

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

SUSAN LORETTA YARBRO,)	
)	
Plaintiff,)	
)	
v.)	No. 15-cv-1239-tmp
)	
CAROLYN W. COLVIN,)	
ACTING COMMISSIONER OF SOCIAL)	
SECURITY,)	
)	
Defendant.)	

ORDER AFFIRMING THE COMMISSIONER'S DECISION

Before the court is plaintiff Susan Loretta Yarbro'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.*, and for supplemental security income ("SSI") under Title XVI of the Act, 42 U.S.C. §§ 1391 *et seq.* (ECF No. 1.) The parties have consented to the jurisdiction of the United States magistrate judge pursuant to 28 U.S.C. § 636(c). (ECF No. 8). The case was reassigned to the undersigned on March 13, 2017. For the following reasons, the Commissioner's decision is affirmed.

I. FINDINGS OF FACT

Yarbro filed a claim for social security disability benefits

¹Carolyn W. Colvin was the Acting Commissioner of Social Security at the time this case was filed. Therefore, she is named in the

and supplemental security income benefits on March 29, 2013, alleging an onset date of August 1, 2008. (R. 85-88; 153-67.) Yarbro's claims were denied at the initial state agency level and upon reconsideration. (R. 89-92; 100-05.) At Yarbro's request, an Administrative Law Judge ("ALJ") held a hearing and issued a decision. (R. 10-38.) The ALJ's decision specifically noted that Yarbro graduated from high school with a special education diploma. (R. 15.) Yarbro reported cutting herself on multiple occasions. (R. 16; 18.) Yarbro at one point had a driver's license; she testified that the test was read to her and that the examiner marked the answers that she indicated for her. (R. 16; 23.) Yarbro indicated problems following written instructions because she cannot read. (R. 16.) At examinations in 2010 and 2012 she could identify the current president of the United States; however, at an interceding examination in 2011 she indicated that she could not name the current president. (R. 16; 18; 21.) Yarbro testified that she could not read the labels on food items by herself. (R. 23.) Yarbro further testified that she could not: do math; work because she could not be around people and could not read; or afford mental health treatment. (R. 23.) Yarbro testified that she last worked for Kentucky Fried Chicken in 2007. (R. 23.) Terri Beam, a friend of Yarbro's, testified that they had lived together for four years, that Yarbro could not do anything by

caption to this case.

herself such as cooking and other household chores, and that Yarbro did not know her date of birth or social security number. (R. 23.) Ms. Beam previously completed a Function Report-Adult-Third-Party, which indicated that Yarbro took the trash out, while Beam did everything else. (R. 20; 207-14.)

The ALJ also detailed numerous evaluations that Yarbro completed at the Social Security Administration's request. (R. 16-24.) For the purposes of this appeal, three evaluations are particularly relevant: the February 17, 2010, consultative examination with Melissa H. Greer; the March 16, 2011, consultative evaluation with Robert W. Kennon, Ph.D.; and a subsequent consultative evaluation by Ms. Greer on May 2, 2012. Yarbro completed a Full Scale IQ exam as part of each of these examinations. On February 17, 2010, Ms. Greer estimated a Full Scale IQ of 48. (R. 17; 370.) Ms. Greer noted that Yarbro presented credibly, and diagnosed moderate intellectual disability.² (R. 17; 372.) On March 16, 2011, Dr. Kennon estimated a Full Scale IQ of 44. (R. 19; 419.) Dr. Kennon noted that the IQ results appeared "globally inaccurate," and that Yarbro "demonstrated obvious attempts to portray herself in a negative light." (R. 19; 419-20.) Dr. Kennon further noted that Yarbro's test results were "suggestive of malingering," and thus invalid.

²At the time of Ms. Greer's diagnosis it was called mental retardation; however, that term is no longer used.

(R. 19; 419.) On May 2, 2012, Ms. Greer estimated a Full Scale IQ of 46. (R. 21; 490.) Ms. Greer diagnosed a mild intellectual disability after this evaluation. (R. 22; 491.)

The ALJ further discussed opinions from additional examiners who commented on the validity of Yarbros Full Scale IQ scores. Specifically, R.G. Chahal, M.D., reviewed Yarbros medical records after Ms. Greers initial examination. (R. 17; 384.) Dr. Chalal noted the low IQ score but also indicated that Yarbros adaptive functioning appeared higher than indicated by the score, and that Ms. Greers diagnoses were not consistent with her opinions or with Yarbros work history. (R. 17; 384.) In April 2011, Frank Kupstas, Ph.D., reviewed Yarbros medical records. (R. 19; 443.) Dr. Kupstas indicated that he was unable to assess the case due to Yarbros malingering. (R. 19; 443.) Dr. Kupstas further opined that Yarbros IQ scores were "invalid." (R. 448.) Finally, in December 2013, George Davis, Ph.D., in response to an interrogatory, indicated that Yarbros Full Scale IQ scores were not valid and were inconsistent with her work history and ability to get a drivers license. (R. 23-24; 550.)

