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

MARY DUNLAP, Plaintiff, vs. JO ANNE B. BARNHART, Commissioner of Social Security, Defendant.	)	No. 03-2514-MaV

REPORT AND RECOMMENDATION

The plaintiff, Mary J. Dunlap, appeals from a decision of the Commissioner of Social Security ("Commissioner"), denying Dunlap's application for disability and disability insurance under Title II of the Social Security Act, 42 U.S.C. §§ 401 et seq. The appeal was referred to the United States Magistrate Judge for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and (C). For the reasons stated below, it is recommended that the decision of the Commissioner be affirmed.

PROPOSED FINDINGS OF FACT

A. Procedural History

Dunlap first applied for Social Security disability benefits on December 30, 1999, citing disability due to systemic lupus erythematosus ("SLE") and fibromyalgia. (R. at 81-83, 94.) Her application was denied initially and upon reconsideration. (R. at 60-67, 71-72.) Dunlap then filed a request for a hearing that was duly held on May 23, 2001, before Administrative Law Judge John J. Schule, III ("ALJ"). (R. at 26.) The ALJ denied Dunlap's application for benefits on July 26, 2001. (R. at 19.) Dunlap

appealed to the Appeals Council of the Social Security Administration, which denied Dunlap's request for review and left the ALJ's decision as the final decision of the Commissioner of Social Security. (R. at 5-6.) Dunlap filed suit in federal district court on July 14, 2003, pursuant to 42 U.S.C. § 405(g), to review the Commissioner's final decision. Her suit alleges that the ALJ' decision was not supported by substantial evidence and that the ALJ applied incorrect legal standards.

B. <u>The Hearing before the ALJ</u>

Dunlap was born on November 22, 1954. (R. at 30.) At the time of the ALJ hearing, Dunlap was 46 years old. (*Id.*) She is a high school graduate and has completed some computer training. (R. at 31.) In 1981, Dunlap began working as a loan officer at the VA Hospital Credit Union ("Credit Union") in Memphis, Tennessee. (R. at 138.) She was employed there until May 14, 1999 and has been unemployed since that date. (R. at 31-32.)

Although she held the title of "loan officer" at the credit union, Dunlap performed the work of almost all positions associated with a financial institution due to the small size of her office. (R. at 33.) As a loan officer, her duties included approving and denying loans, interviewing people for loans, pulling credit reports, and analyzing loan applications. (*Id.*) Additionally, Dunlap would perform the work of a teller and attend to the needs of credit union members. (*Id.*) Those duties included working at the counter, assisting members with withdrawals and deposits, wiping the counter, and answering the telephones. (*Id.*) Dunlap was also responsible for ordering supplies, picking up supplies,

and stocking them. (*Id.*) As a result of her multiple duties, Dunlap's average work day would be spent alternating between standing behind the counter and sitting at her desk. (*Id.*) Her employment at the credit union required the use of her hands to operate the computer on a daily basis and to count large sums of money approximately every other day. (*Id.*) She would have to lift and carry office supplies such as computer paper, and she would also have to lift and carry cash drawers. (R. at 34.) She testified that the heaviest weight she would lift was approximately fifteen pounds.

Dunlap's claimed date of disability onset is May 14, 1999. Before that date, Dunlap would come home from work everyday and go straight to bed. (*Id.* at 35.) Around ninety percent of the time, she would remain in bed until she had to return to work the next day. (*Id.*) She began to break out in a rash and had trouble recovering from infection. (*Id.*) She testified that these symptoms led to the discovery of her impairment and she has not worked since she was diagnosed. (*Id.*)

Dunlap testified as to her daily activities after the discovery of her impairment. She is married with two adult children and lives with her husband. (R. at 30.) She and her husband own their own home. (*Id.*) She testified that she has both good and bad days. (R. 37.) On a good day, Dunlap will get out of bed around nine or ten o'clock in the morning, get dressed, and perform work around her house until she gets tired and has to rest. (R. at 37.) She lays down to rest for a couple of hours at least two or three times a day. (R. at 36.) Dunlap testified that she

tries to do the household cleaning she feels able to do, such as dusting and laundry, even though she might not be able to finish it. (R. at 44.) Her husband vacuums because she is unable to do so without "pay[ing] for it the next day." (R. at 45.) She is able to shop for groceries with the help of her husband. (*Id.*) As for personal shopping, Dunlap testified that she would shop for personal items or gifts as needed with the help of either her husband or friend. (*Id.*) She does not have difficulty driving by herself. (*Id.*) She does, however, have difficulty climbing stairs because it bothers her hips and knees. (R. at 46.) Dunlap attends church but has to get up and walk around during the service. (R. at 47.)

On a bad day, Dunlap stays in bed all day. (R. at 37.) On average, she will experience three or four bad days a week. (R. at 44.) Since being diagnosed with SLE, Dunlap can no longer participate in the activities in which she used to participate. For example, she testified that she can no longer go camping, skiing, or boating. (R. at 46.) She used to enjoy working in her yard but can no longer endure the lifting, pulling, and sun exposure associated with that activity. (*Id.*) Additionally, she testified that she can no longer cross-stitch or needlepoint and has difficulty writing. (R. at 46, 36.)

