IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SERENA L. PEMBERTON,

Plaintiff,

vs. Case No. 16-2501-SAC

NANCY A. BERRYHILL,
Acting Commissioner of
Social Security,[1]

Defendant.

MEMORANDUM AND ORDER

This is an action reviewing the final decision of the Commissioner of Social Security denying the plaintiff disability insurance benefits. The matter has been fully briefed by the parties.

I. General legal standards

The court's standard of review is set forth in 42 U.S.C. § 405(g), which provides that "the findings of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." The court should review the Commissioner's decision to determine only whether the decision was supported by substantial evidence and whether the Commissioner applied the correct legal standards. Glenn v. Shalala, 21 F.3d 983, 984

[1] On January 20, 2017, Nancy A. Berryhill replaced Carolyn W. Colvin as Acting Commissioner of Social Security.

(10th Cir. 1994). Substantial evidence requires more than a scintilla, but less than a preponderance, and is satisfied by such evidence that a reasonable mind might accept to support the conclusion. The determination of whether substantial evidence supports the Commissioner's decision is not simply a quantitative exercise, for evidence is not substantial if it is overwhelmed by other evidence or if it really constitutes mere conclusion. Ray v. Bowen, 865 F.2d 222, 224 (10th Cir. 1989). Although the court is not to reweigh the evidence, the findings of the Commissioner will not be mechanically accepted. Nor will the findings be affirmed by isolating facts and labeling them substantial evidence, as the court must scrutinize the entire record in determining whether the Commissioner's conclusions are rational. Graham v. Sullivan, 794 F. Supp. 1045, 1047 (D. Kan. 1992). The court should examine the record as a whole, including whatever in the record fairly detracts from the weight of the Commissioner's decision and, on that basis, determine if the substantiality of the evidence test has been met. Glenn, 21 F.3d at 984.

The Social Security Act provides that an individual shall be determined to be under a disability only if the claimant can establish that they have a physical or mental impairment expected to result in death or last for a continuous period of twelve months which prevents the claimant from engaging in

substantial gainful activity (SGA). The claimant's physical or mental impairment or impairments must be of such severity that they are not only unable to perform their previous work but cannot, considering their age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy. 42 U.S.C. § 423(d).

The Commissioner has established a five-step sequential evaluation process to determine disability. If at any step a finding of disability or non-disability can be made, the Commissioner will not review the claim further. At step one, the agency will find non-disability unless the claimant can show that he or she is not working at a "substantial gainful activity." At step two, the agency will find non-disability unless the claimant shows that he or she has a "severe impairment," which is defined as any "impairment or combination of impairments which significantly limits [the claimant's] physical or mental ability to do basic work activities." At step three, the agency determines whether the impairment which enabled the claimant to survive step two is on the list of impairments presumed severe enough to render one disabled. If the claimant's impairment does not meet or equal a listed impairment, the inquiry proceeds to step four, at which the agency assesses whether the claimant can do his or her previous work; unless the claimant shows that he or she cannot perform

their previous work, they are determined not to be disabled. If the claimant survives step four, the fifth and final step requires the agency to consider vocational factors (the claimant's age, education, and past work experience) and to determine whether the claimant is capable of performing other jobs existing in significant numbers in the national economy. Barnhart v. Thomas, 124 S. Ct. 376, 379-380 (2003).

The claimant bears the burden of proof through step four of the analysis. Nielson v. Sullivan, 992 F.2d 1118, 1120 (10th Cir. 1993). At step five, the burden shifts to the Commissioner to show that the claimant can perform other work that exists in the national economy. Nielson, 992 F.2d at 1120; Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). The Commissioner meets this burden if the decision is supported by substantial evidence. Thompson, 987 F.2d at 1487.

Before going from step three to step four, the agency will assess the claimant's residual functional capacity (RFC). This RFC assessment is used to evaluate the claim at both step four and step five. 20 C.F.R. §§ 404.1520(a)(4), 404.1520(e,f,g); 416.920(a)(4), 416.920(e,f,g).

II. History of case

On July 28, 2011, plaintiff applied for disability insurance benefits (R. at 10). In a decision dated April 24, 2013, administrative law judge (ALJ) Paul C. Pardo found that

plaintiff was not disabled (R. at 10-22). On May 27, 2014, the Appeals Council denied plaintiff's request for review (R. at 1-5). Plaintiff sought judicial review, and on July 2, 2015, the court reversed the decision of the Commissioner and remanded the case for further hearing (R. at 577-582).

On March 16, 2016, administrative law judge (ALJ) Michael D. Shilling issued his decision (R. at 503-515). Plaintiff alleges that she has been disabled since July 17, 2007 (R. at 503). Plaintiff is insured for disability insurance benefits through December 31, 2012 (R. at 505). At step one, the ALJ found that plaintiff has not engaged in substantial gainful activity from July 17, 2007 through December 31, 2012 (R. at 505). At step two, the ALJ found that plaintiff had severe impairments (R. at 505). At step three, the ALJ determined that plaintiff's impairments do not meet or equal a listed impairment (R. at 506). After determining plaintiff's RFC (R. at 507-508), the ALJ found at step four that plaintiff is unable to perform any past relevant work (R. at 513). At step five, the ALJ found that plaintiff could perform other jobs that exist in significant numbers in the national economy (R. at 514). Therefore, the ALJ concluded that plaintiff was not disabled (R. at 515).

