UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DOUGLAS WILSON, Plaintiff, v. NANCY A. BERRYHILL, *Acting Comm'r of Social Security*, Defendant.	)))))))))	CASE NO. 3:16-cv-01771 JUDGE JAMES G. CARR MAGISTRATE JUDGE DAVID A. RUIZ **REPORT AND RECOMMENDATION**

Plaintiff, Douglas Wilson (hereinafter "Plaintiff"), challenges the final decision of Defendant Nancy A. Berryhill, Acting Commissioner of Social Security (hereinafter "Commissioner"), denying his applications for a Period of Disability ("POD") and Disability Insurance Benefits ("DIB") under Title II of the Social Security Act, 42 U.S.C. §§ 416(i), 423 *et seq*. ("Act"). This court has jurisdiction pursuant to 42 U.S.C. § 405(g). This case is before the undersigned United States Magistrate Judge pursuant to an automatic referral under Local Rule 72.2(b) for a Report and Recommendation. For the reasons set forth below, the Magistrate Judge recommends that the Commissioner's final decision be AFFIRMED.

I. Procedural History

On February 11, 2014, Plaintiff filed his applications for POD and DIB, alleging a disability onset date of June 26, 2013. (Transcript ("Tr.") 166). The application was denied initially and upon reconsideration, and Plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). (Tr. 103-110, 115-116). Plaintiff participated in the hearing on September 15, 2015, was represented by counsel, and testified. (Tr. 29-72). A vocational expert ("VE") also participated and testified. *Id*. On December 1, 2015, the ALJ found Plaintiff not disabled. (Tr. 23). On June 9, 2016, the Appeals Council declined to review the ALJ's decision, and the ALJ's decision became the Commissioner's final decision. (Tr.1-3). On July 12, 2016, Plaintiff filed a complaint challenging the Commissioner's final decision. (R. 1). The parties have completed briefing in this case. (R. 14 & 15).

Plaintiff asserts the following assignments of error: (1) the ALJ erred by rejecting the opinions of a treating physician; (2) the ALJ erred by not ascribing full weight to the opinion of a consultative neuropsychologist, and (3) the ALJ erred by ascribing great weight to State Agency physicians. (R. 14).

II. Evidence

A. Personal and Vocational Evidence

Plaintiff was born in December of 1972 and was 40-years-old on the alleged disability onset date. (Tr. 22). He has at least a high school education and was able to communicate in English. *Id*. (Tr. 22, 36). He had past relevant work as an assembler of taillights. (Tr. 21).

B. Relevant Medical Evidence[1]

1. Treatment Records

On June 26, 2013, Plaintiff was admitted to the Firelands Regional Medical Center and was discharged on June 28, 2013. (Tr. 347). His discharge diagnosis was intractable headache with posttraumatic migraine headaches and atypical migraines, gastroesophageal reflux disease (GERD), obesity, mild hyperlipidemia, left-sided weakness, and cervical arthritis. *Id*.

On July 22, 2013, Plaintiff was seen by Brendan W. Bauer, M.D., for complaints of migraine headaches. (Tr. 390). Dr. Bauer ordered autonomic testing to assess for any signs of dysautonomia. (Tr. 393). Plaintiff was prescribed Ketoprofen and Topamax. (Tr. 394).

On August 21, 2013, Plaintiff reported to nurse Diana Rodriguez that he had migraines "almost every day," and that medications provided no relief. (Tr. 385). His Body Mass Index was 32.81. *Id*.

On September 12, 2013, Plaintiff was seen by Nicole J. Danner, D.O. (Tr. 380-384). Plaintiff reported that he suffered from migraines for the last couple of months; his headaches occurred daily without aura, and medications reduced migraines to a dull ache but lasted four hours. (Tr. 380-381). Dr. Danner opined that Botox injections had become medically necessary. (Tr. 383). Plaintiff had normal reflexes and gait. (Tr. 382).

On October 31, 2013, Plaintiff was seen by Dr. Bauer, who administered an occipital nerve block. (Tr. 372-374). Plaintiff stated that his migraines were less frequent on Trokendi, but that he continued to experience break through migraines. (Tr. 372). Plaintiff's reflexes were absent in the right and left leg adductor, right and left finger flexor, and right and left plantar. (Tr. 371).

[1] The recitation of the evidence is not intended to be exhaustive and includes primarily the opinions of those medical sources germane to Plaintiff's assignments of error.

On December 4, 2013, testing revealed no evidence of significant peripheral vestibular dysfunction, but did disclose evidence of significant central vestibular dysfunction. (Tr. 823-824).

On December 18, 2013, Dr. Danner administered Plaintiff his first Botox injections. (Tr. 813).

On January 17, 2014, and MRI or Plaintiff's spine yielded the following impression: loss of the normal cervical lordosis along with mild anterior disc space narrowing and a mild focal kyphosis at C5-C6; diffuse posterior disc bulge at C6-C7 with mild to moderate central spinal canal stenosis, effacement of the anterior subarachnoid space, and mild mass effect on the ventral surface of the spinal cord; no cord compression; and, mild to moderate bilateral neural foraminal due also to bulging disc at C6-C7. (Tr. 362).

On February 26, 2014, Plaintiff told Dr. Bauer that neither the Botox injection nor his prescription for Trokendi were helping his migraines. (Tr. 809-810).

On March 31, 2014, Dr. Danner again administered Botox injections. (Tr. 805-807).

On May 30, 2014, Dr. Bauer administered a cervical epidural nerve block. (Tr. 798).

On June 27, 2014, Plaintiff reported improvement in his pain symptoms from the nerve block "for a couple of weeks," but stated that his pain was slowly increasing again. (Tr. 794).

On July 14, 2014, Dr. Danner noted that the last set of Botox injections had worked well, and Plaintiff inquired whether he could get them for his neck pain as well. (Tr. 789). Plaintiff continued to receive Botox injections from Dr. Danner up to the time of the hearing, with the last record dated August 20, 2015. (Tr. 973-974).

On July 29, 2014, Bo H. Yoo, M.D., reviewed Plaintiff's MRI films and report and did not recommend any aggressive surgical intervention, but instead recommended Plaintiff "undergo

conservative treatments as much as possible." (Tr. 520). Dr. Yoo did not believe that any of Plaintiff's symptoms/diagnoses were related to a recent motor vehicle accident, but instead were chronic in nature. *Id*. He opined that "[a]s far as his cervical and lumbar spine is concerned, there is no contraindication for him to return to work as soon as his migraine headache has been resolved enough to return to work." *Id*.