Dunlap also testified about her medical problems, symptoms, and treatment. She experiences chronic pain in her neck, shoulders, arms, and legs, and her hips constantly ache. (R. at 36, 38.) She explained that she has peripheral neuropathy that adds to the pain and leaves her with numbness, tingling, and aches

in her extremities if she sits or stands for "a long period of time." (R. at 36, 38.) She claimed that activity can make her pain and fatigue worse. (R. at 37.) She testified that she constantly runs a low grade fever. (R. at 35.) She experiences headaches that may turn into migraines at least two or three times a week. (R. at 38.) She claims she has trouble reading because she cannot concentrate; however, she had stated in previous reports that she continued to read as a hobby. (R. at 43, 234.) Additionally, her lupus will flare whenever she feels stressed. (R. at 46.)

She also testified that she has difficulty sleeping at night and takes medication two or three times a week to help sleep. (R. at 39.) When she takes sleep medication, she can get approximately six hours of sleep a night. (*Id.*) Periodically when her lupus flares, she breaks out in a rash that covers her arms, chest, and face. (R. at 40-41.) She takes Prednisone to clear up the rash and has also started chemotherapy treatment. (R. at 41.) The chemotherapy has resulted in nausea and weight loss. (R. at 31.) Since 1999, Dunlap has been treated by a rheumatologist, Dr. Sprabery, for her lupus. (R. at 42.) In addition to the chemotherapy, she takes Plaquenil and anti-inflammatory medications. (*Id.*) Dunlap has a history of kidney stones that she has been able to pass with lithotripsy. (R. at 48.) Although Dunlap claims that she experiences depression, she does not take anti-depressant medication specifically for that condition, nor does she go to counseling. (R. at 49.) Her doctor has prescribed an anti-depressant to treat her peripheral neuropathy. (*Id.*)

Dunlap's daughter-in-law, Beverly Dunlap, also testified. Ms. Dunlap is a nurse. (R. at 51.) She has known Dunlap since she was eight years old and sees her three or four times a week. (R. at 50.) At the ALJ hearing, she testified about the changes she has observed in her mother-in-law's activities since the onset of impairment. (R. at 51.) Dunlap is not as active as she was five years ago. (*Id.*) For example, she can no longer rise from the sitting position without pain and has to rest at the mall when she goes shopping. (R. at 51-52.) Dunlap has trouble washing her hair and curling it. (R. at 52.) She testified that Dunlap becomes fatigued after the smallest physical exertion and could no longer work in her yard. (R. at 54.)

The ALJ also heard testimony from a vocational expert, Michelle McBroom. (R. at 56.) McBroom evaluated Dunlap's past work and present functional capacities. She testified that Dunlap's past relevant job as a loan officer would normally be classified as a "sedentary, skilled position." (*Id.*) However, Dunlap also performed the work of a teller, which is classified as a "light, skilled" position. (*Id.*) She testified that some of Dunlap's other duties resembled those of a general office clerk, and she categorized that work as "light and semi-skilled." (*Id.*) The ALJ proposed one hypothetical question. He asked the vocational expert whether a claimant of the same age, education, and occupational experience, who was restricted to lifting twenty pounds occasionally and ten pounds frequently, who could only engage in occasional postural activities, and who should be able to sit and stand at her own option could return to her past work. (R.

at 57.) McBroom responded that such a claimant would be able to return to her past work. (*Id.*)

In response to questioning from claimant's counsel, McBroom testified that if the ALJ's hypothetical were changed so that the claimant was a person who should not "do any repetitive grasping or fine manipulation with the hands" and "no pushing or pulling with the arms," then the claimant would not be able to return to her past work. (*Id.*) The vocational expert, however, stated that a claimant with those limitations would be able to perform other jobs in the national economy, including a position as a receptionist, information clerk, reservation clerk, order clerk, and security monitor. (R. at 57-58.) Additionally, if the hypothetical changed so that the claimant would need "at least two hours of rest during an eight-hour workday," McBroom testified that such restrictions would "eliminate light work because it would exceed normal work breaks." (R. at 58.) Finally, when propositioned with a hypothetical where a claimant would miss "at least three days of work in a month," McBroom determined that no jobs would be available for such a claimant.

C. Longitudinal Medical History According to the Records

The medical records contain various reports, statements, and letters from Dunlap's doctor of internal medicine, Dr. Douglas L. O'Dea, rheumatologist Dr. Trev Sprabery, neurologist Dr. Renga Vasu, nephrologists Dr. William R. Bastnagel and Dr. Nawar E. Mansour, urologist Dr. Robert Wake, and Dr. Chris Kasser, along with the assessments of state agency medical consultants. On May 13, 1999, Dunlap sought treatment from Dr. O'Dea, a specialist in

internal medicine, for an "unusual rash and fever, which would not respond to treatment of oral medication." (R. at 146.) Dunlap's symptoms resulted in further testing, and she was diagnosed with aggressive SLE on June 14, 1999. (*Id.*) Dr. O'Dea then referred her to a rheumatologist, Dr. Sprabery, for further treatment and instructed her to remain off work until her appointment with Dr. Sprabery on June 18, 1999. (*Id.*) Dr. Sprabery's notes reflect that the claimant was treated for proteinuria, hematuria, kidney stones, and numbness in the arms, fingers, and legs. (R. 252, 258, 290, 301.) Additionally, she was treated for low grade temperature, rash, redness of the face, fatigue, and poor sleep. (R. 247, 252, 254, 264, 301.) Dr. Spraybery tried steroids, Premarin, Diovan, Prednisone, Lortab, Plaquenil, Lasix, Medrol Dose Pak, Trazadone, Vioxx, and Imuran to treat the lupus and help alleviate Dunlap's related symptoms. (R. 99, 124, 248, 252, 265, 270, 288, 295, 304, 323.) On December 16, 1999, Dr. Sprabery stated in his notes that he was concerned about Dunlap's ability to work, but noted that she could consider part-time employment. (R. at 275.) A month later on January 25, 2000, Dr. Sprabery opined that he "did not feel [Dunlap] could maintain a job." (R. at 269.)

