No. 20-1044

In the Supreme Court of the United States

COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

JOYCE RAMSEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
VIVEK SURI
AUSTIN L. RAYNOR
Assistants to the Solicitor General
MARK B. STERN
JOSHUA M. SALZMAN
DANIEL AGUILAR
AMANDA L. MUNDELL
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a claimant seeking disability benefits under the Social Security Act, 42 U.S.C. 301 *et seq.*, forfeits an Appointments Clause challenge to the appointment of an administrative law judge by failing to present that challenge during administrative proceedings.

PARTIES TO THE PROCEEDINGS

Petitioner (defendant-appellee below) is the Commissioner of Social Security. Respondents (plaintiffs-appellants below) are Joyce Ramsey, Joseph Fortin, Michael Shoops, Anthony Hutchins, Vicky Harris, and Susan Flack.

RELATED PROCEEDINGS

United States District Court (E.D. Mich.):

Hutchins v. *Berryhill*, No. 18-cv-10182 (Mar. 26, 2019)

Ramsey v. *Berryhill*, No. 17-cv-13713 (Mar. 28, 2019)

Fortin v. *Commissioner of Social Security*, No. 18-cv-10187 (Mar. 29, 2019)

Shoops v. *Commissioner of Social Security*, No. 18-cv-10444 (Mar. 29, 2019)

Harris v. *Commissioner of Social Security*, No. 18-cv-11042 (Aug. 28, 2019)

United States District Court (S.D. Ohio):

Flack v. *Commissioner of Social Security*, No. 18-cv-501 (July 22, 2019)

United States Court of Appeals (6th Cir.):

Ramsey v. *Commissioner of Social Security*, No. 19-1579 (Sept. 1, 2020)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Regulations—Continued: Page

In the Supreme Court of the United States

No. 20-1044

COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

JOYCE RAMSEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Commissioner of Social Security, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 973 F.3d 537.

The opinion and order of the district court in *Hutchins* v. *Berryhill*, No. 18-10182 (App., *infra*, 22a-32a) is reported at 376 F. Supp. 3d 775. Subsequent opinions and orders of the district court are not published in the Federal Supplement but are available at 2019 WL 2353184 and 2019 WL 2385107. The report and recommendation of the magistrate judge (App., *infra*, 117a-140a) is not published in the Federal Supplement but is available at 2019 WL 1372169.

The order of the district court and the report and recommendation of the magistrate judge in *Ramsey* v. *Berryhill*, No. 17-cv-13713 (App., *infra*, 33a-42a, 185a-218a) are not published in the Federal Supplement but are available at 2019 WL 1397241 and 2019 WL 2035595.

The opinion and order of the district court in *Fortin* v. *Commissioner of Social Security*, No. 18-10187 (App., *infra*, 43a-64a) is reported at 372 F. Supp. 3d 558. The report and recommendation of the magistrate judge (App., *infra*, 97a-116a) is not published in the Federal Supplement, but is available at 2019 WL 421071.

The opinion and order of the district court and the report and recommendation of the magistrate judge in *Shoops* v. *Commissioner of Social Security*, No. 18-10444 (App., *infra*, 65a-72a, 141a-184a) are not published in the Federal Supplement but are available at 2019 WL 1417164 and 2019 WL 2051902.

The opinion and order of the district court and the report and recommendation and order of the magistrate judge in *Flack* v. *Commissioner of Social Security*, No. 18-cv-501 (App., *infra*, 73a-74a, 85a-96a) are not published in the Federal Supplement but are available at 2019 WL 2635841 and 2019 WL 3290497.

The order of the district court and the report and recommendation of the magistrate judge in *Harris* v. *Commissioner of Social Security*, No. 18-cv-11042 (App., *infra*, 75a-84a, 219a-240a) are not published in the Federal Supplement but are available at 2019 WL 4051741 and 2019 WL 4877339.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Legal Background

1. Under the Social Security Act, 42 U.S.C. 301 *et seq.*, the Social Security Administration (SSA) administers two federal programs that provide benefits to disabled individuals: Title II and Title XVI. *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1772 (2019). Title II provides disability benefits to insured individuals, regardless of financial need. *Ibid.* Title XVI provides supplemental security income to financially needy individuals who are aged, blind, or disabled, regardless of their insured status. *Ibid.*