2. Medical Opinions Concerning Plaintiff's Functional Limitations

On May 13, 2014, Eli Perencevich, D.O., a State agency physician, reviewed Plaintiff's medical records and opined that he could perform a range of light work (Tr. 78-81). Dr. Perencevich found that Plaintiff had limited capacity to push/pull with both upper extremities, explaining that Plaintiff should be limited to frequent overhead reaching bilaterally due to reduced range of motion in the cervical spine and mild degenerative disc disease. (Tr. 79). However, Plaintiff could perform unlimited fine and gross manipulation. (Tr. 80). Dr. Perencevich found that Plaintiff should avoid even moderate exposure to hazards, fumes, odors, dusts, gases, poor ventilation, etc. (Tr. 80). On August 22, 2014, State agency physician Elaine Lewis, M.D., reviewed Plaintiff's medical record and reiterated the RFC assessment of Dr. Perencevich. (Tr. 94-96).

On May 15, 2014, Kristen Haskins, Psy. D., a State agency psychologist, reviewed Plaintiff's medical records and opined that Plaintiff was moderately limited in his ability to understand, remember, and carry out detailed instructions due to reduced attention and concentration, but was not significantly limited in his ability to understand, remember, and carry out short and simple instructions. (Tr. 81). She also found Plaintiff was moderately limited in his ability to maintain attention and concentration for extended periods. *Id*. He had no significant limitations in his ability to do the following: perform activities within a schedule, maintain

regular attendance, and be punctual within customary tolerances; sustain an ordinary routine without special supervision; work in coordination with or in proximity to others without being distracted by them; and, to make simple work-related decisions. (Tr. 81-82). In the area of social interaction and adaptation, Dr. Haskins opined that Plaintiff was not significantly limited, save for moderate limitations in his ability to respond appropriately to changes in the work setting. (Tr. 82-83). On September 1, 2014, State agency psychologist Katherine Fernandez, Psy. D., reviewed Plaintiff's medical records and largely agreed with the limitations assessed by Dr. Haskins. (Tr. 97-98).

On January 7, 2015, Dr. Bauer completed a checklist questionnaire indicating that Plaintiff could occasionally lift/carry 10 pounds, but left blank questions concerning how much Plaintiff could lift/carry frequently or how long Plaintiff could sit, stand or walk. (Tr. 897). Dr. Bauer did check boxes indicating that Plaintiff could rarely climb, balance, stoop, crouch, kneel, or crawl. *Id*. He further indicated that Plaintiff could occasionally reach, but could only rarely push/pull and rarely perform fine and gross manipulation. (Tr. 898). Dr. Bauer further checked boxes indicating that Plaintiff could rarely be exposed to heights, moving machinery, temperature extremes, pulmonary irritants or noise. *Id*. Dr. Bauer indicated that Plaintiff had been prescribed a TENS unit and needed a sit/stand at-will option. *Id*. He rated Plaintiff's pain as moderate, but checked boxes indicating that it would interfere with concentration, take Plaintiff off task, and cause absenteeism. (Tr. 898). Dr. Bauer did not check a box indicating that Plaintiff needed to elevate his legs, but did indicate that Plaintiff would need an additional 6 hours of rest in an 8-hour workday in addition to regular breaks. *Id*. Despite being asked the medical findings that support the assessment, the only response given by Dr. Bauer was "yes – exam." (Tr. 897-898).

On January 28, 2015, Nicholas P. Denbesten, Ph.D., performed a neuropsychological

evaluation of Plaintiff. (Tr. 914-917). Plaintiff scored a full scale IQ of 67 on the Wechsler Adult Intelligence Scale-IV, which is in the extremely low range. (Tr. 915). Dr. Denbesten concluded that Plaintiff had "[b]orderline estimated pre-morbid intellectual functioning, consistent with current intellectual findings once factoring out the impact of slowed speed of processing," and "[s]lowed speed of processing appears to have impacted nearly all timed measures during assessment. Aside from deficient speed processing, all other tasks remain near or at pre-morbid estimates." Dr. Denbesten noted "a significant difference" between Plaintiff's verbal and visual skills, with the latter being much stronger. (Tr. 916). He also concluded Plaintiff had "[m]inimal depression and anxiety with reliable and appropriate interpretation of physical symptoms and pain." *Id*. Dr. Denbesten observed that Plaintiff "would benefit from visual reminders for daily tasks and appointment[s] as well," and recommended establishing a written structured daily routine, and exercise regimen to increase stamina, and frequent review of upcoming activities and appointments. (Tr. 916).

C. Relevant Hearing Testimony

At the September 15, 2015 hearing, Plaintiff testified as follows:

- He has a license to drive, and drives three to four times per week. (Tr. 35-36). The only limits on his ability to drive are his migraine headaches, which he gets four to five days per week. (Tr. 36, 55). They typically last a few hours. He takes medicine, which helps, and lies down in a dark room. (Tr. 55).

- He has a high school diploma, but has trouble reading and spelling. (Tr. 36).

- He worked at Ventra Sandusky assembling taillights. (Tr. 38). The heaviest weight he had to lift was 20 pounds. (Tr. 38). He received short-term disability from that job, but was ineligible for long-term disability. (Tr. 39). He also worked two seasons at Cedar Point performing roller coaster maintenance. *Id*. The heaviest weight he had to lift was 30 pounds. *Id*. He also worked a few months for the Ohio Department of Transportation performing snow removal. (Tr. 40).

- He started having headaches in June of 2013. (Tr. 43). He has been suffering from migraines since that time. (Tr. 44).

- He sometimes becomes dizzy when he is out of breath, such as after walking long distances or climbing stairs. (Tr. 45).

- He could only return to his previous work for two days. After that, he went to the Bureau of Vocational Rehabilitation. (Tr. 45).

- His neck was "messed up" after a motor cycle accident, but has not been treated. (Tr. 47).

- He stated the function report he wrote was inaccurate to the extent it stated that he continued to ride motorcycles and work on vehicles. (Tr. 48).

- He was prescribed a knee brace prior to the motorcycle accident, which he still wears. (Tr. 49). He has had a knee cap replacement and ACL repair. (Tr. 60).

- He has been depressed since his last knee surgery in 2009, but it had improved since 2012. (Tr. 50).

- He has carpal tunnel syndrome in his right hand for which he was not given any treatment. He said he did not receive any treatment for it, but indicated he was given "something to put on it" for a fixed period of time. Immediately thereafter, he denied ever having received a wrist brace. (Tr. 51).

- He received Botox injections for his migraines, which help "take the edge off" but do not "completely knock it out." He received the injections every six months. He has also received nerve blocks, which help a little. (Tr. 52).