Dunlap was examined on January 18, 2000 by Dr. Vasu, a neurologist, when she reported that she had felt "some numbness in both the upper and lower extremities." (R. at 215.) Dunlap indicated that the numbness was not enough to keep her awake, though her sleep had not been "too good." (*Id.*) Dr. Vasu noted that Dunlap was taking Trazadone for sleep, but not on a regular basis. (*Id.*) Additionally, Dunlap reported that she had no

difficulty with walking or balance. (*Id.*) Dr. Vasu's examination revealed that Dunlap's "[s]ensations showed blunting of the vibration in both lower and upper extremities." (R. at 216.) The pinprick test indicated "slight" distal decrease below the ankles; however, Dunlap could "squat down and get up without difficulty." (*Id.*) Dr. Vasu diagnosed the claimant as having peripheral neuropathy associated with lupus and associated fibromyalgia syndrome. (*Id.*)

On March 22, 2000, Dr. Vasu saw Dunlap again. During that visit, Dr. Vasu reported that the claimant was "functioning reasonably well" and that her clinical findings remained unchanged. (R. at 214.) Additionally, "there [were] no findings to suggest myositis or myopathy." (R. at 214.) Dunlap was treated by Dr. Vasu again on September 20, 2000. (R. at 327.) The neurologist noted that Dunlap "has had no major problems related to the peripheral neuropathy itself." (*Id.*) Futhermore, her examination revealed "non-progressive findings" and that the claimant's "gait, station and balance" were stable despite the peripheral neuropathy. (*Id.*)

After an office visit on July 21, 2000, Dr. Sprabery noted that Dunlap had been more active and that she was more fatigued as a result. (R. at 252.) On July 31, 2000, Dr. Sprabery completed a medical assessment of Dunlap's condition and an evaluation of her physical capacities. (R. at 247, 249.) In his medical assessment, Dr. Sprabery noted the claimant's symptoms and indicated that she had a moderate level of severity involvement in her joints, muscles, and skin. (R. at 247.) He stated that Dunlap experiences

moderately severe, continuous pain and severe fatigue with her SLE that can be exacerbated by minimal activity or even inactivity. (R. at 247-248.) In conclusion, Dr. Srabery noted that in his opinion, Dunlap was incapable of "performing sustained, sedentary work activity over an eight hour period or forty hour work week." (R. at 248.) However, Dr. Srabery indicated that he did not expect Dunlap's condition "to last a period of at least [twelve] months." (*Id.*)

In Dr. Srabery's evaluation of Dunlap's physical capacities, he noted that Dunlap can only sit an hour and fifteen minutes at a time before getting up and can stand no more than an hour and fifteen minutes before needing to rest. (R. at 249.) Additionally, Dr. Srabery opined that Dunlap could only sit or stand less than two hours in an eight hour day and would need to be able to shift positions "at will from sitting, standing, or walking." (*Id.*) When asked how much weight Dunlap should be able to lift or carry, Dr. Srabery opined that she could not carry ten pounds even occasionally. (*Id.*) He indicated that Dunlap could not perform repetitive tasks with either hand and that she could not use her feet repetitively to operate foot controls. (R. at 250.) He indicated that Dunlap would have good and bad days and would be expected to be absent from work five or more days per month. (*Id.*) In his opinion, however, he did not believe that stress would exacerbate Dunlap's symptoms and indicated that Dunlap could tolerate moderate stress at work, "limited by joints and fatigue." (R. at 251.) As the medical basis of his opinion, Dr. Spraybery relied on Dunlap's synovitic hands, fluorescent

antinuclear antibodies ("FANA") noted at 1:160, and SSA Antibody. (*Id.*)

In addition to treatment for SLE and peripheral neuropathy, Dunlap has been treated by two nephrologists, Dr. Bastnagel and Dr. Mansour, and a urologist, Dr. Wake, for kidney related problems. Dunlap had been afflicted with kidney stones for several years pre-dating the onset of her impairment. Dunlap had kidney stones in 1983 and 1984 and remained stone free for eleven years. (R. at 202.) She subsequently passed stones in 1995 and was treated for recurrent urolithiasis once in 1996, once in 1997, and once in 2000. (R. at 192, 198, 202.) She was diagnosed as having bilateral stone disease. (R. at 337.) Dunlap also had gross hematuria and passed a stone in 1999. (R. at 165.) Dr. Wake made an assessment after an office visit on August 4, 1999, that Dunlap's hematuria and protenuria were "most likely secondary to her Lupus, however, could be exacerbated by her stone disease as well." (R. at 331.) On February 2, 2000, Dr. Wake indicated in a report that Dunlap had been non-compliant with her metabolic stone treatment for prophylaxis. (R. at 329.) She had three stones on the left side and one stone on the right on that date and claimed to be "doing well." (*Id.*) Dr. Wake noted that Dunlap had not had problems from a urology standpoint. (*Id.*) (R. at 175.) On March 6, 2000, Dunlap had an office visit with Dr. Bastnagel that revealed "gross hematuria," but no proteinuria. (R. at 180.) During that examination, an intravenous pyelogram ("IVP") showed a "small calculus overlying the upper pole of the left kidney" and "mild right caliectasis without evidence of obstruction." (R. at

179.) Dr. Bastnagel indicated that it was "probably stone related," with "hypercalcemia" due to "recent steroids/Lasix" use for treatment of a flare-up of lupus. (R. at 180.)

