IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DEBRAH KAY ELIASON,

Plaintiff,

vs. Case No. 17-1060-SAC

NANCY A. BERRYHILL,
Acting Commissioner of
Social Security,

Defendant.

MEMORANDUM AND ORDER

This is an action reviewing the final decision of the Commissioner of Social Security denying the plaintiff disability insurance benefits. The matter has been fully briefed by the parties.

I. General legal standards

The court's standard of review is set forth in 42 U.S.C. § 405(g), which provides that "the findings of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." The court should review the Commissioner's decision to determine only whether the decision was supported by substantial evidence and whether the Commissioner applied the correct legal standards. Glenn v. Shalala, 21 F.3d 983, 984 (10th Cir. 1994). Substantial evidence requires more than a

scintilla, but less than a preponderance, and is satisfied by such evidence that a reasonable mind might accept to support the conclusion. The determination of whether substantial evidence supports the Commissioner's decision is not simply a quantitative exercise, for evidence is not substantial if it is overwhelmed by other evidence or if it really constitutes mere conclusion. Ray v. Bowen, 865 F.2d 222, 224 (10th Cir. 1989). Although the court is not to reweigh the evidence, the findings of the Commissioner will not be mechanically accepted. Nor will the findings be affirmed by isolating facts and labeling them substantial evidence, as the court must scrutinize the entire record in determining whether the Commissioner's conclusions are rational. Graham v. Sullivan, 794 F. Supp. 1045, 1047 (D. Kan. 1992). The court should examine the record as a whole, including whatever in the record fairly detracts from the weight of the Commissioner's decision and, on that basis, determine if the substantiality of the evidence test has been met. Glenn, 21 F.3d at 984.

The Social Security Act provides that an individual shall be determined to be under a disability only if the claimant can establish that they have a physical or mental impairment expected to result in death or last for a continuous period of twelve months which prevents the claimant from engaging in substantial gainful activity (SGA). The claimant's physical or

mental impairment or impairments must be of such severity that they are not only unable to perform their previous work but cannot, considering their age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy. 42 U.S.C. § 423(d).

The Commissioner has established a five-step sequential evaluation process to determine disability. If at any step a finding of disability or non-disability can be made, the Commissioner will not review the claim further. At step one, the agency will find non-disability unless the claimant can show that he or she is not working at a "substantial gainful activity." At step two, the agency will find non-disability unless the claimant shows that he or she has a "severe impairment," which is defined as any "impairment or combination of impairments which significantly limits [the claimant's] physical or mental ability to do basic work activities." At step three, the agency determines whether the impairment which enabled the claimant to survive step two is on the list of impairments presumed severe enough to render one disabled. If the claimant's impairment does not meet or equal a listed impairment, the inquiry proceeds to step four, at which the agency assesses whether the claimant can do his or her previous work; unless the claimant shows that he or she cannot perform their previous work, they are determined not to be disabled. If

the claimant survives step four, the fifth and final step requires the agency to consider vocational factors (the claimant's age, education, and past work experience) and to determine whether the claimant is capable of performing other jobs existing in significant numbers in the national economy. Barnhart v. Thomas, 124 S. Ct. 376, 379-380 (2003).

The claimant bears the burden of proof through step four of the analysis. Nielson v. Sullivan, 992 F.2d 1118, 1120 (10th Cir. 1993). At step five, the burden shifts to the Commissioner to show that the claimant can perform other work that exists in the national economy. Nielson, 992 F.2d at 1120; Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). The Commissioner meets this burden if the decision is supported by substantial evidence. Thompson, 987 F.2d at 1487.

Before going from step three to step four, the agency will assess the claimant's residual functional capacity (RFC). This RFC assessment is used to evaluate the claim at both step four and step five. 20 C.F.R. §§ 404.1520(a)(4), 404.1520(e,f,g); 416.920(a)(4), 416.920(e,f,g).

II. History of case

On November 25, 2015, administrative law judge (ALJ) Alison K. Brookins issued her decision (R. at 17-28). Plaintiff alleges that she has been disabled since August 31, 2013 (R. at 17). Plaintiff is insured for disability insurance benefits

through September 30, 2017 (R. at 19). At step one, the ALJ found that plaintiff has not engaged in substantial gainful activity since the alleged onset date (R. at 19). At step two, the ALJ found that plaintiff has severe impairments (R. at 19). At step three, the ALJ determined that plaintiff's impairments do not meet or equal a listed impairment (R. at 22). After determining plaintiff's RFC (R. at 22), the ALJ found at step four that plaintiff is unable to perform past relevant work (R. at 26). At step five, the ALJ found that plaintiff could perform other work that exists in significant numbers in the national economy (R. at 27-28). Therefore, the ALJ concluded that plaintiff was not disabled (R. at 28).