- He cut his thumb in May of 2015 with a utility knife while helping his father replace a screen door. (Tr. 52).

- He does not smoke, drink alcohol, or use recreational drugs. He has no problems taking care of himself. (Tr. 53).

- He walks no more than 50 feet. He does not use an assistive device to walk. He can stand 15-30 minutes. He cannot push/pull much with his arms or legs. He can lift/carry no more than ten pounds. He cannot bend, squat, or crawl. (Tr. 54). He climbs stairs at home, but that causes him to lose his breath. (Tr. 55). He can reach overhead with his arms in all directions, but was somewhat limited in his ability to handle and grasp objects with his right hand due to carpal tunnel syndrome. (Tr. 55-56).

- His wife performs most of the household chores, including grocery shopping and mowing the lawn. (Tr. 56, 58).

- He has had problems with his memory for most of his life, but his medication also affects his memory. (Tr. 57-58). His comprehension is also affected. (Tr. 58). He also has problems with focus and attention. (Tr. 59).

The VE characterized Plaintiff's past relevant work as falling into the following categories as defined by the Dictionary of Occupational Titles ("DICOT"): mechanic, DICOT 638.281-014, heavy exertional but medium as performed, skilled, with an SVP of 7; assembler (of taillights), DICOT 706.684-022, light exertional both ordinarily and as performed, unskilled, with an SVP of 2; lawn mower, DICOT 406.684-014, medium exertional both ordinarily and as performed, semi-skilled, with an SVP of 3; and, furnace assembler, DICOT 869.687-030, heavy exertional both ordinarily and as performed, unskilled, with an SVP of 2. (Tr. 63).

The ALJ posed the following hypothetical question to the VE:

> The first [hypothetical] is to please assume that the claimant has the residual functional capacity for light work. He can lift 20 pounds occasionally, ten pounds frequently, carry 20 pound occasionally, and ten pounds frequently, sit for six hours in an eight-hour day, stand for six hours in an eight-hour day, and walk for six hours in an eight-hour day, could push and pull as much as he can lift and carry. He can also occasionally use right-hand and left-foot controls. He can handle, finger, and feel with the right hand frequently. He can occasionally climb ramps and stairs, never climb ladders, ropes, or scaffolds, can frequently balance, stoop, kneel, crouch, and crawl, who can never work at unprotected heights, or around moving mechanical parts. He can occasionally work in conditions of humidity and wetness, extreme heat or cold, and in conditions where there are vibrations, and in conditions where there's concentrated exposure to dust, odors, fumes, or other pulmonary irritants
>
> He's limited to performing simple, routine, and repetitive tasks, but not at a production rate pace. For example, no assembly line work. He's limited to simple work-related decisions. He can respond appropriately to frequent interaction with supervisors, coworkers, and the general public, and he is limited to tolerating few changes in the work setting defined as routine job duties that remain static, and are performed in a stable, predictable work setting. Any necessary changes need to occur infrequently and be adequately and easily explained.

(Tr. 63-64).

The VE testified that such an individual could perform Plaintiff's past relevant work as a taillight assembler, DICOT 706.684-022, light, unskilled, SVP 2. (Tr. 63-65). However, Plaintiff's other past relevant work would be eliminated "either due to skill level or exertional level." (Tr. 65). In addition, the VE identified the following additional jobs that the hypothetical individual could perform: folder, DICOT 369.687-018 (60,000 jobs nationally); production inspector, DICOT 739.687-102 (40,000 jobs nationally); and packer, DICOT 559.687-074 (60,000 jobs nationally).

The ALJ asked the VE whether there would be any change in the hypothetical individual's ability to perform his past relevant work "if he was limited to avoiding even moderate exposure to pulmonary irritants rather than concentrated exposure?" (Tr. 65). The VE testified that the changed limitation would not impact Plaintiff's ability to perform his past relevant work or the other three positions identified. *Id*.

The ALJ also inquired of the VE whether there would be any change in the hypothetical individual's ability to perform his past relevant work "[i]f he was limited to only occasional posturals, bend, stoop, kneel, crouch, crawl occasionally." (Tr. 65-66). The VE testified that such a limitation would have no impact on Plaintiff's ability to perform his past relevant work as a taillight assembler or the other three jobs previously identified in response to the first hypothetical. (Tr. 66). Similarly, the VE testified that an additional limitation to only occasional interaction with supervisors, coworkers, and the general public would have no impact. *Id*.

The ALJ posed a second hypothetical keeping all the limitations of the first but reducing the exertional level to sedentary. (Tr. 66). The VE testified that such an individual could not perform any of Plaintiff's past relevant work. *Id*. However, the VE identified the following three jobs that such an individual could perform: bench worker, DICOT 739.687-182 (12,000 jobs nationally);

bonder, DICOT 726.685-066 (15,000 jobs nationally); and assembler, DICOT 713.687-018 (24,000 jobs nationally). *Id*. The ALJ posed questions reflecting the same three variations above regarding posturals, pulmonary irritants, and interaction with others. (Tr. 66-67). The VE testified that none of the three variations would have any impact on the sedentary jobs he identified. (Tr. 67).

The VE testified that for an individual to be competitively employable, he or she had to be on task eighty percent of the time and be absent no more than one or two days per month. (Tr. 67). The need to lie down during the course of the workday was also incompatible with competitive employment. (Tr. 67-68).

The VE indicated that his testimony had been consistent with the DICOT, except for in the area of absenteeism and the off-task parameters. (Tr. 68). He explained those employment factors are not addressed by the DICOT. *Id*.

Plaintiff's counsel posed a hypothetical question to the VE, asking him to assume the sedentary hypothetical used by the VE with the following additional limitations:

> [I]f we were to add to it there could be no written instructions, everything would have to be demonstrated, the hypothetical worker could not be subjected to any loud noise or pungent smells, which I'm going to define as no factory work, he would require a sit/stand option every 20 minutes, after sitting for 20 minutes he'd have to stand for ten minutes remaining on task. And, lastly, he would require occasional redirection.

(Tr. 68-69).

In response to Plaintiff's counsel's question, the VE testified as follows:

> The bench worker position would involve factory work, so that would be eliminated. The assembler and bonder would not involve factory. It's more of a clean air environment, so that would not be an issue, or an impact on those two positions. Those positions while the DOT does not address a sit/stand capability, based on the fact that all those positions of a sedentary, unskilled nature are performed at a bench area, the variation to allow sit/stand would be applicable

> with maybe a slight reduction in the numbers of appropriately ten percent, so that wouldn't be an issue.
>
> The occasional redirection provided it's outside of the normal entry level period of 30 to 90 days, I believe is going to involve close to a supported employment type of situation, which would not be consistent with competitive employment, and would rule out all jobs then.

