UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DEBRA WITHERELL on behalf of
M.D.H., a minor,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.
_____/

Case Number 13-13350
Honorable David M. Lawson
Magistrate Judge Charles E. Binder

OPINION AND ORDER REJECTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION, GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND REMANDING CASE FOR FURTHER PROCEEDINGS

The plaintiff filed the present action on October 5, 2013 seeking review of the Commissioner's decision denying the plaintiff's claim for supplemental security income under Title XVI of the Social Security Act. The case was referred to United States Magistrate Judge Charles E. Binder pursuant to 28 U.S.C. § 636(b)(1)(B) and E.D. Mich. LR 72.1(b)(3). Thereafter, the plaintiff filed a motion for summary judgement to reverse the decision of the Commissioner and to remand either for further proceedings or an award of benefits. The defendant filed a motion for summary judgment requesting affirmance of the decision of the Commissioner. Magistrate Judge Binder filed a report on August 19, 2014 recommending that the defendant's motion for summary judgment be granted, the plaintiff's motion for summary judgment be denied, and the decision of the Commissioner be affirmed. The plaintiff filed timely objections to the recommendation. This matter is now before the Court for fresh review.

The dispute in this case is quite focused: it addresses one of the domains in the test to determine whether a minor child's severe impairment is functionally equivalent to a listed impairment under 20 C.F.R. § 416.926a. As the magistrate judge explained, the plaintiff, M.D.H., is a minor child, presently 14 years old. His grandmother, also his legal guardian, filed an application on October 18, 2010 for supplemental security income benefits on his behalf. The alleged date of the onset of disability was the date that the plaintiff filed the application. M.D.H. has been diagnosed with attention deficit hyperactivity disorder (ADHD), oppositional defiant disorder (ODD), and reading, writing, and math disability. At the time of the hearing on his claim for benefits, M.D.H. had qualified for special education services since April 2008 based on his learning disability, had been examined by a child neurologist and psychologist, and was taking Concerta, Catapress, and Zyprexa.

The plaintiff's claim initially was denied on January 27, 2011. On February 7, 2011, the plaintiff filed a written request for a hearing on the claim, and on December 8, 2011, the plaintiff and her grandson appeared before Administrative Law Judge (ALJ) Richard P. Gartner. On January 6, 2012, the ALJ issued a written decision in which he found that M.D.H. was not disabled. On June 20, 2013, the Appeals Council denied review of the ALJ's decision.

A child is considered "disabled" under the Social Security Act if he "has a medically determinable physical or mental impairment, which results in marked and severe functional limitations" that will last for more than a year. 42 U.S.C. § 1382c(a)(3)(C)(i). In making that assessment, the Commissioner employs a sequential, three-step process set out in the regulations as follows:

> [1.] If you are doing substantial gainful activity, we will determine that you are not disabled and not review your claim further. [2.] If you are not doing substantial

> gainful activity, we will consider your physical or mental impairment(s) first to see if you have an impairment or combination of impairments that is severe. . . . [3.] If your impairment(s) is severe, we will review your claim further to see if you have an impairment(s) that meets, medically equals, or functionally equals the listings.

20 C.F.R. § 416.924(a).

In M.D.H.'s case, ALJ Gartner found that the child had not engaged in substantial gainful activity since October 18, 2010 (step one); he suffered from attention deficit hyperactivity disorder, oppositional defiant disorder, and reading, math, and written language disability, impairments which were "severe" within the meaning of the Social Security Act (step two); and his impairment did not equal any listing in the regulations (step three). He then analyzed whether M.D.H.'s impairment was functionally equivalent to a listed impairment.

Under the regulations, the Commissioner assesses functional equivalence by considering six "domains," which are "broad areas of functioning intended to capture all of what a child can or cannot do." 20 C.F.R. § 416.926a(b)(1). A child will be found disabled if he has "marked" limitations in two domains, or "extreme" limitations in one domain. 20 C.F.R. § 416.926a(a). A "marked" limitation is present when a child's "impairment(s) interferes seriously with [the child's] ability to independently initiate, sustain, or complete activities." 20 C.F.R. § 416.926a(e)(2)(i). The domains are: "(1) acquiring and using information; (2) attending and completing tasks; (3) interacting and relating with others; (4) moving about and manipulating objects; (5) caring for yourself; and (6) health and physical well-being." 20 C.F.R. § 416.926a(b)(1)(i)-(vi).