III. Did the ALJ err by failing to elicit a reasonable explanation from the vocational expert (VE) for discrepancies

with the testimony of the VE and the Dictionary of Occupational Titles?

In his RFC findings, the ALJ imposed a number of physical and mental limitations on the plaintiff, including a limitation to "simple work" (R. at 507). However, 2 of the 3 jobs identified by the VE and adopted by the ALJ in his decision as jobs that plaintiff could perform (R. at 514) are jobs that require a reasoning level of 2 or 3.[2] A reasoning level of 2 requires the ability to "apply commonsense understanding to **carry out detailed but uninvolved written or oral instructions**." 1991 WL 679631 (emphasis added).[3] Here, a conflict exists between the RFC finding that plaintiff is limited to "simple" work, and the DOT indication that all 3 jobs require the ability to carry out detailed instructions.

In the case of Hackett v. Barnhart, 395 F.3d 1168, 1175 (10th Cir. 2005), the court cited to Haddock and SSR 00-4p, and found that there was no indication in the record that the VE expressly acknowledged a conflict with the DOT or that he offered an explanation for the conflict. An ALJ must inquire about and resolve any conflicts between the VE testimony and the description of that job in the DOT. Poppa v. Astrue, 569 F.3d 1167, 1173 (10th Cir. 2009). In three cases in which plaintiff

[2] The job of bonder, semiconductor has a reasoning level of 2 (DICOT 726.685-066, 1991 WL 679631), and the job of document preparer has a reasoning level of 3 (DICOT 249.587-018, 1991 WL 672349).

[3] By contrast, a job with a reasoning level of 1 requires the ability to apply commonsense understanding to carry out simple one or two step instructions. 1991 WL 679273.

was limited by not being able to understand, remember or carry out detailed instructions, Tate v. Colvin, Case No. 15-4870-SAC (D. Kan. Sept. 7, 2016; Doc. 22 at 19-20); Crabtree v. Colvin, Case No. 14-2506-SAC (D. Kan. Dec. 28, 2015; Doc. 15 at 8-9), and MacDonald v. Colvin, 2015 WL 4429206 at *8 (D. Kan. July 20, 2015), the court held that such a conflict must be explained.

Defendant does not contest this conflict, or the need for the ALJ to explain it, but argues that the vocational expert testified that in regards to the remaining job, lens inserter,[4] 12,000 such jobs exist nationally, which is a significant number of jobs sufficient to support a finding of nondisability (Doc. 9 at 17).

The statute and case law are clear that the Commissioner must show that the claimant can perform other kind of work that exists in significant numbers in the national economy. See Raymond v. Astrue, 621 F. 3d 1269, 1274 (10th Cir. 2009). The proper focus generally must be on jobs in the national, not regional, economy. The Commissioner is not required to show that job opportunities exist within the local area. Raymond v. Astrue, 621 F.3d at 1274. The question for the court is whether, on the facts of this case, the ALJ's error regarding the number of jobs that plaintiff can perform given the RFC limitations established by the ALJ constitutes harmless error.

[4] This job has a reasoning level of 1, which is defined as applying commensense understanding to carry out simple one or two step instructions. DICOT 713.687-026; 1991 WL 679273.

Courts should apply the harmless error analysis cautiously in the administrative review setting. Fischer-Ross v. Barnhart, 431 F.3d 729, 733 (10th Cir. 2005). However, it may be appropriate to supply a missing dispositive finding under the rubric of harmless error in the right exceptional circumstance where, based on material the ALJ did at least consider (just not properly), the court could confidently say that no reasonable factfinder, following the correct analysis, could have resolved the factual matter in any other way. Fischer-Ross, 431 F.3d at 733-734; Allen v. Barnhart, 357 F.3d 1140, 1145 (10th Cir. 2004).

In Trimiar v. Sullivan, 966 F.2d 1326, 1330 (10th Cir. 1992), the court refused to draw a bright line establishing the number of jobs necessary to constitute a "significant number." The court set out several factors that go into the proper evaluation of what constitutes a significant number, including the level of a claimant's disability, the reliability of the VE testimony, the distance claimant is capable of travelling to engage in the assigned work, the isolated nature of the jobs, and the types and availability of such work. Id. Judicial line-drawing in this context is inappropriate, and the determination of a numerical significance entails many fact-specific considerations requiring individualized evaluation. Allen v. Barnhart, 357 F.3d 1140, 1144 (10th Cir. 2004). The

decision should ultimately be left to the ALJ's common sense in weighing the statutory language as applied to a particular claimant's factual situation. Allen, 357 F.3d at 1144; Trimiar, 966 F.2d at 1330.