III. Did the ALJ err in her consideration of the opinions of Dr. Whitmer regarding plaintiff's migraine headaches?

On November 19, 2013, Dr. Whitmer performed a consultative examination on the plaintiff (R. at 347-351). In his report, he discussed in some detail plaintiff's allegations and neurological reports regarding plaintiff's headaches (R. at 349-350). He diagnosed intractable migraine headaches (R. at 351). On September 10, 2014, Dr. Whitmer filled out an RFC questionnaire indicating that plaintiff, because of muscle and joint pain and headaches, could sit, stand, and/or walk for only five minutes at a time during an 8 hour workday; would need to shift positions at will from sitting, standing, or walking; and

would need to take numerous unscheduled breaks during the workday (R. at 386-387).

The ALJ stated that Dr. Whitmer's opinions are not consistent with the record, are conclusory, and are not supported with an explanation. The ALJ further noted that Dr. Whitmer indicated on the RFC form that he had treated plaintiff for 10 years (R. at 386), but the ALJ indicated that there is no evidence of any treatment or examination records prior to November 19, 2013. The ALJ also noted that plaintiff did not allege headaches as an impairment at the hearing. The ALJ gave little, if any, weight to his opinions (R. at 26). The ALJ gave great weight to the opinion of Dr. Coleman, a non-examining consulting physician (R. at 26).

The ALJ never acknowledged that Dr. Whitmer was a treating physician for the plaintiff. The ALJ noted that plaintiff performed a consultative examination (R. at 24), and later indicated that she considered the opinions of Dr. Whitmer (R. at 26). The ALJ never mentioned the fact that Dr. Whitmer, subsequent to the November 19, 2013 examination, treated plaintiff on nine occasions, on December 18, 2013, March 18, 2014, May 2, 2014, June 12, 2014, December 8, 2014, March 4, 2015, June 1, 2015, June 12, 2015, and June 15, 2015 (R. at 355,

368, 438, 434, 431, 449, 492, 488, 469).[1] On eight of those occasions, the medical record stated that plaintiff had migraines-virdigo [sp?] very bad (R. at 433, 436, 440, 357, 363, 371, 451, 490). She was treated for severe migraine headaches on June 12, 2014 (R. at 436). On June 15, 2015, Dr. Whitmer indicated that neurologically she does have a lot of problems with headaches (R. at 470), and gave an impression of chronic migraine headaches (R. at 471). Plaintiff was also seen on June 12, 2015 for a headache (R. at 489). Thus, although there is no evidence that Dr. Whitmer treated or examined her prior to November 19, 2013, the evidence clearly shows that Dr. Whitmer treated her on numerous occasions after that date. The treatment records repeatedly diagnose migraines; on some of those occasions, he treated her for migraines or headaches.

However, the ALJ, in finding that migraine headaches were not a severe impairment, made the following statement:

> **There are no functional limitations that have been imposed by any treatment provider** and no indication in the record that the claimant's history of migraine headaches or history of hypertension causes more than a minimal limitation upon the claimant's ability to perform basic work activities.

(R. at 20, emphasis added). Plaintiff argues that this statement by the ALJ is clearly erroneous (Doc. 12 at 8).

[1] On the March 18, 2014 visit, plaintiff was seen by another medical source as Dr. Whitmer was out of the office (R. at 370).

Following Dr. Whitmer's initial evaluation of plaintiff on November 19, 2013, the medical records clearly indicate that he was plaintiff's treatment provider and saw her on nine occasions between December 18, 2013 and June 15, 2015. The statement that there are no functional limitations that have been imposed by any treatment provider because of plaintiff's migraine headaches is clearly erroneous. Dr. Whitmer was plaintiff's treatment provider and Dr. Whitmer imposed physical limitations on plaintiff due to plaintiff's migraine headaches.

Furthermore, although the ALJ stated that Dr. Whitmer's RFC findings are conclusory, those findings must be considered in light of his November 19, 2013 evaluation and the extensive treatment records from December 2013 through June 2015. The ALJ never acknowledged that Dr. Whitmer treated plaintiff from December 2013 through June 2015. The ALJ only acknowledged that Dr. Whitmer saw plaintiff on June 1, 2015. References to other medical treatment notes in 2015 make no mention of who plaintiff was seeing for medical care (R. at 24-25), and the ALJ makes no reference to the medical care that plaintiff received from Dr. Whitmer in 2013 and 2014 after the initial evaluation.