(Tr. 69).

III. Disability Standard

A claimant is entitled to receive benefits under the Social Security Act when he/she establishes disability within the meaning of the Act. 20 C.F.R. § 404.1505 & 416.905; *Kirk v. Sec'y of Health & Human Servs.*, 667 F.2d 524 (6th Cir. 1981). A claimant is considered disabled when he cannot perform "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." 20 C.F.R. §§ 404.1505(a) and 416.905(a); 404.1509 and 416.909(a).

The Commissioner reaches a determination as to whether a claimant is disabled by way of a five-stage process. 20 C.F.R. § 404.1520(a)(4); *Abbott v. Sullivan*, 905 F.2d 918, 923 (6th Cir. 1990). First, the claimant must demonstrate that he is not currently engaged in "substantial gainful activity" at the time he seeks disability benefits. 20 C.F.R. §§ 404.1520(b) and 416.920(b). Second, the claimant must show that he suffers from a medically determinable "severe impairment" or combination of impairments in order to warrant a finding of disability. 20 C.F.R. §§ 404.1520(c) and 416.920(c). A "severe impairment" is one that "significantly limits ... physical or mental ability to do basic work activities." *Abbott*, 905 F.2d at 923. Third, if the claimant is not performing substantial gainful activity, has a severe impairment (or combination of impairments) that is expected to last for at least twelve months, and the impairment(s) meets a

listed impairment, the claimant is presumed to be disabled regardless of age, education or work experience. 20 C.F.R. §§ 404.1520(d) and 416.920(d). Fourth, if the claimant's impairment(s) does not prevent him from doing past relevant work, the claimant is not disabled. 20 C.F.R. §§ 404.1520(e)-(f) and 416.920(e)-(f). For the fifth and final step, even if the claimant's impairment(s) does prevent him from doing past relevant work, if other work exists in the national economy that the claimant can perform, the claimant is not disabled. 20 C.F.R. §§ 404.1520(g) and 416.920(g), 404.1560(c).

IV. Summary of the ALJ's Decision

The ALJ made the following findings of fact and conclusions of law:

1. The claimant meets the insured status requirements of the Social Security Act through December 31, 2016.

2. The claimant has not engaged in substantial gainful activity since June 26, 2013, the alleged onset date (20 CFR 404.1571 et seq.).

3. The claimant has the following severe impairments: obesity; chronic obstructive pulmonary disease (COPD); migraines; chondromalacia patella and osteoarthritis of the left knee status post partial patellofemoral replacement in 2009; degenerative disc disease of the cervical and lumbar spine; mild right median neuropathy/carpal tunnel syndrome; central vestibular dysfunction; sleep apnea; depression; and borderline intellectual functioning (20 CFR 404.1520(c)).

4. The claimant 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 (20 CFR 404.1520(d), 404.1525 and 404.1526).

5. After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to perform light work as defined in 20 C.F.R. § 404.1567(b) except he can lift 20 pounds occasionally, 10 pounds frequently, carry 20 pounds occasionally, 10 pounds frequently, sit for six hours in an eight hour day, stand for six hours in an eight hour day, and walk for six hours in an eight hour day, and he can push and pull as much as he can lift and carry. He can also occasionally use right hand and left foot controls. He can handle, finger and feel with the right hand frequently. He can

occasionally climb ramps and stairs, never climb ladders, ropes, or scaffolds, and can frequently balance, stoop, kneel, crouch, and crawl. In addition, he can never work at unprotected heights, or around moving mechanical parts, and can occasionally work in conditions of humidity and wetness, in extreme heat or cold, and in conditions where there are vibrations, and in conditions where there is concentrated exposure to dust, odors, fumes, or other pulmonary irritants. He is also limited to performing simple, routine and repetitive tasks, but not at a production rate pace, for example, no assembly line work; he is limited to simple work-related decisions, and he can respond appropriately to frequent interaction with supervisors, coworkers, and the general public. Finally, he is limited to tolerating few changes in the work setting, defined as routine job duties that remain static and are performed in a stable, predictable work setting. Any necessary changes need to occur infrequently, and be adequately and easily explained.

6. The claimant is capable of performing past relevant work as an assembler-taillights. This work does not require the performance of work-related activities precluded by the claimant's residual functional capacity (20 CFR 404.1565).

7. The claimant has not been under a disability, as defined in the Social Security Act, from June 26, 2013, through the date of this decision (20 CFR 404.1520(1)).

(Tr. 11-23).

V. Law and Analysis

A. Standard of Review

Judicial review of the Commissioner's decision is limited to determining whether it is supported by substantial evidence and was made pursuant to proper legal standards. *Ealy v. Comm'r of Soc. Sec.*, 594 F.3d 504, 512 (6th Cir. 2010). Review must be based on the record as a whole. *Heston v. Comm'r of Soc. Sec.*, 245 F.3d 528, 535 (6th Cir. 2001). The court may look into any evidence in the record to determine if the ALJ's decision is supported by substantial evidence, regardless of whether it has actually been cited by the ALJ. *Id*. However, the court does not review the evidence *de novo*, make credibility determinations, or weigh the evidence. *Brainard v. Sec'y of Health & Human Servs.*, 889 F.2d 679, 681 (6th Cir. 1989).

The Commissioner's conclusions must be affirmed absent a determination that the ALJ failed to apply the correct legal standards or made findings of fact unsupported by substantial evidence in the record. *White v. Comm'r of Soc. Sec.*, 572 F.3d 272, 281 (6th Cir. 2009). 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. *Brainard*, 889 F.2d at 681. A decision supported by substantial evidence will not be overturned even though substantial evidence supports the opposite conclusion. *Ealy*, 594 F.3d at 512.

