IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

SHIELA D. HESS,	:	
Plaintiff,	:	Case No. 3:14cv00401
vs.	:	District Judge Walter Herbert Rice
CAROLYN W. COLVIN, Commissioner of the Social Security Administration,	:	Chief Magistrate Judge Sharon L. Ovington
Defendant.	:	

REPORT AND RECOMMENDATIONS[1]

I. Introduction

Plaintiff Shiela D. Hess brings this case challenging the Social Security Administration's denial of her applications for Disability Insurance Benefits and Supplemental Security Income. She asserted in her applications that she was under a benefits-qualifying disability, starting on February 28, 2010, due (in part) to mental-health problems. (Doc. #9, *PageID* #251). As the evidence developed, it became apparent that Plaintiff's health problems included affective disorder and anxiety disorder. Administrative Law Judge Irma J. Flottman denied Plaintiff's applications mainly because she found that Plaintiff's impairments did not constitute a benefits-qualifying disability. *Id*. at 53-65.

[1] Attached hereto is NOTICE to the parties regarding objections to this Report and Recommendations.

The case is presently before the Court upon Plaintiff's Statement of Specific Errors (Doc. #10), the Commissioner's Memorandum in Opposition (Doc. #13), Plaintiff's Reply (Doc. #14), the administrative record (Doc. #9), and the record as a whole. Plaintiff seeks an Order remanding this matter for benefits or, alternatively, further administrative proceedings. The Commissioner seeks an Order affirming the ALJ's decision.

II. Background

A. Plaintiff and Her Testimony

On the date Plaintiff's claimed disability began, she was 37 years old. The Social Security Administration therefore considered her to be a "younger person." *See* 20 C.F.R. §§ 404.1563(c), 416.963(c).[2] She has a "limited" education. 20 C.F.R. § 404.1564(b)(3).

Plaintiff focuses her challenge to the ALJ's assessment of her mental-work abilities and limitations. During the ALJ's hearing, Plaintiff testified that her long-term physician, Dr. Aziz-Khan,[3] was treating her for bipolar disorder. Her symptoms include crying a lot, getting agitated, and difficulty being around other people. She also experiences depression. She takes numerous prescription medications including, in part, Trazadone, Xanax, Lithium, and Risperdal plus medications for chronic obstructive pulmonary disease. Plaintiff explained that the medications cause fatigue and put her "down to where like I'm lazy and

[2] The remaining citations will identify the pertinent regulations for disability insurance benefits with full knowledge of the corresponding regulations for supplemental security income.

[3] The parties' respective briefs refer to Dr. Khan and Dr. Aziz-Kahn. There is no dispute in the record that Dr. Kahn or Dr. Aziz-Kahn are the same physician.

can't motivate." (Doc. #9, *PageID* #79). Plaintiff explained that her difficulty being around others is due to her lack of trust, and she knows people are talking about her. *Id*. at 80. She went to counseling once, about a year before the ALJ's hearing, but she did not return after the counselor told her that everything was her fault. She has difficulty getting along with family members and has a lot of family problems.

Plaintiff does not belong to any organizations. She does not attend church. Once a month she copies a recipe from a magazine. She watches television a little bit, every evening. She has some difficulty focusing on the programs she watches because she'll "start zoning out ...," *id*. at 89, and can't remember what people say.

B. Medical Evidence

Dr. Aziz-Khan completed several assessments regarding Plaintiff's mental residual functional capacity, for the purpose of disability determination by the Ohio Department of Jobs and Family Services. The first was in early March 2010. Dr. Aziz-Khan check-marked boxes to indicate her opinion that Plaintiff had marked limitation in 11 work-related areas. *Id*. at 317. Fourteen months later, in May 2011, Dr. Aziz-Khan again completed the same form but this time identified only 2 areas of marked limitation. Dr. Aziz-Khan opined that Plaintiff was markedly limited (1) in her ability to accept instructions and criticism from supervisors, and (2) her ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods. *Id*. at 316.