On April 18, 2001, Dr. Sprabery referred Dunlap to Dr. Kasser for assistance with pain management. (R. at 346.) Dunlap reported that her pain intensity on that date was a ten on a scale of one to ten and was five out of ten on her best day. (*Id.*) She indicated that she had aches and muscle spasms in her neck, along with nausea and fatigue. (*Id.*) Dunlap also reported that she was taking hydrocodone and severe pain ibuprofen. (*Id.*) Dr. Kasser noted that the neck pain reported by Dunlap was the result of "probable disc disease with severe myofacial syndrome" and that her peripheral neuropathy was stable. (*Id.* at 351.)

In addition to assessments and records from treating physicians, the record reflects that Dunlap was assessed by four non-treating medical consultants for Tennessee Disability Determination Services ("TDDS"). On March 8, 2000, a non-treating, non-examining state agency medical consultant completed a residual functional capacity assessment and opined, without the benefit of statements from treating sources, that Dunlap could lift and carry twenty pounds occasionally and ten pounds frequently; stand, walk, and sit six hours in an eight-hour workday; and had no limitations on pushing or pulling with the hands or feet. (R. at 226.) The medical consultant indicated that Dunlap experienced occasional postural limitations but noted no other limitations. (R. at 227.)

On May 31, 2000, non-treating, non-examining physician Orrin L. Jones, Jr., M.D. completed a residual physical functional

capacity assessment and reached the same conclusions as the first state agency medical consultant. (R. at 218-19.)

A functional mental capacity report was completed on June 19, 2000 by L.D. Hutt, Ph.D., an examining but non-treating clinical psychologist. (R. at 233.) Hutt observed that Dunlap's physical appearance was that of a "clean, well groomed, and fashionably dressed" woman whose hair was "tinted and curled . . . in attractive manner." (*Id.*) Dunlap wore make-up and jewelry and exhibited no pain behaviors. (*Id.*) In observing Dunlap's general attitude, Hutt noted that Dunlap was "pleasant and cooperative." (*Id.*) Her effort on the mental status exam seemed about average, and she appeared to be a "questionable informant." (*Id.*) Hutt observed that Dunlap's attention and concentration were "good" and that her stream of mental activity was "spontaneous, logical, normally paced, and well organized" with no signs of "alogical, disordered thinking." (R. at 235.) Dunlap's affect was "euthymic, stable, and appropriate." (*Id.*) Her memory, judgment, and abstract thinking were intact. (*Id.*) At the end of his examination, Hutt found no impairment-related mental limitations. (R. at 236.)

A psychiatric review technique was completed on July 5, 2000 by James S. Walker, Ph.D., an examining but non-treating psychologist. Walker concluded that Dunlap had no medically determinable impairment. (R. at 237.)

D. The ALJ's Decision

Using the five-step disability analysis,[1] the ALJ in this case

[1] Entitlement to Social Security benefits is determined by a five-step sequential analysis set forth in the Social Security

found, as the first step in the evaluation, that Dunlap had not engaged in any substantial gainful activity since her claimed onset date of May 14, 1999. (R. at 15.) At the second step in the analysis, the ALJ found that Dunlap's SLE with peripheral neuropathy/fibromyalgia imposes a degree of functional limitations and was therefore a severe impairment under the Social Security Act. (R. at 17.) The ALJ prefaced his findings with a summary of Dunlap's medical history and a description of her subjective pains. (R. at 15.) He found that Dunlap tested positive for active lupus on June 14, 1999 and that she was subsequently referred to Dr. Sprabery for further treatment. (*Id.*) He noted that Dunlap was treated for proteinuria, hematuria, kidney stones, numbness in the arms, fingers and legs, low grade temperature, redness of the face, fatigue and poor sleep. (*Id.*)

In addition to Dr. Sprabery's treatment notes, the ALJ relied on the medical records provided by a number of Dunlap's other physicians: Dr. O'Dea, Dr. Vasu, Dr. Bastnagel, Dr. Wake, and Dr.

Regulations. 20 C.F.R. §§ 404.1520, 416.920. First, the claimant must not be engaged in substantial gainful activity for a period of not less than twelve months. 20 C.F.R. § 404.1520(c). Second, a finding must be made that the claimant suffers from a severe impairment. *Id.* Third, 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. 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. 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 residual functional capacity to return to any past relevant work. 20 C.F.R. § 404.1520(e). If the ALJ finds the claimant unable to perform past relevant work, then, at the fifth step, the ALJ must discuss whether the claimant can perform other work which exists in significant numbers in the national economy. 20 C.F.R. § 404.1520(f).

