably be accepted as consistent with the objective medical evidence and other evidence." 20 C.F.R. §§ 404.1529(c)(4); 416.929(c)(4). The regulations do not use the term credibility, and SSR 16-3p and SSR 96-7p instruct the ALJ to consider the same factors, enumerated in §§ 404.1529 and 416.929, in determining the extent to which an individual's statements about the effects of her symptoms are consistent or inconsistent with the evidence in the record. Because SSR 16-3p does not change the law governing symptom evaluation, the court applies it to Taylor's appeal of the ALJ's decision.

The ALJ determined that Taylor's "allegations of pain and other symptoms cannot reasonably be accepted as consistent with the

medical and other evidence.” (R. 34.) The court finds that this determination is reasonable and supported by substantial evidence. Taylor argues that “on the whole, the medical evidence is consistent with the limitations that [she] described in her testimony” because her headache and edema symptoms “are described in the majority of her treatment notes” and “a March 2010 EMG study revealed that she did have peripheral neuropathy secondary to her diabetes.” (ECF No. 14 at 14, 17-18.) However, the ALJ’s opinion relied on the same objective medical evidence and opinion evidence which led him to assign minimal weight to Covington’s opinion to support his conclusion that Taylor’s statements regarding the effect of her symptoms from headaches, edema, neuropathy, and nausea are not fully consistent with the evidence in the record. Given the court’s previous analysis of the objective and opinion evidence on which the ALJ relied, this evidence substantially supports the ALJ’s evaluation of Taylor’s statements. Even if Taylor were correct that her statements about her symptoms can be seen as consistent with the record, the court will not upset the ALJ’s contrary determination so long as it is reasonable and supported by substantial evidence.<sup>6</sup>

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<sup>6</sup>Taylor also argues the ALJ mischaracterized her testimony about her daily activities, and that her daily activities are consistent, rather than inconsistent with her alleged symptoms. It is proper for the ALJ to “consider household and social activities engaged in by the claimant in evaluating a claimant’s assertions of pain or ailments.” Walters v. Comm’r of Soc. Sec., 127 F.3d 525, 532 (6th Cir. 1997). However, the ALJ did not rely on Taylor’s professed

The ALJ did note that Taylor's "noncompliance with prescribed pharmacotherapy reduces her overall credibility, as do her inconsistent statements." (R. at 33-34.) The ALJ referred to a March 2014 treatment note indicating that for three months Taylor had failed to take the Metformin prescribed for her diabetes. The ALJ took her failure to take prescribed medication as an indication that "any symptoms she may have are not as severe as she alleges." (R. 28.) As to inconsistent statements, the ALJ pointed to a treatment note in March 2014 indicating that Taylor claimed to be under a lot of stress at work, even though Taylor testified that she was not working at that time.<sup>7</sup>

Under SSR 16-3p (as under SSR 96-7p), the ALJ is supposed to evaluate an individual's statement about symptoms in light of the evidence in the record, not in light of notions about her credibility more generally. To the extent the ALJ considered Taylor's purported failure to take Metformin as prescribed or her allegedly inconsistent statements to reflect negatively on her overall credibility, that consideration was error. Any such error, however, was harmless. See Ulman, 693 F.3d at 714 ("[H]armless error analysis applies to credibility determinations in the social

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daily activities as a reason for questioning her credibility, but rather to point out that this part of her testimony was inconsistent with the medical evidence in the record.

<sup>7</sup>Taylor contends this note was made by mistake, or was a misunderstanding on the part of the medical provider. Her contention is not supported by any evidence in the record.

security disability context.”). As noted above, the ALJ cited to sufficient evidence in the record to support the weight he gave to Taylor’s statements about her symptoms. Accordingly, any error the ALJ made in referencing broader notions of credibility or character for truthfulness does not warrant reversal.

Although the ALJ referenced Taylor’s purported noncompliance with prescribed pharmacotherapy in terms of overall credibility, earlier in his decision he also stated that:

it would appear that if [Taylor was] indeed experiencing disabling symptoms she would take her medications and follow her physician’s instructions in an effort to obtain any relief she could, and her failure to do so indicates that any symptoms she may have are not as severe as she alleges.

(R. 28.) It is proper for the ALJ to consider an individual’s failure to follow “prescribed treatment that might improve symptoms” in determining whether the individual’s statements about her symptoms are consistent with the record evidence. SSR 16-3p, 2016 WL 1119029, at \*8. However, the ALJ may not “find an individual’s symptoms inconsistent with the evidence in the record on this basis without considering possible reasons he or she may not comply with treatment.” Id.

The ALJ’s opinion does not address possible reasons why Taylor failed to take Metformin as prescribed. The issue was not raised at the hearing, and is not addressed elsewhere in the record.<sup>8</sup> In

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<sup>8</sup>The record also does not indicate which of Taylor’s symptoms would have been alleviated by Metformin.



her brief, Taylor argues that her hearing testimony regarding her lack of health insurance suggests "financial issues may have prevented her from taking the medication." (ECF No. 14 at 19; R. at 61-62.) While the ALJ should not have considered Taylor's failure to take prescribed medications without also considering possible reasons for such failure, this error is also harmless given the objective medical evidence and opinion evidence substantially supporting the weight the ALJ gave to Taylor's allegations regarding her symptoms.

Taylor also contends that the ALJ should not have discounted her statements based on a November 2013 treatment note stating "the frequency of exercise [Taylor] achieves is daily." (R. 639.) She argues the note is "cryptic," and does not indicate what sort of exercise Taylor was purportedly engaging in, or for how long. Taylor may be correct that the note is somewhat cryptic, and standing alone might not justify finding her statements to be inconsistent with the record evidence. However, the objective medical evidence and opinion evidence substantially supports the ALJ's determination even without this note.

### **III. CONCLUSION**

For the reasons described above, the ALJ's decisions to assign minimal weight to Covington's opinion and to Taylor's statements regarding the severity and effect of her symptoms are supported by substantial evidence. Accordingly, the Commissioner's determination that Taylor is not disabled within the meaning of 42

U.S.C. § 423(d) because she has the RFC to perform sedentary work is affirmed.

IT IS SO ORDERED.

s/ Tu M. Pham  
TU M. PHAM  
United States Magistrate Judge

November 15, 2016  
Date