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

JUNIOR ANDERSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**14-cv-1128-TMP**
	)	
NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY,	)	
	)	
Defendant.	)	
	)	

ORDER AFFIRMING THE COMMISSIONER'S DECISION

Before the court is plaintiff Junior Anderson's appeal from a final decision of the Commissioner of Social Security[1] ("Commissioner") denying his application for supplemental security income under Title XVI of the Social Security Act ("Act"), 42 U.S.C. §§ 401 *et seq*. On December 6, 2016, the parties consented to the jurisdiction of the United States magistrate judge pursuant to 28 U.S.C. § 636(c). (ECF No. 17.) For the reasons set forth below, the decision of the Commissioner is affirmed.

I. FINDINGS OF FACT

On November 16, 2012, Anderson applied for supplemental

[1]Carolyn W. Colvin was the Acting Commissioner of Social Security at the time this case was filed. Therefore, she is named in the complaint and in the caption to this case. As of the date of this order, the Acting Commissioner of Social Security is Nancy A.

security income under Title XVI of the Act with an alleged onset date of August 1, 2012. (R. 18.) Anderson's application was denied initially and upon reconsideration by the Social Security Administration ("SSA"). (R. 68, 88.) At Anderson's request, a hearing was held before an Administrative Law Judge ("ALJ") on December 30, 2013. (R. 30-66.) On January 27, 2014, the ALJ issued a decision denying Anderson's request for benefits after finding that Anderson was not disabled because he retained the residual functional capacity ("RFC") to perform jobs that exist in significant numbers in the national economy. (R. 18-24.) On April 9, 2014, the SSA's Appeals Council denied Anderson's request for review. (R. 1-6.) Therefore, the ALJ's decision became the final decision of the Commissioner. (Id.) On June 3, 2014, Anderson filed the instant action. (ECF No. 1.) Anderson challenges the Commissioner's decision on several grounds: that the ALJ erred at step two by not finding that Anderson suffers from the severe impairment of colostomy; erred at step three by failing to properly consider whether Anderson's impairments met any of the impairments listed in 20 C.F.R. § 404, Subpart P, Appendix 1 ("the listings"); improperly weighed the opinion of examining physician Dr. Robert Winston; erred by determining that Anderson has the RFC to perform light work, which is not supported by substantial evidence; and erred at step five in finding that Anderson is able to perform jobs

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Berryhill.

that exist in significant numbers in the national economy.

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.

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. 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. The ALJ's Step 2 Determination

Anderson argues the ALJ erred at step two by failing to find Anderson's colostomy to be a severe impairment. A severe impairment is "any impairment or combination of impairments which significantly limits [the claimant's] physical or mental ability to

do basic work activities." 20 C.F.R. § 416.920(c). The severity determination is "a *de minimis* hurdle in the disability determination process," and "an impairment can be considered not severe only if it is a slight abnormality that minimally affects work ability regardless of age, education and experience." Anthony v. Astrue, 266 F. App'x 451, 457 (6th Cir. 2008) (quoting Higgs v. Bowen, 880 F.2d 860, 862 (6th Cir. 1988)).

While the ALJ did not find Anderson's colostomy to be a severe impairment at step two, he found that Anderson suffered from the severe impairments of rectal adenocarcinoma and seizures. Because the ALJ found in Anderson's favor at step two, he was required to consider all of Andersons impairments, both severe and non-severe, at all of the remaining steps of the disability analysis. See 20 C.F.R. 416.945(a)(2) (stating that when determining a claimant's RFC, the ALJ must "consider all of [his] medically determinable impairments of which [the ALJ is] aware, including [] medically determinable impairments that are not severe"). As a result, the fact that the ALJ did not find that Anderson suffered from the severe impairment of colostomy at step two is "legally irrelevant."[2] Anthony, 266 F. App'x at 457 (citing Maziarz v. Sec'y of Health & Human Servs., 837 F.2d 240, 244 (6th Cir. 1987)). The ALJ did not err at step two.

[2]The ALJ did, in fact, consider Anderson's colostomy in his

D. The ALJ's Step Three Determination

At step three, the ALJ found that Anderson's impairments "are not sufficiently severe to meet the criteria of any impairment" in the Listings, and Anderson "does not suffer from impairment or a combination of impairments, including those deemed non-severe, which is medically equivalent in severity to any listed impairment." (R. 20.) Anderson argues that his impairments meet or equal sections 1, 8, 11, and 13, and that the ALJ should have discussed the criterion for those listings.