In Trimiar, the court found that the ALJ gave proper consideration to the factors that go into the evaluation of what constitutes a significant number, and upheld the ALJ's decision that 650-900 jobs in the state of Oklahoma constitutes a significant number of jobs. 966 F.2d at 1330-1332. By contrast, in Allen, the ALJ had found that plaintiff could perform 3 jobs that exist in significant numbers. However, the VE had testified that claimant could only perform 1 of those jobs (surveillance systems monitor) given the RFC limitations set forth by the ALJ. There were only 100 surveillance systems monitor jobs in the state. Id. at 1143-1144. In light of the ALJ's failure to consider whether 100 jobs constituted a significant number in connection with the Trimiar factors, the court declined to find harmless error, stating that it would be an improper exercise of judicial factfinding rather than a proper application of harmless-error principles. The court held that it is the ALJ's primary responsibility to determine what constitutes a significant number of jobs in light of the various case-specific considerations outlined in Trimiar. Allen, 357 F.3d at 1145.

In Stokes v. Astrue, 274 Fed. Appx. 675, 683-684 (10th Cir. April 18, 2008), the court found that plaintiff could only perform 2 of the 4 jobs identified by the ALJ. The court noted that 11,000 of those 2 jobs existed regionally, and 152,000 of those 2 jobs existed nationally. The court found that no reasonable factfinder could have determined that suitable jobs did not exist in significant numbers in either the region in which the claimant lived or nationally.

In Chrismon v. Colvin, 531 Fed. Appx. 893, 899-900 (10th Cir. Aug. 21, 2013), the ALJ had failed to include in his hypothetical question a limitation to simple, repetitive tasks. Only 2 of the 4 jobs identified by the VE were consistent with this limitation. Regionally, 17,500 of those 2 jobs existed, and nationally 212,000 of those 2 jobs existed. On these facts, the court held that any error in failing include a limitation to simple, repetitive tasks was harmless error.

In Shockley v. Colvin, 564 Fed. Appx. 935, 940-941 (10th Cir. April 29, 2014), only 2 of the 4 jobs identified by the VE and the ALJ were consistent with the claimant's limitations. Regionally, 17,000 of those 2 jobs existed, and 215,000 of those 2 jobs existed nationally. On these facts, the court found that the inclusion of other jobs by the ALJ was harmless error. See also Bainbridge v. Colvin, ___ Fed. Appx. ___, 2015 WL 4081204 (10th Cir. July 7, 2015 at *6)(harmless error when remaining jobs

totaled 20,000 jobs in the state and 500,000 nationally); Anderson v. Colvin, 514 Fed. Appx. 756, 764 (10th Cir. April 4, 2013)(harmless error when remaining jobs totaled 5,900 in the state and 650,000 nationally); Johnson v. Barnhart, 402 F. Supp.2d 1280, 1284-1285 (D. Kan. 2005)(the range of remaining jobs which plaintiff can perform is from 3,040 in the state and 212,000 nationally; court held this was sufficient to show that work exists in significant numbers).

However, in Chavez v. Barnhart, 126 Fed. Appx. 434, 436-437 (10th Cir. Feb. 3, 2005), the ALJ had found that plaintiff could perform 3 jobs; however, only 1 job was properly identified as suitable for the claimant. The VE testified that there were 49,957 of these jobs nationally, and only 199 in the region. The court, noting that the number of jobs available in the region is relatively small, declined the invitation to find harmless error on the ground that the number of jobs is significant as a matter of law, and remanded the case for a determination of whether the number of jobs is sufficient to qualify as significant.

In Vyskocil v. Astrue, Case No. 11-1135-JWL, 2012 WL 2370200 at *3 (D. Kan. June 22, 2012), the court held that the ALJ erred by failing to consider the opinion of Dr. Goering, who had opined that plaintiff was limited to occasional fingering. With this limitation, only one job would remain available; 450

of those jobs were available in Kansas and 55,000 in the national economy. The court noted that the ALJ had not made a determination of whether this number of jobs constituted a significant number of jobs. The court, after citing to Trimiar, Allen, Raymond and Chavez, remanded the case in order for the ALJ to explain the weight to be accorded to Dr. Goering's opinion, and if he accepted the limitation, to determine if there are a significant number of jobs available in the economy to a person with such a limitation.

In Brillhart v. Colvin, Case No. 14-1387-JWL, 2015 WL 7017439 at *5 (D. Kan. Nov. 10, 2015), the court held that it could not hold as a matter of law that the 39,000 jobs remaining nationally was significant as a matter of law. The court was unwilling to find that no reasonable fact-finder could find that there are not a significant number of jobs available to plaintiff. See also Evans v. Colvin, 2014 WL 3860653 at *4-5 (D. Colo. Aug. 6, 2014)(remaining jobs totaled 272 in the region and 18,000 nationally; court, citing to Chavez, and ALJ's failure to discuss Trimiar factors, held that it could not rule as a matter of law that 18,000 jobs is so significant that no reasonable factfinder could reach the opposite conclusion; the court noted that while it would not be surprised if the ALJ determined that 18,000 jobs is sufficient, that decision is for the ALJ to make, not the court).

