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

JOHN EARL MASON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 15-cv-02460-TMP**
	)	
CAROLYN W. COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY,	)	
	)	
Defendant.	)	

ORDER AFFIRMING THE COMMISSIONER'S DECISION

Before the court is plaintiff John Earl Mason'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*. The parties have consented to the jurisdiction of the United States magistrate judge pursuant to 28 U.S.C. § 636(c). For the reasons set forth below, the decision of the Commissioner is AFFIRMED.

I. FINDINGS OF FACT

Prior to the events at issue here, Mason applied for disability insurance benefits and supplemental security income on August 22, 2001, and was denied pursuant to an unfavorable decision of an Administrative Law Judge ("ALJ") after a hearing held on

November 12, 2002. (See R. 64-73.) On November 10, 2011, Mason made new applications for disability insurance benefits and supplemental security income under Titles II and XVI of the Act, from which the following procedural history and matters at issue are derived. (R. 21.)

Mason has alleged disability with an onset date of November 10, 2011.[1] (R. 21.) Mason's claims were denied initially and upon reconsideration by the Social Security Administration ("SSA"). (R. 21.) At Mason's request, a hearing was held before an ALJ on November 27, 2013. (Id.) On February 19, 2014, the ALJ issued a decision denying Mason's request for benefits after finding that Mason was not under a disability because he retained the residual functional capacity ("RFC") to adjust to light work that exists in significant numbers in the national economy. (R. 23-29.) On May 11, 2015, the SSA's Appeals Council denied Mason's request for review. Therefore, the ALJ's decision became the final decision of the Commissioner. (R. 1.) Subsequently, on July 9, 2015, Mason filed the instant action. Mason argues that: (1) the ALJ committed legal error in evaluating the opinion of his treating physician, Samuel Johnson, M.D.; and (2) the ALJ erred in applying *res*

[1]Mason's applications initially claimed his disability began on September 30, 2009, but he amended the onset date at his hearing in front of the ALJ. (R. 38.)

judicata to determine his RFC pursuant to Drummond/Dennard[2] principles. (ECF No. 14.)

II. CONCLUSIONS OF LAW

A. Standard of Review

Under 42 U.S.C. § 405(g), a claimant may obtain judicial review of any final decision made by the Commissioner after a hearing to which he or she was a party. "The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). Judicial review of the Commissioner's decision is limited to whether there is substantial evidence to support the decision and whether the Commissioner used the proper legal criteria in making the decision. Id.; Winn v. Comm'r of Soc. Sec., 615 F. App'x 315, 320 (6th Cir. 2015); Cole v. Astrue, 661 F.3d 931, 937 (6th Cir. 2011); Rogers v. Comm'r of Soc. Sec., 486 F.3d 234, 241 (6th Cir. 2007). Substantial evidence is more than a scintilla of evidence but less than a preponderance, and is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

[2]Referring to Drummond v. Comm'r of Soc. Sec., 126 F.3d 837 (6th Cir. 1997), and Dennard v. Sec'y of Health & Human Servs., 907 F.2d 598 (6th Cir. 1990).

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 he 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 Committed Legal Error in Weighing the Opinion of Mason's Treating Physician

Mason first claims that the ALJ erred at step three of the evaluation by failing to properly evaluate the medical source statement of Mason's treating physician, Dr. Samuel Johnson. Such error, Mason argues, requires that this court reverse the findings of the Commissioner or remand the case for further proceedings.