B. Plaintiff's Assignments of Error

1. Treating Physician[2]

In the first assignment of error, Plaintiff asserts that the ALJ erred by rejecting the opinions of one his treating physicians, Dr. Bauer, as set forth in a January 2015 questionnaire. (R. 14, PageID# 1157-1160). The Commissioner does not challenge that Dr. Bauer was a treating source

[2] New regulations effective March 27, 2017, 20 C.F.R. §§ 404.1527 & 416.927 set forth the rules for evaluating opinion evidence, both medical and nonmedical, for claims filed *before* that date. Conversely, 20 C.F.R. §§ 404.1520c & 416.920c set forth the rules for evaluating such evidence for claims filed *on or after* March 27, 2017. The latter regulations, not applicable to the present case, eliminate the term "treating source," as well as what is customarily known as the "treating source rule." *See also Revisions to Rules Regarding the Evaluation of Medical Evidence*, 81 FR 62560 at 62573-62574 (Sept. 9, 2016) ("we would no longer give a specific weight to medical opinions … this includes giving controlling weight to medical opinions from treating sources … [and] [w]e would not defer or give any specific evidentiary weight, including controlling weight, to any … medical opinion, including from an individual's own healthcare providers.") It bears noting that the current iterations of §§ 404.1527 & 416.927, while purporting to apply to claims filed *before* March 27, 2017, are not identical in language to the version in effect at the time of the ALJ's decision. For the sake of consistency, the court continues to cite the language from the former regulation sections that were in effect at the time of the ALJ's decision. Furthermore, while the current language of the regulations has been modified and renumbered, the changes, on their face, do not appear to be substantive and would not alter this court's recommendation. As noted by the Social Security Administration (SSA), for cases filed before March 27, 2017, it "will continue to apply [its] current rules for evaluating evidence from a treating source …." *See Revisions to Rules Regarding the Evaluation of Medical Evidence*, 82 FR 5844 at 5861 (Jan. 18, 2017). Thus, the SSA also does not perceive its changes to be substantive.

at the time the January 2015 questionnaire was completed. (R. 15, PageID# 1192-1195). The Commissioner does argue that the ALJ reasonably weighed the opinion evidence from Dr. Bauer, because Dr. Bauer provided no supporting explanation for his conclusions. *Id*.

"Provided that they are based on sufficient medical data, 'the medical opinions and diagnoses of treating physicians are generally accorded substantial deference, and if the opinions are uncontradicted, complete deference.'" *Howard v. Comm'r of Soc. Sec.*, 276 F.3d 235, 240 (6th Cir. 2002) (quoting *Harris v. Heckler*, 756 F.2d 431, 435 (6th Cir. 1985)). In other words, "[a]n ALJ must give the opinion of a treating source controlling weight if he finds the opinion 'well-supported by medically acceptable clinical and laboratory diagnostic techniques' and 'not inconsistent with the other substantial evidence in the case record.'" *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 544 (6th Cir. 2004). If an ALJ does not give a treating source's opinion controlling weight, then the ALJ must give good reasons for doing so that are "sufficiently specific to make clear to any subsequent reviewers the weight the adjudicator gave to the treating source's medical opinion and the reasons for that weight." *See Wilson*, 378 F.3d at 544 (*quoting* Social Security Ruling ("SSR") 96-2p, 1996 WL 374188, at *5). The "clear elaboration requirement" is "imposed explicitly by the regulations," *Bowie v. Comm'r of Soc. Sec.*, 539 F.3d 395, 400 (6th Cir. 2008), and its purpose is "in part, to let claimants understand the disposition of their cases, particularly in situations where a claimant knows that [her] physician has deemed [her] disabled and therefore might be especially bewildered when told by an administrative bureaucracy that she is not, unless some reason for the agency's decision is supplied." *Wilson*, 378 F.3d at 544 (*quoting Snell v. Apfel*, 177 F.3d 128, 134 (2d Cir. 1999)); *see also Johnson v. Comm'r of Soc. Sec.*, 193 F. Supp. 3d 836, 846 (N.D. Ohio 2016) ("The requirement also ensures that the ALJ applies the treating physician rule and permits meaningful review of the ALJ's

application of the rule.") (Polster, J.)

It is well-established that administrative law judges may not make medical judgments. *See Meece v. Barnhart*, 192 Fed. App'x 456, 465 (6th Cir. 2006) ("But judges, including administrative law judges of the Social Security Administration, must be careful not to succumb to the temptation to play doctor.") (*quoting Schmidt v. Sullivan*, 914 F.2d 117, 118 (7th Cir. 1990)). Although an ALJ may not substitute his or her opinions for that of a physician, "an ALJ does not improperly assume the role of a medical expert by assessing the medical and non-medical evidence before rendering a residual functional capacity finding." *Poe v. Comm'r of Soc. Sec.*, 342 Fed. App'x 149, 157 (6th Cir. 2009). If fully explained with appropriate citations to the record, a good reason for discounting a treating physician's opinion is a finding that it is "unsupported by sufficient clinical findings and is inconsistent with the rest of the evidence." *Conner v. Comm'r of Soc. Sec.*, 658 Fed. App'x 248, 253-254 (6th Cir. 2016) (*citing Morr v. Comm'r of Soc. Sec.*, 616 Fed. App'x 210, 211 (6th Cir. 2015)); *see also Keeler v. Comm'r of Soc. Sec.*, 511 Fed. App'x 472, 473 (6th Cir. 2013) (holding that an ALJ properly discounted the subjective evidence contained in a treating physician's opinion because it too heavily relied on the patient's complaints).

The ALJ addressed Dr. Bauer's opinions as follows:

> On the other hand, the undersigned gives little weight to the opinion of treating provider Brendan Bauer, M.D., who opined the claimant can occasionally lift/carry 10 pounds, would require 6 additional unscheduled rest periods during an 8 hour workday, an can rarely climb, balance, stoop, crouch, kneel, and crawl (16F, 20F/37-38). Dr. Bauer provided little to no treatment notes to support his opinion and instead relied on a check the box form with little explanation. Dr. Bauer's opinion is also conclusory and contrary to the record. Additionally, his statements appear extreme given the fact that the claimant has had some good objective examination findings, such as 5/5 strength in the upper and lower extremities, negative straight leg raise test, normal reflexes, normal muscle tone bilaterally, intact sensation to light touch and pinprick, no tenderness of the spine

> or sciatic notch tenderness, full range of motion with lumbar flexion and extension, and normal gait (6F/8, 20F/ 17-18, 22F/11).

(Tr. 21).

The court finds that the decision sets forth a sufficiently thorough explanation for ascribing little weight to Dr. Bauer's opinions as contained in the January 2015 assessment, and, taken as a whole, sets forth good reasons for doing so.

