

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

---

AIRNISE COLE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	No. 16-cv-01249-TMP
CAROLYN W. COLVIN, Acting	)	
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	

---

ORDER AFFIRMING THE COMMISSIONER'S DECISION

---

Before the court is plaintiff Airnise Cole's appeal from a final decision of the Commissioner of Social Security<sup>1</sup> ("Commissioner") denying her application for disability insurance benefits under Title II of the Social Security Act ("Act"), 42 U.S.C. §§ 401 *et seq.* (ECF No. 1.) After the parties consented to the jurisdiction of the United States magistrate judge, pursuant to 28 U.S.C. § 636(c), this case was referred to Magistrate Judge Edward G. Bryant. (ECF No. 12.) Subsequently, pursuant to Administrative Order No. 2017-07, this case was reassigned to the undersigned Magistrate Judge. For the following reasons, the Commissioner's decision is affirmed.

I. FINDINGS OF FACT

---

<sup>1</sup>Carolyn W. Colvin was the Acting Commissioner of Social Security at the time this action was filed. Therefore, she is named in the

Cole applied for disability benefits under Title II of the Act on July 29, 2013, with an alleged onset date of May 10, 2013. (R. 192-99.) In her application, Cole alleged disability due to seizures. (R. 231.) The Social Security Administration ("SSA") denied Cole's application initially and upon reconsideration. (R. 120-22, 124-25.) At Cole's request, a hearing was held before an Administrative Law Judge ("ALJ") on April 7, 2015. (R. at 126-27, 186.) On August 17, 2015, the ALJ issued a decision denying Cole's request for benefits after finding that she was not under a disability because she retained the residual functional capacity ("RFC") to perform jobs that exist in significant numbers in the national economy. (R. 41-53.)

In his decision, the ALJ concluded that Cole has the following severe impairments: "major depressive disorder with psychotic features and a history of seizure disorder." (R. 43.) However, the ALJ found that Cole did not have an impairment or combination of impairments listed in or medically equal to one of the listed impairments contained within 20 C.F.R. Part 404, Subpart P, Appendix 1 (the "listings"). (Id.) In discussing the listings, the ALJ thoroughly analyzed why Cole's impairments did not "meet or medically equal the criteria of listing 12.04." (R. 44.) However, in his opinion, the ALJ did not discuss the applicability of listing 12.05. Next, the ALJ concluded that Cole has the RFC to:

---

in the caption to this case. As of the date of this order, the

perform a full range of work at all exertional levels, but with the following nonexertional limitations: the claimant should not climb ladders/ropes/scaffolds and should avoid workplace hazards such as unprotected heights and moving machinery; can understand, remember and carry out routine, repetitive, 1-2 step directions; can make judgments on simple work related decisions; can have occasional contact with the general public; can interact with supervisors and relate to coworkers; and can adapt to infrequent workplace changes.

(R. 46.)

In making that determination, the ALJ considered several medical opinions. (R. 46-52.) Relevant to the present action, the ALJ considered the opinions of Dr. Robert Kennon, Dr. David Pickering, and Dr. Kristin Grant. In his report, Dr. Pickering indicated that, "[o]n the WAIS-II, [cole] attained a VIQ score of 62, a PIQ score of 59 and a FSIQ score of 58." (R. 48.) Further, "Dr. Pickering formed a diagnostic impression including major depression, recurrent, severe, with psychotic features; generalized anxiety disorder; and mild intellectual disability." (Id.) The ALJ gave Dr. Pickering's opinion "little weight" after finding his proposed limitations to be extreme and inconsistent with the record as whole. (R. 50.) Specifically, the ALJ emphasized that Dr. Pickering's analysis was inconsistent with the opinions of two other psychologists who asserted that Cole was malingering. (Id.) The ALJ also found other inconsistencies, including:

The treatment records only show a short admission to the CSU Pathways for claimant reports of suicidal thoughts and depression. The claimant has reported multiple times

---

Acting Commissioner of Social Security is Nancy A. Berryhill.

that she is unable to do much around the house or for herself; however, she reportedly keeps her daughter's three children, all age six and under, and reported planning a funeral for a friend's son who passed away. She also reported that she stayed with her mother while her mother was in a hospital and went to check on her paralyzed uncle every day. She reported on numerous occasions that she does not have friends; however, she reported that she called three friends about a class reunion. She also reported that she has a close friend that is supportive.

