UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARETHA R. GRIFFIN,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. 1:13-cv-594

Bowman, M.J.

MEMORANDUM OPINION AND ORDER

Plaintiff Aretha R. Griffin filed this Social Security appeal in order to challenge the Defendant's finding that she was not disabled. *See* 42 U.S.C. §405(g). Proceeding through counsel, Plaintiff presents four claims of error for this Court's review.[1] As explained below, the ALJ's finding is AFFIRMED, because it is supported by substantial evidence in the administrative record.

I. Summary of Administrative Record

Plaintiff filed applications for Disability Insurance Benefits ("DIB") and for Supplemental Security Income ("SSI") in late 2010, alleging that she became unable to work as of May 8, 2010, due to a combination of physical and mental health issues.[2] Plaintiff's applications were denied initially and upon reconsideration, and she timely requested an evidentiary hearing.

On April 13, 2012, Plaintiff appeared and testified at an evidentiary hearing held before Administrative Law Judge ("ALJ") Kenneth Wilson in Cincinnati, Ohio. An

[1]The parties have consented to final disposition by the undersigned magistrate judge, pursuant to 28 U.S.C. §636(c).
[2]Plaintiff's initial applications reflect only physical limitations, (Tr. 224), but she later added evidence relating to alleged mental limitations.

impartial vocational expert also appeared and testified. On April 26, 2012, the ALJ issued an unfavorable written decision. (Tr. 10-20). He determined that Plaintiff has the following severe impairments: "fibromyalgia and lumbar degenerative disc disease." (Tr. 12). In addition to these severe impairments, the ALJ found obesity, hypertension, plummer-vinson syndrome,[3] sleep apnea, carpal tunnel syndrome, and dysthymic disorder to be non-severe impairments. (Tr. 12).

The ALJ held that Plaintiff, who was 42 years old at the time of his decision, and has a high school education, (Tr. 19), does not have an impairment or combination of impairments that would meet or medically equal one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appx. 1. (Tr. 14). Instead, he found that Plaintiff retains the residual functional capacity ("RFC") to perform sedentary work, with the following nonexertional limitations:

> She can lift 10 pounds occasionally and less than 10 pounds frequently. She can stand/walk for 4 hours in an 8-hour workday and sit for 6 hours in an 8-hour workday. She can push/pull within the lifting restrictions. She could occasionally climb ramps or stairs, stoop, or crouch. She could frequently balance. She could never climb ladders, ropes, or scaffolds, or crawl. She can engage in fine and gross manipulation no more than frequently. She can occasionally reach overhead. She must avoid concentrated exposure to unprotected heights. She has no visual or communicative limitations. She must avoid concentrated exposure to hazardous machinery. Mentally, the claimant is capable of maintaining attention and concentration for 2 hours in an 8-hour workday with normal work breaks. She can interact appropriately with coworkers and supervisors. She can understand, remember, and carry out simple, complex, and detailed instructions. She can adapt to changes in the work setting. She cannot perform high production quotas.

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[3]This syndrome is "a condition that can occur in people with long-term (chronic) iron deficiency anemia," and causes "problems swallowing due to small, thin growths of tissue that partially block the …esophagus." See http://www.nlm.nih.gov/medlineplus/ency/article/001158.htm (accessed on May 8, 2014).

(Tr. 14).

The ALJ determined that the referenced RFC precludes Plaintiff's past relevant work, which primarily was performed as a stocker, (Tr. 19), although she also worked as a nurse assistant. (Tr. 225, 242). Based upon testimony from the VE and the record as a whole, he determined that Plaintiff could still perform jobs that exist in significant numbers in the national economy, including such representative jobs as inspector, order clerk, sorter, and surveillance system monitor. (Tr. 19-20). The Appeals Council denied Plaintiff's request for further review; therefore, the ALJ's decision remains as the final decision of the Commissioner.

