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

BILLY CROSSNO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 14-cv-01148-SHL-tmp**
	)	
CAROLYN W. COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY,	)	
	)	
Defendant.	)	
	)	

REPORT AND RECOMMENDATION

Before the court is *pro se* plaintiff Billy Crossno's appeal from a final decision of the Commissioner of Social Security ("Commissioner") denying his 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*. Pursuant to Administrative Order No. 2013-05, and the Order Reassigning Pending Social Security Cases entered on April 5, 2016 (ECF No. 12), this case has been referred to the undersigned United States magistrate judge for management and for all pretrial matters for determination and/or report and recommendation as appropriate. For the reasons set forth below, it is recommended that the decision of the Commissioner be affirmed.

I. PROPOSED FINDINGS OF FACT

On August 19, 2010, Crossno applied for disability insurance benefits and supplemental security income under Title II and Title XVI of the Act. (R. 5.) In both applications, Crossno alleged disability beginning on December 10, 2007, due to hernias in his stomach, degenerative disc disease, elbow pain, high cholesterol, and depression.[1] (R. 126, 131.) Crossno's application was denied initially and upon reconsideration by the Social Security Administration ("SSA"). (R. 15.) At Crossno's request, a hearing was held before an Administrative Law Judge ("ALJ") on September 7, 2012. (Id.) On September 21, 2012, the ALJ issued a decision denying Crossno's request for disability insurance benefits after finding that Crossno was not under a disability because he retained the residual functional capacity ("RFC") to perform jobs that exist in significant numbers in the national economy. (R. 15-27.) Crossno requested that the SSA's Appeals Council review the ALJ's decision, and the Appeals Council agreed to do so on January 22, 2014. (R. 110.) In its notice granting Crossno's request for review, the Appeals Council stated that it agreed to review Crossno's case because the ALJ's decision did not address Crossno's application for supplemental security income. (R. 111.) However, the notice also stated that the Appeals Council planned to issue a decision finding that Crossno was not entitled to Social Security

[1]On September 7, 2012, Crossno amended his application to allege

benefits because he could perform jobs that exist in significant numbers in the national economy. (R. 4, 111.) The notice informed Crossno that he could submit additional evidence for the Appeals Council's review, but Crossno did not do so. (Id.)

On April 22, 2014, the Appeals Council issued an order denying Crossno's request for benefits after finding that Crossno was not disabled because he was capable of performing jobs that exist in significant numbers in the national economy. (R. 4.) The Appeals Council adopted the ALJ's findings and conclusions regarding whether Crossno was disabled. (Id.) The Appeals Council reasoned that although the ALJ adjudicated Crossno's disability insurance benefits claim but not his supplemental security income claim, "the issue of disability is the same for both claims" and the ALJ "addressed all of the evidence of record." (R. 5.) Therefore, the Appeals Council concluded that the ALJ's reasoning as to Crossno's disability insurance benefits claim also applied to his supplemental security income claim, and as a result, denied both claims. (Id.) The Appeals Council's decision constituted the final decision of the Commissioner. (R. 1.) Subsequently, on June 25, 2014, Crossno filed the instant action. (ECF No. 1.) Crossno argues that the ALJ: (1) improperly analyzed the opinion of Dr. Pearline Butcher; (2) erred by not requesting additional medical

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disability beginning on October 13, 2009. (R. 5.)

records; and (3) failed to properly consider the effects of Crossno's obesity on his ability to work.[2] (ECF No. 10.)

II. PROPOSED 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."

[2]Crossno also argues that the ALJ erred by concluding that his degenerative disc disease and obesity were non-severe impairments. However, both the ALJ and the Appeals Council found that Crossno's degenerative disc disease and obesity were in fact severe impairments. (R. 5, 17.) Therefore, this argument is without

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.

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merit and does not require further analysis.

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 Properly Evaluated the Opinion of Dr. Butcher

First, Crossno argues that the ALJ erred by improperly evaluating the opinion of Dr. Butcher, an examining physician. Crossno contends that the ALJ discounted Dr. Butcher's opinion "because of bias" and argues that the ALJ failed to give good reasons for discounting the opinion. In formulating an RFC finding, "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) (citing 20 C.F.R. § 404.1545(a)(3)); see also Ealy v. Comm'r of Soc. Sec., 594 F.3d 504, 514 (6th Cir. 2010). A treating source opinion is entitled to controlling weight by the ALJ unless he or she has "good reasons" to discount the opinion, while a nontreating source opinion is

never entitled to controlling weight. 20 C.F.R. § 404.1527(c)(2); Gayheart v. Comm'r of Soc. Sec., 710 F.3d 365, 376 (6th Cir. 2013). Rather, the ALJ will weigh nontreating opinions based on the extent of the treatment relationship, specialization, consistency, and supportability. Gayheart, 710 F.3d at 376; see also Ealy, 594 F.3d at 514.

