Conger v. Commissioner of Social Security Doc. 23

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SHEENA M. CONGER,

Plaintiff,

Civil Action 2:13-cv-811
Magistrate Judge Elizabeth P. Deavers

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

OPINION AND ORDER

Plaintiff, Sheena M. Conger, brings this action under 42 U.S.C. § 405(g) for review of a final decision of the Commissioner of Social Security ("Commissioner") denying her application for social security disability insurance benefits and supplemental security income. This matter is before the Court for consideration of Plaintiff's Statement of Errors (ECF No. 14), the Commissioner's Memorandum in Opposition (ECF No. 19), Plaintiff's Reply (ECF No. 20), and the administrative record (ECF No. 12). For the reasons that follow, the Court **OVERRULES** Plaintiff's Statement of Errors and **AFFIRMS** the Commissioner's decision.

I. BACKGROUND

Plaintiff filed her application for benefits on July 12, 2010, alleging that she has been disabled since September 30, 2007, at age 24. (R. at 62.) Plaintiff alleges disability as a result of major depression, agoraphobia, and anxiety. (*Id.*) Plaintiff's application was denied initially and upon reconsideration. Plaintiff sought a *de novo* hearing before an administrative law judge ("ALJ"). ALJ Christopher B. McNeil held a hearing on February 16, 2012, at which Plaintiff,

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represented by counsel, appeared and testified. (R. at 33-61.) George Coleman, a vocational expert, also appeared and testified at the hearing. (R. at 53-60.) On March 27, 2012, the ALJ issued a decision finding that Plaintiff was not disabled within the meaning of the Social Security Act. (R. at 13-29.) On July 11, 2013, the Appeals Council denied Plaintiff's request for review and adopted the ALJ's decision as the Commissioner's final decision. (R. at 1-5.) Plaintiff then timely commenced the instant action.

II. HEARING TESTIMONY

A. Plaintiff's Testimony

At the February 16, 2012 hearing, Plaintiff testified that she completed some, but not all, of ninth-grade. (R. at 41.) Plaintiff noted that she tried to obtain her GED, failed, and has not completed any other educational or job training since. (R. at 41-42.) Plaintiff testified that her driver's license was suspended for failing to pay child support and noted that her mother drove her to the hearing. (R. at 42.) Plaintiff indicated that she had never been fired from a job, but would frequently get anxious and leave jobs suddenly. According to Plaintiff, the longest job she held was the year she spent at Dairy Queen, where she was promoted to manager. (R. at 43.)

Plaintiff testified that she had been diagnosed with depression, bipolar, and anxiety. (R. at 44.) She indicated that Xanax helps with panic attacks and Seroquel helps her to sleep at night. (R. at 45, 47.)

Plaintiff testified that she lives with her boyfriend and three of his four children. (R. at 52.) Plaintiff indicated that she gets her children on the weekends during the school year and during the summer. (R. at 53.) She noted that, due to her depression, she sleeps frequently, is not motivated, and does not like leaving the house. Plaintiff testified that she does not often

grocery shop, because she gets panic attacks at the stores. She indicated that she bathes and changes her clothes every day, but sometimes stays in bed all day. (R. at 46.) Plaintiff noted that she tries to clean her house at least once per week, but wishes she could do more. (R. at 47.) She testified that she makes impulsive decisions. Plaintiff also revealed that she has smoked marijuana in the past and was on cocaine and pain pills when she was twelve or thirteen. (R. at 50-51.)

B. Vocational Expert Testimony

George W. Coleman testified as the vocational expert ("VE") at the administrative hearing. (R. at 53-60.) The VE testified that Plaintiff's past relevant work was as an ice-cream dispenser at the light exertional level. (R. at 55-56.)