In this appeal, Plaintiff claims that she is disabled due primarily to her chronic pain, which allegedly is exacerbated both by her obesity and by psychological conditions. She alleges that the onset of her disability can be traced to a fall on May 9, 2010, from which she never fully recovered. (Tr. 332). She argues that remand is required based upon: (1) the ALJ's failure to analyze her obesity; (2) the ALJ's failure to consider the record as a whole; (3) the failure to credit Plaintiff's subjective symptoms; and (4) the failure to consider the post-hearing RFC of a treating physician as "new and material" evidence.

II. Analysis

A. Judicial Standard of Review

To be eligible for benefits, a claimant must be under a "disability." *See* 42 U.S.C. §1382c(a). Narrowed to its statutory meaning, a "disability" includes only physical or mental impairments that are both "medically determinable" and severe enough to prevent the applicant from (1) performing his or her past job and (2) engaging in

"substantial gainful activity" that is available in the regional or national economies. *See Bowen v. City of New York*, 476 U.S. 467, 469-70 (1986).

When a court is asked to review the Commissioner's denial of benefits, the court's first inquiry is to determine whether the ALJ's non-disability finding is supported by substantial evidence. 42 U.S.C. § 405(g). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (additional citation and internal quotation omitted). In conducting this review, the court should consider the record as a whole. *Hephner v. Mathews*, 574 F.2d 359, 362 (6th Cir. 1978). If substantial evidence supports the ALJ's denial of benefits, then that finding must be affirmed, even if substantial evidence also exists in the record to support a finding of disability. *Felisky v. Bowen*, 35 F.3d 1027, 1035 (6th Cir. 1994). As the Sixth Circuit has explained:

> The Secretary's findings are not subject to reversal merely because substantial evidence exists in the record to support a different conclusion . . . . The substantial evidence standard presupposes that there is a 'zone of choice' within which the Secretary may proceed without interference from the courts. If the Secretary's decision is supported by substantial evidence, a reviewing court must affirm.

Id. (citations omitted).

In considering an application for supplemental security income or for disability benefits, the Social Security Agency is guided by the following sequential benefits analysis: at Step 1, the Commissioner asks if the claimant is still performing substantial gainful activity; at Step 2, the Commissioner determines if one or more of the claimant's impairments are "severe;" at Step 3, the Commissioner analyzes whether the claimant's impairments, singly or in combination, meet or equal a Listing in the Listing of Impairments; at Step 4, the Commissioner determines whether or not the claimant can

still perform her past relevant work; and finally, at Step 5, if it is established that claimant can no longer perform his past relevant work, the burden of proof shifts to the agency to determine whether a significant number of other jobs which the claimant can perform exist in the national economy. *See Combs v. Com'r of Soc. Sec.*, 459 F.3d 640, 643 (6th Cir. 2006); 20 C.F.R. §§404.1520, 416.920. A plaintiff bears the ultimate burden to prove by sufficient evidence that she is entitled to disability benefits. 20 C.F.R. §404.1512(a).

B. Specific Errors

1. Obesity

In June of 2010, Plaintiff's height was measured at five feet two inches, with a weight of 230 pounds. (Tr. 333). With a BMI of 42, Plaintiff is obese. Social Security regulations do not permit a finding of disability based upon obesity, for obvious reasons. According to the Centers for Disease Control and Prevention, more than one-third of all adults in the United States (34.9%) are obese, the vast majority of whom are not disabled. *See* http://www.cdc.gov/obesity/data/adult.html (accessed on May 8, 2014). Nevertheless, "obesity may increase the severity of coexisting or related impairments to the extent that the combination of impairments meets the requirements of a listing. This is especially true of musculoskeletal, respiratory, and cardiovascular impairments." SSR 02-1p. Therefore, SSR 02-1p requires consideration of a claimant's obesity in the assessment of whether a claimant meets or equals any particular listing, and/or in the assessment of whether she can continue to work. Similarly, SSR 96-8p generally requires an ALJ to consider the effect that obesity has upon an individual's residual functional capacity.

Plaintiff does not quibble with the ALJ's finding that her obesity is not a "severe" impairment, meaning that it does not cause more than minimal limitations in Plaintiff's ability to perform basic work activity. Instead, she argues generally that the ALJ erred by failing to comply with either SSR 02-1p or SSR 97-8p, because the ALJ did not sufficiently consider "the combined effect of obesity with Ms. Griffin's other impairments [or] ..the effect obesity would have upon Ms. Griffin's ability to perform routine movement and necessary physical activity within the work environment." (Doc. 9 at 7).