Kasser. (R. at 15-16.) After examining Dr. Vasu's notes that diagnosed Dunlap as having peripheral neuropathy associated with lupus and associated fibromyalgia syndrome, the ALJ noted that during office visits in 2000 Dunlap would report that she was functioning reasonably well and that she was having "no major problems" related to the peripheral neuropathy. (R. at 16.) Additionally, the ALJ found that Vasu's examinations of Dunlap revealed "non-progressive" findings. (*Id.*) After reviewing medical records submitted by Dr. Bastnagel and Dr. Wake, the ALJ recognized that Dunlap has a history of kidney problems that included episodes of recurrent urolithiasis and gross hematuria, along with a diagnosis of having "probable" congenital bilateral renal stones. (*Id.*) The ALJ also reviewed Dunlap's treatment by Dr. Kasser for pain management and found that Dunlap's peripheral neuropathy was stable. (*Id.*)

In addition to the medical evidence, the ALJ considered Dunlap's subjective symptoms as part of his analysis of Dunlap's impairment. (*Id.* (citing 20 C.F.R. 404.1529).) First, the ALJ considered Dunlap's daily activities and found that the claimant was capable of taking care of her own personal needs, grocery shopping, taking short drives, running errands two or three times a week, cooking, light housekeeping, going to church, watching television, visiting friends and relatives, and going to the movies. (*Id.*) Although Dunlap claimed during the ALJ hearing that she had trouble reading and could no longer perform needlework, the ALJ noted that Dunlap had reported to Dr. Hutt on June 14, 2000 that she was able to do those activities. (*Id.*) The ALJ acknowledged that Dunlap was limited in performing some activities

because she can no longer attend church as much as she once could, she cannot always finish household chores, and she needs help with the laundry and vacuuming. (*Id.*)

Next, the ALJ evaluated the location, duration, frequency, and intensity of Dunlap's symptoms. (*Id.*) The ALJ considered Dunlap's own testimony that she experiences "severe" fatigue requiring rest periods several times a day, pain and numbness in the neck, shoulders, and arms ranging from five to ten on a ten point scale, headaches on the average of three of four times per week, and sensitivity to light and to noise whenever her lupus flares. (*Id.*) The ALJ noted that Dunlap claimed to have nausea but had never mentioned it to her physicians. (*Id.*) Additionally, Dunlap claimed to have pain in her hips and legs; however, her records reflected a full range of motion. (*Id.*)

The ALJ went on to find that no precipitating or aggravating factors were mentioned other than that stress causes a rash and that increased activity and change in the weather cause flare-ups. (R. at 17.) He then considered the type, dosage, effectiveness and side effects of medication taken to relieve Dunlap's symptoms. (*Id.*) He noted that the claimant reported that Prednisone helped clear the rashes associated with her lupus flare-ups but had the side effect of nausea and swelling. (*Id.*) Furthermore, Dunlap asserted that she took Ibuprofen but was not sure whether it was effective. (*Id.*) Dunlap did not mention any treatment or other measures taken for relief of her symptoms other than medication. (*Id.*) The ALJ noted that Dunlap reported some functional limitations. (*Id.*) Dunlap claimed that her legs begin to ache after walking for fifteen to twenty minutes and that after sitting

for about fifteen to twenty minutes her hip would go to sleep. (*Id.*) The claimant also reported that she can sleep only two hours without medication and five or six hours with medication, but she did not specify how often she required medication. (*Id.*) Finally, the ALJ noted that Dunlap asserted that she could not perform any activities requiring exposure to the sun. (*Id.*)

After completing a detailed review of the medical evidence and Dunlap's subjective symptoms, the ALJ assessed the credibility of Dunlap's testimony. He found that "[t]he claimant's subjective allegations regarding the extent of her limitations were not entirely credible because of inconsistencies between her allegations and the level of daily activities she enjoys, and because of inconsistency between her assertions and the comments she made to her treating physicians." (*Id.*) Although he acknowledged that Dunlap had some impairments that could "reasonably be expected to cause some limitations," he found that "the evidence does not support the degree the claimant has alleged." (*Id.*) He indicated that Dr. Sprabery's notes "frequently reflected" that Dunlap was feeling or doing better and that Dr. Vasu had reported no problems related to the peripheral neuropathy itself. (*Id.*) Nevertheless, the ALJ concluded that sufficient evidence existed to support a finding that Dunlap's impairment was "severe" as defined under the Act. (*Id.*)

At the third step, the ALJ found after reviewing all of the evidence that Dunlap's impairment did not, singly or in combination, meet or equal the level of severity described for any impairment listed in Appendix 1, Subpart P, of Regulation No. 4. (*Id.*) In reaching his conclusion, the ALJ noted that he considered

the opinions of the "state agency medical consultants, who evaluated this issue at the initial and reconsideration levels of the administrative review process and reached the same conclusion." (*Id.*)

At the fourth step in the analysis, the ALJ determined that Dunlap retained the residual functional capacity to perform "light work activity requiring only occasional postural activities, with a sit/stand option." (R. at 18.) He found that Dunlap could lift, carry, push, and pull ten pounds frequently and twenty pounds occasionally, could stand or walk about six hours out of eight, and sit "about" six hours out of eight. (R. at 19.) In reaching his conclusion, the ALJ first considered the opinion of Dr. Spraberry, who opined that Dunlap was "incapable of even sedentary work activity." (R. at 17.) Although the ALJ recognized that a treating physician's opinion is entitled to deference and may be entitled to controlling weight, the ALJ found that Dunlap's testimony and written reports regarding her ability to function were inconsistent with Dr. Sprabery's assessment. (*Id.*) Specifically, the ALJ found that Dr. Sprabery's opinion as a rheumatologist regarding the limiting effects of Dunlap's fatigue was "apparently based on subjective allegations" and that Dr. Sprabery may have exhibited an "element of sympathy" to the claimant based on his "lengthy" treatment relationship with her. (*Id.*) Accordingly, the ALJ concluded that Dr. Sprabery's opinion was "too limited and not supported by the record." (*Id.*)