The ALJ asked the VE whether a hypothetical individual of Plaintiff's education and past relevant work had the functional capacity to perform Plaintiff's past relevant work with the following non-exertional limitations: the individual cannot understand and remember simple instructions, can sustain attention to simple repetitive tasks where production quotas are not critical, with limited and superficial interpersonal demands in a non-public and static work setting with only routine changes. (R. at 56-57.) Based on the above hypothetical, the VE acknowledged that Plaintiff could not perform her past relevant work as an ice-cream dispenser because of the interaction with public and co-workers. The VE noted, however, that a hypothetical individual with those limitations could likely perform a number of jobs, including a laundry aid, with 1,211 regional jobs and 239,950 national jobs; a router or routing clerk, with 3,113 regional jobs and 450,460 national jobs; and a warehouse checker, with 260 regional jobs and 66,480 national jobs. (R. at 57.) The VE further testified that an individual who was off

task 25-30% of the time, or who was markedly impaired in her ability to maintain attention and concentration, perform work activities in a schedule, and maintain regular attendance would not be able to work competitively.

III. MEDICAL RECORDS AND OPINIONS

A. Six County, Inc.

Plaintiff began treatment at Six County, Inc., on August 9, 2007, after she was admitted to the emergency room for saying she planned to kill herself. (R. at 323-350.) She initially saw Billy R. Hunter, M.D., who diagnosed Plaintiff with major depressive disorder. (R. at 241.) Dr. Hunter noted that Plaintiff felt hopeless and had no energy, but her memory appeared intact and her insights and judgments were fair. He continued Plaintiff's prescription for Prozac.

Plaintiff returned on October 24, 2007, and saw Nurse Practitioner Danine Lajiness-Polosky. (R. at 238-39.) Plaintiff reported that she was doing much better on Paxil and was not nearly as depressed. She indicated, however, that the medication she was taking for her panic attacks (Buspar) was not helping. Nurse Practitioner Lajiness-Polosky noted that Plaintiff was pleasant, cooperative, and interested in educating herself and her boyfriend about her condition. (R. at 238.) She diagnosed Plaintiff with anxiety disorder and replaced Plaintiff's prescription for Buspar with one for Xanax.

Plaintiff saw Nurse Practitioner Lajiness-Polosky again on November 21, 2007. (R. at 236-37.) Plaintiff indicated that the Xanax was helping with her anxiety disorder. At her January 22, 2008 appointment, Nurse Practitioner Lajiness-Polosky noted that Plaintiff was doing well, had good insight, and was pleasant and cooperative. She started Plaintiff on Cymbalta, and continued Plaintiff's prescriptions for Paxil and Xanax. (R. at 234.)

Plaintiff first saw Thomas Vajen, M.D. on April 2, 2008. (R. at 233.) Plaintiff reported that she had been more depressed recently and was not sleeping well. Dr. Vajen noted that Plaintiff was alert and cooperative. He prescribed Seroquel to help Plaintiff sleep. At her next visit on May 8, 2008, Plaintiff reported her depression was better and she was sleeping well on Seroquel. On October 22, 2008, Plaintiff indicated that she was doing reasonably well and had passed the GED pre-test. (R. at 231.) Dr. Vajen noted that Plaintiff would soon be gainfully employed.

At her February 5, 2009, appointment, Plaintiff indicated that she had passed her GED other than the math portion and that she was doing well, but was under a lot of stress. (R. at 230.) Dr. Vajen continued her prescriptions for Seroquel, Xanax, and Cymbalta. Plaintiff returned for follow-up on May 13, 2009 and indicated that she was doing very well and had mostly good days. Plaintiff noted that her medicine adjustments had been positive and her panic attacks had decreased since she cut down on caffeine. (R. at 229.) Plaintiff made a similar report at her August 19, 2009 appointment. (R. at 228.)

On November 5, 2009, Dr. Vajen noted that Plaintiff had her "usual, bubbly personality," despite having to stop driving the day before due to a panic attack. (R. at 227.) On February 4, 2010, Dr. Vajen noted that Plaintiff had done reasonably well but was under significant stress. (R. at 226.) He prescribed Seroquel, Abilify, and Xanax but decreased her dose of Cymbalta. Plaintiff returned for a follow-up visit on July 22, 2010. (R. at 351.) She indicated that she had lost her medical card and was unable to buy her prescription medication. Dr. Vajen gave her samples for Seroquel and Abilify and changed her Cymbalta prescription to Celexa.

On October 21, 2010, Plaintiff indicated that she was doing well and working on her GED. (R. at 371.) On January 14, 2011, Plaintiff reported stress and crying spells following her divorce. (R. at 369.)