ALJ Gartner found that M.D.H. had (1) a less than marked limitation in acquiring and using information; (2) a marked limitation in attending and completing tasks; (3) a less than marked limitation in interacting and relating with others; (4) no limitation in moving about and manipulating objects; (5) a less than marked limitation in his ability to care for himself; and (6) a less than marked

limitation in physical health and well-being. The ALJ concluded, therefore, that M.D.H. did not have an impairment that was functionally equivalent to a listed impairment, and he is not disabled.

In her summary judgment motion, the plaintiff argued only that substantial evidence did not support the ALJ's determination that M.D.H. had a less than marked limitation in acquiring and using information. She says the ALJ engaged in a selective reading of the record, relied on stale information, and emphasized information that is irrelevant to that first domain. She believes that the case should be remanded, either for further adjudication or for an award of benefits. The magistrate judge disagreed, and recommended that the Court affirm the ALJ's decision.

The plaintiff raises a single objection, which essentially repeats her summary judgment argument. She contends that the magistrate judge erred in finding that the ALJ's decision was supported by substantial evidence, because the magistrate judge erroneously accepted the Commissioner's version of the facts nearly "verbatim," disregarded relevant evidence from school and medical professionals who had evaluated M.D.H., and gave undue emphasis to old information that was not relevant to M.D.H.'s condition at the time of the alleged onset of disability date. The plaintiff argues that the magistrate judge improperly emphasized information from the 2008 Individual Education Plan (IEP) that was prepared for M.D.H., because significant changes in M.D.H.'s condition during and after 2010 rendered the 2008 assessment irrelevant to his condition. The plaintiff further contends that the ALJ and the magistrate judge ignored critical information from M.D.H.'s April 2010 IEP report showing that his reading and written language test scores were in the 7th and 9th percentiles, respectively, and that at that time, when M.D.H. was in the fifth grade, his reading level was fourth grade and his math and written language levels were third grade. The plaintiff argues that the magistrate judge disregarded the notation in the April 2010 IEP of

"serious" or "very serious" problems that M.D.H. was having with vocabulary and verbal and reading comprehension, and instead engaged in a selective reading of the IEP, relying only on the notations regarding other areas in which M.D.H. had higher reported ability. The plaintiff contends that if the ALJ properly had considered all of the evidence in M.D.H.'s most current medical and academic records, he should have concluded that M.D.H. had a marked limitation in acquiring using information, and therefore that M.D.H. had marked limitations in at least two of the six functional domains listed in 20 C.F.R. § 416.926a(d).

The defendant did not file any response to the plaintiff's objection.

All parties agree with the magistrate judge that the plaintiff has the burden of proving disability in order to qualify for supplemental security income benefits. *Boyes v. Sec'y of Health & Human Servs.*, 46 F.3d 510, 512 (6th Cir. 1994); *Abbott v. Sullivan*, 905 F.2d 918, 923 (6th Cir. 1990). And they also agree that the Commissioner's findings are conclusive if they are supported by substantial evidence. 42 U.S.C. § 405(g). 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). *See also Lashley v. Sec'y of Health & Human Servs.*, 708 F.2d 1048, 1053 (6th Cir. 1983). The reviewing court must affirm the Commissioner's findings if they are supported by substantial evidence and the Commissioner employed the proper legal standard. *Elam ex rel. Golay v. Comm'r of Soc. Sec.*, 348 F.3d 124, 125 (6th Cir. 2003); *Walters v. Comm'r of Soc. Sec.*, 127 F.3d 525, 528 (6th Cir. 1997).

The Court "may not try the case *de novo*, nor resolve conflicts in evidence, nor decide questions of credibility." *Garner v. Heckler*, 745 F.2d 383, 387 (6th Cir. 1984); *see also Jordan v. Comm'r of Soc. Sec.*, 548 F.3d 417, 422 (6th Cir. 2008); *Smith v. Halter*, 307 F.3d 377, 379 (6th Cir.