At step three, the ALJ "must compare the medical evidence with the requirements for listed impairments in considering whether the condition is equivalent in severity to the medical findings for any Listed Impairment." Reynolds v. Comm'r of Soc. Sec., 424 F. App'x 411, 415 (6th Cir. 2011) (citing Lawson v. Comm'r of Soc. Sec., 192 F. App'x 521, 529 (6th Cir. 2006)). The Reynolds court stated that the ALJ needs "to actually evaluate the evidence, compare it" to the relevant listings, and "give an explained conclusion, in order to facilitate meaningful judicial review." Id. at 416. However, it is the claimant's burden to establish that her impairment meets a listing, and if the claimant has not met that burden, then any error at step three is harmless. See Forrest v. Comm'r of Soc. Sec., 591 F. App'x 359, 366 (6th Cir. 2014).

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opinion. (R. 22, 23.)

The record evidence does not satisfy Anderson's burden of showing that his impairments meet or equal the listings. Sections 1.00 and 8.00 cover the musculoskeletal system and skin disorders, respectively, and Anderson does not explain how his impairments meet or equal these listings. Section 11.00 relates to neurological disorders, and while the record indicates that Anderson has a history of seizures (for which he has been prescribed medication), the record does not support Anderson's claim that his "seizures are at listing level." (ECF No. 14 at 4.) Listing 13.00 covers cancer, and while the record is clear that Anderson was diagnosed with rectal cancer in October 2012, Anderson does not identify which specific factors that his impairments satisfy. Anderson points to the report of Dr. Robert Winston as evidence that his impairments satisfy the listings. However, Dr. Winston does not discuss the applicability of any listing to Anderson, and on its face his report does not establish that any listing would apply to Anderson's impairments. Because Anderson has not met his burden of showing that his impairments meet or equal the listings, any error at step three is harmless and does not justify remand.

E. The ALJ's RFC Determination

Anderson asserts that the ALJ's determination that he has the RFC to perform light work is not supported by substantial evidence. A claimant's RFC is "the most [the claimant] can still do despite [his] limitations." 20 C.F.R. §§ 404.1545(a)(1) & 416.945(a)(1).

The ALJ must assess the claimant’s RFC based on all of the relevant evidence in the record. §§ 404.1545(a)(3) & 416.945(a)(3); see also SSR 96-8P, 1996 WL 374184, at *3 (July 2, 1996) (“The RFC assessment is a function-by-function assessment based upon all of the relevant evidence of an individual's ability to do work-related activities.”). “The ALJ is charged with the responsibility of evaluating the medical evidence and the claimant’s testimony to form an ‘assessment of [her] residual functional capacity.’” Webb v. Comm’r of Soc. Sec., 368 F.3d 629, 633 (6th Cir. 2004) (alteration in original) (quoting 20 C.F.R. § 416.920(a)(4)(iv)). The ALJ found that Anderson

> Has the [RFC] to perform light work as defined in 20 C.F.R. 416.967)b) except cannot climb ladders, ropes, or scaffolds; cannot work at unprotected heights or with dangerous machinery; can occasionally crouch, stoop, kneel, and crawl; can frequently reach overhead bilaterally; would need the option to alternate between sitting and standing every 30 minutes.

(R. 20.)[3]

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[3]“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.

20 C.F.R. § 404.1567(b); see also SSR 83-10, 1983 WL 31251, at *5 (January 1, 1983).

Anderson argues that this RFC finding is not supported by substantial evidence. In particular, Anderson contends that the ALJ erred in giving "little weight" to the opinion of examining physician Dr. Robert Winston, which supports Anderson's assertion that he lacks the RFC to work. Dr. Winston interviewed and examined Anderson in December 2013. He noted that Anderson has a "lower left quadrant colostomy" which "does protrude when going from lying to sitting position which is associated with severe pain." (R. 404.) He further noted "[m]etastatic colorectal carcinoma with lymph node involvement," "S/P Radiation Therapy," "S/P Chemotherapy" and Colon resection with colostomy." (Id.) Dr. Winston wrote that Anderson:

> was diagnosed with invasive rectal cancer with lymph node involvement in October 2012. He had 50 radiation treatments after which he had chemotherapy and surgery completing in February and March of 2013. He has the typical loss of strength and stamina from radiation and chemotherapy. He has protrusion of the stoma of his colostomy and minimum activity. I could not find in his records as to his life expectancy and expected survival, but the usual is 12 to 18 months before recurrence from invasive rectal cancer with lymph node involvement. With a sixth grade education and extensive medical problems, I do not think he is capable of engaging in any significant gainful employment and his prognosis is poor. His condition will last greater than 12-18 months with continued deterioration.