In summary, the 10th Circuit has not drawn a bright line establishing the number of jobs necessary to constitute a significant number of jobs. In general, that determination should be made by the ALJ after considering a number of factors, and weighing the statutory language as applied to a particular claimant's factual situation. However, in a number of cases, the 10th Circuit determined that the ALJ committed harmless error because the court found that when the remaining number of jobs regionally range from 11,000 to 17,500 and nationally range from 152,000 to 215,000 (Stokes, Chrismon, and Shockley), no reasonable factfinder could have determined that a suitable number of jobs do not exist in significant numbers.

On the other hand, in Chavez, the 10th Circuit determined that when the remaining number of jobs was 199 in the region and 49,957 nationally, the court declined to find harmless error and remanded the case in order for the ALJ to make a determination of whether the remaining number of jobs was sufficient to qualify as a significant number of jobs. In Vyskocil, Judge Lungstrum held that when the remaining number of jobs was 450 in the state and 55,000 in the national economy, the court declined to find harmless error and remanded the case. In Brillhart, Judge Lungstrum held that when the remaining number of jobs was 39,000 in the national economy, the court declined to find harmless error and remanded the case. In Evans, the court held

that when 18,000 jobs remained nationally, it was for the ALJ to decide if a significant number of jobs remained).

In the case before the court, the remaining number of jobs is 12,000 nationally. Thus, the remaining number of jobs is lower than in Chavez (49,957), Vyskocil (55,000), Brillhart (39,000), and Evans (18,000), all cases in which the courts declined to find harmless error on the grounds that the remaining number of jobs nationally is significant as a matter of law, and remanded the case for a determination of whether the number of jobs is sufficient to qualify as significant. Based on the facts of this case, and the guidance provided by the cases cited above, the court declines to find harmless error on the ground that the remaining number of jobs is significant as a matter of law, and remands the case in order for the ALJ to determine whether the remaining number of jobs qualifies as a significant number of jobs under the statute.[5]

IV. Did the ALJ err in his credibility analysis?

As a preliminary matter, plaintiff argues that SSR 16-3p is applicable to this case, and that this case should be considered in light of SSR 16-3p, which superseded SSR 96-7p on March 28,

[5] Defendant cites to the case of Rogers v. Astrue, 312 Fed. Appx. 138, 141-142 (10th Cir. Feb. 17, 2009), which found that 11,000 sedentary jobs which existed could be relied on by the ALJ as substantial evidence to support her determination of nondisability. However, the 10th Circuit subsequently noted that the district court below held that the number in Rogers was stated in dictum and harmless error was not at issue in the case. Evans v. Colvin, 640 Fed. Appx. 731, 735 (10th Cir. Jan. 29, 2016). See also Brillhart, 2015 WL 7017439 at *6 (distinguishing Rogers, noting that the decision was not absolutely clear, and finding that the record evidence will support an ALJ's decision is a far cry from weighing the evidence in the first instance and determining whether a significant number of jobs are available in the economy to meet the needs of a particular situation). It is clear from Rogers that the court in that case did not address the issue of harmless error. For these reasons, the court declines to find Rogers persuasive.

2016. 2016 WL 1237954, 1119029. The ALJ decision in this case was issued on March 16, 2016 (R. at 515). When SSR 16-3p was issued, it stated that the Commissioner was "rescinding" SSR 96-7p, and replacing it with this ruling. One of the changes was to eliminate the use of the term "credibility." 2016 WL 1119029 at *1.

Retroactivity is not favored in the law. The general standard is that a rule changing the law is retroactively applied only if Congress expressly authorized retroactive rulemaking and the agency clearly intended the rule to have retroactive effect. Cherry v. Barnhart, 2005 WL 139176 at *2 (10th Cir. Jan. 24, 2005); Nash v. Apfel, 215 F.3d 1337 at *2 (10th Cir. June 1, 2000). In this case, the agency made clear that it is not to take effect until March 28, 2016, after the date of the ALJ decision. Therefore, SSR 16-3p will not be considered in this case.

The court will next consider plaintiff's arguments about the ALJ's findings regarding plaintiff's activities of daily living. In his decision, the ALJ noted that plaintiff has the ability to independently perform most personal care tasks such as dressing, personal hygiene, feeding and toileting. Plaintiff indicated that she needed help from her husband to bathe, and did not participate in household chores. Plaintiff also

admitted the ability to shop and drive (R. at 508). The ALJ then concluded:

> While the claimant's ability to engage in these ordinary life activities is not itself conclusive proof that the claimant is also able to engage in substantial gainful activity, the claimant's capacity to perform these tasks independently is also a **strong indication** that the claimant retains the capacity to perform the requisite physical and mental tasks that are part of everyday basic work activity.

(R. at 508, emphasis added).