First, the ALJ specifically points out that Dr. Bauer's opinion was contained in a checkbox form that contains no support and little explanation for the assessed limitations. (Tr. 21). "Supportability" is one of the factors specifically set forth in the regulations used to evaluate opinion evidence, and states that "[t]he more a medical source presents relevant evidence to support an opinion, particularly medical signs and laboratory findings, the more weight we will give that opinion. The better an explanation a source provides for an opinion, the more weight we will give that opinion." 20 C.F.R. §§ 404.1527(c)(3). Numerous decisions have found that the use of checklist or check-the-box forms that contain little to no accompanying explanation for the assessed limitations, such as the one used herein, are unsupported and, therefore, need not be accepted even when completed by a treating source. *See, e.g., Kepke v. Comm'r of Soc. Sec.*, No. 15-1315, 636 Fed. App'x 625, 2016 WL 124140 at *4 (6th Cir. Jan. 12, 2016) ("Dr. Chapman's checklist opinion did not provide an explanation for his findings; therefore, the ALJ properly discounted it on these grounds."); *accord Langlois v. Colvin*, No. 3:15-CV-01682, 2016 WL 1752853 at *8 (N.D. Ohio May 3, 2016) (Vecchiarelli, M.J.) (finding the ALJ did not err by rejecting a treating source's unexplained checklist opinion); *see also Hyson v. Comm'r of Soc. Sec.*, No. 5:12CV1831, 2013 WL 2456378, at *14 (N.D. Ohio June 5, 2013) (Burke, M.J.) (finding that because Dr. Martinez merely checked the boxes on the form while leaving those

sections of the form blank where she was to provide her written explanation, she failed to provide any substantive basis for her conclusions and the ALJ was not required to accept her opinions); *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012) ("We have held that the ALJ may 'permissibly reject[] ... check-off reports that [do] not contain any explanation of the bases of their conclusions.'") (citations omitted); *Smith v. Astrue*, 359 Fed. App'x 313, 316 (3d Cir. 2009) ("checklist forms ... which require only that the completing physician 'check a box or fill in a blank,' rather than provide a substantive basis for the conclusions stated, are considered 'weak evidence at best' in the context of a disability analysis.") (citations omitted); *cf. Price v. Comm'r SSA*, 342 Fed. App'x 172, 176 (6th Cir. 2009) ("Because Dr. Ashbaugh failed to identify objective medical findings to support his opinion regarding [claimant's] impairments, the ALJ did not err in discounting his opinion.")

Dr. Bauer's January 2015 opinion mirrors the unexplained and unsupported checklist opinions disfavored in the above cases. In fact, the form itself does not even set forth Plaintiff's diagnoses or conditions that would result in the said limitations. (Tr. 897-898). When asked to set forth "What are the medical findings that support this assessment?," Dr. Bauer simply wrote "yes – exam." *Id.* In addition, any limits concerning Plaintiff's ability to stand/walk or sit were left blank. *Id.* As such, the opinion truly consists of nothing more than checked boxes and is utterly devoid of any mention of supporting medical findings for the assessed limitations. *Id.* Plaintiff takes issue with the ALJ's characterization of the opinion as conclusory noting that the limitations contained therein were specific, but the court disagrees. While some of the limitations assessed may be specific, the opinion is conclusory because it fails to set forth any *support* for the alleged limitations. Consistent with the above case law, the ALJ properly discounted Dr. Bauer's January 2015 opinion on the grounds that it was conclusory and did not provide any

support or explanation for his findings.

Furthermore, the ALJ gave additional reasons for discounting Dr. Bauer's opinion. These included the ALJ's observation that Dr. Bauer's opinion was contrary to the record, specifically noting normal objective examination findings, such as normal gait, reflexes, range of motion, and muscle tone, as well as negative straight leg raise test, for example. (Tr. 21). Plaintiff suggests the ALJ's analysis is faulty by pointing to records of abnormal reflexes and Plaintiff's Botox injections, and suggesting that Plaintiff's limitations were primarily due to issues with his upper extremities. (R. 14, PageID# 1159-1160). Plaintiff's treatment regimen of injections does not serve to substitute the lack of objective findings supporting Dr. Bauer's assessed limitations, as pointed out by the Commissioner. Moreover, because this court does *not* reweigh the evidence, Plaintiff's identification of evidence tending to bolster the treating source's opinion does not render an ALJ's reasons for discounting the opinion deficient. In other words, Plaintiff has attempted to remedy the lack of supportability by using his Brief on the Merits to fill in the gaps in Dr. Bauer's opinions. The ALJ's review of a medical source's opinion, however, is properly based only on the opinion itself and not Plaintiff's *post hoc* rationale.

The Court finds that Plaintiff's first assignment of error is without merit, because the ALJ set forth sufficiently good reasons for ascribing little weight to Dr. Bauer's January 2015 assessment.

2. Examining Physician

In the second assignment of error, Plaintiff suggests the ALJ erred by ascribing only "some weight" to the opinion of Dr. Denbesten, a non-treating consultative examiner. (R. 14, PageID# 1160-1161). Specifically, Plaintiff notes that Dr. Denbesten recommended visual reminders for daily tasks, as well as a written, structured daily routine. *Id. citing* Tr. 916. The Commissioner

contends that the ALJ reasonably discounted Dr. Denbesten's opinion, in part, because it was not consistent with Plaintiff's education and work history. (R. 15, PageID# 1195-1197).

Plaintiff's brief cites no authority regarding the weight accorded to non-treating sources, such as Dr. Denbesten. "Generally, [the Social Security Administration] give[s] more weight to the opinion of a source who has examined you than to the opinion of a source who has not examined you. *See* 20 C.F.R. §§ 404.1527(c)(1). In addition, Social Security Ruling ("SSR") 96-8p, 1996 WL 374184 (July 2, 1996), cautions that an ALJ "must always consider and address medical source opinions [and] [i]f the RFC assessment conflicts with an opinion from a medical source, the adjudicator must explain why the opinion was not adopted." *See also Puckett v. Colvin*, 2014 WL 1584166 at * 9 (N.D. Ohio, April 21, 2014) (Vecchiarelli, M.J.) (explaining that, although the ALJ was not required to evaluate opinions of consultative examiners with the same standard of deference as would apply to an opinion of a treating source, he was required to "acknowledge that [the examiners'] opinions contradicted his RFC finding and explain why he did not include their limitations in his determination of Plaintiff's RFC"). The requirement that an ALJ *explain* the weight afforded to a non-treating source's opinion should not be construed as rigorously as the treating physician rule. *See, e.g., Jefferson v. Colvin*, No. 1:14cv01851, 2015 WL 4459928 at *6 (N.D. Ohio 2015) (White, M.J.) (citations omitted); *Chandler v. Comm'r of Soc. Sec.*, No. 2:13cv324, 2014 WL 2988433 (S.D. Ohio, July 1, 2014) ("the ALJ is not required to give 'good reasons' for rejecting a nontreating source's opinions in the same way as must be done for a treating source").

