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

JOANN J. JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 15-cv-02409-TMP**
	)	
CAROLYN W. COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY,	)	
	)	
Defendant.	)	

ORDER REVERSING THE DECISION OF THE COMMISSIONER AND REMANDING CASE PURSUANT TO SENTENCE FOUR OF 42 U.S.C. § 405(g)

Before the court is plaintiff Joann J. Johnson's appeal from a final decision of the Commissioner of Social Security ("Commissioner") denying her application for disability insurance benefits and supplemental security income under Title II and Title XVI of the Social Security Act ("Act"), 42 U.S.C. §§ 401 *et seq*. 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 reversed and the action is remanded pursuant to sentence four of 42 U.S.C. § 405(g).

I. FINDINGS OF FACT

On August 14, 2012, Johnson applied for disability insurance benefits and supplemental security income under Titles II and XVI

of the Act. (R. 22.) Johnson alleged disability beginning on August 16, 2011, due to depression, anxiety disorder, and irritable bowel syndrome. (R. 195.) Johnson's application was denied initially and upon reconsideration by the Social Security Administration ("SSA"). (R. 22.) At Johnson's request, a hearing was held before an Administrative Law Judge ("ALJ") on January 21, 2014. (Id.) On March 5, 2014, the ALJ issued a decision denying Johnson's request for benefits after finding that Johnson was not under a disability because she retained the residual functional capacity ("RFC") to adjust to work that exists in significant numbers in the national economy. (R. 22-31.) On May 1, 2015, the SSA's Appeals Council denied Johnson's request for review. Therefore, the ALJ's decision became the final decision of the Commissioner. (R. 1.) Subsequently, on June 16, 2015, Johnson filed the instant action. Johnson argues that: (1) the ALJ committed legal error in weighing the opinions of her treating gastroenterologist and her treating psychiatrist; (2) the ALJ erred in failing to discuss the opinions of two Tennessee Disability Determination Services ("DDS") non-examining consultants; and (3) the ALJ's RFC assessment is not supported by substantial evidence. (ECF No. 11.)

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 Committed Legal Error in Weighing the Opinions of Johnson's Treating Physicians

Johnson first argues that the ALJ erred at step three of his

evaluation by failing to give appropriate weight to the opinions of her treating gastroenterologist, Dr. Ulric Duncan, and her treating psychiatrist, Dr. Chika Iwueke, and by not providing an adequate explanation for his failure to do so. Such error, Johnson argues, requires that the case be remanded 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). Even if the ALJ finds that a treating physician's opinion is not entitled to controlling weight, "in all cases there remains a presumption, albeit a rebuttable one, that the opinion of a treating physician is entitled to great deference." Rogers, 486 F.3d at 242. 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). Additionally, 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); 20 C.F.R. § 416.927(c). If the ALJ denies benefits, his decision "must contain specific reasons for the weight given to the treating source's medical opinion, supported by the evidence in the case record, and must be sufficiently specific to make clear to any subsequent reviewers the weight the adjudicator gave to the treating source's medical opinion and the reasons for that weight." SSR 96-2p, 1996 WL 374188, at *5 (July 2, 1996); Mitchell v. Comm'r of Soc. Sec., 330 F. App'x 563, 569 (6th Cir. 2009). The Sixth Circuit has explained that, in addition to facilitating meaningful review, this rule "'exists, 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.'" Winn, 615 F. App'x at 321 (quoting Wilson, 378 F.3d at 544) (alterations in original). "Because of the significance of the notice requirement in ensuring

that each denied claimant receives fair process, a failure to follow the procedural requirement of identifying the reasons for discounting the opinions and for explaining precisely how those reasons affected the weight accorded the opinions denotes a lack of substantial evidence, even where the conclusion of the ALJ may be justified based upon the record." Rogers, 486 F.3d at 243.

Here, the ALJ determined that the opinion of Johnson's treating psychiatrist, Dr. Iwueke, should be given "little weight." The ALJ reasoned as follows:

> Dr. Iwueke's opinion is not at all supported by the treatment notes. Treatment notes document reported activities including attending kids' football games, glass making, working, having hobbies and activities, going to New Orleans, exercising, and visiting with friends and family. Additionally, in April 2013, the claimant was noted to be making adequate progress, with improvement of symptoms noted in the record.

(R. 29.) (citations omitted). Similarly, the ALJ determined that the opinion of Johnson's treating gastroenterologist, Dr. Duncan, should be given "partial weight." The ALJ's decision to discount Dr. Duncan's opinion was based on his conclusion that Dr. Duncan's medical source statement was "vague," because it stated that Johnson's symptoms "could cause her to miss no greater than one-two days of work for follow-up care" per month. Additionally, the ALJ concluded that Dr. Duncan's "opinion is not consistent with all of the activities the claimant is noted to be doing in the mental health treatment records." (Id.)

