

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

TERRY LYNN HERRON,)	
)	
Plaintiff,)	
)	
v.)	No. 15-cv-2008-TMP
)	
CAROLYN W. COLVIN,)	
COMMISSIONER OF)	
SOCIAL SECURITY,)	
)	
Defendant.)	

ORDER AFFIRMING THE COMMISSIONER'S DECISION

Before the court is Terry Lynn Herron's appeal from a final decision of the Commissioner of Social Security ("Commissioner") denying her application for disability insurance benefits under Title II of the Social Security Act, 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). (ECF No. 14.) For the reasons set forth below, the decision of the Commissioner is AFFIRMED.

I. FINDINGS OF FACT

A. Procedural History

On December 6, 2011, Terry Lynn Herron applied for disability insurance benefits under Title II of the Social Security Act ("Act"), alleging that her disability commenced on

May 31, 2011. (R. 20.) Herron's application for benefits was denied initially and upon reconsideration by the Social Security Administration ("SSA"). At Herron's request, a hearing was held before an Administrative Law Judge ("ALJ") on June 6, 2013. (R. 20-26.) On September 3, 2013, the ALJ issued a decision denying Herron's request for benefits after finding that Herron was not under a disability because she retained the residual functional capacity ("RFC") to perform light work. (R. 20-26.) On November 4, 2014, the SSA's Appeals Council denied Herron's request for review. (R. 1.) Therefore, the ALJ's decision became the final decision of the Commissioner. Subsequently, Herron filed the instant action requesting that the court either reverse the Commissioner's decision or remand the case for further administrative hearings. (ECF No. 1.) On appeal, Herron argues that: (1) the ALJ's RFC finding is not supported by substantial evidence; (2) the ALJ's credibility determination is not supported by substantial evidence; and (3) the ALJ's step five finding is not supported by substantial evidence because the vocational expert's testimony was based on an incomplete hypothetical question. (ECF No. 15.)

B. Factual Background

Herron was born on November 17, 1961 and was 51 years old at the time of her June 6, 2013 hearing. At the hearing, Herron alleged disability beginning on May 31, 2011, at age 49, due to

chronic obstructive pulmonary disease ("COPD"). (R. 23, 122.) Additionally, Herron was involved in a motor vehicle accident on December 17, 2012, which led to additional complaints of neck and back pain. On her disability questionnaire from the SSA, Herron stated that she is not able to do any household chores, including cleaning, laundry, household repairs, ironing, mowing, or grocery shopping. (R. 165-66.) She further stated that she does not drive, that she can only walk about ten to fifteen feet before needing to rest, and that talking often makes her lose her breath. (R. 166, 168.)

At her hearing before the ALJ, Herron testified that she has a twelfth grade education. (R. 36.) Herron worked as an administrative bookkeeper from 1999 to 2003 and as a bankruptcy clerk from 2005 until 2011, when she was laid off.¹ (R. 37-40.) Herron speculated at the hearing that she was laid off because of her health issues. (R. 40.) She has not worked since May 31, 2011, the date she alleges her disability began. (R. 37.) She testified that she is able to do some laundry, household cleaning, and grocery shopping, but that she has to stop and rest frequently during these activities. (R. 41-45.) She further testified that she can walk the length of "about four buses" before losing breath. (R. 46.)

¹Herron testified that she did not work between 2004 and 2005. (R. 38.)

Herron's medical records indicate that she has a history of smoking, but she testified at her hearing that she quit smoking shortly after she was diagnosed with COPD. (R. 41, 212, 219, 287.) Additionally, prior to her alleged disability on-set date, Herron had back surgery in 1984 and was treated in January 2007 for sciatica and a herniated disc. (R. 151-52, 219.) At the time she filed for disability insurance benefits, Herron was prescribed Advair, Albuterol, and a rescue inhaler. (R. 43, 170.) She stated in her disability application that these medications make her dizzy, but testified at the hearing that she has always been compliant with her medication. (R. 46, 170.)