(R. 50-51.)

The ALJ also considered the opinion of Dr. Kennon, who conducted a consultative psychological examination of Cole. In his report, Dr. Kennon stated that he "did not detect that [Cole] would suffer difficulties in handling simple instructions or carrying out simple instructions if she were motivated to do so." (R. 50.) (quoting Dr. Kennon's report). However, Dr. Kennon was unable to evaluate Cole's social functioning due to her malingering and lack of participation. (Id.) The ALJ afforded Dr. Kennon's opinions great weight but noted that Dr. Kennon's report did not include a mental functional assessment due to Cole's malingering and lack of participation. (Id.) Still, the ALJ emphasized that Dr. Kennon's opinion was consistent with Cole's mental health treatment records. (Id.) Finally, the ALJ considered the opinion of Dr. Kristin Grant who also performed a consultative psychological examination of Cole. Dr. Grant also was unable to offer a definitive assessment of Cole's intellectual functioning due to malingering and lack of participation. However, Dr. Grant concluded that Cole "showed no

evidence of short-term or long-term memory or concentration impairment . . . [and] [s]he appeared to be able to follow instruction, both written and spoken[.]” (R. 51.) (quoting Dr. Grant’s report). The ALJ afforded Dr. Grant’s opinions great weight for reasons similar to why he afforded Dr. Kennon’s opinion great weight. (Id.)

After a lengthy discussion of the RFC determination, the ALJ proceeded to the fourth step and concluded that Cole did not have any past relevant work. (R. 52) As a result, the ALJ’s analysis advanced to step five where he stated that:

considering the claimant’s age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy that the claimant can perform.

(Id.) Accordingly, the ALJ concluded that Cole was not disabled and was therefore not entitled to disability benefits under Title II of the Act. On July 26, 2016, the Appeals Council denied Cole’s request for review, making the ALJ’s decision the final decision of the Commissioner. (R. 1.)

Cole filed the instant action on September 16, 2016, seeking review of the ALJ’s decision. (ECF No. 1.) In her appeal, Cole raises two arguments. Initially, she argues that the ALJ erred at step three by failing to discuss the applicability of listing 12.05(C). (ECF No. 22 at 15.) Next, Cole argues that the ALJ’s RFC determination is unsupported by substantial evidence. (Id. at 15-17.)

## II. CONCLUSIONS OF LAW

### A. Standard of Review

Under 42 U.S.C. § 405(g), a claimant may obtain judicial review of any final decision made by the Commissioner after a hearing to which he or she was a party. "The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). Judicial review of the Commissioner's decision is limited to whether there is substantial evidence to support the decision and whether the Commissioner used the proper legal criteria in making the decision. Id.; Winn v. Comm'r of Soc. Sec., 615 F. App'x 315, 320 (6th Cir. 2015); Cole v. Astrue, 661 F.3d 931, 937 (6th Cir. 2011); Rogers v. Comm'r of Soc. Sec., 486 F.3d 234, 241 (6th Cir. 2007). Substantial evidence is more than a scintilla of evidence but less than a preponderance, and is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Kirk v. Sec'y of Health & Human Servs., 667 F.2d 524, 535 (6th Cir. 1981) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)).

In determining whether substantial evidence exists, the reviewing court must examine the evidence in the record as a whole and "must 'take into account whatever in the record fairly detracts from its weight.'" Abbott v. Sullivan, 905 F.2d 918, 923 (6th Cir.

