

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

FELICIA F. WHITLEY,)	
)	
Plaintiff,)	
)	
v.)	No. 1:15-cv-1242-tmp
)	
NANCY A. BERRYHILL,)	
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 Felicia F. Whitley's appeal from a final decision of the Commissioner of Social Security¹ ("Commissioner") denying her application for disability insurance benefits under Title II of the Social Security Act ("Act"), 42 U.S.C. §§ 401 *et seq.* On December 23, 2015, the parties consented to the jurisdiction of a United States magistrate judge pursuant to 28 U.S.C. § 636(c). (ECF. No. 10.) This case was reassigned to the undersigned magistrate judge on March 13, 2017. For the reasons set forth below, the decision of the Commissioner is reversed and the action is remanded

¹Carolyn W. Colvin was the Acting Commissioner of Social Security at the time this case was filed. As of the date hereof, the Acting Commissioner of Social Security is Nancy A. Berryhill.

pursuant to sentence four of 42 U.S.C. § 405(g).

I. FINDINGS OF FACT

On June 12, 2012, Whitley applied for disability insurance benefits under Title II of the Act. (R. 11, 36.) Whitley alleges a disability onset date of January 15, 2009. (R. 11, 37-38.) The Social Security Administration ("SSA") denied Whitley's application on October 23, 2012 and request for reconsideration on February 4, 2013. (R. 11, 54, 59.) At Whitley's request, a hearing was held before an Administrative Law Judge ("ALJ") on May 15, 2014. (R. 11, 23-35, 63-67.) On June 9, 2014, the ALJ issued a decision for a "period of adjudication" beginning December 9, 2010, finding that Whitley was not disabled under the Act and denying Whitley's request for benefits.² (R. 8-17.) Whitley requested review of the hearing decision to the SSA Appeals Council on June 30, 2014. (R. 7.) On July 30, 2015, the SSA Appeals Council denied Whitley's request for review. (R. 1-3.) Therefore, the ALJ's decision became the final decision of the Commissioner. (Id.) On

²Whitley had applied for benefits twice prior to the present application. During Whitley's May 15, 2014 hearing, the ALJ stated that Whitley's onset date was May 8, 2010 (the day after Whitley filed her second application for benefits). (R. 26.) However, in his opinion, the ALJ determined that the "period of adjudication" for her current application began on December 9, 2010 (the day after Whitley's second application for benefits was finally decided). (R. 11.) Whitley does not challenge this date.

September 27, 2015, Whitley filed the instant action. (ECF No. 12.) Whitley argues that: (1) the ALJ erred in finding that Whitley does not have a severe impairment that meets or equals one of the listed impairments; (2) the ALJ's residual functional capacity ("RFC") determination is not supported by substantial evidence; and (3) the ALJ erred in his finding at Step 5. (See ECF No. 12 at 4-5.)

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* or resolve conflicts in the evidence. 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)). The Commissioner, not the court, is charged with the duty to weigh the evidence 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.

§ 423(d)(2). Under the Act, the claimant bears the ultimate burden of establishing an entitlement to benefits. See 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. See 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. See 20 C.F.R. § 404.1520(a)(4).

C. Whether the ALJ's Listed Impairment Determination is Supported by Substantial Evidence

First, Whitley argues that the ALJ failed to address how he determined that her severe impairments did not meet or equal the severity of the listed impairments. (See ECF No. 12 at 4.) The ALJ found sufficient evidence of the following six severe impairments that limited Whitley's ability to perform work: (1) lumbosacral spondylosis, (2) chondromalacia of the patella, (3) status post anterior cervical discectomy at C5-6 with fusion, (4) status post arthroscopy, (5) status post status post [sic] carpal tunnel release, and (6) obesity. (R. 13.) However, the

ALJ also found that none of Whitley's severe impairments met or were medically equal to one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. (Id.); see 20 C.F.R. §§ 404.1520(d), 404.1525, & 404.1526. The claimant has 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); see Oliver, 415 F. App'x at 682. The claimant must "demonstrate that her impairment satisfies the diagnostic description for the listed impairment in order to be found disabled." Foster v. Halter, 279 F.3d 348, 354 (6th Cir. 2001).