Additionally, the ALJ found that while the record suggested that Dunlap's impairment had limited her activities "to some degree," she had not experienced a "substantial reduction in her

previous levels of social and personal activities" because she "attends church, drives, visits friends and relatives, and apparently makes her doctor's appointments." (R. at 18.) After considering Dr. Sprabery's opinion on Dunlap's residual functional capacity and only giving Dunlap partial credit for her subjective allegations, the ALJ turned to the opinions of the state agency medical consultants and determined that their findings were the "most consistent with the evidence as a whole." (*Id.*)

After determining that Dunlap retained residual functional capacity to perform light work activity requiring only occasional postural activities with a sit/stand option, the ALJ found that Dunlap could perform her past relevant work as a loan officer based on the vocational expert's testimony that Dunlap's past relevant work ranged from sedentary to light in exertion. (*Id.*) Therefore, the ALJ found that Dunlap was not under a "disability" as defined in the Social Security Act and did not proceed with any further analysis. (*Id.*)

PROPOSED CONCLUSIONS OF LAW

On appeal, Dunlap contends that the Commissioner's decision should be reversed because the ALJ committed legal error by failing to provide an analysis of the applicable Medical Listings; by failing to consider lay witness testimony regarding the claimant's symptoms and activities; by failing to apply the Treating Physician Rule; by failing to reconcile the disparity between the Dictionary of Occupational Titles description of a loan officer and the description given by the vocational expert; and by failing to incorporate the impact of documented non-exertional restrictions on the claimant's ability to sustain employment when adopting a

residual functional capacity assessment without a factual or medical basis, thereby failing to rely on substantial evidence in concluding that Dunlap could return to her past relevant work.

A. Standard of Review

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. 42 U.S.C. § 405(g); *Barker v. Shalala*, 40 F.3d 789, 794 (6th Cir. 1994); *Abbott v. Sullivan*, 905 F.2d 918, 922 (6th Cir. 1990). 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 taken as a whole and must take into account whatever in the record fairly detracts from its weight. *Abbott*, 905 F.2d at 923. 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*, 40 F.3d at 794 (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. *Cutlip v. Sec'y of Health & Human Servs.*, 25 F.3d 284, 286 (6th Cir. 1994).

B. Consideration of Lay Witness Testimony

Dunlap contends that the Commissioner's decision should be

reversed because the ALJ failed to take into consideration the lay witness testimony of non-medical sources pursuant to 20 C.F.R. § 404.1513(e)(2). Dunlap asserts that the ALJ's decision does not specifically indicate that he considered the testimony and statement of her daughter-in-law, Beverly Dunlap, and the statement of her friend, Rebecca Hardwick, because the only reference in the ALJ's decision to lay testimony was that Dunlap's daughter-in-law testified that Dunlap could attend to her own personal needs. (Pl.'s Brief at 5.) In *Lashley v. Sec'y of Health & Human Servs.*, 708 F.2d 1048, 1054 (6th Cir. 1983), the Sixth Circuit held that "[p]erceptible weight must be given to lay testimony where . . . it is fully supported by the reports of the treating physicians." While the testimony and statements of lay witnesses must be considered, an ALJ does not have to discuss every piece of evidence presented as long as the record is developed fully and fairly. *Miller v. Shalala*, 8 F.3d 611, 613 (8th Cir. 1993); *cf. Higgs v. Bowen*, 880 F.2d 860, 864 (6th Cir. 1988) (holding that the Appeals Council did not err by failing to "spell out" in its opinion the weight it attached to lay witness testimony where the Council's opinion stated that it "considered the entire record which was before the administrative law judge, including the testimony at the hearing"). In this case, Dunlap is correct in her assertion that the ALJ did not specifically address the written statements of her daughter-in-law and friend in his decision. Nevertheless, the ALJ did specifically indicate that he carefully considered "all the evidence, including documents identified in the record as exhibits, testimony at the hearing, and any arguments presented." (R. at 15.) Accordingly, the ALJ did not err in failing to give perceptible weight to the testimony of the lay witnesses.

C. Weight Given to Treating Physician's Opinion

Dunlap argues that the ALJ erred in failing to give the proper weight to the opinion of Dunlap's treating physician and in giving too much weight to the opinions of non-examining physicians employed by the government. (Pl.'s Brief at 6-7.) Dr. Spraberry, Dunlap's treating rheumatologist, opined on September 8, 1999 and July 31, 2000 that Dunlap was unable to perform sedentary work and confirmed his opinion about Dunlap's ability to work in May 2001. (R. at 325.) Dunlap claims that the ALJ failed to comply with the Treating Physician's Rule as it is set forth in 20 C.F.R. § 404.1527(d)(2), which requires the ALJ to give a treating physician's opinion controlling weight if the opinion is consistent with the medical evidence taken in its entirety. *See Duncan v. Sec'y of Health & Human Servs.*, 801 F.2d 847, 855 (6th *Cir. 1986); King v. Heckler*, 742 F.2d 968, 973 (6th Cir. 1984).