1990) (quoting Garner v. Heckler, 745 F.2d 383, 388 (6th Cir. 1984)). If substantial evidence is found to support the Commissioner's decision, however, the court must affirm that decision and "may not even inquire whether the record could support a decision the other way." Barker v. Shalala, 40 F.3d 789, 794 (6th Cir. 1994) (quoting Smith v. Sec'y of Health & Human Servs., 893 F.2d 106, 108 (6th Cir. 1989)). Similarly, the court may not try the case *de novo*, resolve conflicts in the evidence, or decide questions of credibility. Ulman v. Comm'r of Soc. Sec., 693 F.3d 709, 713 (6th Cir. 2012) (citing Bass v. McMahon, 499 F.3d 506, 509 (6th Cir. 2007)). Rather, the Commissioner, not the court, is charged with the duty to weigh the evidence, to make credibility determinations, and to resolve material conflicts in the testimony. Walters v. Comm'r of Soc. Sec., 127 F.3d 525, 528 (6th Cir. 1997); Crum v. Sullivan, 921 F.2d 642, 644 (6th Cir. 1990); Kiner v. Colvin, No. 12-2254-JDT, 2015 WL 1295675, at \*1 (W.D. Tenn. Mar. 23, 2015).

#### **B. The Five-Step Analysis**

The Act defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1). Additionally, section 423(d)(2) of the Act states that:

An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

Under the Act, the claimant bears the ultimate burden of establishing an entitlement to benefits. Oliver v. Comm'r of Soc. Sec., 415 F. App'x 681, 682 (6th Cir. 2011). The initial burden is on the claimant to prove she has a disability as defined by the Act. Siebert v. Comm'r of Soc. Sec., 105 F. App'x 744, 746 (6th Cir. 2004) (citing Walters, 127 F.3d at 529); see also Born v. Sec'y of Health & Human Servs., 923 F.2d 1168, 1173 (6th Cir. 1990). If the claimant is able to do so, the burden then shifts to the Commissioner to demonstrate the existence of available employment compatible with the claimant's disability and background. Born, 923 F.2d at 1173; see also Griffith v. Comm'r of Soc. Sec., 582 F. App'x 555, 559 (6th Cir. 2014).

Entitlement to social security benefits is determined by a five-step sequential analysis set forth in the Social Security Regulations. See 20 C.F.R. §§ 404.1520 & 416.920. First, the claimant must not be engaged in substantial gainful activity. See



20 C.F.R. §§ 404.1520(b) & 416.920(b). Second, a finding must be made that the claimant suffers from a severe impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii) & 416.920(a)(5)(ii). In the third step, the ALJ determines whether the impairment meets or equals the severity criteria set forth in the Listing of Impairments contained in the Social Security Regulations. See 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526. If the impairment satisfies the criteria for a listed impairment, the claimant is considered to be disabled. On the other hand, if the claimant's impairment does not meet or equal a listed impairment, the ALJ must undertake the fourth step in the analysis and determine whether the claimant has the RFC to return to any past relevant work. See 20 C.F.R. §§ 404.1520(a)(4)(iv) & 404.1520(e). If the ALJ determines that the claimant can return to past relevant work, then a finding of not disabled must be entered. Id. But if the ALJ finds the claimant unable to perform past relevant work, then at the fifth step the ALJ must determine whether the claimant can perform other work existing in significant numbers in the national economy. See 20 C.F.R. §§ 404.1520(a)(4)(v), 404.1520(g)(1), 416.960(c)(1)-(2). Further review is not necessary if it is determined that an individual is not disabled at any point in this sequential analysis. 20 C.F.R. § 404.1520(a)(4).

**C. Whether the ALJ Erred at Step Three**

At step three, the ALJ concluded that Cole "does not have an

impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1." (R. 43.) In making that determination, the ALJ thoroughly discussed listing 12.04, but not 12.05. Cole argues that the ALJ erred by failing to evaluate the applicability of listing 12.05. (ECF No. 22 at 15.)