Dr. Vajen completed a Mental Residual Functional Capacity ("MRFC") form on September 21, 2011. In the form, Dr. Vajen concluded that Plaintiff had marked limitations in all areas of social interaction, except for her ability to relate to the general public, in which he determined she was extremely limited. (R. at 382.) He also found that Plaintiff was markedly limited in all areas of sustained concentration and persistence and adaptation. (R. at 383-84.)

C. Keli A. Yee, Psy.D.

Dr. Yee examined Plaintiff on September 16, 2010. (R. at 357-367.) Dr. Yee determined that Plaintiff would benefit from continued medication management, but at the time was a "poor candidate for being able to sustained remunerative employment." (R. at 363.) Dr. Yee completed a MRFC assessment form, in which she found Plaintiff to be markedly limited in her ability to maintain attention and concentration to perform tasks within a schedule and maintain regular attendance, and complete a normal work day. (R. at 366.) She concluded that Plaintiff was moderately limited in fourteen of the twenty areas on the assessment form. In a letter to Plaintiff's counsel, Dr. Yee explained that a moderate limitation is one in which the individual would be off task approximately 25-35% of the time. (R. at 367.)

D. State Agency Evaluations

On September 8, 2010, State-Agency psychologist Marianne Collins, Ph.D., completed a residual functional capacity analysis for Plaintiff. (R. at 62-81.) Dr. Collins opined that Plaintiff was moderately limited in the ability to: (1) understand and remember detailed instructions; (2)

carry out detailed instructions; (3) maintain attention and concentration for extended periods; (4) perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances; (5) complete a normal workday and workweek without interruptions from psychologically based symptoms; (6) interact appropriately with the general public; (7) accept instructions and respond appropriately to criticism from supervisors; and (8) respond appropriately to changes in the work setting. In the narrative section of the assessment form, Dr. Collins noted that Plaintiff does well on medication, demonstrates the ability to act appropriately with her counselor and others, and has the ability to work in a predictable and routine environment in which she has superficial interaction with the general public. Dr. Collins further noted that Plaintiff has the ability to set realistic goals and make plans independently.

Carl Tishler, Ph.D., completed a review of Plaintiff's records for the State Agency on November 1, 2010. (R. at 84-97.) He opined that Plaintiff was moderately limited in her ability to understand and remember detailed instructions, but that she retained the ability to remember and understand simple instructions. (R. at 91.)

IV. THE ADMINISTRATIVE DECISION

On March 27, 2012, the ALJ issued his decision. (R. at 13-29.) He found that Plaintiff met the insured status requirements of the Social Security Act through September 30, 2007. (R. at 15.) At step one of the sequential evaluation process,[1] the ALJ found that Plaintiff had not

[1] Social Security Regulations require ALJs to resolve a disability claim through a five-step sequential evaluation of the evidence. *See* 20 C.F.R. §416.920(a)(4). Although a dispositive finding at any step terminates the ALJ's review, *see Colvin v. Barnhart*, 475 F.3d 727, 730 (6th Cir. 2007), if fully considered, the sequential review considers and answers five questions:

1. Is the claimant engaged in substantial gainful activity?
2. Does the claimant suffer from one or more severe impairments?

engaged in substantially gainful activity since September 30, 2007, the alleged onset date. (*Id.*) The ALJ found that Plaintiff has the severe impairments of major depressive disorder, mood disorder, bipolar depression, and generalized anxiety with agoraphobia and panic attacks. (*Id.*) He further found that Plaintiff did not have an impairment or combination of impairments that met or medically equaled one of the listed impairments described in 20 C.F.R. Part 404, Subpart P, Appendix 1. (*Id.*) At step four of the sequential process, the ALJ evaluated Plaintiff's residual functional capacity ("RFC").[2] The ALJ found as follows with respect to Plaintiff's RFC:

> After careful consideration of the entire record, I find that the claimant has the residual functional capacity to perform a full range of work at all exertional levels but with the following nonexertional restrictions: understand and remember simple instructions; sustain attention to complete simple repetitive tasks where production quotas are not critical; tolerate co-workers and supervisors with limited and superficial interpersonal demands in an object-focused, nonpublic work setting and adapt to routine changes in a static work setting.