The ALJ found that Yarbros had severe impairments including: osteoarthritis of the right knee, degenerative disc disease and facet arthropathy of the lumbar spine, obesity, a depressive disorder, and a possible cognitive disorder. (R. 24.) However, the ALJ determined that Yarbros was not under a "disability" because

she retained the residual functional capacity ("RFC") to perform work existing in significant numbers in the national economy. (R. 10-38.) Yarbro thereafter filed the present action. (ECF No. 1.)

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).

In this case, Yarbro argues that the ALJ erred at step three by failing to consider whether her mental functioning met Listing 12.05, specifically arguing that the ALJ was under a legal duty to evaluate the three IQ scores. (ECF No. 12 at 14-15.) Yarbro also argues that the failure to consider the IQ scores renders invalid the ALJ's RFC finding at step four. (Id. at 16.)

C. Whether the ALJ Erred in Failing to Consider Listing 12.05

To establish a disabling intellectual disorder under Listing 12.05, a claimant must meet one of four severity prongs (12.05A - D) and the diagnostic description of intellectual disability in the listing's introductory paragraph. See 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00A; Foster v. Halter, 279 F.3d 348, 354-55 (6th Cir. 2001). Listing 12.05B specifically provides that a full scale IQ score of 70 or below meets the standard for significantly subaverage general intellectual functioning. 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05B(1). The Listing further establishes that IQ scores are presumed to be an accurate reflection of general intellectual functioning, unless evidence in the record suggests otherwise. 20 C.F.R. Pt. 404, Subpt. P, App. 1, 12.00H(2)(d). Examples of this evidence can include: "a statement from the test administrator indicating that your obtained score is not an accurate reflection of your general intellectual functioning, prior

or internally inconsistent IQ scores, or information about your daily functioning.” Id. Furthermore, “[o]nly qualified specialists, Federal and State agency medical and psychological consultants, and other contracted medical and psychological experts” may conclude that an obtained IQ score is not an accurate reflection of general intellectual functioning. Id.

Here, Yarbro’s three IQ scores of 48, 44, and 46 all fall below the standard established by Listing 12.05B. However, contrary to Yarbro’s assertions, the ALJ evaluated Yarbro’s IQ scores and explained why those scores appeared invalid. Specifically, the 2010 and 2012 evaluations were “questionable” because Ms. Greer’s final diagnoses were inconsistent with one another even though the scores and other evaluations were similar. (R. 25.) Also, the record did not indicate that Ms. Greer reviewed her first report before issuing the second. (R. 25.) In addition, Dr. Kennon noted in his 2011 examination that the IQ results were “globally inaccurate” and that Yarbro “demonstrated obvious attempts to portray herself in a negative light.” (R. 19.) Dr. Chahal noted the low IQ score but also indicated that Yarbro’s adaptive functioning appeared higher than indicated by the score, and that Ms. Greer’s diagnoses were not consistent with her opinions or Yarbro’s work history. (R. 17; 384.) Dr. Kupstas indicated that he was unable to assess the case due to Yarbro’s malingering, and opined that Yarbro’s IQ scores were “invalid.”

(R. 448.) Finally, Dr. Davis indicated that Yarbro's Full Scale IQ scores were not valid and were inconsistent with her work history and ability to get a driver's license. (R. 23-24; 550.) There is no indication in the record, and Yarbro does not argue, that consideration of any of these opinions was inappropriate as a matter of law. See 20 C.F.R. Pt. 404, Subpt. P, App. 1, 12.00H(2)(d). The ALJ thus properly weighed the evidence before him, and concluded that Yarbro's IQ scores were not valid. See Walters, 127 F.3d at 528; Crum, 921 F.2d at 644. This decision was supported by substantial evidence and, accordingly, will be affirmed.

D. Whether Substantial Evidence Supported the ALJ's RFC Analysis

At step four of the social security benefits analysis, the ALJ must determine whether the claimant has the RFC to return to any past relevant work and, if not, whether the claimant retains the capacity to adjust to other jobs in the nation or region in light of her age, education, and work experience. See 20 C.F.R. §§ 404.1520(a)(4)(iv); 404.1520(e); 404.1545. Yarbro argues that, in making the RFC determination, the ALJ improperly rejected the three IQ scores. As explained above, however, the ALJ pointed to specific testimony in the record that casts doubt on the validity of the IQ scores. Accordingly, the ALJ's decision to not consider the IQ scores when conducting his RFC analysis was supported by substantial evidence. Such determination was not in error and

accordingly, must be likewise affirmed.

III. CONCLUSION

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

IT IS SO ORDERED.

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

March 19, 2018
Date