It is the claimant's burden to "demonstrate that her impairment satisfies the diagnostic description for the listed impairment in order to be found disabled thereunder." Foster v. Halter, 279 F.3d 348, 354 (6th Cir. 2001); see also Watters v. Comm'r of Soc. Sec. Admin., 530 F. App'x 419, 425 (6th Cir. 2013) (stating that the Sixth Circuit "has consistently affirmed that the claimant bears the burden of producing sufficient evidence to show the existence of a disability"); 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."). "To establish that an impairment meets a listing, a claimant must present 'specific medical evidence to satisfy all of the criteria' of that listing." West v. Berryhill, No. 16-1132, 2017 WL 4556722, at \*4 (W.D. Tenn. May 23, 2017) (quoting Perschka v. Comm'r of Soc. Sec., 411 F. App'x 781, 786 (6th Cir. 2010)).

"Yet, neither the listings nor the Sixth Circuit require the ALJ to 'address every listing' or 'to discuss listings that the applicant clearly does not meet.'" Smith-Johnson v. Comm'r of Soc. Sec., 579 F. App'x 426, 432 (6th Cir. 2014) (quoting Sheeks v. Comm'r of Soc. Sec., 544 F. App'x 639, 641 (6th Cir. 2013)). "If, however, the record 'raise[s] a substantial question as to whether [the claimant] could qualify as disabled' under a listing, the ALJ should discuss that listing." Sheeks, 544 F. App'x at 641 (quoting Abbott, 905 F.2d at 925). "A claimant must do more than point to evidence on which the ALJ could have based his finding to raise a 'substantial question' as to whether he has satisfied a listing." Smith-Johnson, 579 F. App'x at 432. "[T]he claimant must point to *specific evidence* that demonstrates he reasonably could meet or equal every requirement of the listing." Id. (emphasis added).

Because the ALJ's decision here does not discuss listing 12.05, the court "must determine whether the record evidence raises a substantial question as to [the claimant's] ability to satisfy each requirement of the listing." Id. at 433. Listing 12.05(C) provides:

12.05 Intellectual disability: Intellectual disability refers to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; i.e., the evidence demonstrates or supports onset of the impairment before age 22.

The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied.

. . . C. A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function[.]

20 C.F.R. pt. 404, Subpt. P, App. 1, § 12.05(C). The Sixth Circuit has summarized the two parts of listing 12.05(C) as follows:

The first part, which is referred to as the "diagnostic definition," requires: 1) significantly sub-average general intellectual functioning; 2) deficits in adaptive functioning; and 3) onset before age twenty-two. 20 C.F.R. Pt. 404, App. 1, § 12.05; see also Hayes v. Comm'r of Soc. Sec., 357 F. App'x 672, 675 (6th Cir.2009). The second part, which is referred to as the "severity criteria" of subsection C, requires: 1) a valid verbal, performance, or full scale IQ of 60 through 70; and 2) a physical or other mental impairment imposing an additional and significant work-related limitation or function. 20 C.F.R. Pt. 404, App. 1, § 12.05(C); Sheeks v. Comm'r of Soc. Sec., 544 F. App'x 639, 641 (6th Cir. 2013).

Smith-Johnson, 579 F. App'x at 432.

Here, Cole argues that the ALJ erred by not considering the applicability of listing 12.05 simply because the record contained an IQ score in the range contemplated by subsection (C) of the listing. (ECF No. 22 at 15.) However, in Smith-Johnson, the Sixth Circuit stated that the listing's first part, "[t]he diagnostic definition[,] is not satisfied merely because one Verbal IQ score is within the range contemplated by subsection (C) of the severity criteria." 579 F. App'x at 433; see also Quisenberry v. Comm'r of Soc. Sec., No. 2:16-cv-11156, 2017 WL 4946575, at \*6 (E.D. Mich. July 17, 2017) ("In sum, the diagnostic definition is not satisfied merely because one Verbal IQ score is within the range contemplated

by subsection (C) of the severity criteria, and Plaintiff can point to only one unsubstantiated IQ score in the record within the range of 60-70." (internal citation and quotation omitted)).