(R. at 18.) In reaching this determination, the ALJ gave "great weight" to the opinion of State-Agency reviewing psychologists, finding that the limitations about which they opined were consistent with the longitudinal record and were not contradicted by any treating source. (R. at

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3. Do the claimant's severe impairments, alone or in combination, meet or equal the criteria of an impairment set forth in the Commissioner's Listing of Impairments, 20 C.F.R. Subpart P, Appendix 1?
4. Considering the claimant's residual functional capacity, can the claimant perform his or her past relevant work?
5. Considering the claimant's age, education, past work experience, and residual functional capacity, can the claimant perform other work available in the national economy?

See 20 C.F.R. §416.920(a)(4); *see also Henley v. Astrue*, 573 F.3d 263, 264 (6th Cir. 2009); *Foster v. Halter*, 279 F.3d 348, 354 (6th Cir. 2001).

[2]A claimant's "residual functional capacity" is an assessment of the most a claimant can do in a work setting despite his or her physical or mental limitations. 20 C.F.R. §404.1545(a); *see Howard v. Commissioner of Social Sec.*, 276 F.3d 235, 239 (6th Cir. 2002).

19-20.) The ALJ assigned "some weight" to the opinion of Job and Family Services consulting psychologist Dr. Yee, but concluded that the severe limitations she assigned were inconsistent with the weight of the medical evidence. He assigned "less weight" to the September 21, 2011 mental residual functional capacity assessment completed by treating physician Dr. Vajen, finding the opinion that Plaintiff was markedly limited in every category involving social interaction was conclusory and not supported by the weight of the medical evidence in the record or his own treatment notes. (R. at 20.) The ALJ further noted that Plaintiff's medically determinable mental impairments could reasonably be expected to cause the alleged symptoms. He concluded, however, that Plaintiff's statements concerning the intensity, persistence, and limiting effects of these symptoms are not entirely credible. (R. at 23.)

The ALJ relied upon the VE's testimony to conclude that Plaintiff retained the RFC to perform jobs existing in significant number in the regional and national economy, including the representative jobs of laundry aide, routing clerk, and warehouse checker. He therefore concluded that Plaintiff was not disabled under the Social Security Act. (*Id.*)

V. STANDARD OF REVIEW

When reviewing a case under the Social Security Act, the Court "must affirm the Commissioner's decision if it 'is supported by substantial evidence and was made pursuant to proper legal standards.'" *Rabbers v. Comm'r of Soc. Sec.*, 582 F.3d 647, 651 (6th Cir. 2009) (quoting *Rogers v. Comm'r of Soc. Sec.*, 486 F.3d 234, 241 (6th Cir. 2007)); *see also* 42 U.S.C. § 405(g) ("[t]he findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive . . . ."). Under this standard, "substantial evidence is defined as 'more than a scintilla of evidence but less than a preponderance; it is such relevant

evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Rogers*, 486 F.3d at 241 (quoting *Cutlip v. Sec'y of Health & Hum. Servs.*, 25 F.3d 284, 286 (6th Cir. 1994)).

Although the substantial evidence standard is deferential, it is not trivial. The Court must "'take into account whatever in the record fairly detracts from [the] weight'" of the Commissioner's decision. *TNS, Inc. v. NLRB*, 296 F.3d 384, 395 (6th Cir. 2002) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951)). Nevertheless, "if substantial evidence supports the ALJ's decision, this Court defers to that finding 'even if there is substantial evidence in the record that would have supported an opposite conclusion.'" *Blakley v. Comm'r of Soc. Sec.*, 581 F.3d 399, 406 (6th Cir. 2009) (quoting *Key v. Callahan*, 109 F.3d 270, 273 (6th Cir. 1997)). Finally, even if the ALJ's decision meets the substantial evidence standard, "'a decision of the Commissioner will not be upheld where the SSA fails to follow its own regulations and where that error prejudices a claimant on the merits or deprives the claimant of a substantial right.'" *Rabbers*, 582 F.3d at 651 (quoting *Bowen v. Comm'r of Soc. Sec.*, 478 F.3d 742, 746 (6th Cir. 2007)).