Because Dr. Butcher only examined Crossno on one occasion, she is not considered a treating source. See Coldiron v. Comm'r of Soc. Sec., 391 F. App'x 435, 442 (6th Cir. 2010) (holding that two doctors who only examined the claimant once did not constitute treating physicians). Thus, the ALJ was not required to assign Dr. Butcher's opinion controlling weight, nor was she required to give good reasons for rejecting the opinion, because "the SSA requires ALJs to give reasons for only *treating* sources." Smith v. Comm'r of Soc. Sec., 482 F.3d 873, 876 (6th Cir. 2007) (emphasis in original); see also Norris v. Comm'r of Soc. Sec., 461 F. App'x 433, 439 (6th Cir. 2012) (stating that "a claimant is entitled under the SSA only to reasons explaining the weight assigned to his treating sources"). Although not required to do so, the ALJ nevertheless explained her reasons for giving no weight to Dr. Butcher's opinion. See id. ("Here, although the ALJ did not find the one-time consultative sources to be treating sources, the ALJ nevertheless explained [his] rationale for granting minimal weight

to their opinions."). The ALJ noted that Dr. Butcher examined Crossno "well after" the date he was last insured. (R. 25.) As the Sixth Circuit has explained, "[e]vidence of disability obtained after the expiration of insured status is generally of little probative value." Strong v. Soc. Sec. Admin., 88 F. App'x 841, 845 (6th Cir. 2004) (citing Cornette v. Sec'y of Health & Human Servs., 869 F.2d 260, 264 n.6 (6th Cir. 1988)). Additionally, the ALJ explained how Dr. Butcher's opinion was not consistent with the medical evidence in the record. For example, Dr. Butcher opined that Crossno might have bipolar disorder, even though she had only examined him once and Crossno had never reported any mental impairment other than depression. (R. 25.) Based on a review of the entire record, the court finds that the ALJ's examination of Dr. Butcher's opinion was not improper and that her decision to discount the weight of Dr. Butcher's opinion is supported by substantial evidence.

D. Whether the ALJ Erred by Not Requesting Additional Medical Evidence

Next, Crossno argues that the ALJ erred by not requesting additional medical records from his treating physicians after his attorney presented new medical evidence at his hearing. This argument is unpersuasive. It is true that an ALJ must develop a claimant's complete medical history before making a determination that the claimant is not disabled. 20 C.F.R. § 404.1512. However,

the Sixth Circuit "has consistently affirmed that the claimant bears the burden of producing sufficient evidence to show the existence of a disability." Watters v. Comm'r of Soc. Sec. Admin., 530 F. App'x 419, 425 (6th Cir. 2013) (citing Harley v. Comm'r of Soc. Sec., 485 F. App'x 802, 803 (6th Cir. 2012)). Moreover, the ALJ specifically asked Crossno's counsel at the hearing whether the record was complete, and he indicated that it was. (R. 41.) As such, the ALJ would have no reason to believe she needed to request additional medical evidence. See Culp v. Comm'r of Soc. Sec., 529 F. App'x 750, 751 (6th Cir. 2013) (rejecting plaintiff's argument that the ALJ should have obtained additional medical evidence, reasoning that "the ALJ did not have a special duty to develop the record because Culp was represented by counsel"); Delgado v. Comm'r of Soc. Sec., 30 F. App'x 542, 549 (6th Cir. 2002) (noting that the claimant or her counsel could have submitted additional evidence at the hearing before the ALJ). Furthermore, the Appeals Council provided Crossno additional time to produce medical evidence to support his case before rendering its final decision, but Crossno failed to do so. See Watters, 530 F. App'x at 425 (rejecting plaintiff's argument that the ALJ should have obtained additional medical evidence, noting that the Appeals Council provided the claimant additional time to produce evidence to support his claim). Because the "ALJ was under no obligation to investigate [Crossno's]

case for him," his argument is without merit. Id.