In the case of Winick v. Colvin, 674 Fed. Appx. 816, 819-821 (Jan. 4, 2017), the ALJ erred by considering one of the physicians as an examining source rather than a treating source. The ALJ mistakenly assumed that Dr. Ganzell had only examined

the claimant twice and had not treated him; however, the record showed multiple treatment visits over an extended period of time. The court held as follows:

> Had the ALJ properly analyzed Dr. Ganzell's opinion as a treating rather than an examining physician's opinion, he would have been obligated to follow the procedure for weighing a treating physician's opinion. See Mays v. Colvin, 739 F.3d 569, 574 (10th Cir. 2014). This procedure requires the ALJ to "first consider whether the opinion is well-supported by medically acceptable clinical and laboratory diagnostic techniques" and "consistent with other substantial evidence in the record." Id. If the opinion does not meet either of these criteria, it is not entitled to controlling weight, but the ALJ must still give it deference and weigh it using the appropriate factors. Id.; see also 20 C.F.R. §§ 404.1527(c), 416.927(c) (identifying factors to be considered).
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> The Commissioner argues that the ALJ's error was harmless because the ALJ provided reasons for discounting Dr. Ganzell's opinion that would have applied even if he had analyzed the opinion as a treating source opinion… But we cannot treat this error as harmless. To do so would ignore the ALJ's duties not only to determine whether to assign a treating physician's opinion controlling weight, but to give deference to a treating physician's opinion even if he does not assign it controlling weight. Mays, 739 F.3d at 574. The exercise of such deference might have changed the relative weight assigned to all the medical opinions, including the non-examining consultants to whose opinions the ALJ assigned great weight.
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> Moreover, in assigning weight to a medical opinion, the ALJ is required to consider factors such as the frequency of treatment,

> the length of the treatment relationship, and the nature and extent of the treatment relationship. See 20 C.F.R. §§ 404.1527(c)(2)-(3), 416.927(c)(2)-(3). The ALJ's analysis of these factors in this case rested on a flawed premise. He mistakenly assumed that Dr. Ganzell had only examined Mr. Winnick twice and had not treated him for his psychological impairments. But Dr. Ganzell's psychotherapeutic relationship with Mr. Winnick included multiple treatment visits over an extended period of time… We cannot repair the deficiencies in the ALJ's analysis by inserting our own judgment concerning Dr. Ganzell's treatment relationship with Mr. Winnick. The weighing of such factors is the ALJ's job, not ours. See, e.g., Allen v. Barnhart, 357 F.3d 1140, 1145 (10th Cir. 2004) (court may supply missing dispositive finding only where "no reasonable administrative factfinder, following the correct analysis, could have resolved the factual matter in any other way."). We must therefore remand to the Commissioner for a proper analysis of Dr. Ganzell's treating physician's opinion.

The court's holding in Winick governs the outcome of this case. The ALJ's finding that no functional limitations have been imposed by any treatment provider because of migraine headaches is clearly erroneous. Dr. Whitmer was plaintiff's treatment provider, and he opined that plaintiff had functional limitations because of migraine headaches. The court cannot treat this error as harmless, for the reasons set forth in Winick. The court must therefore remand to the Commissioner for a proper analysis of Dr. Whitmer's treating physician's opinions and his extensive treatment notes.

When this case is remanded, the ALJ should also consider Dr. Whitmer's treatment notes regarding plaintiff's anxiety. This issue was discussed by Dr. Whitmer on December 18, 2013, May 2, 2014, and December 8, 2014 (R. at 357, 440, 432-433). On May 2, 2014, Dr. Whitmer noted a history of chronic anxiety (R. at 440). On December 8, 2014, Dr. Whitmer found plaintiff having a lot of depression and anxiety (R. at 432). He diagnosed depression with anxiety which is not being controlled with medication (R. at 433).

IV. Did the ALJ err in her evaluation of plaintiff's credibility?

Plaintiff has also asserted error by the ALJ in evaluating plaintiff's credibility. The court will not address this issue because it may be affected by the ALJ's resolution of the case on remand after the ALJ considers the medical records and opinions of Dr. Whitmer as a treating source. See Robinson v. Barnhart, 366 F.3d 1078, 1085 (10th Cir. 2004).

IT IS THEREFORE ORDERED that the judgment of the Commissioner is reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this memorandum and order.

Dated this 18th day of April 2018, Topeka, Kansas.

s/Sam A. Crow
Sam A. Crow, U.S. District Senior Judge