The Code of Federal Regulations defines a treating source as a medical professional who has not only examined the claimant, but who also has an "ongoing treatment relationship" with him or her consistent with "accepted medical practice." 20 C.F.R. § 404.1502; Smith v. Comm'r of Soc. Sec., 482 F.3d 873, 875 (6th Cir. 2007). The SSA requires the ALJ to assign a treating source opinion controlling weight if it is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the claimant's] case record." 20 C.F.R. § 404.1527(b)(2); Wilson v. Comm'r of Soc. Sec., 378 F.3d 541, 544 (6th Cir. 2004). However, "a treating source's opinion may be given little weight if it is unsupported by sufficient clinical findings and is inconsistent

with the rest of the evidence." Morr v. Comm'r of Soc. Sec., 616 F. App'x 210, 211 (6th Cir. 2015) (citing Bogle v. Sullivan, 998 F.2d 342, 347–48 (6th Cir. 1993)). If the ALJ discounts the weight normally given to a treating source opinion, he must provide "good reasons" for doing so. 20 C.F.R. § 404.1527(c)(2); Gayheart v. Comm'r of Soc. Sec., 710 F.3d 365, 376 (6th Cir. 2013). Here, the court finds that the ALJ provided good reasons for giving Dr. Johnson's opinion little, as opposed to controlling, evidentiary weight. As such, Mason is not entitled to remand on this point.

The ALJ discussed Dr. Johnson's opinion regarding Mason's limitations and determined that it was inconsistent with evidence in the record:

> Treating physician Dr. Samuel Johnson assessed the claimant as able to lift 5 pounds occasionally and 1 pound frequently, to sit for three hours per day, and to stand and walk one hour per day with the use of a cane. He also stated that the claimant can only perform rare pushing, pulling, manipulation, bending, balancing, stooping, reaching, exposure to environmental irritants, operation of a motor vehicle, and hazardous machinery, and he stated that the claimant would miss more than four days per month due to his medical conditions (Exhibit 13F). Neither Dr. Johnson's treatment records or the record otherwise contain any clinical or laboratory findings of any pathology that could impose the degree of functional limitation that he opined to be present, and for this reason, it is given little evidentiary weight.

(R. 27.) It is the factors considered, not the length or depth of discussion, that controls whether the ALJ has made a proper evaluation under the regulations. See Allen v. Comm'r of Soc. Sec., 561 F.3d 646, 651 (6th Cir. 2009) (stating that "brief"

statement was sufficient to address weight of treating physician opinion when statement reached several of the necessary factors). The ALJ is required to take certain factors into consideration when determining how much weight to give a treating source opinion, including: "'the length of the treatment relationship and the frequency of examination, the nature and extent of the treatment relationship, supportability of the opinion, consistency of the opinion with the record as a whole, and the specialization of the treating source . . . .'" Winn, 615 F. App'x at 321 (quoting Wilson, 378 F.3d at 544); see also 20 C.F.R. §§ 404.1527(c) & 416.927(c). Here, the ALJ reviewed the extent and nature of the medical evidence. (R. 25.) The ALJ discussed the frequency of treatment, noting "the scarcity of medical observations, due to the fact the claimant has not sought frequent medical treatment." (R. 26.) And the ALJ based the decision regarding the evidentiary weight of Dr. Johnson's opinion on a lack of support in the overall medical record and lack of consistency in Dr. Johnson's own treatment records.[3] (R. 27.) See Hill v. Comm'r of Soc. Sec., 560 F. App'x 547, 549-50 (6th Cir. 2014) (affirming the ALJ's decision

[3]The ALJ did not address the length of the treatment relationship, 20 C.F.R. § 404.1527(c)(2)(i), or any specialization, id. § 404.1527(c)(5), and thus did not address *all* of the factors. However, the ALJ did address what appear here to be "the *appropriate* factors." Steagall v. Comm'r of Soc. Sec., 596 F. App'x 377, 380 (6th Cir. 2015) (emphasis added). Here, the ALJ focused on frequency rather than length and did not address specialization as it appears from the record that Dr. Johnson is a

to assign "little to no weight" to a treating physician opinion because it was not supported by the physician's own treatment notes, other medical tests, or the plaintiff's own statements about her daily activities); see generally Steagall, 596 F. App'x at 380 (affirming the ALJ's decision to give "no weight" to a treating physician opinion because it was inconsistent with findings of other doctors and was unsupported by the rest of plaintiff's medical records).