2001). Instead, the Court must uphold "the ALJ's decision if there is 'such relevant evidence as a reasonable mind might accept' as sufficient to support the ALJ's conclusion." *Bass v. McMahon*, 499 F.3d 506, 509 (6th Cir. 2007) (quoting *Foster v. Halter*, 279 F.3d 348, 353 (6th Cir. 2001 (citation omitted)). Thus, where the Commissioner's decision is supported by substantial evidence, it must be upheld even if the record might support a contrary conclusion. *Smith v. Sec'y of Health & Human Servs.*, 893 F.2d 106, 108 (6th Cir. 1989). The substantial evidence standard "presupposes that there is a zone of choice within which decisionmakers can go either way, without interference from the courts." *Mullen v. Bowen*, 800 F.2d 535, 545 (6th Cir. 1986) (en banc) (internal quotes and citations omitted).

However, a substantiality of evidence evaluation does not permit a selective reading of the record. "Substantiality of the evidence must be based upon the record taken as a whole. Substantial evidence is not simply some evidence, or even a great deal of evidence. Rather, the substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Garner*, 745 F.2d at 388 (internal quotes and citations omitted); *see also Laskowski v. Apfel*, 100 F. Supp. 2d 474, 482 (E.D. Mich. 2000).

The Commissioner defines the domain of acquiring and using information as "how well [a child] acquire[s] or learn[s] information, and how well [he] use[s] the information [he] ha[s] learned." 20 C.F.R. § 416.926a(g). As the Commissioner explains, the idea encompasses learning and thinking. *Id.* at § 926a(g)(1). Learning includes taking in information through the five senses, understanding a convention of naming objects, recognizing symbols, acquiring language skills, and "be[ing] able to learn to read, write, do arithmetic, and understand and use new information." *Id.* at § 926a(g)(1)(i). Thinking consists of perceiving relationships, reasoning, making choices based

on acquired information, solving problems, and using language. *Id.* at § 926a(g)(2)(ii). Under this domain, a school-age child "should be able to learn to read, write, and do math, and discuss history and science." *Id.* at § 926a(g)(2)(ii). Evaluations are normative, based on "compar[ing] the child's functioning to the functioning of same-age children without impairments." Social Security Ruling (SSR) 09-3P. Therefore, impairments may be evidenced by a child's difficulty with "reading about various subjects and producing oral and written projects, solving mathematical problems, taking achievement tests, doing group work, and entering into class discussions," 20 C.F.R. § 926a(g)(2)(ii), when compared to children of a similar age.

In deciding that M.D.H. had a less than marked limitation in acquiring and using information, the ALJ made only the following observations:

> The claimant has less than marked limitation in acquiring and using information. The claimant has a reading, math and written language disability and receives special education services in school. However, in April 2008 the Wechsler Intelligence Scale for Children-Fourth Edition was administered to the claimant and he obtained a verbal comprehension index of 104, perceptual reasoning index of 96, working memory index of 97, processing speed index of 97 and full scale IQ score of 99 (average) (Exhibit 1F). In November 2010, the claimant's fifth grade teacher noted his reading level was fourth grade, his math level was third grade and his written language level was third grade. She reported the claimant's behavior impeded his ability to make process (Exhibit 4E).

Tr. 27-28. Based on that evidence, the ALJ apparently concluded that M.D.H.'s severe impairments did not "interfere[] seriously with [his] ability to independently initiate, sustain, or complete activities." 20 C.F.R. § 416.926a(e)(2)(i).

The plaintiff argues that reliance on the 2008 IQ test is misleading, because it does not measure the trait that is the focus of this domain. She has a point. IQ tests are generally understood to measure a person's cognitive capability; there is nothing in the record that suggests how that measure addresses performance, which is the focus of the first domain. In this case, the Wechsler

test administered in April 2008 indicates average intelligence, which suggests that one might expect M.D.H. to acquire information on an average trajectory. But the school records, which were not discussed by the ALJ, indicate otherwise. By April 2010, M.D.H. demonstrated below-grade-level performance and significant learning deficits. The assessment states:

> [M.D.H.] is a 4th grade student who demonstrates a pattern of below grade level academic performance as well as a discrepancy between ability and achievement in the areas of reading, written expression and math. Brigance testing for Reading Comprehension indicates that [M.D.H.] comprehends at the beginning 4th grade level. He can read and answer text at the 3rd-4th grade level with minimal assistance. [M.D.H.] reads 74 wpm at the second grade reading level according to DIBELS. He continues to need assistance to decode words with digraphs, blends, long vowel patterns, and multisyllabic words. Most 4th graders are reading ~~124~~ 118 wpm at the end of the year, [and] can decode words with unfamiliar spelling and common rules in isolation and context. According to student writing samples, [M.D.H.] needs assistance with spelling high frequency words, using descriptive terms in his writing and using transitions between topics. Most 4th grade students are able to write multiple paragraphs on a given topic. KeyMath3 grade level results are as follows: Basic Concepts 3.3, Operations 4.4, Applications 3.8, and Total Math 3.6. [M.D.H.] struggles with dividing numbers with a single digit divisor, solving problems involving multiple steps and operations, and using estimation. Most 4th graders are able [to] solve basic algebraic equations, complete long division problems and solve word problems involving multiple steps.

Tr. at 139.

Even earlier in 2008, the records describe significant learning problems. For instance, the summary from April of that year states that

> [M.D.H.] is a friendly boy. He is a talented artist. His ability levels are in the middle of the average range. However, he is having difficulty in the reading and writing areas. His poor phonic skills interfere with reading comprehension, spelling and writing. In addition, he is not making appropriate progress with his reading fluency skills. Using age-appropriate sentence structure, capitalization and punctuation is also an area of weakness for [M.D.H.].

Tr. at 146.

The ALJ cited reports from M.D.H.'s fifth grade records, which also documented learning problems, noting that his reading level was a grade behind, and his math and written language levels were two grades behind. The ALJ attributed the problem to his "behavior." The report, however, states that "[d]ue to [M.D.H.]'s low reading, writing, and math abilities it makes it difficult for him to keep up with and progress in the general education curriculum without special education support." Tr. at 177. That report also documents specific performance deficits in reading and math. For reading, the report notes:

> [M.D.H.] struggles with reading fluency. Progress monitoring at 3rd grade level. His last 3 scores were 58, 62, and 68 wpm. At the 5th grade level, his benchmark scores are 44 wpm (Sept. 2010) and 60 wpm (Jan. 2011). Students reading fluently at benchmark should be reading at 120 wpm.
>
> Reading comprehension is an area of difficulty for [M.D.H.]. At the 5th grade level he is 35% accurate. He has difficulty answering literal questions from a narrative text. [M.D.H.] struggles with what and how questions (10 of the 12 questions that were incorrect w[h]ere what or how questions.) He also struggles with identifying the main idea of a story.

Tr. at 177-78.

It is difficult to reconcile this evidence with the ALJ's conclusion that M.D.H. has a less than marked limitation in acquiring and using information. A reading of the whole record suggests the opposite, that is, that M.D.H.'s diagnosed learning disabilities "interfere[] seriously with [his] ability to" acquire and use information. However, the ALJ has not explained why he apparently rejected the reports, or why he has drawn different conclusions. Of course, it is the ALJ's prerogative to consider and weigh the evidence, and make decisions that flow from those considerations. But the record here does not reflect that process.

The Sixth Circuit has explained that "[i]t is the ALJ's duty to consider all of the evidence and make findings of fact and conclusions of law which adequately set forth the factual and legal

basis for his decision." *Dir., Office of Workers' Comp. Programs v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983). And those findings and conclusions must be "based upon the record in its entirety." *Rogers v. Comm'r of Soc. Sec.*, 486 F.3d 234, 249 (6th Cir. 2007) (citing *Houston v. Sec'y of Health & Human Servs.*, 736 F.2d 365, 366 (6th Cir. 1984)). "[F]ocus[ing] on isolated pieces of the record" does not satisfy that responsibility. *Gayheart v. Comm'r of Soc. Sec.*, 710 F.3d 365, 378 (6th Cir. 2013). When the ALJ fails to discuss or ignores such a significant part of the record, "some explanation" is required. *Id.* at 379. Without such an explanation, the ALJ's decision is not supported by substantial evidence. As the Sixth Circuit explained;

> In the absence of an explicit and reasoned rejection of an entire line of evidence, the remaining evidence is "substantial" only when considered in isolation. It is more than merely "helpful" for the ALJ to articulate reasons . . . for crediting or rejecting particular sources of evidence. It is absolutely essential for meaningful appellate review.