1. Medical Treatment

The medical records reflect that Herron was first treated for COPD at Methodist North Hospital from July 11 through July 14, 2011, where she was examined by Dr. Ramon Ungab (R. 207-17.) At the time of admittance, Herron relayed that she had been experiencing progressive shortness of breath and wheezing for the past three to four months. (R. 212.) Herron also reported that she smoked "about 1/2 or less than a pack" of cigarettes per day and that she was allergic to cat dander. (R. 212.) Upon examination, Herron's shortness of breath was described as moderate in terms of degree of severity. (R. 208.) Ultimately, Dr. Ungab diagnosed Herron with COPD and acute

bronchitis, and discussed smoking cessation with her. (R. 213-14.)

On May 10, 2012, Herron sought treatment from a Tennessee Department of Health facility and requested COPD medication. At this time, the individual who examined Herron noted that she had a congested cough and audible wheezing. (R. 249.)

On May 31, 2012, Herron sought treatment from Nurse Morgan Wager, employed by the Tennessee Department of Health, for the flu. During her examination, Nurse Wager noted scattered wheezes throughout Herron's lungs. Herron told Nurse Wagner during this examination that she had quit smoking. (R. 247.)

On June 7, 2012, Herron received a "well woman" exam from Nurse Wager. During this exam, Nurse Wager noted occasional inspiratory wheezes in Herron's lungs. (R. 245.)

On August 24, 2012, Herron sought treatment relating to stomach pain. Nurse Wager examined Herron and noted that Herron exhibited scattered fine inspiratory and expiratory wheezes throughout her lungs. During this examination, Herron reported to Nurse Wager that she had not used Albuterol for two weeks because she had run out of it. (R. 243.)

On December 17, 2012, Herron was involved in a motor vehicle accident and was taken to Methodist North Hospital for treatment. (R. 272.) At that time, a CT scan of Herron's cervical spine showed degenerative cervical disc disease. (R.

256, 282.) A CT scan of Herron's head produced no acute findings. (R. 280.) Herron was diagnosed with a head contusion and a cervical sprain and was prescribed pain medication upon her discharge. (R. 275-76.) During this hospital visit, Herron reported that she used tobacco regularly. (R. 274.)

On December 21, 2012, Herron went to TLC Medical & Physical Therapy Clinic ("TLC") for further evaluation and treatment of her injuries following the car accident. Herron's initial complaints included pain and stiffness in her neck, back, and left shoulder, as well as severe pain in her tailbone. (R. 255.) At TLC, Herron was treated by Dr. Vernois Buggs, who diagnosed her with left shoulder sprain, cervical strain, thoracic strain, lumbar strain, left shoulder sprain, and contusion to coccyx and sacral areas. (R. 257, 261.) Dr. Buggs also referred Herron to the Flinn Clinic for an x-ray of her lumbar spine, which revealed degenerative disc disease and mild bony degenerative changes. (R. 285.) Herron received treatment at TLC for her ailments from December 21, 2012 through January 10, 2013, during which time she responded positively to physical therapy and showed signs of gradual improvements in her symptoms and increased functional mobility. (R. 257.) Although Dr. Buggs recommended continued therapy to address Herron's remaining symptoms and mobility deficits, Herron was discharged from TLC following her January 10 appointment because TLC was

unable to contact her to schedule further appointments. (R. 257.)

On April 26, 2013, Herron visited Nurse Wager, at which time she complained of shortness of breath and indicated she needed prescription refills. During this visit, Herron reported that she smoked one pack of cigarettes per week. (R. 287.) Nurse Wager observed mild inspiratory wheezes in Herron's lungs and encouraged Herron to stop smoking. (R. 288.)

2. Residual Functional Capacity Assessments

On January 30, 2012, Dr. Douglas Karmel, a Tennessee Disability Determination Services consultative examiner, examined Herron. (R. 219-20.) In this examination, Herron reported that she smoked one pack of cigarettes a day for thirty-five years, but that she had gradually reduced her smoking over the last five months. (R. 219.) Dr. Karmel observed "[s]ome expiratory wheezing," but "good air entry." (R. 220.) A chest x-ray showed "flattening of the diaphragm consistent with COPD." (R. 220.) Pulmonary function tests ("PFT") demonstrated "significant moderate obstruction, which improved tremendously with bronchodilation." (R. 220.) More specifically, the PFT showed that Herron's forced expiratory volume was 62% before bronchodilator treatment, but that it increased to 81% after bronchodilator treatment, which Dr. Karmel described as a "significant improvement." (R. 220.)

