

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON

YONEST L. GIBSON,

Plaintiff,

Case No. 3:17-cv-210

vs.

COMMISSISONER OF SOCIAL SECURITY,

District Judge Thomas M. Rose

Magistrate Judge Michael J. Newman

Defendant.

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**REPORT AND RECOMMENDATION<sup>1</sup> THAT: (1) THE ALJ'S NON-DISABILITY FINDING BE FOUND SUPPORTED BY SUBSTANTIAL EVIDENCE, AND AFFIRMED; AND (2) THIS CASE BE CLOSED**

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This is a Social Security disability benefits appeal. At issue is whether the Administrative Law Judge (“ALJ”) erred in finding Plaintiff not “disabled” and therefore unentitled to Disability Insurance Benefits (“DIB”). This case is before the Court upon Plaintiff’s Statement of Errors (doc. 8), the Commissioner’s memorandum in opposition (doc. 9), Plaintiff’s reply (doc. 10), the administrative record (doc. 5), and the record as a whole.

**I.**

**A. Procedural History**

Plaintiff filed an application for DIB asserting disability as of March 19, 2013. PageID 207-08. Plaintiff claims disability as a result of multiple impairments including, *inter alia*, degenerative disc disease, residual effects of a cerebrovascular accident, headaches, an affective disorder, and anxiety. PageID 39.

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<sup>1</sup> Attached hereto is a NOTICE to the parties regarding objections to this Report and Recommendation.

After an initial denial of his application, Plaintiff received a hearing before ALJ Elizabeth A. Motta on January 26, 2016. PageID 67-103. The ALJ issued a decision on April 13, 2016 finding Plaintiff not disabled. PageID 36-59. Specifically, the ALJ found at Step 5 that, based upon Plaintiff's residual functional capacity ("RFC") to perform light work,<sup>2</sup> "there are jobs that exist in significant numbers in the national economy that [Plaintiff can perform.]" PageID 47-59.

Thereafter, the Appeals Council denied review on April 27, 2017, making the ALJ's non-disability finding the final administrative decision of the Commissioner. PageID 26-28. *See Casey v. Sec'y of Health & Human Servs.*, 987 F.2d 1230, 1233 (6th Cir. 1993). Plaintiff then filed this timely appeal. *Cook v. Comm'r of Soc. Sec.*, 480 F.3d 432, 435 (6th Cir. 2007).

## **B. Evidence of Record**

The evidence of record is adequately summarized in the ALJ's decision (PageID 36-59), Plaintiff's Statement of Errors (doc. 8), the Commissioner's memorandum in opposition (doc. 9), and Plaintiff's reply (doc. 10). The undersigned incorporates all of the foregoing and sets forth the facts relevant to this decision herein.

## **II.**

### **A. Standard of Review**

The Court's inquiry on a Social Security appeal is to determine (1) whether the ALJ's non-disability finding is supported by substantial evidence, and (2) whether the ALJ employed the correct legal criteria. 42 U.S.C. § 405(g); *Bowen v. Comm'r of Soc. Sec.*, 478 F.3d 742, 745-

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<sup>2</sup> Light work "involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds" and "requires a good deal of walking or standing, or . . . sitting most of the time with some pushing and pulling of arm or leg controls." *Id.* § 404.1567(b). An individual who can perform light work is presumed also able to perform sedentary work. *Id.* Sedentary work "involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties." *Id.* § 404.1567(a).

46 (6th Cir. 2007). In performing this review, the Court must consider the record as a whole. *Hephner v. Mathews*, 574 F.2d 359, 362 (6th Cir. 1978).

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). When substantial evidence supports the ALJ’s denial of benefits, that finding must be affirmed, even if substantial evidence also exists in the record upon which the ALJ could have found Plaintiff disabled. *Buxton v. Halter*, 246 F.3d 762, 772 (6th Cir. 2001). Thus, the ALJ has a “‘zone of choice’ within which he [or she] can act without the fear of court interference.” *Id.* at 773.

The second judicial inquiry -- reviewing the correctness of the ALJ’s legal analysis -- may result in reversal even if the ALJ’s decision is supported by substantial evidence in the record. *Rabbers v. Comm’r of Soc. Sec.*, 582 F.3d 647, 651 (6th Cir. 2009). “[A] decision of the Commissioner will not be upheld where the [Social Security Administration] fails to follow its own regulations and where that error prejudices a claimant on the merits or deprives the claimant of a substantial right.” *Bowen*, 478 F.3d at 746.

## **B. “Disability” Defined**

To be eligible for disability benefits, a claimant must be under a “disability” as defined by the Social Security Act. 42 U.S.C. § 423(d)(1)(A). Narrowed to its statutory meaning, a “disability” includes physical and/or mental impairments that are both “medically determinable” and severe enough to prevent a claimant from (1) performing his or her past job and (2) engaging in “substantial gainful activity” that is available in the regional or national economies. *Id.*

Administrative regulations require a five-step sequential evaluation for disability determinations. 20 C.F.R. § 404.1520(a)(4). Although a dispositive finding at any step ends the ALJ’s review, *see Colvin v. Barnhart*, 475 F.3d 727, 730 (6th Cir. 2007), the complete sequential

review poses five questions:

1. Has the claimant engaged in substantial gainful activity?;
2. Does the claimant suffer from one or more severe impairments?;
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 (the "Listings"), 20 C.F.R. Subpart P, Appendix 1?;
4. Considering the claimant's RFC, can he or she perform his or her past relevant work?; and
5. Assuming the claimant can no longer perform his or her past relevant work -- and also considering the claimant's age, education, past work experience, and RFC -- do significant numbers of other jobs exist in the national economy which the claimant can perform?

20 C.F.R. § 404.1520(a)(4); *see also Miller v. Comm'r of Soc. Sec.*, 181 F. Supp.2d 816, 818 (S.D. Ohio 2001). A claimant bears the ultimate burden of establishing disability under the Social Security Act's definition. *Key v. Comm'r of Soc. Sec.*, 109 F.3d 270, 274 (6th Cir. 1997).

### III.

In his Statement of Errors, Plaintiff argues that the ALJ erred by: (1) improperly weighing opinion evidence, including the opinions of treating physicians James Laub, D.O. and Vismai Sinha, M.D.; (2) inadequately accounting for his social limitations and headaches in the RFC; and (3) improperly assessing his credibility. Doc. 8 at PageID 1448-60.

Having carefully reviewed the administrative record and the parties' briefs, and also having carefully considered the ALJ's analysis leading to the non-disability finding here at issue, the Court finds the ALJ carefully and reasonably developed and reviewed the record; appropriately considered the medical evidence at issue; properly weighed opinion evidence based upon reasons supported by substantial evidence (including the opinions of Drs. Laub and Sinha); reasonably assessed Plaintiff's credibility; posed appropriate hypothetical questions to

the VE; accurately determined Plaintiff's RFC; and appropriately concluded, at Step Five, that Plaintiff can perform a significant number of jobs in the national economy.

**A. Medical Opinion Evidence**

Until March 27, 2017, "the Commissioner's regulations [that apply to this appeal] establish[ed] a hierarchy of acceptable medical source opinions[.]" *Snell v. Comm'r of Soc. Sec.*, No. 3:12-cv-119, 2013 WL 372032, at \*9 (S.D. Ohio Jan. 30, 2013). In descending order, these medical source opinions are: (1) treaters; (2) examiners; and (3) record reviewers. *Id.* Under the regulations then in effect, which control here, the opinions of treaters are entitled to the greatest deference because they "are likely to be . . . most able to provide a detailed, longitudinal picture of [a claimant's] medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations[.]" 20 C.F.R. § 404.1527(c)(2).

A treater's opinion must be given "controlling weight" if "well-supported by medically acceptable clinical and laboratory diagnostic techniques and . . . not inconsistent with the other substantial evidence in [the] case record." *LaRiccía v. Comm'r of Soc. Sec.*, 549 F. App'x 377, 384 (6th Cir. 2013). Even if a treater's opinion is not entitled to controlling weight, "the ALJ must still determine how much weight is appropriate by considering a number of factors, including 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 any specialization of the treating physician." *Blakley v. Comm'r*

*of Soc. Sec.*, 581 F.3d 399, 406 (6th Cir. 2009); *see also* 20 C.F.R. § 404.1527(c).<sup>3</sup>

After treaters, “[n]ext in the hierarchy are examining physicians and psychologists, who often see and examine claimants only once.” *Snell*, 2013 WL 372032, at \*9.

Record reviewers are afforded the least deference and these “non-examining physicians’ opinions are on the lowest rung of the hierarchy of medical source opinions.” *Id.* Put simply, “[t]he regulations provide progressively more rigorous tests for weighing opinions as the ties between the source of the opinion and the individual [claimant] become weaker.” *Id.* (citing SSR 96-6p, 1996 WL 374180, at \*2 (July 2, 1996)). In the absence of a controlling treating source opinion, an ALJ must “evaluate all medical opinions” with regard to the factors set forth in 20 C.F.R. § 404.1527(c), *i.e.*, length of treatment history; consistency of the opinion with other evidence; supportability; and specialty or expertise in the medical field related to the individual’s impairment(s). *Walton v. Comm’r of Soc. Sec.*, No. 97-2030, 1999 WL 506979, at \*2 (6th Cir. June 7, 1999).

The record in this case contains, *inter alia*, opinions from treating physicians Drs. Laub and Sinha. PageID 859-60, 870-71. Dr. Laub opined that Plaintiff can only stand 15 minutes at a time; can sit only 30 minutes at a time; can work zero hours in a workday; can lift up to 20 pounds occasionally and up to five pounds frequently; can bend and stoop occasionally; can manipulate with the right hand occasionally; can raise either arm over shoulder level occasionally; can never balance; cannot manipulate with the left hand; and would likely be off task up to 20 percent of a typical workday. PageID 859-60. Dr. Sinha opined that Plaintiff can

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<sup>3</sup> In essence, “opinions of a treating source . . . must be analyzed under a two-step process, with care being taken not to conflate the steps.” *Cadle v. Comm’r of Soc. Sec.*, No. 5:12-cv-3071, 2013 WL 5173127, at \*5 (N.D. Ohio Sept. 12, 2013). Initially, “the opinion must be examined to determine if it is entitled to controlling weight” and “[o]nly if . . . the ALJ does not give controlling weight to the treating physician’s opinion is the opinion subjected to another analysis based on the particulars of” 20 C.F.R. § 404.1527. *Id.*

only stand 15 minutes at a time; can sit only 15 minutes at a time; can work one hour in a workday; can lift up to 20 pounds occasionally and up to ten pounds frequently; can never bend; can stoop and balance occasionally; can manipulate with either hand frequently; can raise either arm over shoulder level frequently; and would likely be off task up to 20 percent of a typical workday. PageID 870-71.

The ALJ gave the opinions of Drs. Laub and Sinha “little-to-no weight.” PageID 50. The undersigned finds no reversible error in the ALJ’s assessment of these medical source opinions.

Initially, the undersigned notes the ALJ’s failure to mention the specific phrase “controlling weight” when weighing the opinions of Drs. Laub and Sinha. PageID 49-52. However, the ALJ states these limitations are in no way supported by “convincing objective medical evidence or clinical findings,” PageID 51, and numerous inconsistencies in the medical evidence exist which is the “controlling weight” standard. *See* 20 C.F.R. § 404.1527(c)(2); *LaRiccia v. Comm’r of Soc. Sec.*, 549 F. App’x 377, 384 (6th Cir. 2013). Thus, arguably, the ALJ performed the controlling weight analysis. *Id.* Even if the ALJ failed to perform the controlling weight analysis -- which the undersigned finds he did not -- any error in this regard can be harmless if the ALJ “has otherwise met the regulation’s goal.” *Gayheart v. Comm’r of Soc. Sec.*, 710 F.3d 365, 380 (6th Cir. 2013). The undersigned finds that the ALJ otherwise met the regulation’s goal in rejecting these opinions by noting that they were unsupported by: (1) objective medical evidence and clinical findings in the record (PageID 39-46); and (2) normal clinical findings -- including normal gait, normal station, motor strength normal, ambulated normally, muscle strength normal, upper and lower extremities revealed full range of motion, bilateral straight-leg-raise was normal, no neurological deficits -- upon examination. PageID 40-

41, 50-51, 298, 352, 365, 481, 485, 489-60, 492, 563-64, 847, 849, 851, 853, 988-89. Thus, the ALJ's decision is supported by substantial evidence. *See Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 547 (6th Cir. 2004).

## **B. RFC**

Plaintiff next alleges the ALJ failed to incorporate limitations stemming from his (1) social limitations and (2) headaches. Doc. 8 at PageID 1455-59.

The Commissioner's regulations provide that a claimant's "impairment(s), and any related symptoms, such as pain, may cause physical and mental limitations that affect what [he or she] can do in a work setting." 20 C.F.R. § 404.1545(a)(1). An individual's RFC "is the most [he or she] can still do despite [his or her] limitations." *Id.* While the determination of an RFC is within the ALJ's province, "the RFC is ultimately a medical question that must find at least some support in the medical evidence of record." *Powell v. Comm'r of Soc. Sec.*, No. 3:15-CV-406, 2017 WL 1129972, at \*4 (S.D. Ohio Mar. 27, 2017) (citing *Casey v. Astrue*, 503 F.3d 687, 697 (8th Cir. 2007)). The ALJ must resolve conflicts in the evidence and incorporate only the credible limitations of record in the RFC finding. *See Casey v. Sec'y of Health & Human Servs.*, 987 F.2d 1230, 1234-35 (6th Cir. 1993)

Here, as noted by the Commissioner and consistent with agency regulations, the ALJ accepted the symptoms attributable to Plaintiff's social limitations and headaches and properly incorporated those credible limitations into his RFC assessment. PageID 38-39, 41, 42, 43-44, 45, 53, 82, 88. Thus, Plaintiff's alleged error in this regard is without merit.

## **C. Credibility**

Plaintiff lastly challenges the ALJ's adverse credibility finding. Doc. 8 at PageID 1459. The ALJ, and not this Court, "evaluate[s] the credibility of witnesses, including that of the



claimant.” *Rogers v. Comm’r of Soc. Sec.*, 486 F.3d 234, 247 (6th Cir. 2007). A reviewing Court must “accord the ALJ’s determinations of credibility great weight and deference particularly since the ALJ has the opportunity, which we do not, of observing a witness’s demeanor while testifying.” *Jones v. Comm’r of Soc. Sec.*, 336 F.3d 469, 476 (6th Cir. 2003) (citations omitted).

Nevertheless, in setting forth a credibility finding, the ALJ’s determination “cannot be based on an intangible or intuitive notion about an individual’s credibility[,]” and instead, “[t]he reasons for the credibility finding must be grounded in the evidence and articulated in the determination or decision.” *See* SSR 96-7p, 1996 WL 374186, at \*7 (July 2, 1996). In fact, the ALJ must set forth “specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual’s statements and the reasons for that weight.” *Id.*

Contrary to Plaintiff’s conclusion, the ALJ lengthy, detailed opinion -- read as a whole -- adequately sets forth a substantive explanation for his adverse credibility finding. PageID 48-56. Thus, the credibility finding here is deemed supported by substantial evidence.

#### IV.

For the foregoing reasons, the Court finds Plaintiff’s assignments of error unmeritorious.

#### **IT IS THEREFORE RECOMMENDED THAT:**

1. The Commissioner’s non-disability finding be found supported by substantial evidence, and **AFFIRMED**; and
2. This case be **CLOSED**.

Date: March 5, 2018

s/ Michael J. Newman  
Michael J. Newman  
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 Recommendation. This period is not extended by virtue of Fed. R. Civ. P. 6(d) if served on you by electronic means, such as via the Court's CM/ECF filing system. If, however, this Report and Recommendation was served upon you by mail, this deadline is extended to **SEVENTEEN DAYS** by application of Fed. R. Civ. P. 6(d). Parties may seek an extension of the deadline to file objections by filing a motion for extension, which the Court may grant upon a showing of good cause.

Any objections filed shall specify the portions of the Report and Recommendation 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. As noted above, this period is not extended by virtue of Fed. R. Civ. P. 6(d) if served on you by electronic means, such as via the Court's CM/ECF filing system. If, however, this Report and Recommendation was served upon you by mail, this deadline is extended to **SEVENTEEN DAYS** by application of Fed. R. Civ. P. 6(d).

Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140, 153-55 (1985); *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981).