According to the regulations, activities such as taking care of yourself, household tasks, hobbies, therapy, school attendance, club activities or social programs are generally not considered to constitute substantial gainful activity. 20 C.F.R. § 404.1572(c) (2013 at 399). Furthermore, although the nature of daily activities is one of many factors to be considered by the ALJ when determining the credibility of testimony regarding pain or limitations, Thompson v. Sullivan, 987 F.2d 1482, 1489 (10th Cir. 1993), the ALJ must keep in mind that the sporadic performance of household tasks or work does not establish that a person is capable of engaging in substantial gainful activity. Krauser v. Astrue, 638 F.3d 1324, 1332-1333 (10th Cir. 2011); Thompson, 987 F.2d at 1490.

In the case of Draper v. Barnhart, 425 F.3d 1127, 1130-1131 (8th Cir. 2005), the ALJ noted that the claimant engaged in

household chores, including laundry, grocery shopping, mowing, cooking, mopping and sweeping. The ALJ concluded that claimant's allegations of disabling pain were inconsistent with her reports of her normal daily activities and were therefore not deemed credible. The court found that substantial evidence did not support this conclusion, holding as follows:

> **The fact that Draper tries to maintain her home and does her best to engage in ordinary life activities is not inconsistent with her complaints of pain, and in no way directs a finding that she is able to engage in light work**. As we said in McCoy v. Schweiker, 683 F.2d 1138, 1147 (8th Cir.1982) (en banc), the test is whether the claimant has "the ability to perform the requisite physical acts day in and day out, in the sometimes competitive and stressful conditions in which real people work in the real world." In other words, evidence of performing general housework does not preclude a finding of disability. In Rainey v. Dep't of Health & Human Servs., 48 F.3d 292, 203 (8th Cir.1995), the claimant washed dishes, did light cooking, read, watched TV, visited with his mother, and drove to shop for groceries. We noted that these were activities that were not substantial evidence of the ability to do full-time, competitive work. In Baumgarten v. Chater, 75 F.3d 366, 369 (8th Cir.1996), the ALJ pointed to the claimant's daily activities, which included making her bed, preparing food, performing light housekeeping, grocery shopping, and visiting friends. We found this to be an unpersuasive reason to deny benefits: "**We have repeatedly held...that 'the ability to do activities such as light housework and visiting with friends provides little or no support for the finding that a claimant can perform full-time competitive work**.'" Id. (quoting Hogg v. Shalala, 45

F.3d 276, 278 (8th Cir.1995)). Moreover, we have reminded the Commissioner

> **that to find a claimant has the residual functional capacity to perform a certain type of work, the claimant must have the ability to perform the requisite acts day in and day out, in the sometimes competitive and stressful conditions in which real people work in the real world...The ability to do light housework with assistance, attend church, or visit with friends on the phone does not qualify as the ability to do substantial gainful activity**.
>
> Thomas v. Sullivan, 876 F.2d 666, 669 (8th Cir.1989) (citations omitted).

Draper, 425 F.3d at 1131 (emphasis added).

In Hughes v. Astrue, 705 F.3d 276 (7th Cir. 2013), the court stated:

> [The ALJ] attached great weight to the applicant's ability to do laundry, take public transportation, and shop for groceries. We have remarked the naiveté of the Social Security Administration's administrative law judges in equating household chores to employment. “The critical differences between activities of daily living and activities in a full-time job are that a person has more flexibility in scheduling the former than the latter, can get help from other persons (... [her] husband and other family members), and is not held to a minimum standard of performance, as she would be by an employer. The failure to recognize these differences is a recurrent, and deplorable, feature of opinions by administrative law judges in social security disability cases [citations omitted].”

705 F.3d at 278.

On remand, the ALJ should consider plaintiff's activities in light of the case law set forth above in order to determine if she is able to engage in substantial gainful activity. The activities described by the ALJ do not provide a "strong indication" that plaintiff has the capacity to perform the requisite physical and mental tasks that are part of everyday basic work. As noted above, the ability to do basic daily activities such as personal care tasks, and that she can shop and drive provide little or no support for finding that a claimant can perform full-time competitive work.

V. Did the ALJ err in his consideration of the opinions of Dr. Markway and Dr. Blum when making his mental RFC findings?

Dr. Markway and Dr. Blum reviewed the medical records and offered opinions regarding plaintiff's mental limitations. When asked to rate her limitations in 20 categories, they found that plaintiff was moderately limited in her ability to: 1) understand, remember and carry out detailed instructions; 2) maintain attention and concentration for extended periods; 3) work in coordination with or in proximity to others without being distracted by them; 4) interact appropriately with the general public; 5) accept instructions and respond appropriately to criticism from supervisors; 6) get along with coworkers or

peers without distracting them or exhibiting behavioral extremes, and 7) respond appropriately to changes in the work setting (R. at 75-76, 92-94). In their narrative explanations, they stated the following:

> **The claimant retains the ability to understand and remember simple instructions. The claimant can carry out simple work instructions**. She can maintain adequate attendance and sustain an ordinary routine without special supervision. The claimant can interact adequately with peers and supervisors in a work setting where demands for social interaction are not primary job requirements. The claimant can adapt to most changes in a competitive work setting.

(R. at 76, 94, emphasis added).

The ALJ found that their opinions were consistent with the evidence of record and are given "significant" weight (R. at 512). The ALJ's mental RFC findings stated that plaintiff would be limited to simple work with occasional interaction with co-workers and occasional interaction with members of the general public. She retains the ability to adapt to changes in the workplace on a basic level (R. at 508).

Plaintiff argues that the ALJ erred by not including in his RFC findings that plaintiff had moderate limitations in her ability to interact with supervisors, in her ability to maintain attention and concentration for extended periods, in her ability to work in coordination with or in proximity to others without being distracted by them, and in her ability to respond

appropriately to changes in the work setting. Plaintiff also argues that while the ALJ found plaintiff to have moderate difficulties maintaining concentration, persistence or pace, the ALJ failed to adequately account for his own findings in this regard. Instead, the ALJ only limited plaintiff to simple work, which fails to account for all these impairments.

At step two, the ALJ found that plaintiff had moderate difficulties with concentration, persistence or pace (R. at 507). However, this finding does not appear in the ALJ's RFC findings.

According to SSR 96-8p:

> The psychiatric review technique described in 20 CFR 404.1520a and 416.920a and summarized on the Psychiatric Review Technique Form (PRTF) requires adjudicators to assess an individual's limitations and restrictions from a mental impairment(s) in categories identified in the "paragraph B" and "paragraph C" criteria of the adult mental disorders listings. The adjudicator must remember that the limitations identified in the "paragraph B" and "paragraph C" criteria are not an RFC assessment but are used to rate the severity of mental impairment(s) at steps 2 and 3 of the sequential evaluation process. The mental RFC assessment used at steps 4 and 5 of the sequential evaluation process requires a more detailed assessment by itemizing various functions contained in the broad categories found in paragraphs B and C of the adult mental disorders listings in 12.00 of the Listing of Impairments, and summarized on the PRTF.

1996 WL 374184 at *4. Thus, the PRTF form is used to determine the severity of a mental impairment at steps 2 and 3 of the sequential evaluation process, while a mental RFC assessment form is used to determine a claimant's RFC at steps 4 and 5.

The ALJ made findings at step two in the four broad areas, which are only for the purpose of rating the severity of a mental impairment at steps 2 and 3 of the sequential evaluation process. These findings are not an RFC assessment. The mental RFC assessment used at steps 4 and 5 of the sequential evaluation process requires a more detailed assessment.

The ALJ made findings at step two in accordance with the opinions of Dr. Markway and Dr. Blum, including a moderate limitation in regards to concentration, persistence or pace (R. at 70, 88, 506-507). The ALJ then made RFC findings based on the step four mental assessments by Dr. Markway and Dr. Blum. On the facts of this case, the ALJ did not err by failing to include a moderate limitation found at step two in his RFC findings.

Plaintiff argues that the ALJ erred by failing to include in her RFC findings the opinions of Dr. Markway and Dr. Blum that plaintiff had various moderate mental impairments. It is true that the ALJ did not include all of the moderate mental impairments, but the ALJ's mental RFC findings are in accordance with the narrative explanation of Dr. Markway and Dr. Blum.

The 20 questions on the mental RFC assessment (Section I on some assessments) filled out by Dr. Markway and Dr. Blum in which they found various moderate limitations are to help determine the individual's ability to perform sustained work activities. However, the actual mental RFC assessment is recorded in the narrative discussion (Section III on some assessments) (R. at 74, 92). It is the narrative written by the psychologist or psychiatrist that ALJs are to use as the RFC assessment. That does not mean that the ALJ should turn a blind eye to the moderate limitations enumerated that are not adequately explained in the narrative. Lee v. Colvin, 631 Fed. Appx. 538, 541 (10th Cir. Nov. 12, 2015).[6]

In Lee v. Colvin, 631 Fed. Appx. 538, 541 (10th Cir. Nov. 12, 2015), and Smith v. Colvin, 821 F.3d 1264, 1268-1269 & n.1 (10th Cir. May 9, 2016), the consultant made Section I findings which included a finding that the claimant was moderately limited in their ability to maintain attention and concentration for extended periods (Lee, 631 Fed. Appx. at 542), or moderately limited in their ability to maintain concentration, persistence, and pace (Smith, 821 F.3d at 1268). However, in both cases, the Section III, or narrative findings, limited plaintiff to simple tasks (Lee, 631 Fed. Appx. at 542), or limited plaintiff to work that was limited in complexity (Smith, 821 F.3d at 1268). In

[6] In Smith v. Colvin, 821 F.3d 1264, 1269 (10th Cir. 2016), the court stated that although Lee v. Colvin is not precedential, it is persuasive.

both cases, the ALJ followed the Section III, or narrative findings, and limited plaintiff to simple work. Smith, 821 F.3d at 1268-69; Lee, 631 Fed. Appx. at 542). In both cases, the court found no error when the moderate limitation in concentration, or concentration for extended periods (Section I findings), was not included in the RFC findings because the ALJ adopted the Section III or narrative discussion. It is the narrative written by the psychiatrist or psychologist in Section III that ALJ's are to use as the assessment of RFC. Lee, 631 Fed. Appx. at 541. As the court indicated in Lee, the Section III narrative, which the ALJ incorporated in his RFC assessment, reflected, explained, accounted for, and delimited each of the moderate limitations expressed in Section I. Lee, 631 Fed. Appx. at 541-542.

