IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

NATOLA EVETTE PERKINS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 13-cv-02452-TMP**
	)	
CAROLYN W. COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY,	)	
	)	
Defendant.	)	
	)	

ORDER AFFIRMING THE DECISION OF THE COMMISSIONER

Before the court is plaintiff Natola Evette Perkins's appeal from a final decision of the Commissioner of Social Security ("Commissioner") denying her application for supplemental security income under Title XVI of the Social Security Act ("Act"), 42 U.S.C. §§ 401 *et seq*. On June 23, 2016, the parties consented to the jurisdiction of the United States magistrate judge pursuant to 28 U.S.C. § 636(c). (ECF No. 12.) For the reasons set forth below, the decision of the Commissioner is affirmed.

I. FINDINGS OF FACT

On September 24, 2008, Perkins applied for supplemental security income under Title XVI of the Act. (R. 10.) Perkins alleged disability beginning on May 10, 2008, due to heart problems, high blood pressure, carpal tunnel, and a cyst on her

wrist bone. (R. 115.) Perkins's application was denied initially and upon reconsideration by the Social Security Administration ("SSA"). (R. 10.) At Perkins's request, a hearing was held before an Administrative Law Judge ("ALJ") on June 9, 2011. (Id.) On November 3, 2011, the ALJ issued a decision denying Perkins's request for benefits after finding that Perkins was not under a disability because she retained the residual functional capacity ("RFC") to adjust to work that exists in significant numbers in the national economy. (R. 10-17.) On April 26, 2013, the SSA's Appeals Council denied Perkins's request for review. Therefore, the ALJ's decision became the final decision of the Commissioner. (R. 1.) Subsequently, on June 25, 2013, Perkins filed the instant action. Perkins argues that: (1) the ALJ erred by failing to provide her with the interrogatories posed to a vocational expert ("VE") by the ALJ after the hearing; (2) the ALJ erred by not establishing that the VE was qualified and reliable; and (3) the ALJ erred by positing an incomplete hypothetical to the VE. (ECF No. 9.)

II. CONCLUSIONS OF LAW

A. Standard of Review

Under 42 U.S.C. § 405(g), a claimant may obtain judicial review of any final decision made by the Commissioner after a hearing to which he or she was a party. "The court shall have

power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). Judicial review of the Commissioner's decision is limited to whether there is substantial evidence to support the decision and whether the Commissioner used the proper legal criteria in making the decision. Id.; Winn v. Comm'r of Soc. Sec., 615 F. App'x 315, 320 (6th Cir. 2015); Cole v. Astrue, 661 F.3d 931, 937 (6th Cir. 2011); Rogers v. Comm'r of Soc. Sec., 486 F.3d 234, 241 (6th Cir. 2007). Substantial evidence is more than a scintilla of evidence but less than a preponderance, and is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Kirk v. Sec'y of Health & Human Servs., 667 F.2d 524, 535 (6th Cir. 1981) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)).

In determining whether substantial evidence exists, the reviewing court must examine the evidence in the record as a whole and "must 'take into account whatever in the record fairly detracts from its weight.'" Abbott v. Sullivan, 905 F.2d 918, 923 (6th Cir. 1990) (quoting Garner v. Heckler, 745 F.2d 383, 388 (6th Cir. 1984)). If substantial evidence is found to support the Commissioner's decision, however, the court must affirm that decision and "may not even inquire whether the record could support

a decision the other way." Barker v. Shalala, 40 F.3d 789, 794 (6th Cir. 1994) (quoting Smith v. Sec'y of Health & Human Servs., 893 F.2d 106, 108 (6th Cir. 1989)). Similarly, the court may not try the case *de novo*, resolve conflicts in the evidence, or decide questions of credibility. Ulman v. Comm'r of Soc. Sec., 693 F.3d 709, 713 (6th Cir. 2012) (citing Bass v. McMahon, 499 F.3d 506, 509 (6th Cir. 2007)). Rather, the Commissioner, not the court, is charged with the duty to weigh the evidence, to make credibility determinations, and to resolve material conflicts in the testimony. Walters v. Comm'r of Soc. Sec., 127 F.3d 525, 528 (6th Cir. 1997); Crum v. Sullivan, 921 F.2d 642, 644 (6th Cir. 1990); Kiner v. Colvin, No. 12-2254-JDT, 2015 WL 1295675, at *1 (W.D. Tenn. Mar. 23, 2015).

B. The Five-Step Analysis

The Act defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1). Additionally, section 423(d)(2) of the Act states that:

> An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in

> the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

Under the Act, the claimant bears the ultimate burden of establishing an entitlement to benefits. Oliver v. Comm'r of Soc. Sec., 415 F. App'x 681, 682 (6th Cir. 2011). The initial burden is on the claimant to prove she has a disability as defined by the Act. Siebert v. Comm'r of Soc. Sec., 105 F. App'x 744, 746 (6th Cir. 2004) (citing Walters, 127 F.3d at 529); see also Born v. Sec'y of Health & Human Servs., 923 F.2d 1168, 1173 (6th Cir. 1990). If the claimant is able to do so, the burden then shifts to the Commissioner to demonstrate the existence of available employment compatible with the claimant's disability and background. Born, 923 F.2d at 1173; see also Griffith v. Comm'r of Soc. Sec., 582 F. App'x 555, 559 (6th Cir. 2014).