(Id.) Dr. Winston also submitted a "Medical Source Statement of Ability to Do Work-Related Activities (Physical)." Dr. Winston's opinion includes findings that Anderson: could lift and carry up to ten pounds occasionally; could never lift or carry more than ten pounds; could sit for three hours without interruption; could walk

and stand for one hour without interruption; did not require a cane to ambulate; could never reach, push or pull, could handle, finger, and feel occasionally; could occasionally operate foot controls, could never climb stairs, ramps, ladders, or scaffolds; and could never balance, stoop, kneel, crouch or crawl.

The ALJ gave little weight to Dr. Winston's opinion, concluding that "[s]uch drastic limitations are not supported by the medical evidence of record or by [Anderson's] own testimony." (R. 23.) The ALJ characterized the physical exam performed by Dr. Winston as "largely normal, with the exception of pain when moving from lying to sitting position as well as a left lower quadrant colostomy." (R. 22.) Anderson contends that the ALJ did not sufficiently evaluate Dr. Winston's opinion, which Anderson argues is consistent with the record evidence and should have been given great weight. In making the disability decision the ALJ must "evaluate every medical opinion" in the case record, regardless of its source.[4] See 20 C.F.R. § 416.927(b) & (c). The SSA has established 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). "A treating source, accorded

[4]The SSA has recently revised its rules for the evaluation of medical evidence, effective March 27, 2017. See 82 FR 5844 (January 18, 2017). The changes to the rules for the evaluation of medical opinions, now codified at 20 C.F.R. § 416.920c, apply to claims filed on or after March 27, 2017. The rules as codified in § 416.927 apply to claims filed before March 27, 2017. Id. at 5867-68.

the most deference by the SSA, has not only examined the claimant but also has an 'ongoing treatment relationship' with her consistent with accepted medical practice." Smith v. Comm'r of Soc. Sec., 482 F.3d 873, 875 (6th Cir. 2007) (quoting 20 C.F.R. § 404.1502). The SSA gives the most deference to opinions from a claimant's treating sources because treating sources "are likely to be medical professionals most able to provide a detailed, longitudinal picture of [the claimant's] medical impairment(s)." Id. (citing 20 C.F.R. § 404.1527(c)(2)) (alterations in original). "A nontreating source, who physically examines the patient 'but does not have, or did not have an ongoing treatment relationship with' the patient, falls next along the continuum." Norris, 461 F. App'x at 439 (quoting Smith, 482 F.3d at 875). "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). In weighing the medical opinions the ALJ must "consider factors 'including the length and nature of the treatment relationship, the evidence that the physician offered in support of her opinion, how consistent the opinion is with the record as a whole, and whether the physician was practicing in her specialty.'" Id. (quoting Ealy v. Comm'r of Soc. Sec., 594 F.3d 504, 514 (6th Cir. 2010)); see 20 C.F.R. § 916.427(c).

The court finds that the ALJ's RFC determination is supported by substantial evidence, and that he did not err in giving little

weight to Dr. Winston's opinion. Because Dr. Winston is not a treating physician, the ALJ was not required to give "good reasons" for the weight he assigned to the opinion, and was free to give the opinion any weight he felt appropriate based on the record. In reviewing the relevant evidence in the record, the ALJ noted that Anderson was diagnosed with rectal cancer after he presented with rectal pain, rectal bleeding, and abdominal pain. (R. 209-10.) A biopsy of the rectal mass revealed "an invasive adenocarcinoma, moderately differentiated." (R. 235.) He received pre-operative radiation therapy through December 2012, and Dr. Jeffrey Kovalic noted that he tolerated the radiation therapy well, though he experienced some considerable rectal pain. (R. 231, 241.) He underwent abdominoperineal resection on February 3, 2013, and a LifePort was surgically implanted in March 2013. (R. 378.) On May 7, 2013, Dr. James Chambers at the Jackson Clinic noted that there was no evidence of cancer recurrence and the port site was clean. (R. 311.) He noted that Anderson did report pain in his sacrum after sitting for long periods of time, and that after receiving two rounds of post-operative chemotherapy treatment, he did not wish to continue that treatment. (R. 311-12.) X-rays taken on June 4, 2013, showed "[p]ostsurgical changes involving the rectum, with creation of a left lower quadrant colostomy. No convincing evidence of recurrent or metastatic disease in the chest, abdomen, and pelvis." (R. 316.) On July 2, 2013, Dr. Chambers noted that Anderson was "doing well" and "reported no pain or problems." (R.