With regard to Herron's range of motion, Dr. Karmel noted that all of her extremities tested normal except for her cervical spine, which had a decreased range of motion. (R. 220, 224-25.) Dr. Karmel's medical assessment of Herron's ability to do work-related activities was as follows:

In relation to the impairment, the claimant retains the capacity to occasionally lift and/or carry including pulling for one-third of an eight-hour workday maximum of 10 lbs, frequently lift and/or carry for one-third or two-thirds of an eight-hour workday maximum of 10 lbs, stand and/or walk with normal breaks for a total of at least two hours in an eight-hour workday, sit with normal breaks for a total of about six hours in an eight-hour work day.

On February 3, 2012, state agency medical consultant Dr. Susan Warner reviewed the record and completed an RFC assessment on Herron. (R. 229-37.) Dr. Warner opined that Dr. Karmel's medical assessment of Herron was "too restrictive," because the PFT results showed "only moderate restrictions with excellent bronchodilator response." (R. 235.) Dr. Warner opined that Herron could occasionally lift and/or carry fifty pounds, frequently lift and/or carry twenty-five pounds, stand for about six hours in an eight-hour workday, and sit for about six hours in an eight-hour workday. (R. 230.) Additionally, Dr. Warner noted that Herron should avoid concentrated exposure to fumes, odors, dust, gases, and poor ventilation due to her COPD. (R. 233.) In conclusion, Dr. Warner noted that although Herron alleges COPD, she "does not name any recent sources other than

an ER visit in 6/11" and has no regular treatment for COPD. (R. 236.) Furthermore, Dr. Warner found Herron's statements regarding the severity of her disability to be only partially credible, because Herron "has a very good response to bronchodilators with good PFT results."² (R. 236.) Dr. Warner opined that Herron's musculoskeletal limitations were non-severe based on the results of her exam and Herron's absence of treatment. (R. 236.) Ultimately, Dr. Warner concluded that Herron was not disabled. (R. 61.)

On April 8, 2012, Dr. Marvin Cohn, another state agency medical consultant, reviewed Herron's entire file and agreed with Dr. Warner's February 3, 2012 assessment as written. Dr. Cohn also noted that as of January 30, 2012, Herron still smoked. (R. 239.)

On April 13, 2012, state disability examiner K.B. Adams examined Herron's file. In addition to Herron's primary diagnosis of COPD, Adams added a secondary diagnosis of "disorders of back." However, Adams ultimately concluded that Herron was not disabled. (R. 62.)

²According to Dr. Warner, Herron stated that she "[w]akes up every morning wheezing, has to rest after dressing, walking to car gets her out of breath, uses an inhaler every two hours, has difficulty talking in long sentences, gets [short of breath] with lighting, squatting, and bending. Can only walk 10-15 feet." (R. 236.)

On July 26, 2012, state disability examiner Sharon M. Brown conducted a case analysis of Herron's file. (R. 240-41.) Brown concluded that "[t]he claimant does not meet or equal a listing. The claimant was assessed a Medium RFC with limitations with avoiding concentrated exposure to fumes, odors and gases due to COPD. There is no evidence to support limitations greater than those previously determined." (R. 241.)

3. Vocational Assessments

On February 3, 2012, Summer Hameed, a state agency vocational examiner, completed a vocational assessment of Herron. (R. 171-73.) Hameed opined that with some environmental limitations, Herron could perform her past relevant work as an administrative clerk. (R. 172.) Hameed acknowledged that Herron suffered from COPD, but found that Herron was not disabled. (R. at 61.)

At the June 6, 2013 hearing, another vocational expert, William Selby, testified in response to various hypothetical questions posed by the ALJ. First, the ALJ asked Selby to assume a hypothetical individual of Herron's age, education, and past work experience who would be limited to medium exertional work, would need to avoid concentrated exposure to pulmonary irritants such as dusts, odors, fumes, and gases, and could not be exposed to extreme heat, cold, or any outside atmospheric conditions. (R. 49-50.) With these limitations in mind, the