Thus, even if Cole's IQ score meets the 12.05(c) listing, she still must point to specific evidence in the record that establishes an onset date before age twenty-two. While Cole argues that her IQ score sufficiently indicates "sub-average intellectual functioning" prior to age twenty-two, the court disagrees. See, e.g., Miller v. Comm'r of Soc. Sec., No. 17-12756, 2018 WL 4690954, at \*8 (E.D. Mich. Sep. 11, 2018) (Davis, M.J.), adopted by, 2018 WL 4679711 (E.D. Mich. Sep. 28, 2011) (Tarnow, J.) ("IQ evidence obtained well after the age of 22 by itself is not sufficient to satisfy the requirement that subaverage intellectual functioning manifested during the developmental period."). In addition, Cole fails to highlight any evidence indicating she had deficits in adaptive skills before age twenty-two.<sup>2</sup> Because "the claimant must point to specific evidence that demonstrates he reasonably could meet or equal every requirement of the listing," the court concludes that the ALJ did not err in failing to discuss the applicability of listing 12.05(C).

---

<sup>2</sup>"The American Psychiatric Association defines adaptive-skills limitations as [c]oncurrent deficits or impairments . . . in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." Hayes v. Comm'r of Soc. Sec., 357 F. App'x 672, 677 (6th Cir. 2009).

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

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); Nejat v. Comm'r of Soc. Sec., 359 F. App'x 574, 578 (6th Cir. 2009) ("Although physicians opine on a claimant's residual functional capacity to work, ultimate responsibility for capacity-to-work determinations belongs to the Commissioner."); Webb v. Comm'r of Soc. Sec., 368 F.3d 629, 633 (6th Cir. 2004) (stating that under the SSA regulations, "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'" (quoting 20 C.F.R. § 416.920(a)(4)(iv))).

Cole argues that the ALJ erred in determining that she "could meet the mental demands of work." (ECF No. 22 at 15.) Here, the ALJ found that Cole:

can understand, remember and carry out routine, repetitive, 1-2 step directions; can make judgments on simple work related decisions; can have occasional contact with the general public; can interact with supervisors and relate to coworkers; and can adapt to infrequent workplace changes.

(R. 46.) Cole argues that “[t]he ALJ’s finding to that effect is not supported by substantial evidence.” (ECF No. 22 at 15.) Cole supports this argument with the report of Dr. David Pickering who “concluded, based upon objective testing, that Plaintiff was functioning in the mild intellectual impairment range, and suffered marked limitations.” (Id. at 16.)

However, the ALJ gave little weight to the opinion of Dr. Pickering because it was inconsistent with the record. See 20 C.F.R. § 416.927(c)(4) (“Generally, the more consistent a medical opinion is with the record as a whole, the more weight we will give to that medical opinion.”). The ALJ stated that Dr. Pickering’s opinion was inconsistent with the opinions of two other psychologists who examined Cole and Cole’s treatment records. (R. 50.) Dr. Pickering’s opinion was also found to be inconsistent with the fact that Cole “reportedly keeps her daughter’s three children, . . . reported planning a funeral for a friend’s son who passed away[,] reported that she stayed with her mother while her mother was in a hospital and went to check on her paralyzed uncle every day.” (R. 51.) Moreover, the record contains several pieces of evidence supporting the ALJ’s RFC determination, including the reports of Dr. Grant and Dr. Kennon. (R. 49-52.); cf. Justice v.

Comm'r of Soc. Sec., 515 F. App'x 583, 588 (6th Cir. 2013) ("In a battle of the experts, the agency decides who wins. The fact that [the claimant] now disagrees with the ALJ's decision does not mean that the decision is unsupported by substantial evidence."). Accordingly, the court concludes that the ALJ's RFC determination is supported by substantial evidence.

### III. CONCLUSION

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

IT IS SO ORDERED.

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

December 20, 2018  
\_\_\_\_\_  
Date