VI. ANALYSIS

In her Statement of Errors, Plaintiff asserts that: 1) the ALJ erred in her analysis of medical source opinions; 2) the RFC assigned by the ALJ was not supported by substantial evidence as it pertained to Dr. Yee's opinions; and 3) the administrative record does not provide a factual basis for a finding that Plaintiff could perform other work. (ECF No. 14.) The Court will consider each of these purported errors in turn.

A. Weighing of Opinion Evidence

The ALJ must consider all medical opinions that he or she receives in evaluating a claimant's case. 20 C.F.R. § 416.927(d). The applicable regulations define medical opinions as "statements from physicians . . . that reflect judgments about the nature and severity of your impairment(s), including your symptoms, diagnosis and prognosis, what you can still do despite impairment(s), and your physical or mental restrictions." 20 C.F.R. § 416.927(a)(2).

The ALJ generally gives deference to the opinions of a treating source "since these are likely to be the medical professionals most able to provide a detailed, longitudinal picture of [a patient's] medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone . . . ." 20 C.F.R. § 416.927(d)(2); *Blakley*, 581 F.3d at 408. If the treating physician's opinion is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence in [the claimant's] case record, [the ALJ] will give it controlling weight." 20 C.F.R. § 404.1527(d)(2).

If the ALJ does not afford controlling weight to a treating physician's opinion, the ALJ must meet certain procedural requirements. *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 544 (6th Cir. 2004). Specifically, if an ALJ does not give a treating source's opinion controlling weight:

> [A]n ALJ must apply certain factors—namely, the length of the treatment relationship and the frequency of examination, the nature and extent of the treatment relationship, supportability of the opinion, consistency of the opinion with the record as a whole, and the specialization of the treating source—in determining what weight to give the opinion.

Id.

Furthermore, an ALJ must "always give good reasons in [the ALJ's] notice of determination or decision for the weight [the ALJ] give[s] your treating source's opinion." 20 C.F.R. § 416.927(d)(2). Accordingly, the ALJ's reasoning "must be 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." *Friend v. Comm'r of Soc. Sec.*, No. 09-3889, 2010 WL 1725066, at *7 (6th Cir. 2010) (internal quotation omitted). The United States Court of Appeals for the Sixth Circuit has stressed the importance of the good-reason requirement:

> "The requirement of reason-giving exists, in part, to let claimants understand the disposition of their cases," particularly in situations where a claimant knows that his physician has deemed him 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." *Snell v. Apfel*, 177 F.3d 128, 134 (2d Cir.1999). The requirement also ensures that the ALJ applies the treating physician rule and permits meaningful review of the ALJ's application of the rule. *See Halloran v. Barnhart*, 362 F.3d 28, 32–33 (2d Cir. 2004).

Wilson, 378 F.3d at 544–45. Thus, the reason-giving requirement is "particularly important when the treating physician has diagnosed the claimant as disabled." *Germany-Johnson v. Comm'r of Soc. Sec.*, 312 F. App'x 771, 777 (6th Cir. 2008) (citing *Rogers*, 486 F.3d at 242).

1. Dr. Vajen

Plaintiff asserts that the ALJ erred in the weight he assigned to Dr. Vajen's MRFC dated September 21, 2011. In the MRFC, Dr. Vajen indicated that Plaintiff was markedly limited in all areas of social interaction, except for her ability to relate to the general public and be socially appropriate, in which he opined that Plaintiff was "extremely limited." (R. at 382-384.) First, Plaintiff asserts that the ALJ's discussion of the opinion evidence was procedurally deficient because he discussed the weight he gave to the state-agency reviewing physicians prior to

discussing the weight he gave to Dr. Vajen's assessment. Plaintiff also contends that the ALJ should have provided more weight to Dr. Vajen's opinion evidence.