According to Dunlap, the only reason given by the ALJ for not giving Dr. Sprabery's opinion controlling weight over the opinions of the state physicians was that Dr. Sprabery's opinion appeared to be "'based on subjective allegations' and sympathy from the 'lengthy treatment relationship with the claimant.'" (Pl.'s Brief at 7-8 (quoting R. at 17.).) If the claimant's assertion was accurate, this court would be inclined to find that a departure from the Treating Physician's Rule would not be warranted because a lengthy treatment relationship between the claimant and Dr. Sprabery would only lend more weight to his opinion instead of discrediting it.[2] However, a closer reading of the ALJ's decision

[2] 20 C.F.R. § 404.1527(d)(2)(i) directs the ALJ to give more weight to the opinion of a treating physician when that physician has a lengthy treatment relationship with the claimant and has frequently examined her. *See also Feild v. Apfel*, 34 F.

reveals that the ALJ did not discredit Dr. Sprabery's opinion based on his lengthy treatment relationship alone. The ALJ also discredited Dr. Sprabery's opinion because Dunlap's testimony and written reports about her ability to function were inconsistent. The ALJ found that Dunlap had not experienced a "substantial reduction in her previous levels of social and personal activities," even though she had limited her activities "to some degree." (R. at 18.) The ALJ noted that Dunlap could still perform household chores, go shopping for groceries and personal items, run errands two or three times a week, drive for short distances, attend church, prepare three meals a day, watch television, go to the movies, read, and occasionally visit with friends and relative. The ALJ found that all of the foregoing activities were inconsistent with the restrictive limitations imposed by Dr. Sprabery. Furthermore, the ALJ found that Dr. Sprabery's opinion was based on Dunlap's subjective allegations and not supported by any detailed, clinical, or diagnostic evidence.

Although the ALJ considered Dr. Sprabery's opinion in making his decision, he did not give the opinion controlling weight and was not required to do so under the Social Security Act. While the treating physician's diagnosis is entitled to greater weight than that of the government's physician, the ultimate issue of whether an individual is under a disability must be decided by the Commissioner. *Kirk*, 667 F.2d at 538 (citing 20 C.F.R. § 404.1527); *see also* Soc. Sec. Rul. 96-5p (July 2, 1996) (opinions that a person is "disabled" or "unable to work" are not medical opinions but are administrative findings on issues reserved to the

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Supp. 2d 1081, 1088 (W.D. Tenn. 1998).

Commissioner). Accordingly, the ALJ properly credited Dr. Sprabery's opinion and substantial evidence supports his determination.

D. Equivalency of Applicable Medical Listings

Dunlap next argues that the Commissioner's decision should be reversed because the ALJ committed legal error by not finding that Dunlap's impairment met the requirements of an applicable Medical Listing. As demonstrated by the claimant, the ALJ's analysis of the Medical Listings was limited to two sentences:

> **At the third step of the sequential evaluation, the Administrative Law Judge has reviewed *all of the evidence* and concludes that the claimant's impairments do not, singly or in combination meet or equal the level of severity described for *any* impairment listed in Appendix 1, Subpart P, Regulations No. 4. In reaching this conclusion, the Administrative Law Judge has considered the opinions of the state agency medical consultants who evaluated this issue at the initial and reconsideration levels of the administrative review process and reached the same conclusion.**

(R. at 17 (emphasis added).) Dunlap asserts that the ALJ's conclusory determination must be rejected because he neither cited nor performed an analysis of the applicable Medical Listings for arthritis, musculoskeletal involvement, or SLE.

A claimant is considered disabled per se if the listings criteria are met for their impairment. *See* 20 C.F.R. § 404.1520(d); *Gambill v. Bowen*, 823 F.2d 1009, 1011 (6th Cir. 1987). However, the claimant has the burden of establishing that she meets a listed impairment, and an impairment meets a listing only when it manifests the specific findings described in the medical criteria for the particular impairment. *See* 20 C.F.R. § 404.1525(d); *Evans v. Sec'y of Health & Human Servs.*, 820 F.2d 161, 164 (6th Cir. 1987). Upon review of the entire record, Dunlap has not met her

burden in the present case. Although the claimant has challenged the sufficiency of the ALJ's analysis at the third step, Dunlap has not offered specific evidence to indicate that she meets or has an impairment equal to the criteria of any applicable Medical Listing. Additionally, when an ALJ makes a disability determination after "a thorough review of the medical evidence of record" in deciding that a claimant does not meet a listed impairment, a "more elaborate articulation" is not required. *Gooch v. Sec'y of Health & Human Servs.*, 833 F.2d 589, 592 (6th Cir. 1987). In this case, the ALJ came to a conclusion based on "all of the evidence" and found that Dunlap did not meet "any" Medical Listing. His conclusion was not contradicted by any of Dunlap's treating physicians or any of the state agency physicians that reviewed Dunlap's medical history and records at the initial and reconsideration levels of disability determination.

Dunlap argues that the state agency medical consultants offered no opinion regarding Dunlap's listed impairment equivalency and that the ALJ's reliance on their findings is misplaced. (Pl.'s Brief at 8.) However, a review of the entire record indicates otherwise. The initial and reconsideration Disability Determination and Transmittal Forms include boxes to be checked by state agency physicians if they believe that the claimant's impairments meet or equal a listed impairment. Contrary to Dunlap's assertion, an unchecked box on the transmittal form does not indicate that the state agency physicians offered no opinion at all on the listed impairment issue. The signature of a state medical consultant on a transmittal form ensures that consideration by a physician designated by the Commissioner has been given to the question of medical equivalence. *See* Soc. Sec. Rul. 96-6p. In

this instance, the state agency physicians did not check the listed impairment box, which indicates to the court that they did not believe that Dunlap's impairment met or equaled a listed impairment. (R. at 60, 62.) Accordingly, the ALJ did not err in relying on the state agency medical consultants' opinions that Dunlap's impairment did not meet or equal that of a listed impairment.