In November 2011, Dr. Aziz-Khan completed the same form and again found Plaintiff to have some markedly limited mental-work abilities. Dr. Aziz-Khan believed that Plaintiff was markedly limited in 7 work-related abilities, and moderately limited in an additional 7 areas. *Id*. at 360.

Plaintiff's long-term treating physician answered written interrogatories in January 2011. She diagnosed Plaintiff with depression and panic attacks. She noted that Plaintiff was taking Xanax. She indicated that Plaintiff was responding "Great" to prescribed therapy, although she did not elaborate further. *Id*. at 313. And she noted that Plaintiff was not having any issues of compliance that interfere with her treatment.

A detailed description of Plaintiff's remaining medical records and medical-opinions is unnecessary because the undersigned has reviewed the entire administrative record and because Plaintiff and the ALJ have discussed the pertinent records in detail. The Commissioner, moreover, relies on the ALJ's decision.

III. "Disability" Defined and the ALJ's Decision

To be eligible for Disability Insurance Benefits or Supplemental Security Income a claimant must be under a "disability" within the definition of the Social Security Act. *See* 42 U.S.C. §§ 423(a), (d), 1382c(a). The definition of the term "disability" is essentially the same for both DIB and SSI. *See Bowen v. City of New York*, 476 U.S. 467, 469-70 (1986). 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*, 476 U.S. at 469-70 (1986).

To determine whether Plaintiff was under a benefits-qualifying disability, ALJ Flottman applied the Social Security Administration's 5-Step sequential evaluation procedure. *See* 20 C.F.R. § 404.1520(a)(4). Her more significant findings began at Step 2 where she described Plaintiff's severe impairments as "chronic obstructive pulmonary disease..., asthma, left knee arthopathies, affective disorder, and anxiety disorder." (Doc. #9, *PageID* #55). At Step 3, the ALJ concluded that Plaintiff's impairments or combination of impairments did not meet or equal the criteria in the Commissioner's Listing of Impairments.

The ALJ assessed at Step 4 Plaintiff's mental residual functional capacity or the most she could do in a work setting despite her impairments.[4] Doing so, the ALJ found Plaintiff "limited to simple, routine, and repetitive tasks; no interaction with the public; and only occasional interaction with coworkers." *Id*. at 58. The ALJ also found that Plaintiff had no past relevant work experience.

At Step 5, the ALJ found that Plaintiff could perform a significant number of jobs that exist in the national economy. *Id*. at 63-64. In the end, the ALJ's finding at Step 5 led her to ultimately conclude that Plaintiff was not under a benefits-qualifying disability.

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[4] *See* 20 C.F.R. §404.1545(a); *see also Howard v. Commissioner of Social Sec*., 276 F.3d 235, 239 (6th Cir. 2002).

IV. Judicial Review

The Social Security Administration's denial of Plaintiff's applications for benefits – here, embodied in ALJ Flottman's decision – is subject to judicial review along two lines: whether the ALJ applied the correct legal standards and whether substantial evidence supports the ALJ's findings. *Blakley v. Comm'r of Social Sec.*, 581 F.3d 399, 405 (6th Cir. 2009); *see Bowen v. Comm'r of Social Sec*., 478 F3d 742, 745-46 (6th Cir. 2007). Reviewing the ALJ's legal criteria for correctness may result in reversal even if the record contains substantial evidence supporting the ALJ's factual findings. *Rabbers v. Comm'r of Social Sec.*, 582 F.3d 647, 651 (6th Cir. 2009); *see Bowen*, 478 F3d at 746.

The substantial-evidence review does not ask whether the Court agrees or disagrees with the ALJ's factual findings or whether the administrative record contains evidence contrary to those factual findings. *Rogers v. Comm'r of Social Sec*., 486 F.3d 234, 241 (6th Cir. 2007); *see Her*, 203 F.3d at 389-90. Instead, substantial evidence supports the ALJ's factual findings when "a 'reasonable mind might accept the relevant evidence as adequate to support a conclusion.'" *Blakley*, 581 F.3d at 406 (quoting *Warner v. Comm'r of Social Sec.*, 375 F.3d 387, 390 (6th Cir. 2004)). Substantial evidence consists of "more than a scintilla of evidence but less than a preponderance..." *Rogers*, 486 F.3d at 241.