With respect to Plaintiff's obesity, the ALJ reasoned that "[a]lthough the claimant has a history of obesity.., there is no evidence that she is unable to ambulate effectively." (Tr. 12). He noted that Plaintiff was observed to walk with a limp, but that she does not require any assistive devices. (*Id*.). Based upon all of Plaintiff's impairments, including but not limited to obesity, the ALJ limited her to sedentary work. He imposed numerous additional requirements that, at least arguably, take into account Plaintiff's obesity. For example, the ALJ limited Plaintiff to only "occasionally" stooping, crouching, or climbing ramps or stairs, and "never" climbing ladders, ropes, or scaffolds, or crawling. (Tr. 14). "The absence of further elaboration on the issue of obesity likely stems from the fact that [Plaintiff] failed to present evidence" of any functional limitations resulting specifically from her obesity." *Essary v. Com'r of Soc. Sec*., 114 Fed. Appx. 662, 667 (6th Cir. 2004).

Plaintiff does not articulate any specific way in which her obesity impacts her to a greater extent than found by the ALJ. Rather, Plaintiff cites only the general "guidance" provided by SSR 02-1p, noting that obesity commonly leads to and often complicates multiple diseases, including some of those with which Plaintiff has been diagnosed, and that obesity "may" cause or contribute to mental impairments including depression.

(Doc. 9 at 6). Despite these multiple references to the fact that obesity "may" worsen conditions like sleep apnea, Plaintiff fails to cite to any portion of the medical record that would support an argument that any of these possible effects of obesity more severely restricted her ability to work. Plaintiff was able to work despite being obese prior to her alleged disability onset date. The record supports a conclusion that Plaintiff's obesity does not impact her ability to work more than as assessed by the ALJ. For example, although obesity ostensibly "may" contribute to or worsen psychological conditions such as depression, Plaintiff points to no evidence that her depression or psychological limitations are greater than assessed by the ALJ, which assessment is strongly supported by the record. (*See, e.g.,* Tr. 13, concluding Plaintiff's "dysthymic disorder…does not cause more than minimal limitation"; Tr. 425, psychological report noting GAF score of 64, and finding Plaintiff to be no more than "mildly" impaired in any functional area.).

Historically the Sixth Circuit has required only minimal articulation at Step 3 of the sequential analysis, *see Bledsoe v. Barnhart*, 165 Fed. Appx. 408, 412 (6th Cir. 2006)(stating in a case where obesity was not severe, that "[i]t is a mischaracterization to suggest that Social Security Ruling 02-01p offers any particular procedural mode of analysis for obese disability claimants."). So long as the ALJ's decision as a whole articulates the basis for his or her conclusion, the decision may be affirmed. *See generally Hurst v. Sec'y of Health & Human Servs.*, 753 F.2d 517, 519 (6th Cir. 1985); *see also Moody v. Com'r of Soc. Sec.,* 2011 WL 3840217 at *9 (E.D. Mich. July 15, 2011)(affirming where medical evidence reflected obesity, and ALJ found that Plaintiff could not engage in *any* climbing, crawling, bending, kneeling, stooping or crouching, could stand for no more than 10 minutes at a time, and required a sit/stand option, all of

which addressed mobility problems associated with obesity). With respect to consideration of Plaintiff's obesity, the Court finds no reversible error on the record presented. *Accord, Cranfield v. Com'r of Soc. Sec*., 79 Fed. Appx. 852, 857 (6th Cir. 2003)(affirming in case where the claimant failed to present evidence of any specific obesity-related limitations, such that "the ALJ was not required to give the issue any more attention than he did.").