In the Commissioner's memorandum in support of her decision, she acknowledges that the ALJ must consider certain factors as outlined in the Code of Federal Regulations in determining how much weight to assign medical source opinions. Although the ALJ's decision does not contain a discussion of these required factors with regard to the opinions of either Dr. Iwueke or Dr. Duncan, the Commissioner nevertheless argues that the ALJ provided good reasons for discounting the opinions of Johnson's treating physicians. (ECF No. 12.) However, the court finds that Johnson is entitled to remand on this point, because the "ALJ's decision provides no indication that he applied the factors set out in § 404.1527(c)." Gayheart, 710 F.3d at 376. The ALJ did not mention the length of the treating physicians' relationships with Johnson, their specialties within the medical field, or their opinions about the employment accommodations they believed Johnson needed. See Rogers, 486 F.3d at 245 (reversing judgment of district court upholding Commissioner's decision and remanding because ALJ "failed to provide an analysis of the factors to be considered in determining the weight accorded the opinions of Rogers' treating physicians"); see also Minor v. Comm'r of Soc. Sec., 513 F. App'x 417, 437-38 (6th Cir. 2013).

Furthermore, the ALJ's description of Dr. Iwueke's treatment notes "improperly disregards significant portions" of the treatment records. Winn, 615 F. App'x at 322. The ALJ emphasized discrete

instances in which Johnson participated in social activities, such as the fact that she attended her children's football games, visited New Orleans on one occasion, and participated in glass making as a hobby. However, Johnson's participation in these activities does not constitute substantial evidence that she would be able to participate in *work* activities. See id. at 323 (noting that Winn's participation in social activities "does not constitute substantial evidence that Winn would be able to participate in *work* activities") (emphasis in original); see also Rogers, 486 F.3d at 248 (holding that claimant's ability to "drive, clean her apartment, care for two dogs, do laundry, read, do stretching exercises, and watch the news" were "not comparable to typical work activities"). The ALJ failed to mention Dr. Iwueke's other treatment notes describing that, despite participating in limited social activities, Johnson continued to experience difficulties with depression and anxiety.

The "ALJ's failure to follow agency rules and regulations 'denotes a lack of substantial evidence, even where the conclusion of the ALJ may be justified based upon the record.'" Cole, 661 F.3d at 937 (quoting Blakley v. Comm'r of Soc. Sec., 581 F.3d 399, 407 (6th Cir. 2009)). Accordingly, it is ordered that Johnson's application for disability benefits be remanded for the ALJ to properly evaluate and give appropriate weight to the opinions of Dr. Duncan and Dr. Iwueke or explicitly identify legitimate reasons

for discrediting those opinions. See Sawdy v. Comm'r of Soc. Sec., 436 F. App'x 551, 553 (6th Cir. 2011) (stating that "when an ALJ violates the treating-source rule, '[w]e do not hesitate to remand,' and 'we will continue remanding when we encounter opinions from ALJ[s] that do not comprehensively set forth the reasons for the weight assigned to a treating physician's opinion'") (quoting Hensley v. Astrue, 573 F.3d 263, 267 (6th Cir. 2009)).

D. Whether the ALJ Erred in Failing to Explain the Weight Accorded to the Opinions of Two Non-Examining DDS Consultants

Next, Johnson argues that the ALJ erred by failing to discuss or even mention the opinions of non-examining DDS consultants Dr. Jenaan Khaleeli and Dr. M. Duncan Currey, who both offered assessments of Johnson's psychological condition. The SSA regulations outline "a presumptive sliding scale of deference to be given to various types of opinions." Norris v. Comm'r of Soc. Sec., 461 F. App'x 433, 439 (6th Cir. 2012). On this sliding scale, "[a] nonexamining source, who provides an opinion based solely on review of the patient's existing medical records, is afforded the least deference." Id. (citing Smith, 482 F.3d at 875). It is well-settled that an "ALJ need not discuss every piece of evidence in the record for his decision to stand." Thacker v. Comm'r of Soc. Sec., 99 F. App'x 661, 665 (6th Cir. 2004). However, according to governing SSA rulings, ALJs may not ignore the opinions of state agency non-examining sources and "must

explain the weight given to these opinions in their decisions." SSR 96-6p, 1996 WL 374180, at *2; see also 20 C.F.R. § 404.1527(e)(2)(ii) ("Unless a treating source's opinion is given controlling weight, the administrative law judge must explain in the decision the weight given to the opinions of a State agency medical or psychological consultant or other program physician, psychologist, or other medical specialist.").

The ALJ did not assign Johnson's treating source opinions controlling weight; as such, he was required to explain the weight given to the opinions of the various DDS consultants involved in the case. The court finds that the ALJ committed legal error by failing to properly explain the weight afforded to the opinions of Dr. Khaleeli and Dr. Currey. In her memorandum in support of her decision, the Commissioner concedes that "the regulations state an ALJ should consider the non-examining doctors' opinions in making his disability determination," but argues that "in this case, the ALJ's discussion of the sources' opinions would have made no difference, because their opinions were consistent with the ALJ's findings and RFC." (ECF No. 12.) However, as the Sixth Circuit has made clear, "[e]ven when substantial evidence otherwise supports the [ALJ's] decision," the court must remand if "the agency failed to follow its own procedural regulation." Sawdy, 436 at 553 (quoting Wilson, 378 F.3d at 544) (internal quotation marks omitted). Refusing to remand under such circumstances "would