Entitlement to social security benefits is determined by a five-step sequential analysis set forth in the Social Security Regulations. See 20 C.F.R. §§ 404.1520 & 416.920. First, the claimant must not be engaged in substantial gainful activity. See 20 C.F.R. §§ 404.1520(b) & 416.920(b). Second, a finding must be made that the claimant suffers from a severe impairment. 20 C.F.R.

§§ 404.1520(a)(4)(ii) & 416.920(a)(5)(ii). In the third step, the ALJ determines whether the impairment meets or equals the severity criteria set forth in the Listing of Impairments contained in the Social Security Regulations. See 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526. If the impairment satisfies the criteria for a listed impairment, the claimant is considered to be disabled. On the other hand, if the claimant's impairment does not meet or equal a listed impairment, the ALJ must undertake the fourth step in the analysis and determine whether the claimant has the RFC to return to any past relevant work. See 20 C.F.R. §§ 404.1520(a)(4)(iv) & 404.1520(e). If the ALJ determines that the claimant can return to past relevant work, then a finding of not disabled must be entered. Id. But if the ALJ finds the claimant unable to perform past relevant work, then at the fifth step the ALJ must determine whether the claimant can perform other work existing in significant numbers in the national economy. See 20 C.F.R. §§ 404.1520(a)(4)(v), 404.1520(g)(1), 416.960(c)(1)-(2). Further review is not necessary if it is determined that an individual is not disabled at any point in this sequential analysis. 20 C.F.R. § 404.1520(a)(4).

C. Whether the ALJ Committed Legal Error

All three of Perkins's arguments regarding why the ALJ's decision should be reversed relate to interrogatory responses the

ALJ procured from a VE after the hearing. First, Perkins argues that "the Commissioner's decision should be reversed because the ALJ erred as a matter of law in failing to afford Ms. Perkins a full and fair adjudication of her claim warranting reversal." Specifically, Perkins argues that she was denied due process because the ALJ failed to proffer interrogatory responses obtained from a VE after Perkins's hearing, as required by the Social Security Administration's Hearings, Appeals, and Litigation Law Manual ("HALLEX").

HALLEX is an "internal guidance tool" published by the SSA for use by its staff and ALJs. Alilovic v. Astrue, No. 1:12CV323, 2012 WL 5611077, at *7 (N.D. Ohio Nov. 15, 2012) (citing Bowie v. Comm'r of Soc. Sec., 539 F.3d 395, 399 (6th Cir. 2008)). Although the Sixth Circuit has held that HALLEX is non-binding on courts, it has also held that HALLEX sets forth safeguards and procedures that provide due process for SSA proceedings. See Bowie, 539 F.3d at 399; Robinson v. Barnhart, 124 F. App'x 405, 410 (6th Cir. 2005); Adams v. Massanari, 55 F. App'x 279, 285-86 (6th Cir. 2003). However, "an ALJ's failure to comply with HALLEX does not necessarily constitute a due process violation." Bailey v. Colvin, No. 14-104-DLB, 2015 WL 428103, at * 3 (E.D. Ky. Jan. 1, 2015) (citing Eboch v. Comm'r of Soc. Sec., No. 5:12CV649, 2012 7809080, at *4 (N.D. Ohio Dec. 13, 2012)). To determine whether an SSA

hearing satisfies due process principles, courts apply the test set forth in Mathews v. Eldridge, 424 U.S. 319, 335 (1976). However, courts are not required to consider the merits of an alleged due process violation without a requisite showing of prejudice. Graham v. Mukasey, 519 F.3d 546, 549 (6th Cir. 2008) (citing Warner v. Ashcroft, 381 F.3d 534, 539 n.1 (6th Cir. 2004)). "[T]o establish the requisite prejudice, [the claimant] must show that the due process violations led to a substantially different outcome from that which would have occurred in the absence of those violations." Id. at 549-50 (citing Garza-Moreno v. Gonzales, 489 F.3d 239, 241-242 (6th Cir. 2007)).

In her pleadings, Perkins does not allege that the ALJ's failure to comply with HALLEX prejudiced her in any way, nor does she argue that the ALJ's error led to a substantially different outcome than if the error had not occurred. Additionally, the record before the court does not provide any evidence of prejudice. Therefore, it is not necessary for the court to apply the Mathews test in this case. Based on the foregoing, the court finds that the ALJ's failure to comply with HALLEX does not entitle Perkins to remand. See Bailey, 2015 WL 428103, at *3-5 (denying remand where claimant argued that the ALJ's failure to proffer post-hearing materials violated HALLEX because claimant did not demonstrate that he suffered prejudice); Estep v. Astrue, No. 2:11-0017, 2013 WL

212643, at *11-12 (M.D. Tenn. Jan. 18, 2013), report and recommendation adopted by Estep v. Colvin, No. 2:11-CV-00017, 2013 WL 2255852, at *1 (M.D. Tenn. May 22, 2013) (denying remand where claimant argued that the ALJ failed to follow HALLEX procedures because the claimant made no allegation of prejudice).