2. Consideration of the Record as a Whole

Plaintiff's second assertion of error contends that the ALJ's review amounted to "picking and choosing" evidence in support of his non-disability finding, while ignoring evidence favorable to Plaintiff. Plaintiff relies on three discrete pieces of evidence: (a) a January 2011 cervical MRI that shows multi-level degenerative disc changes, with moderate left forminal stenosis at C6 (Tr. 460-462); (b) a July 8, 2011 electrodiagnostic study from Dr. Lee-Robinson, (Tr. 523-524); and (c) sleep apnea results. (*See* Tr. 432-451).

This Court's review of Plaintiff's medical records reveal long-standing complaints of lower back and hip pain. Based upon those complaints, objective testing and imaging studies (x-rays and MRI) were conducted on her lumbar (lower) spine and pelvis in June 2010. Consistent with those results, the ALJ specifically stated that "there was no evidence of central canal or foraminal stenosis" in her lumbar spine. (Tr. 16; *see* Tr. 313, 322-326). X-ray results of the same areas were "overall good." (Tr. 330). Plaintiff complains, however, that the ALJ ignored a January 2011 MRI that subsequently revealed more significant findings in her cervical spine, or upper back/neck area. (Tr. 460-462).

Plaintiff began to complain of more pain in her upper back/neck region sometime late in 2010. Still, the January 2011 MRI on which she relies shows "no central canal stenosis or foraminal stenosis" in the C2-C3 area (Tr. 460), or at C3-C4. (Tr. 461). At C4-C5, the report notes an absence of any foraminal stenosis, but concludes that there is "mild central canal stenosis." Only at C5-C6, as Plaintiff points out, is there a contrary finding. Even there, however, the report concludes that there is "no foraminal stenosis," and only "mild central canal stenosis." The report does find "moderate left foraminal stenosis" at the C5-C6 level. (Tr. 461-462). Despite the fact that the ALJ did not refer to the 2011 MRI, he did discuss cervical spine x-rays, which showed "spurring at the C4-5-6 levels, but only slight narrowing of the disc spaces." (Tr. 16). The ALJ also discussed multiple records that suggested that Plaintiff had no significant problems with muscle strength, motor control or sensation, and no neurological deficits, including a June 2010 record that showed that Plaintiff's "symptoms of radiculopathy were resolving." (Tr. 16).

The second piece of evidence on which Plaintiff focuses is a nerve study conducted by Dr. Robinson, which Plaintiff argues concludes that she suffers from "cervical radiculopathy." (Tr. 523-524). However, closer review of the Robinson study reveals that its conclusion is more nuanced. The interpretive section concludes only that the findings of the study are "*most commonly associated with*" things like C6 cervical radiculopathy, as well as "disc displacements/protrusions and consequent foraminal and/or central canal stenosis, in particular involving C5/6 & C4/5 regions." (Tr. 523). This general interpretative language is modified with the explanation that "[c]orrelation of these findings with imaging studies …is recommended." The same EMG study suggests an "acute [nerve] entrapment and better prognosis for recovery

with surgical release," but there is no evidence that surgery was ever recommended or performed. (Tr. 523).

Plaintiff appears to have been referred to Dr. Robinson for the EMG study in relation to her carpal tunnel syndrome complaints, for which splints were prescribed. (Tr. 522). While it is unclear whether Plaintiff ever wore the splints, later records demonstrate that her CTS symptoms resolved with treatment administered in November 2011. In fact, December 2011 treatment notes confirm: (a) complete success/resolution of prior CTS symptoms;[4] (b) Plaintiff demonstrated full range of motion and equal bilateral wrist range of motion; and (c) normal capillary refill, no swelling, and appropriate muscular strength. (*See* Tr. 540, 12/28/11 record from Dr. Willis, noting "complete relief" and "Fully Resolved symptoms of bilateral Carpal Tunnel Syndrome"; Tr. 520, 6/14/11 record stating "no objective evidence for carpal tunnel syndrome.").

While the July 2011 EMG provides some support for Plaintiff's complaints of back pain, the record demonstrates that Plaintiff previously saw a pain management specialist who administered facet block injections that provided "significant relief of pain symptoms although not complete." (Tr. 313; *see also* Tr. 336-337, reporting on July 12, 2010 that "majority of her pain gone" after first injection). In addition, the EMG study is not completely favorable, in that other findings concerning "the upper extremities are within normal limits…." (*Id*.). Also notable is the reference in the report to the Plaintiff's "10+ year history of progressive neck, bilateral arm symptoms that correlate with these

[4]Clinical records from Plaintiff's primary care physician, Dr. Drake, dated September, 2010 reflect an extensive list of symptoms and diagnoses, but with no symptoms reported or diagnosis of carpal tunnel syndrome at that time. (Tr. 347-348, 351-352). Other records suggest that Plaintiff's CTS symptoms both arose and fully resolved over an 8-month period in 2011. (Tr. 540-541).

findings." (Tr. 523). On June 1, 2010, Plaintiff similarly reported to Dr. Kudalkar that she had been at a "7/10" pain level "for [the] past 10 years at least." (Tr. 317). As of that date, she reported working "12 hour shifts as a CNA." (*Id*.). Therefore, Plaintiff remained capable of full-time work during most of the decade prior to her alleged disability onset date, notwithstanding a constant and persistently high level of reported back pain throughout that time period.

The third and last piece of evidence that Plaintiff complains that the ALJ improperly ignored was her sleep apnea study dated March 2011. Plaintiff argues that the ALJ incorrectly concluded that her sleep apnea does not result in significant limitations (Tr. 13), ignoring the study's conclusion (for diagnostic coding purposes) that she suffers from "severe obstructive sleep apnea." (Tr. 444). However, the study also noted that Plaintiff scored within normal limits on the Epworth Sleepiness Scale, meaning that her apnea did not result in additional daytime sleepiness, despite reduced sleep efficiency which resulted in the referenced "severe" diagnostic code. (Tr. 443). Therefore, substantial evidence supports the ALJ's conclusion that "[t]here do not appear to be any significant [work] limitations caused by the claimant's" sleep apnea. (Tr. 13).

Discounting the sleep study evidence which does not aid Plaintiff's case, the Court is left to consider whether the ALJ's failure to discuss the 2011 cervical MRI and the 2011 EMG results requires remand for further review. On the record presented, it does not. An ALJ's failure to discuss every piece of medical evidence is not always impermissible "cherry picking." *See Boseley v. Com'r of Soc. Sec*., 397 Fed. Appx. 195, 199 (6th Cir. 2010)(holding that ALJ is not required to discuss each piece of data or evidence). The cervical MRI and EMG both include relatively modest findings that only

partially support Plaintiff's claims of disabling pain symptoms, which are at odds with other evidence cited by the ALJ. A mere diagnosis of a general condition like spinal stenosis reveals little about the level of functional impairment or any work-related limitations. *See Higgs v. Bowen*, 880 F.2d 860, 863 (6th Cir. 1988)("The mere diagnosis of arthritis, of course, says nothing about the severity of the condition."). For example, pain from stenosis can be treated with exercise and physical therapy, a back brace, pain medication, or more invasive therapies like spinal fusion surgery. *See, e.g*., Fast Facts About Spinal Stenosis, published by the National Institutes of Health, at http://www.niams.nih.gov/Health_Info/Spinal_Stenosis/spinal_stenosis_ff.asp (accessed on May 20, 2014).

In short, Plaintiff's cherry-picking argument cuts both ways. As Defendant is quick to point out, Plaintiff fails to address the June 2010 treatment notes which showed a good range of motion with no contractures in the upper or lower extremities, no joint tenderness, deformities or synovitis, and 5/5 muscle strength in the upper extremities and at least a 4+ (out of 5) in the lower extremities. (Tr. 16, 315). Plaintiff also fails to cite the April 2011 RFC assessment of consulting physician Dr. Long, which concluded she could perform a much broader range of "light" work than the ALJ determined, even though he gave Dr. Long's RFC opinions "some weight." (Tr. 18). And Plaintiff fails to acknowledge the multiple records that showed that her carpal tunnel syndrome symptoms had fully resolved by December 2011. The ALJ assigned greater limitations to Plaintiff than did Dr. Long, specifically citing Plaintiff's "history of chronic back pain and fibromyalgia." (Tr. 18). The fact that Plaintiff can point to evidence that might have supported a different decision does not mean that the ALJ's decision should be remanded. The Commissioner's decision must be affirmed so long as it falls within the

acceptable "zone of choice" and is supported by substantial evidence. This Court has reviewed Plaintiff's medical records in their entirety, and concludes that substantial evidence in the record as a whole supports the ALJ's analysis and conclusions, notwithstanding his failure to discuss Plaintiff's 2011 MRI and EMG results.

3. Evaluation of Subjective Complaints of Pain; Credibility

In her third assertion of error, Plaintiff argues that the ALJ disregarded regulatory standards when he discounted her subjective complaints of pain, finding them not to be fully credible. An ALJ's credibility assessment must be supported by substantial evidence, but "an ALJ's findings based on the credibility of the applicant are to be accorded great weight and deference, particularly since an ALJ is charged with the duty of observing a witness's demeanor and credibility." *Walters v. Com'r of Soc. Sec.*, 127 F.3d 525, 531 (6th Cir. 1997). Further, a credibility determination cannot be disturbed "absent a compelling reason." *Smith v. Halter*, 307 F.3d 377, 379 (6th Cir. 2001). Thus, it is proper for an ALJ to discount the claimant's testimony where there are contradictions among the medical records, his testimony, and other evidence. *Warner v. Com'r of Soc. Sec*., 375 F.3d at 387, 392 (6th Cir. 2004).

Considering that the ALJ limited Plaintiff to sedentary work with a number of non-exertional limitations, he clearly recognized that Plaintiff has significant restrictions. However, the ALJ found that although Plaintiff's "medically determinable impairments could reasonably be expected to cause the alleged symptoms,… the [Plaintiff's] statements, and those of her mother, concerning the intensity, persistence and limiting effects of these symptoms are not credible to the extent they are inconsistent with" the RFC determined by the ALJ. (Tr. 16). The ALJ cited six reasons for his adverse credibility finding: (1) a June 2010 imaging study that was inconsistent with disabling

pain; (2) that "physical examinations throughout the record are generally within normal limits;" (3) that treatment notes dated June and July 2010 were "inconsistent with the level [of] severity and limitation asserted by the claimant," (Tr. 16); (4) that Plaintiff's asserted difficulty using her hands was inconsistent with December 2011 notes that reflected that Plaintiff's carpal tunnel syndrome was "fully resolved," (*see* Tr. 16); (5) that allegations of mental limitations were inconsistent with numerous records, (*see* Tr. 17); and (6) that her allegations about the severity of her impairments were inconsistent with her activities of daily living, (*see* Tr. 17).

Plaintiff again points to the January 2011 cervical MRI, and additionally complains that the ALJ failed to discuss the effects of her medications "or other factors concerning limitations and restrictions due to pain or other symptoms, including the effects of obesity." (Doc. 9 at 10). For the reasons previously discussed, the Court finds no error. *See e.g., Daniels v. Com'r of Soc. Sec.*, 2011 WL 2110145 at*4 (S.D. Ohio May 25, 2011)(normal neurological findings or other results of objective testing may be considered in determining credibility of subjective complaints, citing *Cross v. Com'r of Soc. Sec.*, 373 F. Supp.2d 724, 732 (N.D. Ohio 2005)).

Next, Plaintiff asserts that the ALJ discusses her daily activities but does not adequately relate those activities to her ability to work. Again the Court finds no error. Divorced in December 2009, Plaintiff testified that she lives with her three daughters and an additional young girl who "got put out her house." (Tr. 33). In a typical day, she testified that she gets her children up for school, visits with an elderly neighbor, and tries to walk a little bit. (Tr. 36-39). She reported that she maintains the ability to perform personal care, prepare meals, and shop. (Tr. 15). In her initial applications, Plaintiff states that she does "everything" because three of the girls living with her are still in

school, and the fourth (the oldest) is disabled and expecting a baby. (Tr. 234). On December 1, 2010, Plaintiff reported to a consulting psychologist that that she cooks, cleans, does laundry, grocery shops, and on a typical day watches her grandchild, takes care of a neighbor, goes to the store, and watches TV. (Tr. 423). She reported some assistance from her daughters, but also stated that she does cleaning, laundry and ironing approximately 5 hours per day. (Tr. 236, 255). She enjoys watching TV, sewing, cooking, baking, and reading every day. (Tr. 237; *see also* Tr. 423). Her mother reported that she also enjoys going out to eat and "hang[ing] out with friends and family," although she no longer "often" engages in social activities due to her impairments (Tr. 257-258).

Although Plaintiff relies on *Lawson v. Astrue*, 695 F. Supp.2d 729, 737 (S.D. Ohio 2010)(citing *Rogers*, *supra*, 486 at 248) to argue that her "minimal" daily activities cannot be compared to work, the cited case does not stand for a blanket proposition that daily activities are never relevant. Indeed, they are highly relevant, and are properly evaluated on a case-by-case basis. There was no legal requirement for the ALJ to specifically explain how each of Plaintiff's daily activities might translate to a non-disability finding; it was enough for the ALJ to generally discuss the activities on which he relied. *See* 20 C.F.R. §404.1529(c)(3)(daily activities may be useful to assess nature and severity of symptoms).

Last, Plaintiff argues that the ALJ should have found her complaints to be more credible in light of her persistent attempts to alleviate her pain, including referrals to specialists. In her reply memorandum, Plaintiff adds a new argument that the ALJ improperly relied upon objective evidence to discount her credibility concerning her fibromyalgia. *See, e.g., Rogers v. Com'r of Soc. Sec*., 486 F.3d 234, 245 (6th Cir.

2007)(discussing low relevance of objective data concerning fibromyalgia). Because it is newly presented in her reply memorandum, this Court need not consider Plaintiff's fibromyalgia argument. Regardless, there is little evidence that her fibromyalgia causes greater restrictions than assessed by the ALJ. (*See* Tr. 346, 9/15/10 record from Dr. Drake describing fibromyalgia as "stable," reflecting report of weekly exercise).

Plaintiff has primarily been treated by Dr. Drake, but occasionally has sought specialist treatment for her fibromyalgia. A March 6, 2011 record reflects her most recent referral to rheumatologist Dr. Salem Foad. (Tr. 428-429). Dr. Foad notes that Plaintiff presents with pain in her lower back of "5 years duration," reflecting fibromyalgia symptoms dating long before her alleged disability onset date in 2010. Dr. Foad noted "no weakness" in Plaintiff's legs with a negative straight leg raising test, and "[n]o synovitis present in the fingers, wrists or elbows," or in the knees, ankles or toes. (Tr. 428-429). Her shoulders were "tender and painful, but not swollen *or limited*." (*Id*., emphasis added). She also had "tenderness" in her back. Dr. Foad noted that Plaintiff's rheumatoid factor and ANA were both "negative." He confirmed Plaintiff's diagnosis of fibromyalgia along with "mild" arthritis, but found "no evidence for inflammatory arthritis, or diffuse connective tissue disease," or "any type of inflammatory muscle disease." (Tr. 429). Dr. Foad prescribes exercise and an increased dose of Cymbalta to treat her fibromyalgia symptoms, and states that he "explained to the patient that I would not give her any pain medication." (Tr. 429). Thus, the expert rheumatologist with whom Plaintiff most recently consulted reports many normal findings and prescribes only conservative treatment for Plaintiff's fibromyalgia. He suggest that she could consider trigger point injections if continuation of conservative treatment proves insufficient.

As other courts have noted, many people experience chronic pain that is less than disabling. *See Blacha v. Secretary of Health and Human Services*, 927 F.2d 228, 230-231 (6th Cir. 1990)(affirming ALJ's determination that back pain from nerve root compression and herniated disc, coupled with degenerative changes, was not disabling). There is no listing for fibromyalgia. While that diagnosis must be considered in evaluating pain complaints, many patients with fibromyalgia continue to work. In fact, Plaintiff's own diagnosis of fibromyalgia and complaints of back pain both long preceded her alleged disability onset date. Plaintiff implicitly suggests that her fibromyalgia symptoms worsened over time, but Dr. Foad's 2011 report and the earlier report from Dr. Drake that her condition was "stable" contradict any such argument. Thus, the Court finds no error in the ALJ's assessment of Plaintiff's subjective pain complaints and credibility, which was sufficiently articulated by the ALJ as stated, and supported by the record as a whole.