ALJ asked Selby if the hypothetical individual could perform Herron's past jobs of administrative clerk and inventory clerk, to which Selby answered in the affirmative. (R. 50.) Second, the ALJ asked Selby to assume the same limitations as previously stated, but to assume instead that the individual would be limited to light exertional work. (R. 50.) Selby responded that the hypothetical individual could still perform Herron's past jobs. (R. 50.) Third, the ALJ added to the last hypothetical that the individual could stand and walk for six hours in an eight-hour day, but he or she would need to sit for ten minutes after every hour of standing and/or walking. (R. 50.) Selby stated that with these limitations, the hypothetical individual could not perform Herron's past jobs, and that there were no other light exertional level jobs the individual could perform. (R. 50-51.) Fourth, the ALJ asked if there were any light exertional jobs that would allow for a sit/stand at-will option, to which Selby responded in the affirmative. (R. 52.) Selby gave examples of such jobs, including information clerk, assembler of small products, and buttoner.³ (R. 53-54.) Lastly, the ALJ asked Selby to assume all of the limitations from the

³Selby stated that the Dictionary of Occupational Titles ("DOT") job description for these three jobs did not include a sit/stand option, but that he believed employees could sit or stand at will in these positions based on his work experience. (R. 53-54.)

first hypothetical, but to instead assume the individual was restricted to a sedentary exertional level. (R. 54.) Selby testified that some of the skills acquired in Herron's past jobs would transfer to a job at the sedentary exertional level even with the other previously mentioned limitations, except for the sit/stand at-will option. (R. 54.) More specifically, Selby explained that those skills would be transferable to jobs such as referral clerk, credit card control clerk, and credit card clerk in retail trade. (R. 55-56.)

C. The ALJ's Decision

After considering the record and the testimony given at the hearing, the ALJ used the five-step analysis to conclude that Herron was not disabled at any time through the date of his decision. At the first step, the ALJ found that Herron had not "engaged in substantial gainful activity since May 31, 2011, the alleged onset date." (R. 22.) At the second step, the ALJ concluded that Herron suffers from the following severe impairments: COPD, degenerative disc disease of the cervical spine, and degenerative disc disease of the lumbar spine. At the third step, the ALJ concluded that Herron's impairments do not meet or medically equal, either alone or in the aggregate, one of the impairments listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. (R. 22.) Accordingly, the ALJ had to then determine whether Herron retained the RFC to perform past

relevant work or could adjust to other work. The ALJ found that:

[Herron] has the residual functional capacity to perform light work as defined in 20 CFR 404.1567(b) with avoidance of concentrated exposure to pulmonary irritants such as dust, odors, fumes, and gases; cannot be exposed to extreme heat or cold as defined in the Selected Characteristics of Occupations; cannot be exposed to outside atmospheric conditions while at the workplace; and would need the option to sit or stand at will while at the workplace.⁴

(R. 22-23.) The ALJ then found at step four that Herron was unable to perform any of her past relevant work. (R. 24-25.) However, at step five the ALJ found that considering Herron's age, education, work experience, and RFC, there are jobs that exist in significant numbers in the national economy that Herron can perform. (R. 25.) Accordingly, the ALJ concluded that Herron was not disabled from May 31, 2011 through the date of his decision. (R. 26.)

⁴Light work is defined in 20 C.F.R. 404.1567(b) 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.

More specifically, the ALJ noted that although Herron has been diagnosed with COPD, the record demonstrates only one exacerbation in July 2011 and one complaint of shortness of breath in April 2013. The ALJ stated that "[t]his minimal treatment, along with the fact that the claimant continues to smoke cigarettes, shows that she is in no ongoing, significant respiratory distress." Additionally, the ALJ noted that the record shows that Herron's condition improves tremendously with bronchodilation treatment and that Herron testified that her medications "work well and quickly." Therefore, the ALJ held that Herron failed to establish that her COPD cannot be controlled by continued adherence to her treatment regimen. With regard to Herron's degenerative disc disease, the ALJ stated that the "fact that the claimant did not complete her course of physical therapy and received no further treatment for complaints of neck and back pain shows that any symptoms had abated." (R. 23.) Furthermore, the ALJ noted that Herron's medical records document "completely normal musculoskeletal and neurological findings other than some diminished range of motion of the cervical spine," and that the records do not document any signs of chronic disabling neck or back pain. (R. 23-24.)