Whitley argues that her spine and knee injuries and carpal tunnel releases are severe impairments. (See ECF No. 12 at 6.) However, Whitley does not indicate any specific listing at issue, and she fails to cite to specific evidence demonstrating that her impairments meet or medically equal any listed impairments. See Thacker v. Soc. Sec. Admin., 93 F. App'x 725, 728 (6th Cir. 2004) ("When a claimant alleges that he meets or equals a listed impairment, he must present specific medical findings that satisfy the various tests listed in the description of the applicable impairment or present medical evidence which describes how the impairment has such equivalency."). For these reasons, the court finds that Whitley

has not met her burden and that the ALJ has not been shown to have committed legal error in his finding at the third step.

D. Whether the ALJ's RFC Determination is Supported by Substantial Evidence

Second, Whitley argues that the ALJ's RFC determination is not supported by substantial evidence. (See ECF No. 12 at 5.) Although the ALJ "consider[s] opinions from medical sources" as to the claimant's RFC, "the final responsibility for deciding [the RFC] is reserved to the Commissioner." 20 C.F.R. §§ 404.1527(d)(2) & 416.927(d)(2); see Coldiron v. Comm'r of Soc. Sec., 391 F. App'x 435, 439 (6th Cir. 2010) (citing 42 U.S.C. § 423(d)(5)(B)) ("The Social Security Act instructs that the ALJ – not a physician – ultimately determines a claimant's RFC."). In this case, the ALJ found: "that the claimant has the residual functional capacity to perform the full range of sedentary work as defined in 20 C.F.R. § 404.1567(a) except the claimant can occasionally climb ramps/stairs, stoop, crouch, and kneel but never climb ladders/ropes/scaffolds or crawl." (R. 14.)

Whitley asserts that the ALJ failed "to even cite to a prior examination performed by Dr. Edward Crosthwait, who unequivocally states that Plaintiff is unable to work." (ECF No. 12 at 6.) At Exhibit 10F, the record contains Dr. Crosthwait's assessment, including a Medical Source Statement of Ability to Do Work-Related Activities (Physical), provided

pursuant to a consultative examination performed on November 18, 2010. (R. 432-41.) Dr. Crosthwait indicated, among other findings, that Whitley can never climb ramps/stairs, stoop, crouch, or kneel (R. 437), and he concluded that she "cannot work" (R. 434, 440). Dr. Crosthwait's assessment is not mentioned in the ALJ's decision. However, during the hearing, the ALJ cited to this assessment as "strong evidence." (R. 32 ("I don't see the need for any further questions. We've got strong evidence here, at 10F and Dr. Crosby is supportive at 17F.")) (emphasis added).) As discussed, to determine whether a finding is supported by substantial evidence, the court's review "must be 'based on the record as a whole' and must 'take into account whatever in the record fairly detracts from its weight.'" Abbott, 905 F.2d at 923 (quoting Garner, 745 F.2d at 388). Dr. Crosthwait's assessment seemingly detracts from the weight of the ultimate RFC finding. Because the ALJ does not mention Dr. Crosthwait's assessment in his opinion, the court is unable to determine how the assessment factored into the ALJ's decision. For this reason, the court cannot conclude that the RFC is supported by substantial evidence. Accordingly, it is ordered that Whitley's application for disability benefits be remanded for the ALJ to revisit Whitley's RFC, which would include specifying the weight assigned to Dr. Crosthwait's

assessment or explaining why it should not be considered.³

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

July 13, 2017

Date

³Because the court remands at this step, the court refrains from addressing the claimant's arguments regarding the ALJ's Step 5 findings, which necessarily rely on the ALJ's RFC determination.