The ALJ addressed Dr. Denbesten's opinions as follows:

> Moreover, the undersigned gives some weight to Nicholas Denbesten, Ph.D., who opined newly presented information should be presented succinct and to the point in order to maximize likelihood of comprehension and retention, and establish a

> written structured daily routine (19F/8-9). As the claimant's treating provider,[3] he was able to personally examine the claimant. However, his statements appear extreme given the fact that the claimant graduated high school and there are no school records indicating any problems at all. Additionally, the claimant has past relevant work as a mechanic, which is an SVP 7 job (Hearing Transcript).

(Tr. 21).

While Plaintiff clearly believes the opinions of Dr. Denbesten, including his recommendations, should have been fully credited, that alone does not provide a basis for a remand. Both sides argue that the other side misreads Dr. Denbesten's report. (R. 14, PageID# 1161; R. 15, PageID# 1197). However, this court does not conduct a *de novo* review and it is not this court's function to decide between the parties' various interpretations of the evidence. It was not unreasonable for the ALJ to find that Dr. Denbesten's finding of borderline intellectual functioning was unsupported based on Plaintiff's history of higher cognitive functioning as evidenced by school records and work history.

The issue before the court is, simply stated, whether the ALJ sufficiently explained why Dr. Denbesten's opinion was not adopted in its entirety. In the case at bar, the ALJ did not ignore Dr. Denbesten's opinion, but *considered* it and, furthermore, *explained* that the recommendations were inconsistent with Plaintiff's school records and his ability to perform work with an SVP of 7.[4] Furthermore, Plaintiff's contention that the ALJ did not provide "good reasons for rejecting

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[3] Plaintiff concedes that Dr. Denbesten saw him on only one occasion for a neuropsychological evaluation, and, therefore, is properly classed as an examining physician instead of a treating physician. (R. 14, PageID# 1160).

[4] SVP ("Specific Vocational Preparation") is defined by the DICOT "as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation." APPENDIX C - COMPONENTS OF THE DEFINITION TRAILER, 1991 WL 688702. An SVP level of 7 involves over "2 years up to and including 4 years." *Id*.

Dr. Denbesten's opinion" invokes an incorrect standard of review for non-treating source opinions. The *explanation* requirement applicable to non-treating sources, such as Dr. Denbesten, should not be confused with or construed as rigorously as the standard applicable under treating physician rule. *See, e.g., Jefferson v. Colvin*, 2015 WL 4459928 at *6 (N.D. Ohio 2015) (White, M.J.). As such, it is not surprising that other courts have determined that "the regulation requiring an ALJ to provide 'good reasons' for the weight given a treating physician's opinion does not apply to an ALJ's failure to explain his favoring of one non-treating source's opinion over another." *Williams v. Colvin*, 2015 WL 5165458 at *5 (N.D. Ohio, Sept. 2, 2015) (*citing Kornecky v. Comm'r of Soc. Sec.*, 167 Fed. App'x 496 (6th Cir. 2006); *accord Chandler v. Comm'r of Soc. Sec.*, 2014 WL 2988433 at *8 (S.D. Ohio, July 1, 2014) ("the ALJ is not required to give 'good reasons' for rejecting a nontreating source's opinions in the same way as must be done for a treating source"); *Wright v. Colvin*, 2016 WL 5661595 at *10 (N.D. Ohio Sept. 30, 2016) (McHargh, M.J.) (declining to "judicially expand the treating physician rule to non-treating sources").

Furthermore, the ALJ assigned "great weight" to the opinions of State agency psychologists Drs. Fernandez and Haskins, whose opinions did not include the need for visual reminders for daily tasks or a written, structured daily routine. (Tr. 20-21). Although the "the opinions of nontreating sources are generally accorded more weight than nonexamining sources, it is not a *per se* error of law … for the ALJ to credit a nonexamining source over a nontreating source." *Norris v. Comm'r of Soc. Sec.*, 461 Fed. App'x 433, 439 (6th Cir. 2012) ("While perhaps the ALJ could have provided greater detail, particularly as to why the nonexamining opinions were more consistent with the overall record, the ALJ was under no special obligation to do so insofar as he was weighing the respective opinions of nontreating versus nonexamining sources.") The ALJ's

decision sufficiently explains the weight assigned to the opinion of a non-treating source, and the ALJ's decision to instead credit Drs. Fernandez and Haskins does not constitute legal error. To the extent Plaintiff "may disagree with the ALJ's explanation or her interpretation of the evidence of record, her disagreement with the ALJ's rationale does not provide a basis for remand." *Steed v. Colvin*, No. 4:15cv01269, 2016 WL 4479485, at *10 (N.D. Ohio Aug. 25, 2016) (McHargh, M.J.)

For the foregoing reasons, the second assignment of error is without merit.

3. State Agency Physicians

In his final assignment of error, Plaintiff contends the ALJ erred by assigning great weight to the opinions of State agency physicians, specifically Drs. Perencevich and Lewis. (R. 14, PageID# 1162-1163). Alternatively, Plaintiff argues that even if the ALJ had not erred by ascribing great weight to their opinions, the RFC was deficient because it failed to include some of the limitations they assessed. *Id*.

While the regulations state that ALJs "are not bound' by any prior findings made by State agency physicians or psychologists, ALJs must consider their opinions in accordance with the same factors used to review other medical source opinions, because "State agency medical and psychological consultants and other program physicians, psychologists, and other medical specialists are highly qualified physicians, psychologists, and other medical specialists who are also experts in Social Security disability evaluation." 20 C.F.R. § 404.1527(e)(1) & (2).

Here, the ALJ did indeed purport to ascribe great weight to the opinions of Drs. Perencevich and Lewis. (Tr. 20). Plaintiff suggests an ALJ errs where he or she ascribes greater weight to the opinion of a State agency physician than that of a treating physician where the former's opinion is not based on a complete review of the record. (R. 14, PageID# 1162-1163).

Plaintiff cites *Blakley v. Comm'r of Soc. Sec.*, 581 F.3d 399, 409 (6th Cir. 2009) in support. *Blakely*, however, is distinguishable, as therein the Court found the ALJ erred by failing to mention the opinion of a treating source anywhere in the decision. *Id*. at 408. The *Blakely* court held the failure to give good reasons on the record for according less than controlling weight to the treating source's opinion required remand. *Id*. at 409. By contrast, here the ALJ did not neglect to address Dr. Bauer's opinion, and, as discussed *supra*, the ALJ gave good reasons for discounting his opinion. *See, e.g.*, *Tilley v. Comm'r of Soc. Sec.*, 394 Fed. App'x 216, 222 (6th Cir. 2010) ("Unlike in *Blakley*, the ALJ's decision in the instant case fully described the reasoning for discounting [a treating doctor's] opinion.")