4. New and Material Evidence and Remand Under Sentence Six

As her last assertion of error, Plaintiff argues that she has offered new and material evidence to support her claim. Specifically, a month after the evidentiary hearing on May 24, 2012, her treating physician, Betsy Drake, M.D., completed an additional RFC form that opines that Plaintiff has severe functional limitations. Dr. Drake's RFC form was submitted to the Appeals Council. The Appeals Council indicated that it had applied its rules, including the rule that it will conduct review if presented with "new and material" evidence that rendered the ALJ's decision "contrary to the weight of all the evidence now in the record," but that it found "no reason" for further review of the ALJ's decision. (Tr. 1).

Dr. Drake has seen Plaintiff from three to six times per year since September 2010. (Tr. 544). She offers multiple opinions in the RFC form that would preclude the sedentary jobs testified to by the VE, such as opinions that Plaintiff can only sit for 15-20 minutes at a time, and can sit for only 2 hours total in an 8-hour day, with less than 2 hours of standing/walking, (Tr. 546), is precluded from virtually all lifting and most postural activities, and has significant limitations in reaching, handling, or fingering. (Tr. 547-548). She also suggests that Plaintiff would likely be absent from work more than four days per month. (Tr. 548).

Evidence that was not presented to the ALJ may not be reviewed by this Court for purposes of determining whether substantial evidence exists to uphold the administrative decision. *See Cotton v. Sullivan*, 2 F.3d 692, 696 (6th Cir. 1993). Because the Appeals Council declined to find Dr. Drake's RFC report was sufficiently "new and material" evidence that would provide grounds for further review, this Court is precluded from considering Dr. Drake's RFC assessment in determining whether substantial evidence exists to uphold the ALJ's non-disability finding.

The only basis under which this Court may consider such evidence is to determine whether remand is appropriate under sentence six of 42 U.S.C. §405(g). Technically Plaintiff has requested only a reversal for an award of benefits or remand under sentence four, and not remand under sentence six. To that extent, the Court is disinclined to consider the "new" RFC evidence. Alternatively, to the extent that Plaintiff's argument is construed as seeking remand under sentence six, a plaintiff must show both that she possesses evidence that is "new and material" and establish "good cause" to excuse her failure to present that same evidence during the pendency of the administrative proceeding. *See Oliver v. Sec'y of Health and Human Servs*., 804 F.2d

964, 966 (6th Cir. 1986). Plaintiff offers the evidence as "new" insofar as the form was not completed by Dr. Drake until after the evidentiary hearing, and argues that the evidence is "material" because it arguably could affect the outcome of her case.

It is unnecessary for this Court to re-examine the Appeals Council's contrary determination. Even if Plaintiff could show that the new RFC form is both new and material concerning the time period prior to the ALJ's decision, Plaintiff has failed to offer any justification that would show "good cause" for her failure to timely obtain that assessment. In fact, at the conclusion of the April 13, 2012 hearing the ALJ specifically inquired of counsel "[a]ny need to leave the record open?" and Plaintiff's counsel replied with an unequivocal, "No." (Tr. 50). True to his word, the ALJ promptly filed his decision just thirteen days later.

To the extent that Plaintiff believes that Dr. Drake's May 2012 RFC opinions reflect an increase in her symptoms and/or limitations, the ALJ's decision reflects a disability determination only through its April 2012 date. Plaintiff remains free to submit a new application to seek disability benefits on or after that date.

III. Conclusion and Order

For the reasons explained herein, **IT IS ORDERED THAT:**

1. Defendant's decision is **SUPPORTED BY SUBSTANTIAL EVIDENCE**, and is therefore **AFFIRMED;**

2. As no other matters remain pending, this case shall be **CLOSED.**

s/ Stephanie K. Bowman
Stephanie K. Bowman
United States Magistrate Judge