E. Residual Functional Capacity Determination

Dunlap also contends that the ALJ's residual functional capacity ("RFC") assessment is not supported by substantial evidence because the ALJ did not take into consideration the pain and fatigue associated with SLE and fibromyalgia. (R. at 9-10.) Dunlap asserts that under Social Security Rulings 96-8p, 96-3p, 85-15, 96-4p, and 96-7p, an ALJ is required to consider allegations of pain or other symptoms in determining a claimant's RFC and ability to perform her prior work. However, Social Security Ruling 96-7p also indicates that "the extent to which an individual's statements about symptoms can be relied upon as probative evidence in determining whether the individual is disabled depends on the credibility of the statements." An ALJ's credibility determination is given great deference because the fact finder has the unique opportunity to observe and evaluate the witness, and his assessment need only be supported by substantial evidence. *See Walters v. Comm'r of Soc. Sec.*, 127 F.3d 525, 531 (6th Cir. 1997); *Gooch*, 833 F.2d at 592. An ALJ may discount credibility "to a certain degree" where he finds "contradictions among the medical reports, claimant's testimony, and other evidence." *Walters*, 127 F.3d at 531. Furthermore, a claimant's household and social activities may be considered in evaluating a claimant's assertions of pain or

ailments. *Id.* An ALJ may also take a claimant's consistency into account to determine credibility by comparing "statements made by the individual in connection with his or her claim for disability benefits with statements he or she made under other circumstances . . . [e]specially . . . statements made to treating or examining medical sources." Soc. Sec. R. 96-7p.

In this case, the ALJ partially discredited Dunlap's subjective complaints and limitations because of inconsistencies between her allegations and the level of daily activities she enjoyed, and because of inconsistency between her assertions and the comments he made to her treating physicians. (R. at 17.) For instance, the ALJ noted that Dunlap reported to Dr. Vasu that she had no major problems related to the peripheral neuropathy itself, and her neurologist saw no apparent reason for ongoing treatment. (*Id.*) The ALJ also noted that Dr. Spraberry's notes often reflected that Dunlap was "doing better" and that she "feels better." (*Id.*) The ALJ concluded that "[w]hile the claimant does have impairments that could reasonably be expected to cause some limitations, the evidence does not support the degree the claimant has alleged." (*Id.*) Additionally, the ALJ discredited the opinion of Dunlap's treating physician based in part on Dr. Sprabery's reliance on Dunlap's subjective allegations and also on the inconsistency of his opinion with the record taken as a whole. (R. at 17-18.) To the extent the ALJ found the claimant's subjective allegations of pain and fatigue credible, he adjusted his RFC determination to reflect that credibility and found that Dunlap retained the residual functional capacity to perform "light work activity requiring only occasional postural activities, with a sit/stand option." (*See* R. at 18.) Although the ALJ discredited

both Dunlap's subjective allegations and the opinion of her treating physician, the ALJ's RFC assessment was consistent with the opinions of the state agency medical consultants and therefore has support in the record. Accordingly, substantial evidence supports the ALJ's credibility finding and his assessment of Dunlap's RFC.

F. Conflict Between Vocational Expert's Testimony and Dictionary of Occupational Titles

Finally, Dunlap asserts that the ALJ committed reversible error by failing to reconcile an inconsistency between his RFC assessment and the RFC for a loan officer as listed in the Directory of Occupational Titles ("DOT"). At the ALJ hearing, the vocational expert categorized Dunlap's loan officer position as one requiring light physical exertion. (*See* R. at 56-57.) When the ALJ rendered his decision, he found that Dunlap retained the RFC to perform "light work activity requiring only occasional postural activities, with a sit/stand option." (R. at 18.) Under the DOT, the RFC for a loan officer is "sedentary" as opposed to "light." Social Security Ruling 00-4p states that when there is an apparent "unresolved" conflict between the vocational expert evidence and the DOT, the ALJ has a duty to inquire of the vocational expert, on the record, as to whether the information provided by the vocational expert conflicts with the DOT. However, it appears to this court that no such conflict exists because the regulations indicate that if someone can perform "light" work, they can also perform "sedentary" work. 20 C.F.R. § 1567(b). Furthermore, the DOT only lists the maximum requirements of occupations as they are generally performed and not as they are performed in specific instances. *See* Soc. Sec. Rul. 00-4p. At the hearing, the

vocational expert took into account Dunlap's testimony that her loan officer position as performed included tasks requiring both sedentary and light levels of physical exertion. Therefore, the vocational expert's categorization was more specific and precise than that of the DOT. Accordingly, the ALJ had no duty to resolve a conflict between the vocational expert opinion, and substantial evidence supports his determination.

CONCLUSION

The totality of the record indicates that the ALJ's decision was supported by substantial evidence at each step of the decision-making process. Accordingly, it is recommended that the Commissioner's decision be affirmed. The claimant's request for attorney fees is denied.

Respectfully submitted this 15th day of March, 2004.

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DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE