

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

HEATHER ARY,	:	
Plaintiff,	:	Case No. 3:16-cv-102
v.	:	JUDGE WALTER H. RICE
NANCY A. BERRYHILL,	:	MAGISTRATE JUDGE
Acting Commissioner of Social	:	SHARON L. OVINGTON
Security,	:	
Defendant.	:	

DECISION AND ENTRY REJECTING REPORT AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE (DOC. #13), AND SUSTAINING OBJECTIONS OF PLAINTIFF HEATHER ARY (DOC. #14) THERETO; JUDGMENT TO BE ENTERED IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, REVERSING THE COMMISSIONER’S DECISION THAT PLAINTIFF WAS NOT DISABLED AND, THEREFORE, NOT ENTITLED TO BENEFITS UNDER THE SOCIAL SECURITY ACT, AND REMANDING THE CAPTIONED CAUSE TO THE COMMISSIONER UNDER THE FOURTH SENTENCE OF 42 U.S.C. § 405(g) FOR FURTHER PROCEEDINGS; TERMINATION ENTRY

Plaintiff Ronald Greene (“Plaintiff”) has brought this action pursuant to 42 U.S.C. § 405(g) to review a decision of the Defendant Nancy A. Berryhill, Acting Commissioner of the Social Security Administration (“Commissioner”), denying Plaintiff’s application for Social Security disability benefits. On April 26, 2017, Magistrate Judge Sharon L. Ovington filed a Report and Recommendations, Doc. #13, recommending that the Commissioner’s decision that Plaintiff was not disabled and, therefore, not entitled to benefits under the Social Security Act (“Act”), 42 U.S.C. § 301 *et seq.*, be affirmed. Based upon reasoning and citations of authority set forth below, as well as upon a

thorough *de novo* review of this Court's file, including the Administrative Transcript, Doc. #5, and a thorough review of the applicable law, this Court REJECTS the Report and Recommendations, Doc. #13, and SUSTAINS Plaintiff's Objections, Doc. #14 to said judicial filing. The Court, in so doing, orders the entry of judgment in favor of Plaintiff and against the Commissioner, reversing the decision of the Commissioner that Plaintiff was not disabled and, therefore, not entitled to benefits under the Act, as not supported by substantial evidence, and remanding the matter to the Commissioner under the fourth sentence of 42 U.S.C. § 405(g) for further proceedings consistent with this Entry.

In reviewing the Commissioner's decision, the Magistrate Judge's task is to determine if that decision is supported by "substantial evidence." 42 U.S.C. § 405(g). Under 28 U.S.C. § 636(b)(1)(C), this Court, upon objections being made to the Magistrate Judge's Report and Recommendations, is required to make a *de novo* review of those recommendations of the report to which objection is made. This *de novo* review, in turn, requires this Court to re-examine all the relevant evidence, previously reviewed by the Magistrate Judge, to determine whether the findings "are supported by substantial evidence." *Valley v. Comm'r of Soc. Sec.*, 427 F.3d 388, 390 (6th Cir. 2005). This Court's sole function is to determine whether the record as a whole contains substantial evidence to support the Commissioner's decision. The Commissioner's findings must be affirmed if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971) (quoting *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed.2d 126 (1938)). "Substantial evidence means more than a mere scintilla, but only so much

as would be required to prevent a directed verdict.”¹ *Foster v. Bowen*, 853 F.2d 483, 486 (6th Cir. 1988). To be substantial, the evidence “must do more than create a suspicion of the existence of the fact to be established. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.” *LeMaster v. Sec’y of Health & Human Servs.*, 802 F.2d 839, 840 (6th Cir. 1986) (quoting *N.L.R.B. v. Columbian Enameling and Stamping Co.*, 306 U.S. 292, 300, 59 S.Ct. 501, 83 L.Ed. 660 (1939)).

In determining “whether there is substantial evidence in the record . . . we review the evidence in the record taken as a whole.” *Wilcox v. Sullivan*, 917 F.2d 272, 276-77 (6th Cir. 1980) (citing *Allen v. Califano*, 613 F.2d 139, 145 (6th Cir. 1980)). However, the Court “may not try the case *de novo*[:] nor resolve conflicts in evidence[:] nor decide questions of credibility.” *Jordan v. Comm’r of Soc. Sec.*, 548 F.3d 417, 422 (6th Cir. 2008) (quoting *Garner v. Heckler*, 745 F.2d 383, 387 (6th Cir. 1984)). “The findings of the Commissioner are not subject to reversal merely because there exists in the record substantial evidence to support a different conclusion.” *Buxton v. Halter*, 246 F.3d 762, 772 (6th Cir. 2001). Rather, if the Commissioner’s decision “is supported by substantial evidence, then we must affirm the [Commissioner’s] decision[,] even though as triers of fact we might have arrived at a different result.” *Elkins v. Sec’y of Health and Human Servs.*, 658 F.2d 437, 439 (6th Cir. 1981) (citing *Moore v. Califano*, 633 F.3d 727, 729 (6th Cir. 1980)).

¹ Now known as a “Judgment as a Matter of Law.” Fed. R. Civ. P. 50.

In addition to the foregoing, in ruling as aforesaid, this Court makes the following, non-exclusive, observations:

1. Plaintiff's treating physician, Penny Hogan, M.D., "completed forms for the [S]tate of Ohio Department of Job and Family Services in 2011 and 2012 in which she opined that [Plaintiff] was unable to perform work-related activities on a full-time basis[.]" Doc. #5-2, PAGEID #52 (citations omitted). The ALJ assigned "little weight" to Dr. Hogan's opinion, concluding that a finding of disability was not supported by her own treatment records, and noting that Dr. Hogan did not cite any other medical source in support of her conclusions. *Id.*

Plaintiff objects to the Magistrate Judge's conclusion that the ALJ's weighing of Dr. Hogan's opinion was proper. Doc. #14, PAGEID #898; *see also* Doc. #13, PAGEID #894 ("Dr. Hogan's missing explanations and lack of objective supporting evidence constitute a sound basis for discounting her opinions."). Plaintiff argues that Dr. Hogan's conclusion was consistent with the limitations opined by Bobbie Fussichen, CNS, and Stephen Halmi, Psy.D., the Commissioner's examining psychologist, *id.*, PAGEID #899 (citing Doc. #5-7, PAGEID #366-69; Doc. #5-8, PAGEID #636-41), and that consistency dictates that Dr. Hogan's opinion be given controlling weight. *Id.*, PAGEID #900.

The Magistrate Judge concluded that, "[a]t best for Plaintiff, these records [from Ms. Fussichen and Dr. Halmi] constitute evidence detracting from the ALJ's assessment of her work abilities and limitations[.]" and that such evidence "is insignificant given the significant problems in Dr. Hogan's opinions and in the face of substantial evidence

supporting the ALJ's reasons for discounting Dr. Hogan's opinions." Doc. #13, PAGEID #895 (citing *Blakley v. Comm'r of Soc. Sec.*, 581 F.3d 399, 406) (6th Cir. 2009)). Yet, the ALJ did not even mention Ms. Fussichen's examination of Plaintiff anywhere in her opinion, and while she reproduced a block quote from Dr. Halmi's report, Doc. #5-2, PAGEID #46, the ALJ does not explain how, despite Dr. Halmi opining that "her psychological symptoms are severe and cause a major impairment in her daily functioning[.]" *id.*, she could reasonably conclude that, as to Dr. Hogan's opinion, "there is no objective evidence to support [Plaintiff's] assessed limitations." *Id.*, PAGEID #52. In sum, the ALJ did not build a logical bridge between the evidence of record and her conclusion that Dr. Hogan's opinion is entitled to little weight. Accordingly, the ALJ's finding of non-disability is not supported by substantial evidence, and must be reversed. *Daniel v. Colvin*, No. 3:15-cv-126, 2016 WL 4467561, at * 2 (S.D. Ohio Aug. 23, 2016) (Rice, J.).

2. The ALJ's decision discussed the opinions of other treating, examining and consulting sources, several of which could support a finding of non-disability. Doc. #5-2, PAGEID #45-53 (citations omitted). As "[a] judicial award of benefits is proper only where the proof of disability is overwhelming or where the proof of disability is strong and evidence to the contrary is lacking," *Faucher v. Sec'y of Health & Human Servs.*, 17 F.3d 171, 176 (6th Cir. 1994) (emphasis added), remand for further proceedings, rather than an award of benefits, is appropriate.

WHEREFORE, based upon the aforesaid, this Court rejects the Report and Recommendations of the United States Magistrate Judge, Doc. #13, and sustains Plaintiff's Objections to said judicial filing. Doc. #14. Judgment shall enter in favor of Plaintiff and against the Defendant Commissioner, reversing the decision of the Defendant Commissioner that Plaintiff was not disabled and, therefore, not entitled to benefits under the Act, and remanding the captioned cause to the Defendant Commissioner, pursuant to the fourth sentence of 42 U.S.C. § 405(g), for further proceedings. Upon remand, the Commissioner must determine whether Dr. Hogan's opinion is consistent with other evidence of record, including but not limited to the opinions of Ms. Fussichen and Dr. Halmi, and if so, whether Dr. Hogan's opinion is entitled to controlling weight. 20 C.F.R. § 404.1527(c)(2).

The captioned case is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

Date: July 25, 2017



WALTER H. RICE
UNITED STATES DISTRICT JUDGE