The Court concludes that the ALJ complied with the necessary procedural requirements in determining how much weight to assign Dr. Vajen's opinion. First, the Social Security Regulations do not require an ALJ to discuss opinion evidence in a certain order. Instead, "[d]iscretion is 'vested in the ALJ to weigh all the evidence.'" *Collins v. Comm'r*, 375 F. App'x 663, 668 (6th Cir. 2009) (quoting *Bradley v. Sec'y of Health & Human Servs.*, 862 F.2d 1224, 1227 (6th Cir. 1988)). Second, substantial evidence supports the ALJ's evaluation of the weight assigned to Dr. Vajen's opinion. The ALJ provided good reasons for discounting Dr. Vajen's opinion as conclusory and inconsistent with the objective medical evidence, as well as his own treatment notes. *See Helm v. Comm'r of Soc. Sec.*, 405 F. App'x 997, 1001 (6th Cir. 2011) (concluding that the ALJ met the "good reasons" requirement for a variety of reasons, including by noting that the treating physician's findings were "unsupported by objective medical findings and inconsistent with the record as a whole."); *Simpson v. Comm'r of Soc. Sec.*, 344 F. App'x 181, 193 (6th Cir. 2009) (concluding that the ALJ met the good reason requirement by noting that the opinion was inconsistent with the physician's treatment notes and with the record evidence). Further, the ALJ indicated that Dr. Vajen's conclusions were highly dependent upon Plaintiff's subjective complaints, but Plaintiff was not wholly credible or fully reliable. (R. at 21, 23.) Finally, the ALJ correctly noted that Dr. Vajen's statement that Plaintiff was a strong candidate for disability was not entitled to controlling weight. The degree to which an individual is capable of performing work is an issue reserved to the Commissioner. *See* 20 C.F.R. § 404.1527(d)(1) ("[The Commissioner] is responsible for making the determination or decision

about whether [the claimant] meets the statutory definition of disability. . . . A statement by a medical source that you are 'disabled' or 'unable to work' does not mean that [the ALJ] will determine that you are disabled."); *Bass v. McMahon*, 499 F.3d 506, 511 (6th Cir. 2007) (holding that the ALJ properly rejected a treating physician's opinion that the claimant was disabled because such a determination was reserved to the Commissioner.).

Substantial evidence supports the ALJ's evaluation of and weight assigned to Dr. Vajen's extreme opinion. In Dr. Vajen's treatment notes, he describes Plaintiff as "doing very well." (R. at 229.) On November 5, 2009, he describes Plaintiff as having "her usual, bubbly personality." (R. at 227.) Dr. Vajen also indicated that Plaintiff had passed her GED except for the math portion, and would "soon be gainfully employed." (R. at 231.) Similarly, the State-Agency reviewers concluded that Plaintiff did well on her medication, was forward-thinking, demonstrated the ability to set realistic goals, and was able to communicate her needs. (R. at 67-71.) Plaintiff's own self-reports indicate that she does housework, spends time with her children, and sometimes cooks dinner with her boyfriend. (R. at 46-48.) Accordingly, the Court concludes that the ALJ did not err in failing to afford greater weight to the very restrictive September 12, 2011 opinion of Dr. Vajen.

2. Dr. Yee

Plaintiff asserts that the ALJ erred by discarding the limitations about which Dr. Yee opined in her OJDFS assessment form. Specifically, Plaintiff contends that the ALJ should have afforded more weight to Dr. Yee's opinion that she was moderately limited in fourteen of the twenty assessment areas and her definition of "moderate" as 25-35% off task. (R. at 366-67.)

Substantial evidence also supports the ALJ's treatment of and weight afforded to Dr.

Yee's opinion. Dr. Yee's opinion is not entitled to controlling weight because she does not qualify as Plaintiff's treating physician. As set forth above, to qualify as a treating source, the physician must have an "ongoing treatment relationship" with the claimant. 20 C.F.R. § 404.1502. This is because "the rationale of the treating physician doctrine simply does not apply" where a physician issues an opinion after a single examination. *Barker v. Shalala*, 40 F.3d 789, 794 (6th Cir. 1994). Here, as the ALJ pointed out, Dr. Yee saw Plaintiff only once. (R. at 20.) The ALJ was therefore required only to "consider factors including the length and nature of the treatment relationship, the evidence that the physician offered in support of her opinion, how consistent the opinion is with the record as a whole, and whether the physician was practicing in her specialty." *Ealy v. Comm'r of Soc. Sec.*, 594 F.3d 504, 514 (6th Cir. 2010) (citing 20 C.F.R. § 404.1527(d)).