In reaching his decision, the ALJ found that Herron's allegations regarding her disability were "not fully credible," because her daily activities, as described by Herron at the

hearing, were not as limited as would be expected in light of Herron's alleged disability. He found it noteworthy that Herron was employed until May 2011 when she was laid off, and stated that "[t]his indicates that [Herron's] unemployment is due to reasons other than her allegedly disabling physical impairments." Moreover, the ALJ noted that although Herron had received treatment for her impairments, "that treatment has been essentially routine and/or conservative in nature." The ALJ gave "only partial weight" to the opinion of Dr. Karmel, the state consultative examiner who found that Herron could lift and carry ten pounds, stand and walk for two hours total, and sit for six hours total in an eight-hour workday. The ALJ found Dr. Karmel's assessment overly restrictive "considering the claimant's pulmonary function tests indicating marked improvement with bronchodilation and her testimony regarding activities of daily living supporting greater lifting ability." Additionally, the ALJ gave "little weight" to the opinions of state consultative examiners Dr. Warner and Dr. Cohn, who both found that Herron was capable of medium work with avoidance of concentrated exposure to pulmonary irritants. The ALJ discounted these assessments, stating that "greater restrictions are warranted based upon the claimant's testimony and the medical evidence." (R. 24.)

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., No. 14-3499, 2015 WL 3702032, at *4 (6th Cir. June 15, 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's 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. Walter 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 v. Comm'r of Soc. Sec., 127 F.3d 525, 529 (6th Cir. 1997)); 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. The ALJ's RFC Finding was Supported by Substantial Evidence

Herron first argues that the ALJ's RFC finding was not supported by substantial evidence. More specifically, Herron contends that the ALJ did not rely on any opinion evidence in making his determination and that he did not afford proper weight to the opinion of Dr. Karmel. (ECF No. 15.) 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) (explaining that when determining RFC, the ALJ considers "three types of medical sources - nonexamining sources, nontreating (but examining) sources, and treating sources"). 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). Treating source opinions are usually given controlling weight by the SSA; accordingly, the ALJ must provide "good reasons" if he discounts the weight normally given to a treating source opinion. 20 C.F.R. § 404.1527(c)(2); Gayheart v. Comm'r of Soc. Sec., 710 F.3d 365, 376 (6th Cir. 2013). However, opinions from nontreating and nonexamining sources are never assigned controlling weight; rather, the ALJ will weigh these 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.

Herron's assertion that the ALJ did not rely on opinion evidence is without merit. The ALJ discussed and relied on opinion evidence from Dr. Karmel, as well as two other state consultative examiners, in reaching his ultimate RFC finding. (R. 24.) While it is true that his RFC finding did not correspond exactly to any of the medical opinions he considered, the "Social Security Act instructs that the ALJ – not a physician – ultimately determines a claimant's RFC." Coldiron v. Comm'r of Soc. Sec., 291 F. App'x 435, 439 (6th Cir. 2010); see also Rudd v. Comm'r of Soc. Sec., 531 F. App'x 719, 728 (6th Cir. 2013) ("[T]o require the ALJ to base her RFC finding on a physician's opinion, would, in effect, confer upon the treating source the authority to make the determination or decision about whether an individual is under a disability, and thus would be

an abdication of the Commissioner's statutory responsibility to determine whether an individual is disabled.") (internal quotation marks and citation omitted).

Additionally, Herron's contention that the ALJ did not afford proper weight to Dr. Karmel's opinion is also without merit. As explained above, the ALJ discussed Dr. Karmel's opinion and afforded it "partial weight" in reaching his RFC finding. (R. 24.) The ALJ's assignment of only partial weight to Dr. Karmel's opinion was not improper, because Dr. Karmel was a state consultative examining physician, not a treating physician. As such, Dr. Karmel's opinion was not controlling, and the ALJ was free to weigh his opinion based on the particular facts and circumstances of Herron's case. Therefore, the court finds that the ALJ's RFC finding was supported by substantial evidence.