V. Discussion

Plaintiff contends that the ALJ's decision should be reversed because substantial

evidence does not support her assessment of Plaintiff's mental residual functional capacity. She maintains that the ALJ violated the treating physician rule in her evaluation of Dr. Aziz-Kahn's opinions and failed to provide good reasons for rejecting Dr. Aziz-Kahn's opinions. Plaintiff further maintains that the work limitations Dr. Aziz-Kahn set corresponded to Dr. Aziz-Khan's personal examinations of Plaintiff and were consistent with mental-health-treatment notes. And, Plaintiff argues that the ALJ erred in relying on non-examining medical source opinions, which essentially left Dr. Aziz-Kahn's opinions unrefuted.

The Commissioner opposes Plaintiff's arguments and concludes that substantial evidence supports the ALJ's review of the medical source opinions.

Social security regulations recognize several different types of medical sources: treating physicians and psychologists, nontreating/examining physicians and psychologists, and nontreating/record-reviewing physicians and psychologists. *See* 20 C.F.R. § 404.1527(c), (e). "The regulations provide progressively more rigorous tests for weighing opinions as the ties between the source of the opinion and the individual become weaker." Social Security Ruling No. 96–6p, 1996 WL 374180, at *2 (July 2, 1996)). The strongest ties potentially arise between a treating-medical source and his or her patients. Given this, the treating physician rule requires ALJs to apply controlling weight to a treating-medical source's opinion when the opinion is (1) "well supported by medically acceptable clinical and laboratory diagnostic techniques," and (2) "is not inconsistent with other substantial evidence in [a claimant's] case record." 20 C.F.R. §404.1527(c)(2)); *see Gentry v. Comm'r*

of Soc. Sec., 741 F.3d 708, 723 (6th Cir. 2014). If both conditions do not exist, the treating source's opinions are not controlling. The treating source's opinions, however, might still be due dispositive weight because the ALJ must continue to weigh the opinion under additional factors, "including the length, frequency, nature, and extent of the treatment relationship; the supportability of the physician's conclusions; the specialization of the physician; and any other relevant factors." *Gentry*, 741 F.3d at 723 (citation omitted). These factors likewise apply to the ALJ's review of a nontreating source's opinions. 20 C.F.R. §404.1527(e); *see* Soc. Sec. Rul. 96-6P, 1996 WL 374180 at *2.

The ALJ placed "little weight" on the opinions provided by Plaintiff's treating physician Dr. Aziz-Kahn about Plaintiff's mental-work limitations for a number of reasons. She first noted that Dr. Aziz-Kahn is an "internist unqualified to offer an opinion on [Plaintiff's] level of mental functioning." (Doc. #9, *PageID* #63). She then found that Dr. Aziz-Kahn's opinion about Plaintiff's marked limitations are completely inconsistent with Dr. Aziz-Kahn's indication (in January 2011) that Plaintiff's response to Xanax was "great." *Id*.; *see PageID* # 313. Next, the ALJ observed that the marked limitations Dr. Aziz-Khan identified are "out of proportion to the preponderance of the objective mental status findings ...." *Id*. at 63. Lastly, the ALJ gave little weight to Dr. Aziz-Kahn's opinion that Plaintiff was unemployable because the disability determination is reserved to the Commissioner, and the record did not indicate that Dr. Khan was qualified to offer an opinion about Plaintiff's employability. *Id*.

The ALJ correctly described the legal criteria applicable to weighing medical source opinions, including the standards applicable under the treating physician rule and the need to apply additional factors when the treating physician rule does not apply. The ALJ then accurately identified the applicable factors. *See* Doc. #9, *PageID* #62. Despite this, several of the reasons the ALJ provided in support of her decision to place little weight on Dr. Aziz-Kahn's opinions are problematic.

