

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

LUE ANN VESTER,)	
)	
Plaintiff,)	
)	
v.)	14-cv-2756-TMP
)	
NANCY A. BERRYHILL,)	
ACTING COMMISSIONER OF SOCIAL)	
SECURITY,)	
)	
Defendant.)	
)	

ORDER AFFIRMING THE COMMISSIONER'S DECISION

Before the court is plaintiff Lue Ann Vester's appeal from a final decision of the Commissioner of Social Security¹ ("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.* On December 16, 2016, the parties consented to the jurisdiction of the United States magistrate judge pursuant to 28 U.S.C. § 636(c). (ECF No. 15.) For the reasons set forth below, the decision of the Commissioner is affirmed.

¹Carolyn W. Colvin was the Acting Commissioner of Social Security at the time this case was filed. Therefore, she is named in the complaint and in the caption to this case. As of the date of this order, the Acting Commissioner of Social Security is Nancy A. Berryhill.

I. FINDINGS OF FACT

On March 10, 2011, Vester applied for disability insurance benefits and supplemental security income under Titles II and XVI of the Act. (R. 26.) In both applications Vester alleged a disability onset date of August 6, 2008. (R. 19, 66.) Vester's applications were denied initially and upon reconsideration by the Social Security Administration ("SSA"). (R. 66-69.) At Vester's request, a hearing was held before an Administrative Law Judge ("ALJ") on March 4, 2013. (R. 86-87.) On April 3, 2013, the ALJ issued a decision denying Vester's request for benefits after finding that Vester was not disabled because she retained the residual functional capacity ("RFC") to perform past work as a cleaner/housekeeper. (R. 26-34.) On July 25, 2014, the SSA's Appeals Council denied Vester's request for review. (R. 3-7.) Therefore, the ALJ's decision became the final decision of the Commissioner. (Id.) On September 26, 2014, Vester filed the instant action. (ECF No. 1.) Vester argues that the ALJ's determination that she has the residual functional capacity to perform light work is not supported by substantial evidence. (ECF No. 12.)

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.

§ 423(d)(2). 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. See 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. See 20 C.F.R. § 404.1520(a)(4).

C. The ALJ's RFC Determination

Vester's only argument is that the ALJ's determination that she has the RFC to perform light work is not supported by substantial evidence. A claimant's RFC is "the most [the claimant] can still do despite [her] limitations." 20 C.F.R. §§ 404.1545(a)(1) & 416.945(a)(1). The ALJ must assess the claimant's RFC based on all of the relevant evidence in the record. §§ 404.1545(a)(3) & 416.945(a)(3); see also SSR 96-8P, 1996 WL 374184, at *3 (July 2, 1996) ("The RFC assessment is a function-by-function assessment based upon all of the relevant evidence of an

individual's ability to do work-related activities."). Although the ALJ "consider[s] opinions from medical sources" as to the claimant's RFC, "the final responsibility for deciding [the RFC] is reserved to the Commissioner." 20 C.F.R. §§ 404.1527(d)(2) & 416.927(d)(2); see Coldiron v. Comm'r of Soc. Sec., 391 F. App'x 435, 439 (6th Cir. 2010) (citing 42 U.S.C. § 423(d)(5)(B)) ("The Social Security Act instructs that the ALJ – not a physician – ultimately determines a claimant's RFC.").

The ALJ found that Vester "has the residual functional capacity to perform the full range of light work as defined in 20 C.F.R. § 404.1567(b) and 416.967(b)." (R. 29.) "Light work"

involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities.

20 C.F.R. §§ 404.1567(b) & 416.967(b); see also SSR 83-10, 1983 WL 31251, at *5 (January 1, 1983). "Frequent" is defined as "occurring from one-third to two thirds of the time." SSR 83-10, 1983 WL 31251, at *6. For the following reasons, pursuant to the standards for substantial evidence discussed above, the court finds that this RFC determination is supported by substantial evidence.

Vester asserts that the opinion of consultative examiner Dr. Lewis Loskovitz supports her claim of disability. She contends that because the ALJ did not adopt either Dr. Loskovitz's opinion

or the opinion of the nonexamining state consultative medical experts, the ALJ "formulated her RFC assessment using her own lay interpretation of raw data in the medical record," which is not supported by substantial evidence.² (ECF No. 12 at 7.)