D. The ALJ's Credibility Determination was Supported by Substantial Evidence

Herron argues that the ALJ's findings as to her credibility were not supported by substantial evidence because he failed to take into account the amount of time her daily tasks take her to complete and the breaks she needs to take during these tasks. Herron also disputes the ALJ's inference that Herron's unemployment was "due to reasons other than her allegedly disabling physical impairments," because he did not take into

account Herron's testimony that she believed she was laid off because of her health. (ECF No. 15.) The ALJ, not the reviewing court, is "tasked with evaluating the credibility of witnesses, including that of the claimant." Kalmbach v. Comm'r of Soc. Sec., 409 F. App'x 852, 863 (6th Cir. 2011). When making a disability determination, the ALJ may consider the claimant's credibility and is not required to accept the claimant's subjective complaints. Jones v. Comm'r of Soc. Sec., 336 F.3d 469, 476 (6th Cir. 2003). Rather, the ALJ may properly discount the claimant's credibility if he or she finds "contradictions among the medical reports, claimant's testimony, and other evidence." Warner v. Comm'r of Soc. Sec., 375 F.3d 387, 392 (6th Cir. 2004) (citing Walters v. Comm'r of Soc. Sec., 127 F.3d 525, 531 (6th Cir. 1997)). "The ALJ's findings as to a claimant's credibility are entitled to deference, because of the ALJ's unique opportunity to observe the claimant and judge her subjective complaints." Buxton v. Halter, 246 F.3d 762, 773 (6th Cir. 2001). Thus, the court may not disturb an ALJ's credibility determination without a compelling reason to do so. Smith v. Halter, 307 F.3d 377, 379 (6th Cir. 2001).

The court finds that the ALJ's credibility determination was supported by substantial evidence. The ALJ considered Herron's testimony regarding her daily activities, which he concluded "are not limited to the extent one would expect, given

[Herron's] complaints of disabling symptoms and limitations." (R. 24.) He also considered Herron's medical records and other evidence, some of which contradicted Herron's testimony. For example, in her report to the SSA Herron stated that she is unable to do any household chores, including cleaning and laundry, and that she does not go grocery shopping. (R. 165-66.) However, at her hearing Herron testified to the contrary, that she is able to do laundry, household cleaning, and grocery shopping, even though she has to stop and rest frequently during these activities. (R. 41-45.) See Johnson v. Comm'r of Soc. Sec., 535 F. App'x 498, 505 (6th Cir. 2013) (discrediting claimant's credibility because his hearing testimony was inconsistent with the answers on his SSA disability questionnaire). Additionally, other than Herron's vague testimony regarding her suspicions, there is no evidence in the record to suggest that Herron was laid off because of her physical impairments. Thus, because the court has not been presented with a compelling reason to disregard the ALJ's credibility determination, the court will defer to the ALJ's findings regarding credibility.

E. The ALJ's Step Five Finding was Supported by Substantial Evidence

Lastly, Herron argues that the ALJ's step five finding was not supported by substantial evidence because in reaching his

finding, the ALJ relied on the vocational expert's testimony in response to an incomplete hypothetical question. More specifically, Herron contends that the hypothetical question was incomplete because it did not include the full range of limitations that she alleged in her testimony and was not based on medical opinion evidence. (ECF No. 15.) "A vocational expert's testimony concerning the availability of suitable work may constitute substantial evidence where the testimony is elicited in response to a hypothetical question that accurately sets forth the plaintiff's physical and mental impairments." Thomas v. Comm'r of Soc. Sec., 550 F. App'x 289, 290 (6th Cir. 2014) (quoting Smith, 307 F.3d at 378). While it is true that an ALJ may rely on a vocational expert's response to a hypothetical question only if the question accurately portrays the claimant's impairments, the "ALJ is required to incorporate only those limitations that he or she accepted as credible." Lester v. Soc. Sec. Admin., 596 F. App'x 387, 389-90 (6th Cir. 2015) (citing Ealy, 594 F.3d at 516 & Casey v. Sec'y of Health & Human Servs., 987 F.2d 1230, 1235 (6th Cir. 1993)). Here, the ALJ reasonably incorporated into his hypothetical questions to the vocational expert Herron's need to avoid pulmonary irritants, exposure to extreme cold and heat, and sitting or standing for long periods of time without breaks. (R. 49-56.) The ALJ was not required to include in his hypothetical

questions information from Herron or the record that he did not find credible. Accordingly, the court finds that the ALJ's step five determination was supported by substantial evidence.

III. CONCLUSION

Because there is substantial evidence in the record supporting the Commissioner's decision denying Herron's application for benefits, the Commissioner's decision is affirmed.

IT IS SO ORDERED.

s/ Tu M. Pham

TU M. PHAM
United States Magistrate Judge

October 27, 2015

Date