In addition, there is no indication that the ALJ improperly discredited Dr. Bauer's opinion in favor of the State agency consulting physicians *because* it was inconsistent with the State agency opinions.[5] (Tr. 21). The ALJ's decision is devoid of any statement suggesting that the ALJ discounted Dr. Bauer's opinion because it was inconsistent with the opinions of non-treating sources. Finally, Plaintiff's reading of *Blakely* is erroneous. *See, e.g.*, *Kepke v. Comm'r of Soc. Sec.*, 636 F. App'x 625, 632 (6th Cir. 2016) (claimant "misconstrues the Court's holding in *Blakley v. Commissioner of Social Security* as providing a blanket prohibition on an ALJ's adoption of a non-examining source opinion, where that source has not reviewed the entire record"); *Downs v. Comm'r of Soc. Sec.*, 634 F. App'x 551, 554 (6th Cir. 2016) (finding no error

5 Where the reason given for rejecting a treating source's opinion is simply that it conflicts with a non-treating source's opinion, the treating physician rule has been violated. *See, e.g., Gayheart v. Comm'r of Soc. Sec.*, 710 F.3d 365, 377 (6th Cir. 2013) (finding that an ALJ may not base the rejection of a treating source's opinion upon its inconsistency with the opinions of non-examining State agency consultants, as that would turn the treating physician rule on its head); *see also Brewer v. Astrue*, No. 1:10-CV-01224, 2011 WL 2461341, at *7 (N.D. Ohio June 17, 2011) (White, M.J.). Here, the ALJ gave other "good reasons" for discounting the treating physician's opinion independent of the State agency physician's conflicting opinions.

where the ALJ accorded greater weight to the opinions of State agency physicians than to a treating source where the ALJ provided "sound reasons" supported by substantial evidence); *Williamson v. Comm'r of Soc. Sec.*, No. 1:11cv828, 2013 WL 121813 at *6 (S.D. Ohio Jan. 9, 2013) ("There is no regulation or case law that requires the ALJ to reject an opinion simply because medical evidence is produced after the opinion is formed. Indeed, the regulations provide only that an ALJ should give more weight to an opinion that is consistent with the record as a whole."), *report and recommendation adopted*, 2013 WL 1090303 (S.D. Ohio Mar. 15, 2013).

Turning to the issue of whether the ALJ failed to incorporate limitations assessed by the State agency physicians to whom he ascribed great weight, the Commissioner argues that any error was harmless. (R. 15, PageID# 1197-1200). Specifically, Plaintiff argues the ALJ erred by failing to include the following limitations assessed by the State agency physicians into the RFC or into the hypothetical questions posed to the VE: (1) that Plaintiff was limited to frequent reaching overhead bilaterally (Tr. 79-80, 95); and (2) that Plaintiff should avoid "even moderate exposure" to pulmonary irritants such as fumes, odors, gases, etc. (Tr. 80, 96). The RFC only prohibited concentrated exposure to pulmonary irritants and limited Plaintiff to frequently handling, fingering, and feeling with the right hand. (Tr. 15). No such limitations were extended to the left hand and no mention is made of only frequent overhead reaching bilaterally. *Id.*

At the hearing, contrary to Plaintiff's argument, the ALJ unequivocally inquired whether changing Plaintiff's limitations to avoiding "even moderate exposure to pulmonary irritants rather than concentrated exposure" had any impact on Plaintiff's ability to perform his past relevant work as a taillight assembler or the other three positions identified by the VE in response to the first hypothetical. (Tr. 65). The VE responded that there would be no impact. *Id.*

Therefore, the court agrees with the Commissioner that the ALJ's failure to adopt a prohibition against even moderate exposure to pulmonary irritants, as suggested by the State agency physicians, was harmless error. The VE's testimony was clear—such a limitation had no effect on Plaintiff's ability to perform his past relevant work as a taillight assembler, nor did it impact the three other jobs the VE identified in response to the hypothetical. (Tr. 65).

As for the ALJ's failure to incorporate a restriction to only frequent reaching overhead bilaterally, it is clear from the DICOT that Plaintiff's past relevant work as a taillight assembler, identified by the VE as corresponding to DICOT 706.684-022, does not require more than frequent reaching (which constitutes from 1/3 to 2/3 of the time).[6] 1991 WL 679050. The other three jobs the VE identified—folder (DICOT 369.687-018, 1991 WL 673072), packer (DICOT 559.687-074, 1991 WL 683797), and production inspector (DICOT 739.687-102, 1991 WL 680198)—also do not require reaching more often than frequently. Again, any omission by the ALJ was harmless, because neither Plaintiff's past relevant work nor the three additional jobs identified required more than frequent reaching.

The Sixth Circuit has explained that a matter should not be remanded where the plaintiff cannot establish that "a ruling was anything but harmless error," noting the futility of "sending the case back to the ALJ" where it would not "serve any useful purpose …." *Kobetic v. Comm'r of Soc. Sec.*, 114 Fed. App'x 171, 173 (6th Cir. 2004) ("When 'remand would be an idle and useless formality,' courts are not required to 'convert judicial review of agency action into a ping-pong game.'") (*quoting NLRB v. Wyman–Gordon Co.*, 394 U.S. 759, 766 n. 6, 89 S.Ct.

[6] By contrast, an activity that is labeled as needed to be performed "constantly" exists 2/3 or more of the time. *See* Selected Characteristics of Occupations in the Revised Dictionary of Occupational Titles ("SCODICOT"), Appendix C. Physical Demands.

1426, 22 L.Ed.2d 709 (1969)); *see also Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 547 (6th Cir. 2004) (same). "No principle of administrative law or common sense requires us to remand a case in quest of a perfect opinion unless there is reason to believe that remand might lead to a different result." *Fisher v. Bowen*, 869 F.2d 1055, 1057 (7th Cir.1989); *accord Mabrey v. Comm'r of Soc. Sec.*, 1:13-cv-555, 2015 WL 556435 at *5 (S.D. Ohio Feb. 10, 2015), *adopted by* 2015 WL 1412205 (Mar. 26, 2015).

Plaintiff's third assignment of error, therefore, is wholly without merit.

IV. Conclusion

For the foregoing reasons, it is recommended that the Commissioner's final decision be AFFIRMED.

s/ *David A. Ruiz*
David A. Ruiz
United States Magistrate Judge

Date: June 5, 2017

OBJECTIONS

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within fourteen (14) days after the party objecting has been served with a copy of this Report and Recommendation. 28 U.S.C. § 636(b)(1). Failure to file objections within the specified time may waive the right to appeal the district court's order. *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986).