More recently, in the case of Nelson v. Colvin, 2016 WL 3865856 at *2 (10th Cir. July 12, 2016), the consultant in Section I found some moderate and marked limitations, including a moderate limitation in the ability to maintain attention and concentration for extended periods. Then, in Section III, the consultant limited plaintiff to carrying out simple work, and further determined that plaintiff can interact with supervisors and coworkers on a superficial basis, but not with the general public. The ALJ did not include the moderate limitation in attention and concentration for extended periods in the RFC

findings. The court first found no error because the ALJ incorporated the Section III assessment in the RFC, and further determined that the Section III narrative adequately captured the limitations found in Section I.

On the facts of this case, the court finds that the narratives by Dr. Markway and Dr. Blum, which were incorporated into the ALJ's mental RFC findings, explain, account for, and reflect the moderate limitations previously identified by Dr. Markway and Dr. Blum on their assessment. The court finds no error by the ALJ in his consideration of the opinions of Dr. Markway and Dr. Blum.

VI. Did the ALJ err in his consideration of the opinions of advanced registered nurse practitioner (ARNP) Tucker?

ARNP Tucker was a treatment provider for the plaintiff. In July 2011, she filled out a mental RFC assessment form indicating that plaintiff had some moderate and marked limitations, particularly in the categories listed under social interaction. She also opined that plaintiff's impairments meet listed impairments 12.04 and 12.06 (R. at 358-364).

The ALJ found that ARNP Tucker's treatment notes failed to corroborate these opinions. The ALJ also found that plaintiff's own reports on the efficacy of her treatment regimen further belie the opinions of ARNP Tucker. The ALJ further noted that other mental health treatment notes similarly fail to provide a

basis for any finding that plaintiff meets the listed impairments or that she suffers severe limitations. For these reasons, the ALJ accorded little weight to the opinions of ARNP Tucker. The ALJ also noted that ARNP is not an acceptable medical source and that this opinion, standing alone, cannot constitute documentation of severe or disabling vocational limitations. However, this report by ARNP Tucker was considered with respect to severity and effect on function (R. at 513).

The term "medical sources" refers to both "acceptable medical sources" and other health care providers who are not "acceptable medical sources." SSR 06-03p, 2006 WL 2329939 at *1. "Acceptable medical sources" include licensed physicians and licensed or certified psychologists. 20 C.F.R. § 404.1513(a)(1)-(2); 20 C.F.R. § 404.1502.

An ARNP is not an "acceptable medical source" under the regulations. 20 C.F.R. § 404.1513(a). Information from other medical sources cannot establish the existence of a medically determinable impairment. There must be evidence from an acceptable medical source for this purpose. However, evidence from "other medical sources," including an ARNP, may be based on special knowledge of the individual and may provide insight into the severity of an impairment and how it affects the claimant's ability to function. Opinions from other medical sources are important and should be evaluated on key issues such as

impairment severity and functional effects, along with the other relevant evidence in the file. The fact that an opinion is from an "acceptable medical source" is a factor that may justify giving that opinion greater weight than an opinion from a medical source who is not an "acceptable medical source" because "acceptable medical sources" are the most qualified health care professionals. However, depending on the particular facts in a case, and after applying the factors for weighing opinion evidence, an opinion from a medical source who is not an "acceptable medical source" may outweigh the opinion of an "acceptable medical source," including the medical opinion of a treating source. SSR 06-03p, 2006 WL 2329939 at **2,3,5.

The court finds that the ALJ's analysis of the opinions of ARNP Tucker are in accordance with SSR 06-3p. The ALJ considered these opinions in regards to the severity of the impairments and their effect on her ability to function.

The next question is whether the treatment notes corroborate the opinions of ARNP Tucker. Plaintiff (Doc. 8 at 24-25) and defendant (Doc. 9 at 9-10) each quote from selective portions of the treatment record. Dr. Blum and Dr. Markway had the treatment records from Wyandot Center when they offered their opinions (R. at 66, 68-69, 82, 83, 85, 86), and discussed those treatment records (R. at 71, 88). As noted above, the ALJ gave significant weight to their opinions (R. at 512).

