

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

BRENDA KAY MAHARREY,)	
)	
Plaintiff,)	
)	
v.)	
)	No. 17-cv-02607-TMP
NANCY A. BERRYHILL, Acting)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	

ORDER AFFIRMING THE COMMISSIONER'S DECISION

Before the court is plaintiff Brenda Maharrey's appeal from a final decision of the Commissioner of Social Security ("Commissioner") denying her application for disability insurance benefits under Title II of the Social Security Act ("Act"), 42 U.S.C. §§ 401 *et seq.* (ECF No. 1.) After the parties consented to the jurisdiction of the United States magistrate judge, pursuant to 28 U.S.C. § 636(c), this case was referred to the undersigned Magistrate Judge. (ECF No. 14.) For the following reasons, the Commissioner's decision is affirmed.

I. FINDINGS OF FACT

Maharrey applied for disability benefits under Title II of the Act on January 20, 2014, with an alleged onset date of November 30, 2013. (R. 66, 139-42.) Maharrey alleged disability due to the following illnesses, injuries, or conditions: "back problem, high

blood pressure, degenerative joint disease, [and] possible diabetes." (R. 48.) The Social Security Administration ("SSA") denied Maharrey's application initially and upon reconsideration. (R. 86, 91.) At Maharrey's request, a hearing was held before an Administrative Law Judge ("ALJ") on March 16, 2016. (R. at 93, 127.) On May 26, 2016, the ALJ issued a decision denying Maharrey's request for benefits after finding that she 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. 16-24.)

In her decision, the ALJ concluded that Maharrey has the following severe impairments: lumbar spinal stenosis, cervical radiculopathy, polyneuropathy. (R. 18.) However, the ALJ found that Maharrey did not have an impairment or combination of impairments listed in or medically equal to one of the listed impairments contained within 20 C.F.R. Part 404, Subpart P, Appendix 1. (R. 20.) The ALJ then concluded that Maharrey retains the RFC "to perform the full range of sedentary work as defined in 20 C.F.R. 404.1567(a)." (Id.) In making that RFC determination, the ALJ considered Maharrey's testimony and medical records. (R. 20-22.) The ALJ also considered the opinions of Dr. Lisa Mani¹ and Dr. Iris Rotker (the state agency consultants). (R. 55-61, 76-81.)

¹Although the ALJ refers to Dr. Jane Yates when discussing this report, it is apparent that the report discussed was completed by Dr. Mani.

Dr. Mani concluded that Maharrey could perform heavy work and Dr. Rotker concluded that Maharrey could perform light work. (R. 61, 79-80.) The ALJ assigned both of those opinions "little weight." (R. 22.) Ultimately, the ALJ concluded that Maharrey's RFC determination was "supported by the medical records of evidence that show [Maharrey] is capable of sedentary work in addition to frequent reaching, handling, and fingering." (R. 22.)

At step four, the ALJ concluded that Maharrey could not perform any past relevant work. (R. 22.) The ALJ's analysis advanced to step five where she stated that:

considering the claimant's age, education, work experience, and residual functional capacity, the claimant has acquired work skills from past relevant work that are transferable to other occupations with jobs existing in significant numbers in the national economy.

(R. 22.) Accordingly, the ALJ concluded that Maharrey was not disabled and was therefore not entitled to disability benefits under Title II of the Act. (R. 23.) On June 20, 2017, the Appeals Council denied Maharrey's request for review, making the ALJ's decision the final decision of the Commissioner. (R. 1.)

Maharrey filed this action on August 22, 2017, seeking review of the ALJ's decision. (ECF No. 1.) Maharrey argues that the ALJ's RFC determination is unsupported by substantial evidence. (ECF No. 18 at 12-18.) Specifically, Maharrey argues that the ALJ erred in making the RFC determination because it was not based on any medical opinion. (Id. at 17-18.) Maharrey also argues that

the ALJ did not adequately explain the basis for the RFC determination and how she concluded that Maharrey is capable of frequent reaching, handling, and fingering. (Id. at 18.)

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*, resolve conflicts in the evidence, or decide questions of credibility. 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)). Rather, the Commissioner, not the court, is charged with the duty to weigh the evidence, to make credibility determinations, 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. Whether the ALJ's RFC Determination Was Supported by Substantial Evidence

The "Social Security Act instructs that the ALJ – not a physician – ultimately determines a claimant's RFC." Coldiron v. Comm'r of Soc. Sec., 291 F. App'x 435, 439 (6th Cir. 2010); see also Rudd v. Comm'r of Soc. Sec., 531 F. App'x 719, 728 (6th Cir. 2013) ("[T]o require the ALJ to base her RFC finding on a physician's opinion, would, in effect, confer upon the treating source the authority to make the determination or decision about whether an individual is under a disability, and thus would be an abdication of the Commissioner's statutory responsibility to determine whether an individual is disabled.") (internal quotation marks and citation omitted); Nejat v. Comm'r of Soc. Sec., 359 F. App'x 574, 578 (6th Cir. 2009) ("Although physicians opine on a claimant's residual functional capacity to work, ultimate responsibility for capacity-to-work determinations belongs to the Commissioner."); Webb v. Comm'r of Soc. Sec., 368 F.3d 629, 633 (6th Cir. 2004) (stating that under the SSA regulations, "the ALJ is charged with the responsibility of evaluating the medical evidence and the claimant's testimony to form an 'assessment of [her] residual functional capacity'" (quoting 20 C.F.R. § 416.920(a)(4)(iv))).