Dr. Loskovitz examined Vester on August 16, 2011. He noted her chief complaint as "[c]annot use left hand, severe arthritis, diabetes, vision problems, and gait problems." (R. 530.) Vester reported to Dr. Loskovitz that she has constant, severe pain in her left hand, wrist, and knuckles that has not been diagnosed. She also reported "severe problems with her lumbar spine" that hurts all the time, knee pain and swelling, and that she uses a walker. The review of systems revealed "depression, tingling, memory loss, diabetes, frequent urination, and back pain." (R. 531.) Upon examination, Dr. Loskovitz described Vester as "well-developed, well nourished," not in acute distress, with "difficulty standing straight and difficulty walking, slow gait, and pain in left hand." He found "full range of motion in all of her extremities except for her shoulders," "abnormal stance bend over by 15 degrees with a severe lordosis. She cannot straighten up and she walks with a very slow gait with a walker." (Id.) He found "4/5 strength in all extremities except for her left hand which she refuses to use because of pain." (Id.)

Dr. Loskovitz concluded that Vester "can't use her left hand,

²The record also contains several psychological opinions. (R.

can't use her back. This patient cannot lift and carry 10 lbs one-third of the day. She cannot lift and carry 10 lbs one-third to two-thirds of the day. She cannot stand two hours a day and she can sit without difficulty." (R. 532.) He also noted that an "x-ray of the left hand . . . is normal. There are normal joint spaces, normal bony areas, no arthritic change, and no soft tissue changes." (Id.)

The ALJ discussed Dr. Loskovitz's report in detail in her opinion, and compared his conclusions to the other evidence in the record. She found that the objective medical evidence does not support severely limiting back pain, noting that the record does not contain evidence of ongoing treatment for back pain, Vester's lumbar x-rays were interpreted as normal, and the record evidence indicated Vester had a non-tender back. As to knee pain, the ALJ observed that Vester continued to work for a year after x-rays showed degenerative changes in her left knee in 2007, she refused an injection for knee pain in 2011, and although Dr. Loskovitz reported that Vester was unable to bend her knees more than 90 degrees, he did not note any swelling, heat, or edema. The ALJ further stated that the record "does not support a finding of a medically determinable impairment involving the claimant's shoulders" given that "the longitudinal medical record contains no ongoing complaints of shoulder pain, and x-rays of her left

838-45; 846-59.)

shoulder were normal.” (R. 32.) The ALJ ultimately determined that Dr. Loskovitz’s opinion was not entitled to any weight.

While Vester argues that the ALJ’s RFC determination is not supported by substantial evidence, she does not identify any specific medical evidence which the ALJ allegedly misinterpreted or mischaracterized in determining how much weight to give to Dr. Loskovitz’s opinion. Because Dr. Loskovitz is not a treating physician, the ALJ was not required to give good reasons for not giving his opinion controlling weight and was entitled to give it the weight the ALJ felt appropriate based on the evidence in the record. See Smith v. Comm’r of Soc. Sec., 482 F.3d 873, 876 (6th Cir. 2007); 20 C.F.R. §§ 404.1527(c) & 416.927(c).³ The ALJ was not required to base her RFC determination on a physician’s opinion, and contrary to Vester’s contention, the ALJ did not improperly draw RFC conclusions from raw medical data or laboratory reports.⁴ See Rudd v. Comm’r of Soc. Sec., 531 F. App’x 719, 727-28

³The SSA has recently revised its rules for the evaluation of medical evidence. See 82 FR 5844 (January 18, 2017). The changes to the rules for the evaluation of medical opinions, now codified at 20 C.F.R. § 416.920c, apply to claims filed on or after March 27, 2017. The rules as codified in §§ 404.1527 and 416.927 apply to claims filed before March 27, 2017. Id. at 5867-68, 5878-79.

⁴Nonexamining state agency medical consultant Dr. Carolyn Parrish concluded that Vester does not have any medically determinable impairments that are severe, and nonexamining state agency medical consultant Dr. James Gregory affirmed this conclusion at reconsideration stage. (R. 566-70; 837.) However, the ALJ gave “some credit to [Vester’s] testimony and finds it reasonable to conclude that [Vester] is limited to light exertion due to a combination of impairments.” (R. 33.)

(6th Cir. 2013). The ALJ is ultimately charged with determining a claimant's RFC, and on these facts the ALJ's RFC determination is supported by substantial evidence.

III. CONCLUSION

For the reasons described above, the ALJ's RFC determination is supported by substantial evidence. Accordingly, the ALJ's determination that Vester is not disabled within the meaning of 42 U.S.C. § 423(d) is affirmed.

IT IS SO ORDERED.

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

April 24, 2016
Date