E. Whether the ALJ Erred in Analyzing the Effects of Crossno's Obesity on his Ability to Work

Lastly, Crossno argues that the ALJ failed to give any consideration to the effects of his obesity on his ability to work. Social Security Ruling 02-1p explains the SSA's policy regarding the evaluation of obesity. SSR 02-1p states:

> An assessment should also be made of the effect obesity has upon the individual's ability to perform routine movement and necessary physical activity within the work environment. Individuals with obesity may have problems with the ability to sustain a function over time . . . [O]ur RFC assessments must consider an individuals' maximum remaining ability to do sustained work activities in an ordinary work setting on[ ]a regular and continuing basis. A "regular and continuing basis" means 8 hours a day, for 5 days a week, or an equivalent work schedule.

SSR 02-1P, 2002 WL 34686281, at *6 (Sept. 12, 2002). The Sixth Circuit has made clear that SSR 02-1p does not mandate "'any particular procedural mode of analysis for obese disability claimants.'" Coldiron, 391 F. App'x at 443 (quoting Bledsoe v. Barnhart, 165 F. App'x 408, 412 (6th Cir. 2006)); see also Nejat v. Comm'r of Soc. Sec., 359 F. App'x 574, 577 (6th Cir. 2009). Rather, the regulation "only states that obesity, in combination with other impairments, 'may' increase the severity of the other limitations." Bledsoe, 165 F. App'x at 412. As such, this regulation "merely directs an ALJ to consider the claimant's obesity, in combination with other impairments, at all stages of

the sequential evaluation." Nejat, 359 F. App'x at 577.

In his application for benefits, Crossno did not list obesity as an impairment that limits his ability to work. (R. 131.) Nevertheless, the ALJ found, based on the medical records, that Crossno's morbid obesity was a severe impairment that has more than a *de minimis* effect on his ability to perform basic work activities. (R. 17.) The ALJ referenced the requirements of SSR 02-1p and explained that the medical evidence in the record showed that Crossno "had not developed obesity-related co-morbidities such as coronary artery disease, diabetes mellitus or arthritis." (Id.) Crossno does not cite any medical evidence in support of his argument that his obesity limits his ability to work. Nevertheless, the ALJ took Crossno's obesity into consideration in determining his RFC, as she specifically referenced Crossno's weight, body mass index, and obesity numerous times throughout her opinion and acknowledged morbid obesity as one of Crossno's severe impairments, despite the fact that Crossno did not list it as an impairment in his disability application. (R. 17, 20-24.) Moreover, the ALJ gave "significant weight" to the opinions of Dr. A. Baitch and Dr. L. Cylus, both of whom discussed Crossno's obesity in formulating their opinions. (R. 25, 261, 270.) The ALJ ultimately concluded that Crossno has the RFC to perform light work

with the following limitations:[3]

> [H]e can lift and/or carry 20 pounds occasionally and 10 pounds frequently; stand and/or walk six hours in an eight-hour workday; sit six hours in an eight-hour workday; with unlimited ability to push and/or pull, other than as show for lift and/or carry; frequently able to balance; occasionally able to climb ramps/stairs, stoop, kneel, crouch and crawl; never able to climb ladders, ropes or scaffolds; and with an avoidance to concentrated exposure to extreme cold, vibration, and hazards, such as machinery and heights.

(R. 20.) Upon review of the entire record, the court finds that the ALJ adequately considered Crossno's obesity in reaching her ultimate RFC finding and that her RFC finding is supported by substantial evidence. See Coldiron, 391 F. App'x at 443 ("Given the ALJ's discussion of Coldiron's obesity throughout his findings of fact and the ALJ's use of RFCs from physicians who explicitly considered Coldiron's obesity, we find that the ALJ adequately accounted for the effect that obesity has on Coldiron's ability to perform sedentary work."); Bledsoe, 165 F. App'x at 412 (finding that the ALJ properly considered the claimant's obesity because he

[3]The regulations define "light work" as follows:

> 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.

specifically mentioned the claimant's obesity in his findings of fact and because he credited two doctors' opinions that considered the claimant's obesity).

III. RECOMMENDATION

Because the ALJ did not commit legal error and because her decision is supported by substantial evidence, the court recommends that the Commissioner's decision be affirmed.

Respectfully submitted,

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

August 11, 2016
Date

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