In this case, the ALJ concluded that Maharrey has the RFC "to perform the full range of sedentary work as defined in 20 C.F.R. 404.1567(a)." (R. 20.) The ALJ later stated that, in addition to being able to perform sedentary work, Maharrey is capable of "frequent reaching, handling, and fingering." (R. 21.) In making this RFC determination, the ALJ described Maharrey's testimony at the hearing and her medical treatment history (between 2013 and 2015). (R. 20-22.) The ALJ then considered the opinion evidence:

As for the opinion evidence, the undersigned ALJ gives little weight to the state agency medical consultants in Exhibit 1A by M. Jane Yates [sic], Ph.D., who opined the claimant could perform the maximum sustained work capability for heavy work (Ex. 1A/14) and 5A by Iris Rotker, M.D., who opined the claimant could perform the maximum sustained work capability for light work (Ex. 5A/14).

(R. 21.) The ALJ ultimately concluded that Maharrey's RFC "assessment is supported by the medical records of evidence." (R. 22.)

Maharrey argues that the ALJ erred when making this RFC determination because it was not based on any medical opinion. (ECF No. 18 at 15) (arguing that the ALJ "erred by making her own independent medical findings and not recontacting Plaintiff's treating physicians or obtaining a consultative examination for a medical opinion on which to base her opinion"). In the Commissioner's view, Maharrey's "argument is based on the incorrect premise that the ALJ must have a medical opinion that precisely matches the residual functional capacity." (ECF No. 21 at 4.)

However, in her reply brief, Maharrey clarifies her argument: "the RFC determination must be supported by at least one medical opinion, not by one in particular." (ECF No. 22 at 1); (see also id. at 2) ("Plaintiff is requesting that the RFC be based on *some* medical evidence interpreted by a medical professional, and not the lay assumptions of an ALJ." (emphasis in original)).

"[T]he Sixth Circuit has held that an ALJ 'must not succumb to the temptation to play doctor and make [his] own independent medical findings.'" Canfield v. Colvin, No. 3:12-0050, 2017 WL 816824, at *11 (M.D. Tenn. Mar. 1, 2017) (quoting Simpson v. Comm'r of Soc. Sec., 344 F. App'x 181, 194 (6th Cir. 2009)). In support of her argument, Maharrey utilizes Canfield and other district court opinions from this circuit, which have emphasized that an ALJ's RFC determination should be based on the opinion of at least one medical expert. See Childress v. Berryhill, No.1:16-cv-119, 2017 WL 758941, at *4 (W.D. Ky. Feb. 27, 2017) ("Critical to the residual functional capacity finding are medical source statements expressing medical opinions regarding functional limitations caused by the claimant's physical or mental impairments."); Gross v. Comm'r of Soc. Sec., 247 F. Supp.3d 824, 828 (E.D. Mich. 2017) ("[T]here is significant case law in [the Eastern District of Michigan] confirming the general principle that the ALJ 'must generally obtain a medical expert opinion' when formulating the RFC unless the 'medical evidence shows relatively little physical

impairment such that the ALJ can permissibly render a commonsense judgment about functional capacity[.]'" (quoting Guido v. Comm'r of Soc. Sec., No. 13-cv-13520, 2014 WL 4771929, at *12 (E.D. Mich. Sept. 24, 2014)); Dillman v. Comm'r of Soc. Sec., 990 F. Supp.2d 787, 795 (S.D. Ohio 2013) ("As ALJs are not qualified to interpret raw medical data, a RFC determination must be supported by medical opinions in the record."). But see Coey v. Comm'r of Soc. Sec., No. 2:18-cv-301, 2018 WL 6380668, at *3 (S.D. Ohio Dec. 6, 2018) ("[T]he ALJ is charged with evaluating several factors when determining the RFC, including the medical evidence (*not limited to medical opinion testimony*), and the claimant's testimony." (emphasis added)); Watson v. Comm'r of Soc. Sec., No. 1:16-cv-432, 2018 WL 1460866, at *9 (E.D. Tenn. Mar. 23, 2018) ("Although the RFC must be supported by evidence of record, it need not correspond to, or even be based on any specific medical opinion." (quoting Simon v. Comm'r of Soc. Sec., No. 2:16-CV-259, 2017 WL 1017733, at *6 (S.D. Ohio Mar. 16, 2017)); Henderson v. Comm'r of Soc. Sec., No. 1:08-cv-2080, 2010 WL 750222, at *2 (N.D. Ohio Mar. 2, 2010) ("The Sixth Circuit has repeatedly upheld ALJ decisions where the ALJ rejected medical opinion testimony and determined RFC based on objective medical evidence and non-medical evidence. . . . Although the ALJ discounted the testimony of the doctors who proposed widely varying ranges of limitations, and found Ms. Henderson to not be fully credible in her testimony as to her limitations and

abilities, he was within a clearly appropriate 'zone of choice' to find that the testimony (even if not all fully credible) suggested some limitation was appropriate.").