Second, Perkins argues that the ALJ erred by not establishing that the VE was qualified before relying on the VE's interrogatory responses in reaching her decision. Perkins contends that the VE "was never properly introduced on the record as an expert witness qualified to provide testimony in this case and no opportunity to object to her qualifications or to engage in *voir dire* was ever permitted."[1] This argument is without merit. Perkins incorrectly states that 20 C.F.R. §416.966(d) and Social Security Ruling 00-4p require that an ALJ "make a specific finding that occupational evidence presented by a vocational expert is reliable before it can serve as a basis for a denial" of a claim. These provisions do not stand for the proposition espoused by Perkins, and Perkins does not cite any other statute, regulation, guideline, or case law in support of her position.

The Federal Rules of Evidence do not apply to SSA hearings, Schuler v. Comm'r of Soc. Sec., 109 F. App'x 97, 102 (6th Cir.

[1]The court notes that the VE was present via telephone at Perkins's hearing and was introduced on the record as "Dr. Tyra Watts . . . the vocational expert." (R. 25.)

2004), and the court is unaware of any law that requires an ALJ to demonstrate that a VE is qualified as an expert witness or that his or her testimony is reliable. To the contrary, the Sixth Circuit has explained that "nothing in applicable Social Security regulations requires the administrative law judge to conduct his or her own investigation into the testimony of a vocational expert to determine its accuracy." Ledford v. Astrue, 311 F. App'x 746, 757 (6th Cir. 2008) (citing Martin v. Comm'r of Soc. Sec., 170 F. App'x 369, 374-75 (6th Cir. 2006)). Moreover, even if the ALJ did somehow err with regard to the VE's qualifications, "'the burden of showing that an error is harmful normally falls upon the party attacking the agency's determination.'" Sharp v. Comm'r of Soc. Sec., No. 5:14-CV-12829, 2015 WL 5729090, at *11 (E.D. Mich. Sept. 30, 2015) (quoting Shinseki v. Sanders, 556 U.S. 396, 409 (2009)). Perkins does not argue that the VE was unqualified or that her interrogatory responses were unreliable, nor does she argue that the ALJ's result would have been different if Perkins had been allowed to challenge the VE's qualifications. Additionally, there is no evidence in the record to suggest that the VE was unqualified or unreliable. Therefore, Perkins is not entitled to remand on this point.

Lastly, Perkins argues that the ALJ erred by positing an incomplete hypothetical question to the VE. Specifically, Perkins

contends that the hypothetical question was incomplete because it did not include all of the limitations that she alleges are supported by the medical evidence in the record. "'A vocational expert's testimony concerning the availability of suitable work may constitute substantial evidence where the testimony is elicited in response to a hypothetical question that accurately sets forth the plaintiff's physical and mental impairments.'" Thomas v. Comm'r of Soc. Sec., 550 F. App'x 289, 290 (6th Cir. 2014) (quoting Smith v. Halter, 307 F.3d 377, 378 (6th Cir. 2001)). While it is true that an ALJ may rely on a VE's response to a hypothetical question only if the question accurately portrays the claimant's impairments, the "ALJ is required to incorporate only those limitations that he or she accepted as credible." Lester v. Soc. Sec. Admin., 596 F. App'x 387, 389-90 (6th Cir. 2015) (citing Ealy v. Comm'r of Soc. Sec., 594 F.3d 504, 516 (6th Cir. 2010) & Casey v. Sec'y of Health & Human Servs., 987 F.2d 1230, 1235 (6th Cir. 1993)). Here, the ALJ reasonably incorporated into her hypothetical question Perkins's need to be limited to simple sedentary work with only "occasional collaborative and cooperative work with coworkers, supervisors, and members of the public." (R. 223.) The ALJ was not required to include in her hypothetical question information from Perkins or the record that she did not find credible. Based on a review of the entire record, the court finds that the ALJ did

not err in this regard.[2]

III. CONCLUSION

For the foregoing reasons, the Commissioner's decision is affirmed.

IT IS SO ORDERED.

s/ Tu M. Pham
TU M. PHAM
United States Magistrate Judge

July 8, 2016
Date

[2]As a final matter, Perkins also argues that the SSA Appeals Council erred as a matter of law by improperly declining to review her case. However, the court "is charged with reviewing the decision of the ALJ, and not the denial of review by the Appeals Council, because when the Appeals Council denies review, the decision of the ALJ becomes the final decision of the Commissioner." Osburn v. Apfel, 182 F.3d 918 (6th Cir. 1999); see also Hammond v. Apfel, 211 F.3d 1269 (6th Cir. 2000); Phelps v. Sec'y of Health & Human Servs., 961 F.2d 1578 (6th Cir. 1992). Therefore, the court finds that this argument has no merit.