The record demonstrates that the ALJ considered the above factors with respect to Dr. Yee's opinion as a whole and with respect to her definition of "moderate." First, the ALJ indicated that Plaintiff saw Dr. Yee only once, that her opinion was "highly dependent upon the claimant's report of symptoms and limitations during the evaluation," and that Plaintiff was not wholly credible. (R. at 20.) The ALJ also properly supported his decision to discount Dr. Yee's findings by indicating that the severe limitations about which she opined were inconsistent with the weight of the medical evidence.

An ALJ is entitled to discount a medical opinion based on a claimant's subjective complaints that are not supported by objective medical evidence. *See Ferguson v. Comm'r of Soc. Sec.*, 628 F.3d 269, 273-74 (6th Cir. 2010) (concluding that the ALJ did not err in rejecting a medical opinion based on the claimant's subjective complaints, which were not supported by

objective medical evidence); *Braun v. Comm'r of Soc. Sec.*, No. 1:12-cv-12, 2013 WL 443542, at *10 (S.D. Ohio Feb. 5, 2013) ("The ALJ is not required to accept medical opinions from mental health providers which are based on plaintiff's subjective complaints that are not supported by clinical observations."); *Lunsford v. Astrue*, No. 2:11-cv-308, 2012 WL 1309265, at *5 (S.D. Ohio April 15, 2012.) (concluding that "if an ALJ finds . . . subjective reports to be unworthy of complete belief, any medical opinion based on such complaints may also be discounted."); *Holmes v. Astrue*, No. 3:08-cv-2801, 2010 WL 1258080, at *8 (N.D. Ohio Mar. 26, 2010)(concluding that, where the ALJ finds a claimant to not be credible, the ALJ is entitled to "reasonably attribute less weight" to a medical opinion based in large part on the claimant's subjective report of symptoms). Here, for these reasons, the ALJ properly supported his decision to discount Dr. Yee's opinion and his conclusion is supported by substantial evidence.

Plaintiff's assertion that the ALJ was "playing doctor" by discounting Dr. Yee's definition of the term "moderate" is not well taken. (Statement of Errors 10-11, ECF No. 14.) "'ALJs must not succumb to the temptation to play doctor and make their own independent medical findings.'" *Simpson v. Comm'r of Soc. Sec.*, 344 F. App'x 181, 194 (6th Cir. 2009) (quoting *Rohan v. Chater*, 98 F.3d 966, 970 (7th Cir. 1996)); *see also Isaacs v. Astrue*, No. 1:08–CV–00828, 2009 WL 3672060, at *10 (S.D. Ohio Nov. 4, 2009) (holding that an "ALJ may not interpret raw medical data in functional terms") (internal quotations omitted). Here, however, the ALJ was not interpreting raw medical data and making medical findings. Instead, the ALJ concluded that the nonexertional limitations Dr. Yee imposed, including her finding that Plaintiff would be off-task 25 to 35% of the time, were inconsistent with the record as a whole. As addressed above, the ALJ was not required to afford significant weight to Dr. Yee's opinion as a

non-treating physician. Substantial evidence therefore supports the ALJ's decision to afford less weight to Dr. Yee's opinion.

B. Mental Residual Functional Capacity

Plaintiff asserts that the ALJ's hypothetical question to the VE was not reflected correctly in Plaintiff's RFC. Specifically, Plaintiff points out that according to the hearing transcript the ALJ posed the following hypothetical to the VE: "There are no exertional limitations but due to mental impairments the hypothetical individual *can't* understand and remember simple instructions . . . ." (Statement of Errors 17, ECF No. 14) (emphasis added.) The VE responded that a hypothetical individual with those limitations would be capable of performing unskilled positions such as a laundry aid, routing clerk, or warehouse checker. (R. at 57.) In the RFC provided by the ALJ, however, he describes the limitation as "*understand* and remember simple instructions . . . ." (R. at 18)(emphasis added.) Plaintiff maintains that, because of this discrepancy, the ALJ's RFC assessment is not supported by substantial evidence.