Recently, the Sixth Circuit clarified that an ALJ's RFC determination need not be supported by any medical opinion. In Mokbel-Aljahmi v. Comm'r of Soc. Sec., 732 F. App'x 395, 401 (6th Cir. 2018), the Sixth Circuit stated:

Finally, Mokbel-Aljahmi notes that, in assessing his residual functional capacity, the ALJ gave no weight to nearly all the physicians' opinions regarding Mokbel-Aljahmi's ability to stand, walk, or reach, finding them inconsistent with the physicians' own notes. Mokbel-Aljahmi contends that once the ALJ decided to give no weight to the physicians' opinions regarding his ability to work, the ALJ was required to get the opinion of another physician before setting the residual functional capacity. *We disagree. We have previously rejected the argument that a residual functional capacity determination cannot be supported by substantial evidence unless a physician offers an opinion consistent with that of the ALJ. See Shepard v. Comm'r of Soc. Sec.*, 705 F. App'x. 435, 442-43 (6th Cir. 2017) (rejecting the argument that "the ALJ's [residual functional capacity] lacks substantial evidence because no physician opined that [the claimant] was capable of light work"); Rudd v. Comm'r of Soc. Sec., 531 F. App'x. 719, 728 (6th Cir. 2013) (rejecting the same argument because "the ALJ is charged with the responsibility of determining the [residual functional capacity] based on her evaluation of the medical and non-medical evidence"). We similarly find no error here. The ALJ undertook a laborious evaluation of the medical record when determining the residual functional capacity, and substantial evidence supports the ALJ's conclusions.

(emphasis added); see also Hockey v. Comm'r of Soc. Sec., No. 1:17-cv-796, 2018 WL 3737945, at *1 (W.D. Mich. Aug. 7, 2018) ("Plaintiff also repeats her original argument that the RFC must be

based on at least one medical opinion unless the medical evidence on the record shows relatively little physical impairment. Plaintiff asserts that a medical opinion should be required in this case because two examining physicians determined that she was disabled. However, as the Commissioner notes in response, the Sixth Circuit recently rejected this argument in Mokbel-Aljahmi."). Therefore, the court rejects Maharrey's argument that the ALJ erred by not basing the RFC determination on the opinion of a medical expert.

"Nevertheless, substantial evidence must support the Commissioner's RFC finding." Coey, 2018 WL 6380668, at *3. The ALJ must assess the claimant's RFC based on all of the relevant evidence in the record. 20 C.F.R. §§ 404.1545(a)(3), 416.945(a)(3); see also SSR 96-8P, 1996 WL 374184, at *3 (S.S.A. 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."). Here, the ALJ considered the opinions of the state agency consultants and ultimately assigned those opinions minimal weight because they were not limiting enough. Maharrey concedes that the ALJ's decision to assign those opinions minimal weight was proper. (ECF No. 18 at 15) ("[T]he ALJ properly attributed little weight to these exertional opinions[.]"). The ALJ later concluded that Maharrey

was only capable of performing sedentary work after considering the objective medical evidence, namely Maharrey's medical records.

Finally, Maharrey takes issue with the ALJ's finding that Maharrey is capable of frequent reaching, handling, and fingering. In making this argument, Maharrey emphasizes that "non-examining State agency review physician Dr. Rotker opined Plaintiff can never reach overhead with her left upper extremity, and can only do other reaching 'occasionally.'" (ECF No. 18 at 17) (citing R. 77, Dr. Rotker's report). However, the ALJ gave Dr. Rotker's opinion minimal weight and instead based the RFC determination on Maharrey's medical records. Those records support the ALJ's conclusion that Maharrey is capable of frequent reaching, handling, and fingering. Specifically, as the ALJ noted, those records show that Maharrey failed to consistently attend her prescribed physical therapy sessions. (R. 21-22.) In addition, the ALJ cited a report from Maharrey's physical examination, which concluded that Maharrey had normal strength. (R. 22) (citing Exhibit 12F). Other evidence in the record also supports that Maharrey's range of motion is only minimally restricted. (See R. 346-47.) Accordingly, the court concludes that the ALJ's RFC determination is supported by substantial evidence.

III. CONCLUSION

For the reasons above, the Commissioner's decision is affirmed.

IT IS SO ORDERED.

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

January 28, 2019
Date