The court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Hackett v. Barnhart, 395 F.3d 1168, 1173 (10th Cir. 2005); White v. Barnhart, 287 F.3d 903, 905, 908, 909 (10th Cir. 2002). Although the court will not reweigh the evidence, the conclusions reached by the ALJ must be reasonable and consistent with the evidence. See Glenn v. Shalala, 21 F.3d 983, 988 (10th Cir. 1994)(the court must affirm if, considering the evidence as a whole, there is sufficient evidence which a reasonable mind might accept as adequate to support a conclusion). The court can only review the sufficiency of the evidence. Although the evidence may support a contrary finding, the court cannot displace the agency's choice between two fairly conflicting views, even though the court may have justifiably made a different choice had the matter been before it de novo. Oldham v. Astrue, 509 F.3d 1254, 1257-1258 (10th Cir. 2007).

The court finds no clear error in the ALJ's finding that the treatment notes do not corroborate the opinions of ARNP Tucker. Plaintiff and defendant both cite to portions of the treatment record which they believe support their respective positions. Dr. Markway and Dr. Blum reviewed the treatment records and concluded that plaintiff's limitations were not as severe in some areas as opined by ARNP Tucker. The court will

not reweigh the evidence; there is substantial evidence in the record to support the ALJ's finding on this issue.

VII. Did the ALJ in his consideration of the opinions of Dr. Bailey when making his physical RFC findings?

In his report dated August 29, 2007, Dr. Bailey opined the following:

> I do believe the patient has work ability at this time. I would place her at a light physical demand level of 20 pounds and indicate that the patient is able to work a full 8-hour day. I would limit her sitting, bending, squatting, kneeling, climbing, reaching, sitting standing and twisting activities **to an occasional basis which is at one time up to one-third of a day**.

(R. at 333, emphasis added). The ALJ stated that this opinion was consistent with the evidence of record and is given significant weight (R. at 511).

The ALJ's RFC findings do not limit plaintiff's sitting, bending, squatting, kneeling, climbing, or reaching to only an occasional basis, or 1/3 of a day (R. at 507). Plaintiff alleges that the ALJ erred by failing to include these limitations after giving significant weight to these opinions. However, defendant interprets the statement of Dr. Bailey as indicating that plaintiff can only perform those activities for 1/3 of a day at one time. Thus, according to defendant, plaintiff could perform these activities for more than 1/3 of a work day; however, defendant would need a break or breaks in

those activities if defendant performed any of those activities for 1/3 of a work day at one time.

The court finds that the opinion of Dr. Bailey is ambiguous on this point. It could be interpreted either way. On remand, the ALJ will seek clarification of that opinion.

VIII. Did the ALJ err in his consideration of plaintiff's obesity?

At step two, the ALJ found that obesity was a severe impairment (R. at 505). Later in his decision, the ALJ noted that plaintiff was obese, and included plaintiff's body mass index. The ALJ stated that as a result of obesity, an individual may have limitations in any of the exertional functions, postural functions, in the ability to manipulate objects, or to tolerate extreme heat, humidity or hazards, and cited to SSR 02-01p. The ALJ then stated that the effects of plaintiff's obesity were considered when determining plaintiff's RFC (R. at 509).

SSR 02-1p is a social security ruling governing the evaluation of obesity. It states that, when assessing RFC, obesity may cause limitations of various functions, including exertional, postural and social functions. Therefore, an assessment should also be made of the effect obesity has upon the claimant's ability to perform routine movement and necessary physical activity within the work environment. Obesity may also

affect the claimant's ability to sustain a function over time. In cases involving obesity, fatigue may affect the individual's physical and mental ability to sustain work activity. 2002 WL 32255132 at *7. The discussion in the SSR on obesity and RFC concludes by stating that: "As with any other impairment, we will explain how we reached our conclusions on whether obesity caused any physical or mental limitations." 2002 WL 32255132 at *8.

The ALJ stated that the effects of obesity were considered when determining plaintiff's RFC. Plaintiff has failed to point to any evidence in the record indicating that plaintiff's obesity resulted in limitations not included in the ALJ's RFC findings. See Arles v. Astrue, 438 Fed. Appx. 735, 740 (10th Cir. Sept. 28, 2011); Warner v. Astrue, 338 Fed. Appx. 748, 751 (10th Cir. July 16, 2009). Therefore, the court finds no error by the ALJ in his consideration of plaintiff's obesity.

In summary, on remand the ALJ will need to inquire about and resolve any conflicts between the RFC findings, the VE testimony and the DOT. The ALJ will also need to make a determination of whether the remaining jobs that plaintiff can perform, given the RFC limitations (including a limitation to simple work), is a significant number of jobs in the national economy. Second, the ALJ will need to reevaluate the weight accorded to plaintiff's daily activities. Plaintiff's daily

activities, as set forth in the ALJ decision, are not a strong indication that plaintiff has the capacity to perform full-time competitive work. Finally, the ALJ should clarify whether Dr. Bailey intended to limit various activities to an occasional basis (1/3 of a day) over the course of an 8 hour workday.

IT IS THEREFORE ORDERED that the judgment of the Commissioner is reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this memorandum and order.

Dated this 26th day of April 2017, Topeka, Kansas.

s/Sam A. Crow
Sam A. Crow, U.S. District Senior Judge