Plaintiff points out that Dr. Aziz-Kahn was a Board Certified specialist in family medicine, not an "internist" as the ALJ found. Dr. Aziz-Kahn's status as a family-medicine specialist qualified her to provide an opinion about Plaintiff's mental work limitations, rather than unqualified as the ALJ believed. The American Board of Family Medicine, the body responsible for certifying family-medicine physicians, describes family medicine as "the medical specialty that provides continuing, comprehensive health care for the individual and family. It is a specialty in breadth that integrates the biological, clinical and behavioral sciences...." *See* American Board of Family Medicine, https://www.theabfm.org/index.aspx (search public database: "What is family medicine?") (emphasis added). Given the inclusion of behavioral sciences in breadth of this medical specialty, substantial evidence does not support the ALJ's decision to place little weight on Dr. Aziz-Khan's opinions on the ground she is an internist "unqualified to offer an opinion about [Plaintiff's] mental functioning." (Doc. #9, *PageID* #63).

Despite this problem, substantial evidence supports the ALJ's decision to place little

weight on Dr. Aziz-Kahn's opinions about Plaintiff's markedly limited mental-work abilities. Dr. Aziz-Kahn provided no explanation for why she believed Plaintiff was markedly limited in her mental-work abilities. Instead, her opinions appear only in the check-marks she placed in boxes on the forms she completed. *See id*. at 273-74, 360. This problem triggers the supportability factor, which provides, in part, "The better an explanation a source provides for an opinion, the more weight [an ALJ] will give that opinion." 20 C.F.R. §404.1527(c)(3).

Plaintiff contends that Dr. Aziz-Khan's treatment notes support her opinions about Plaintiff's mental-work abilities. Careful review of the notes, however, reveals few references to the type of signs and symptoms needed to support an opinion about mental-work limitations. *See* Doc. #9, *PageID* #s 376-82. Instead, the treatment notes frequently contain mere diagnoses, such as depression, panic attacks, and "bipolar" without indicating the severity of these mental-health problems or the signs or symptoms that would support Dr. Aziz-Khan's opinion held about the severity of Plaintiff's mental-health problems. *See Simons v. Barnhart*, 114 Fed. Appx. 727, 733-34 (6th Cir. 2004); *see also Landsaw v. Secretary of Health and Human Services,* 803 F.2d 211, 213 (6th Cir. 1986); *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.").

Substantial evidence also supports the ALJ's application of the "consistency" factor to justify placing little weight on Dr. Aziz-Kahn's opinions about Plaintiff's mental-work

functioning. This is because the information and answers Dr. Aziz-Kahn provided (in January 2011) to certain written questions were inconsistent with the marked mental-work limitations she found applicable to Plaintiff. Dr. Aziz-Khan wrote, "Great," when asked to describe "the prescribed therapy and [Plaintiff's] response to therapy." (Doc. #9, *PageID* #313). Dr. Aziz-Khan, moreover, provided only the diagnoses of depression and panic attacks. She declined to provide any details in support of these diagnoses and instead merely wrote "same as above," referring to the diagnoses themselves. *Id*. at 312. Perhaps most significantly, it appears that Dr. Aziz-Khan wrote the symbol "∅," used in mathematics for the integer zero,[5] and used in this context for the word "none." *Id*. at 313. Even if this misreads the symbol Dr. Aziz-Khan used, she otherwise declined to provide any response when asked to describe any limitations Plaintiff's impairments impose on her ability to perform sustained work activity. *Id*. at 313.

Plaintiff argues that records from Consolidated Care are consistent with Dr. Aziz-Kahn's opinions. The information in these records were compiled on one occasion in July 2011 by a licensed social worker. *Id*. at 318-32. To the extent these records supported or were consistent with Dr. Aziz-Kahn's conclusory opinions, the records document Plaintiff's condition on only 1 day. The records are, therefore, minimally probative of Plaintiff's condition over an extended period of time. In addition, the presence of such evidence does not negate or override the substantial evidence supporting the ALJ's other

[5] Use of "∅" avoids confusing the integer zero for the letter "O."

reasons for discounting Dr. Aziz-Kahn's opinions. *Foster v. Halter*, 279 F.3d 348, 353 (6th Cir. 2001) ("we must defer to an agency's decision 'even if there is substantial evidence in the record that would have supported an opposite conclusion, so long as substantial evidence supports the conclusion reached by the ALJ.") (citation omitted)).