There is support in the record such that these findings are within the ALJ's "zone of choice." See Blakely v. Comm'r of Soc. Sec., 581 F.3d 399, 406 (6th Cir. 2009) ("'The substantial-evidence standard . . . presupposes that there is a zone of choice within which the decision makers can go either way, without interference by the courts.'" (quoting Mullen v. Bowen, 800 F.2d 535, 545 (6th Cir. 1986) (en banc))). Moreover, the ALJ provides sufficient reasoning such that Mason should be able to understand the basis for the decision. See Winn, 615 F. App'x at 321 (stating that the rules exist, "'in part, to let claimants understand the disposition of their cases, particularly in situations where a claimant knows that [her] physician has deemed [her] disabled and therefore might be especially bewildered when told by an administrative bureaucracy that she is not, unless some reason for the agency's decision is supplied.'" (alterations in original) (quoting Wilson, 378 F.3d at

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generalist and not a specialist.

544)). Therefore, the ALJ did not commit reversible legal error in weighing the opinion of Mason's treating physician, Dr. Johnson.

D. Whether the ALJ Committed Legal Error in Applying Drummond in Deciding Mason's RFC

In Drummond v. Comm'r of Soc. Sec., 126 F.3d 837, 842 (6th Cir. 1997), the court held, "[a]bsent evidence of an improvement in a claimant's condition, a subsequent ALJ is bound by the findings of a previous ALJ."[4] In response, the SSA clarified in Acquiescence Ruling 98-4(6) how this *res judicata* principle should be applied to claimants making claims within the Sixth Circuit.

> Read together, Drummond and Acquiescence Ruling 98-4(6) clearly establish that a subsequent ALJ is bound by the legal and factual findings of a prior ALJ unless the claimant presents new and material evidence that there has been either a change in the law or a change in the claimant's condition.

Blankenship v. Comm'r of Soc. Sec., 624 F. App'x 419, 425 (6th Cir. 2015).

Mason argues that the ALJ improperly relied on this principle in assessing an RFC of light work — the same as was set by the prior ALJ (R. 72) — because the present ALJ allegedly failed to "properly recognize and consider" substantial new evidence,

[4]Mason also references Dennard v. Sec'y of Health & Human Servs., 907 F.2d 598, 600 (6th Cir. 1990), which is an earlier case holding similarly to Drummond and upon which that latter court relied. However, SSA Acquiescence Ruling, 98-4(6), 1998 WL 283902 (June 1, 1998), was issued in direct response to Drummond, and the recent Sixth Circuit cases that have analyzed the issue do so under Drummond, only occasionally citing Dennard as additional support. Therefore, Mason's complaint is

including a 2004 MRI, a consultative examination report prepared by Dr. Steven Rudd, and an opinion from Mason's treating physician, Dr. Johnson. (ECF No. 14.) Thus, Mason claims, the ALJ's decisions is without the support of substantial evidence. This claim is without merit. Pursuant to Drummond, the ALJ recognized the finding of the prior decision, then analyzed and evaluated the medical record compiled since that time. This thorough evaluation over the course of thirteen paragraphs included analysis of the 2004 MRI (R. 24), Dr. Rudd's report (R. 26-27), and Dr. Johnson's opinion (R. 27). Therefore, it is incorrect to claim that the ALJ did not "properly recognize and consider" the new evidence; rather, after review, the ALJ determined that light work remained the appropriate RFC and, thus, there was no basis for a change from the prior decision. This analysis is in accord with the Sixth Circuit's guidance on applying Drummond. See, e.g., Ealy v. Comm'r of Soc. Sec., 172 F. App'x 88, 90 (6th Cir. 2006) ("While allowing that the new evidence suggested deterioration in Ealy's condition since 1999, the ALJ nevertheless determined independently that Ealy still retained the residual functional capacity to perform sedentary work . . . . The record does not demonstrate that Drummond was misapplied." (internal quotation marks omitted)). Therefore, the ALJ did not commit reversible legal error in finding an RFC of light work, either in the application of Drummond or

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appropriately addressed by analyzing Drummond and SSAR 98-4(6).

under the substantial evidence standards.

III. CONCLUSION

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

IT IS SO ORDERED.

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

May 5, 2016
Date