afford the Commissioner the ability [to] violate the regulation with impunity and render the protections promised therein illusory." Id. (quoting Wilson, 378 F.3d at 546) (internal quotation marks omitted). Accordingly, because the ALJ violated SSA regulations by failing to explain the weight given to the opinions of Dr. Khaleeli and Dr. Currey, Johnson is also entitled to remand on this point. See Kolasa v. Comm'r of Soc. Sec., No. 13-cv-14311, 2015 WL 1119953, at *10 (E.D. Mich. Mar. 11, 2015) ("Accordingly, because the ALJ disregarded the applicable regulations in considering the State agency consultant's opinion, plaintiff is entitled to remand on this point."); Hovater v. Colvin, 2013 WL 4523502, at *10-11 (N.D. Ohio Aug. 26, 2013) (remanding because the ALJ failed to explain why opinions of state consultants were not adopted); Sommer v. Astrue, No. 3:10-CV-99, 2010 WL 5883653, at *5-6 (E.D. Tenn. Dec. 17, 2010) (remanding because the ALJ failed to explain in his decision the weight given to non-examining source opinions).

E. Whether the ALJ's RFC Finding is Supported by Substantial Evidence

Lastly, Johnson argues that the ALJ's RFC finding is not supported by substantial evidence. Specifically, Johnson contends that the ALJ erred by failing to address restrictions suggested by her treating physicians, Dr. Iwueke and Dr. Duncan. Dr. Iwueke opined that Johnson "has major depression, which has severely

limited her functioning at home and with her friends, family and children," and stated that Johnson "is not currently able to function in the work environment." (R. 430.) Dr. Duncan opined that Johnson needs frequent breaks during the workday to alleviate the symptoms of irritable bowel syndrome. (R. 432.) He also stated that Johnson "may have up to 3-4 flares monthly which could cause her to miss no greater than one-two days for follow-up care and treatment with our office." (R. 517.)

With regard to an ALJ's RFC assessment, SSA regulations provide as follows:

> The RFC assessment must always consider and address medical source opinions. If the RFC assessment conflicts with an opinion from a medical source, the adjudicator must explain why the opinion was not adopted. Medical opinions from treating sources about the nature and severity of an individual's impairment(s) are entitled to special significance and may be entitled to controlling weight. If a treating source's medical opinion on an issue of the nature and severity of an individual's impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the case record, the adjudicator must give it controlling weight.

SSR 96-8p, 1996 WL 374184, at *7. Here, the ALJ determined that Johnson has the RFC "to perform light work as defined in 20 CFR 404.1567(b) and 416.967(b) except cannot climb ladders, ropes, or scaffolds; can occasionally climb ramps and stairs; can occasionally crouch, stoop, kneel, or crawl; would be limited to unskilled work where changes in the workplace setting would be

infrequent and gradually introduced."[1] (R. 26.) However, in reaching this conclusion, the ALJ did not discuss why he omitted the limitations suggested by Johnson's treating physicians. Moreover, as discussed previously, the ALJ did not provide an adequate explanation for discounting the treating physicians' opinions. Because the ALJ did not explain why he omitted the restrictions suggested by Johnson's treating physicians as required by SSA guidelines, Johnson is entitled to remand on this point. See Hubbard v. Comm'r of Soc. Sec., No. 1: 15-CV-148, 2016 WL 79994, at *14-15 (S.D. Ohio Jan. 6, 2016) (remanding because ALJ's RFC assessment failed to assign appropriate weight to the opinions of plaintiff's treating physicians concerning her work limitations); Mertens v. Comm'r of Soc. Sec., No. 13-11872, 2014 WL 3558179, at *10 (E.D. Mich. July 17, 2014) (remanding because the ALJ "essentially gave no reason at all for not incorporating" limitations suggested by plaintiff's treating physician into his RFC assessment); Hovater, 2013 WL 4523502, at *10 (remanding

[1]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.

because the ALJ failed to explain his decision to omit restrictions suggested by medical source opinions from his RFC finding); Kaminski v. Astrue, No. 3:10-CV-226, 2011 WL 1897689, at *4 (E.D. Tenn. Apr. 28, 2011) (remanding because ALJ failed to account for limitations suggested by plaintiff's treating physician in her RFC determination); Dissette v. Comm'r of Soc. Sec., No. 1:09CV1335, 2010 WL 2925998, at *8 (N.D. Ohio July 23, 2010) (reversing and remanding because ALJ offered no explanation as to why he was not adopting physicians' opinions related to plaintiff's limitations); Potts v. Astrue, No. 3:07-CV-1284, 2009 WL 2168731, at *6 (M.D. Tenn. July 17, 2009) (remanding because ALJ did not address, "much less explain his reasons for disregarding," the opinion of a doctor concerning claimant's limitations).

III. CONCLUSION

For the foregoing reasons, the ALJ's decision is reversed, and this case is remanded pursuant to sentence four of 42 U.S.C. § 405(g) for proceedings consistent with this opinion.

IT IS SO ORDERED.

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

April 12, 2016
Date