A plaintiff's RFC "is defined as the most a [plaintiff] can still do despite the physical and mental limitations resulting from her impairments." *Poe v. Comm'r of Soc. Sec.*, 342 F. App'x 149, 155 (6th Cir. 2009); *see also* 20 C.F.R. §§ 404.1545(a), 416.945(a). The determination of RFC is an issue reserved to the Commissioner. 20 C.F.R. §§ 404.1527(e), 416.927(e). Nevertheless, substantial evidence must support the Commissioner's RFC finding. *Berry v. Astrue*, No. 1:09CV000411, 2010 WL 3730983, at *8 (S.D. Ohio June 18, 2010).

An ALJ is required to explain how the evidence supports the limitations that he or she set forth in the claimant's RFC:

> The RFC assessment must include a narrative discussion describing how the evidence supports each conclusion, citing specific medical facts (e.g., laboratory

> findings) and nonmedical evidence (e.g., daily activities, observations). In assessing RFC, the adjudicator must discuss the individual's ability to perform sustained work activities in an ordinary work setting on a regular and continuing basis (i.e., 8 hours a day, for 5 days a week, or an equivalent work schedule), and describe the maximum amount of each work-related activity the individual can perform based on the evidence available in the case record. The adjudicator must also explain how any material inconsistencies or ambiguities in the evidence in the case record were considered and resolved.

S.S.R. 96–8p, 1996 WL 374184, at *6–7 (internal footnote omitted).

"Substantial evidence may be produced through reliance on the testimony of a vocational expert in response to a 'hypothetical' question, but only 'if the question accurately portrays [plaintiff's] individual physical and mental impairments.'" *Varley v. Sec'y of Health & Human Servs.*, 820 F.2d 777, 779 (6th Cir. 1987) (quoting *Podeworny v. Harris*, 745 F.2d 210, 218 (3d Cir. 1984)). Where the hypothetical posited to the VE is more favorable to Plaintiff than the limitations included in the RFC, remand is inappropriate where the RFC is supported by substantial evidence. *Pasco v. Comm'r of Soc. Sec.*, 127 F. App'x 828, 845 (6th Cir. 2005) (affirming the Commissioner's decision where the hypothetical posed to the VE was more favorable to plaintiff than the one included in the RFC); *Beverly v. Astrue*, No. 1:11-cv-41, 2012 WL 395081, at *4 (S.D. Ohio Feb. 7, 2012) (concluding that, where the hypothetical question to the VE was more favorable to plaintiff, the RFC should be affirmed because it was substantially supported by the record and "clear that there are jobs that exist in significant numbers that Plaintiff can perform based upon the testimony of the vocational expert.").

Substantial evidence supports the ALJ's RFC assessment. First, the hypothetical the ALJ posed to the VE was more favorable to Plaintiff than the restrictions he ultimately included in her RFC. Specifically, the ALJ asked the VE to consider someone who could not understand simple

instructions; the ALJ's assessment of Plaintiff's RFC indicated she could understand simple instructions. Despite this variance, the VE testified that the hypothetical individual would be capable of performing work as a laundry aide, a routing clerk, and a warehouse checker. Thus, based on the VE's testimony, it is clear that jobs exist in significant numbers that Plaintiff can perform. Further, the ALJ pointed out that State-Agency reviewers, whose opinions he afforded great weight, opined that Plaintiff was "not significantly limited" in her ability to understand and remember simple instructions." (R. at 19-20, 67, 77, 91, and 105.) The ALJ further supported his RFC by noting that Plaintiff reported she was in job training. (R. at 23.) Additionally, the ALJ noted that Dr. Yee found that Plaintiff "possessed normal thought content and processes" which was consistent with the record as a whole. (R. at 23.) Finally, the ALJ opined that the record is "replete with documentation that her memory, mentation, attention, orientation and cognition were normal and intact." (*Id.*) Substantial evidence supports the ALJ's conclusions with respect to Plaintiff's RFC.

VII. DISPOSITION

From a review of the record as a whole, the Court concludes that substantial evidence supports the ALJ's decision denying benefits. Accordingly, Plaintiff's Statement of Errors is **OVERRULED**, and the Commissioner of Social Security's decision is **AFFIRMED**.

IT IS SO ORDERED.

Date: August 28, 2014

/s/ *Elizabeth A. Preston Deavers*
Elizabeth A. Preston Deavers
United States Magistrate Judge