Relying on *Gayheart*, 710 F.3d at 376-77, Plaintiff contends that the ALJ erred by applying more rigorous scrutiny to Dr. Aziz-Kahn's opinions than to the opinions of state agency psychologist Dr. Bergstrom. This contention lacks merit because *Gayheart* is distinguished from the present case. In *Gayheart*, the ALJ rejected the opinions of the plaintiff's treating physicians for alleged internal inconsistencies and for being inconsistent with the record as a whole while at the same time accepting the opinions of the state agency physicians that suffered from the same flaws. This was a problem, the Court of Appeals reasoned, because evidence conflicting with the treating source's opinions "must consist of more than the medical opinions of the nontreating and nonexamining doctors. Otherwise the treating-physician rule would have no practical force because the treating source's opinion would have controlling weight only when the other sources agreed with that opinion." *Gayheart*, 710 F.3d at 377. In the present case, unlike *Gayheart*, the ALJ did not reject Dr. Aziz-Kahn's opinions only because they were inconsistent with the nontreating and nonexamining physicians' opinions. The ALJ instead provided other reasons, which substantial evidence supports, as explained above. As a result, the ALJ's decision in this case is distinguished from the ALJ's decision in *Gayheart*, and the ALJ

here did not violate the rule enunciated in *Gayheart*.

Plaintiff contends that the state-agency psychologist's opinions were outdated and the ALJ committed reversible error by relying on them in violation of Soc. Sec. R. 96-6p, 1996 WL 374180 (July 2, 1996). Plaintiff reasons that under Ruling 96-6p, for a state-agency-medical source's opinions to receive greater weight than a treating source's opinions, the record reviewed by the state-agency source must provide more detailed and comprehensive information than that available to the treating source. Plaintiff, however, reads too much into Ruling 96-6p, which states in pertinent part:

> In appropriate circumstances, opinions from State agency medical and psychological consultants and other program physicians and psychologists may be entitled to greater weight than the opinions of treating or examining sources. For example, the opinion of the State agency medical or psychological consultant ... may be entitled to greater weight than a treating source's medical opinion if the State agency medical or psychological consultant's opinion is based on a review of a complete case record that includes a medical report from a specialist in the individual's particular impairment which provides more detailed and comprehensive information than what was available to the individual's treating source.

1996 WL 374180 at *3. This example does not establish the principle that Plaintiff's identify; it does not say that a nontreating or nonexamining medical source's opinions are given more weight only when they review a more complete record than the record before the treating source. The example, merely sets a permissive example – "may be entitled to greater weight ..." – for crediting a nontreating or nonexamining source's opinions over a treating source's opinions. Ruling 96-6p, moreover, explains that opinions by state-agency-medical sources are evaluated by the factors set forth in the regulations, 20 C.F.R.

§404.1527, most notably with regard to a plaintiff's residual functional capacity. 1996 WL 374180 at *4. As a result, the completeness of the record is one of many factors used to weigh state-agency source's opinions.

Accordingly, Plaintiff's Statement of Errors lacks merit.

IT IS THEREFORE RECOMMENDED THAT:

1. The Commissioner's non-disability determination be affirmed; and

2. The case be terminated on the docket of this Court.

December 10, 2015

Sharon L. Ovington
Chief United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within **FOURTEEN** days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(d), this period is extended to **SEVENTEEN** days because this Report is being served by one of the methods of service listed in Fed. R. Civ. P. 5(b)(2)(C), (D), (E), or (F). Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendation is based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within **FOURTEEN** days after being served with a copy thereof.

Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn,* 474 U.S. 140 (1985); *United States v. Walters,* 638 F.2d 947, 949-50 (6th Cir. 1981).