Hurst v. Sec'y of Health & Human Servs., 753 F.2d 517, 519 (6th Cir. 1985).

The defendant and the magistrate judge cited several areas of the record that they believed lent support to the ALJ's conclusion. They referred to M.D.H.'s second grade evaluation report that he had average intelligence, he was a talented artist, and that math was his "area of strength." However, that evaluation preceded the disability onset date by two years; as of the onset date, M.D.H.'s reading ability was two years behind. And his talent in art and his intelligence, as discussed earlier, were not relevant measures of the domain of acquiring and using information. The same can be said for the reports about M.D.H.'s first grade report card, his prowess at kick ball, and his cooperative demeanor in class. The reference to the fourth grade teacher's report that M.D.H. could read text at the third and fourth grade level does not include the entire summary of his abilities. The full passage is quoted above; it does not amount to substantial evidence that could

support the ALJ's decision. The reference to the fifth grade teacher's scoring sheet, indicating that M.D.H. had "problems functioning in [the] domain" of "acquiring and using information," Tr. at 117, is curious, in that the teacher indicated that in the ten categories, M.D.H. had a slight problem in one area, an obvious problem in six areas, a serious problem in two, and a very serious problem in one area. The very serious problem area is "[u]nderstanding school content and vocabulary," and the serious problem areas are "[r]eading and comprehending written material," and "[r]ecalling and applying previously learned material." *Ibid.* Those are key components of the ability to acquire and use information. The Secretary has indicated that deficits in this domain are evidenced by "not reading, writing, or doing arithmetic at appropriate grade level." SSR 09-3P. Reliance on this document as substantial evidence that supports the ALJ's finding is misplaced.

The ALJ's determination that M.D.H. has a less than marked limitation in the domain of acquiring and using information is not supported by substantial evidence. That leaves the question whether further fact-finding is required, for "[i]f a court determines that substantial evidence does not support the Secretary's decision, the court can reverse the decision and immediately award benefits only if all essential factual issues have been resolved and the record adequately establishes a plaintiff's entitlement to benefits." *Faucher v. Sec'y of Health & Human Servs.*, 17 F.3d 171, 176 (6th Cir. 1994). Generally, when an ALJ fails to explain his or her rationale for rejecting a body of evidence, remand for further proceedings is the appropriate remedy. *See Hensley v. Astrue*, 573 F.3d 263, 267 (6th Cir. 2009) (stating that the court does "not hesitate to remand when the Commissioner has not provided 'good reasons' for" failing to give appropriate weight to evidence) (quoting *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 545 (6th Cir. 2004)); *see also Cole v. Astrue*, 661 F.3d 931, 939 (6th Cir. 2011); *Blakeley v. Comm'r of Soc. Sec.*, 581 F.3d 399, 408 (6th Cir. 2009); *Rogers v.*

Comm'r of Soc. Sec., 486 F.3d 234, 245-46 (6th Cir. 2007). That is the appropriate remedy in this case, as authorized by sentence four of 42 U.S.C. § 405(g).

After a *de novo* review of the entire record and the materials submitted by the parties, the Court concludes that the plaintiff's objection to the magistrate judge's report and recommendation has merit, the ALJ's decision is not supported by substantial evidence, and the matter should be remanded for further proceedings.

Accordingly, it is **ORDERED** that the magistrate judge's report and recommendation [dkt. #21] is **REJECTED**.

It is further **ORDERED** that the plaintiff's objection [dkt. #27] is **SUSTAINED**.

It is further **ORDERED** that the plaintiff's motion for summary judgment [dkt. #16] is **GRANTED**.

It is further **ORDERED** that the defendant's motion for summary judgment [dkt #19] is **DENIED**.

It is further **ORDERED** that the matter is **REMANDED** to the Commission for further administrative proceedings.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: September 30, 2014

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on September 30, 2014.

s/Shawntel Jackson
SHAWNTEL JACKSON