319.) Similarly, at a November 5, 2013 follow-up, Dr. Chambers stated that although Anderson reported "some complaints of fatigue", he was in "[n]o acute distress, well-appearing and well nourished." The ALJ also considered and gave partial weight to the opinion of nonexamining state agency consultant Dr. James Gregory, submitted on June 15, 2013. The ALJ determined that Anderson's RFC was more limited than that opined by Dr. Gregory due to Anderson's fatigue, stomach cramping, and history of colostomy.

The ALJ also discussed Anderson's hearing testimony that he was unable to work, but found that his testimony was not fully consistent with the evidence in the record. In particular, the ALJ noted that while Anderson testified that he stopped his post-operative chemotherapy because it made him feel sick, there was no mention of this in the medical records. Anderson also testified that his seizure medication was effective in preventing seizures, and that the medicine did not have any side effects.

In light of the record evidence, the ALJ's RFC determination is supported by substantial evidence. There may be evidence in the record that would support a different RFC finding, but there is enough support for the ALJ's determination to place it within the ALJ's "zone of choice." See Blakely v. Comm'r of Soc. Sec., 581 F.3d 399, 406 (6th Cir. 2009) (quoting Mullen v. Bowen, 800 F.2d 535, 545 (6th Cir. 1986) (en banc) ("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.”)).

F. The ALJ’s Step Five Determination

Anderson’s final argument is that the ALJ erred at step five by finding that he has the RFC to perform jobs that are available in significant numbers in the national economy. “While the claimant bears the burden of proof during the first four steps, that burden shifts to the Commissioner in step five. At step five, the Commissioner must identify a significant number of jobs in the economy that accommodate the claimant's residual functional capacity and vocational profile.” Johnson v. Comm'r of Soc. Sec., 652 F.3d 646, 651 (6th Cir. 2011). The SSA “consider[s] that work exists in the national economy when it exists in significant numbers either in the region where you live or in several other regions of the country.” 20 C.F.R. § 416.966(a); see also § 416.966)(b) (“Work exists in the national economy when there is a significant number of jobs (in one or more occupations) having requirements which [the claimant is] able to meet with [his] physical or mental abilities and vocational qualifications.”).

At the hearing, a vocational expert (“VE”) testified that based on his age, education, work experience, and RFC, Anderson “would be able to perform the requirements of representative occupations” such as “electrical accessory assembler” and “production assembler.”[5] The VE stated that there were 700 and

[5]Anderson contends that the ALJ incorrectly characterized

1,000, respectively, of these jobs in Tennessee, and 20,000 and 25,000 of these jobs in the United States. Anderson contends that the ALJ was required to elicit additional testimony from the VE in order to satisfy the Commissioner's burden at step five.[6] However, the court finds that the ALJ's reliance on the VE's testimony satisfies the burden to show that Anderson is capable of performing work that exists in significant numbers in the national economy. Accordingly, ALJ's step five determination is supported by substantial evidence, and remand is not appropriate.

Anderson's education as limited rather than marginal. "Marginal education means ability in reasoning, arithmetic, and language skills which are needed to do simple, unskilled types of jobs. [The SSA] generally consider that[s] formal schooling at a 6th grade level or less is a marginal education." 20 C.F.R. § 416.964(b)(2). "Limited education means ability in reasoning, arithmetic, and language skills, but not enough to allow a person with these educational qualifications to do most of the more complex job duties needed in semi-skilled or skilled jobs. [The SSA] generally consider that a 7th grade through the 11th grade level of formal education is a limited education." § 416.964(b)(3). Anderson testified that the sixth grade was the last grade he completed. (R. 37-38.) However, to the extent the ALJ was incorrect in stating in the opinion that Anderson's education was limited, that statement did not affect the step five determination. The ALJ based the step five determination on the VE's testimony, and the VE based her testimony on Anderson's hearing testimony.

[6]Anderson cites Hall v. Bowen, 837 F.2d 272 (6th Cir. 1988) and Graves v. Sec'y of Health, Ed., & Welfare, 473 F.2d 807 (6th Cir. 1973) for the proposition that based on the numbers of Tennessee jobs for these occupations, the ALJ was required to elicit further testimony from the VE in order to satisfy the Commissioner's burden at step five. However, it is clear from the opinion in Graves that the remand in that case was grounded in the court's concern that the ALJ based his step five determination on testimony by the VE that the VE later qualified. See Graves, 473 F.2d at 808-10; see

III. CONCLUSION

For the reasons described above, the Commissioner's determination that Anderson is not disabled is supported by substantial evidence. Accordingly, the Commissioner's decision is affirmed.

IT IS SO ORDERED.

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

August 8, 2017
Date

also Hall, 837 F.2d at 274.