SSA regulations establish a four-step administrative process for adjudicating claims for disability benefits and supplemental security income. See *Smith*, 139 S. Ct. at 1772. First, the claimant must seek an initial eligibility determination from the agency. 20 C.F.R. 404.902, 416.1402. Second, if the claimant is dissatisfied with that determination, he may seek reconsideration. 20 C.F.R. 404.908(a), 416.1408(a). Third, if the claimant remains dissatisfied, he may demand a hearing before an administrative law judge (ALJ). 20 C.F.R. 404.929, 416.1429. Finally, the claimant may seek review of the ALJ's decision from the agency's Appeals Council. 20 C.F.R. 404.967, 416.1467. Once that administrative process ends, the claimant may seek judicial review of the agency's final decision by filing suit in federal district court. See 42 U.S.C. 405(g).

2. This case concerns the selection of SSA's ALJs—the officials who conduct the third step of the multi-step adjudicatory process just described. The Appointments Clause of the Constitution governs the appointment of "Officers of the United States." U.S. Const. Art. II, § 2,

Cl. 2. The Clause requires principal officers to be appointed by the President with the advice and consent of the Senate. *Ibid.* The Clause allows Congress to choose among four methods for appointing inferior officers: appointment by the President with the advice and consent of the Senate, by the President alone, by the Heads of Departments, and by the courts of law. *Ibid.* If a person performing governmental functions qualifies as an employee rather than an officer, however, the Clause does not govern his selection. See *United States* v. *Germaine*, 99 U.S. 508, 510 (1879).

Before 2018, SSA treated its ALJs as employees rather than as officers. See *Bandimere* v. *SEC*, 844 F.3d 1168, 1199 (10th Cir. 2016) (McKay, J., dissenting), cert. denied, 138 S. Ct. 2706 (2018). It selected its ALJs through a merit-selection process administered by the Office of Personnel Management, and did not provide for their appointment in a manner prescribed by the Appointments Clause. See *O'Leary* v. *OPM*, 708 Fed. Appx. 669, 670 (Fed. Cir. 2017) (per curiam), cert. denied, 138 S. Ct. 2616 (2018).

In *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), however, this Court held that ALJs appointed by the Securities and Exchange Commission were officers rather than employees, and that the Appointments Clause accordingly governed their appointment. *Id.* at 2049. The Court also held that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case" is entitled to a new hearing, and it directed that the new hearing be held before a different, constitutionally appointed officer. *Id.* at 2055 (citation omitted).

B. Proceedings Below

1. Respondents Joyce Ramsey, Joseph Fortin, Michael Shoops, Vicky Harris, Anthony Hutchins, and Susan Flack each applied for Social Security disability benefits, supplemental security income benefits, or both. App., *infra*, 2a. In each case, the application for benefits was denied, an ALJ upheld the decision to deny benefits, and the Appeals Council also denied relief. *Ibid.* The ALJs who denied respondents' claims had been selected under the pre-*Lucia* regime, but respondents failed to challenge the ALJs' appointments before the agency at the ALJ level, and again failed to do so at the Appeals Council level. *Id.* at 2a-3a.

Respondents Ramsey, Fortin, Shoops, Harris, and Hutchins each then filed suit in the Eastern District of Michigan, and respondent Flack did likewise in the Southern District of Ohio. App., *infra*, 1a. In briefs filed in district court, each respondent argued for the first time that the ALJs who had denied their claims had been appointed in violation of the Appointments Clause. *Id.* at 2a. As relevant here, the district court ultimately ruled in each case that the claimant had forfeited the Appointments Clause challenge by failing to raise it during administrative proceedings. *Id.* at 3a.

2. A divided court of appeals reversed. App., *infra*, 1a-21a.

The court of appeals noted that the "precise issue" presented in this case had been presented in three recent decisions by other courts of appeals. App., *infra*, 4a. It observed that, in *Cirko* v. *Commissioner of Social Security*, 948 F.3d 148 (3d Cir. 2020), "the Third Circuit held that issue exhaustion of an Appointments Clause challenge is not required in Social Security proceedings." App., *infra*, 4a. It then observed that the Eighth

and Tenth Circuits, by contrast, had "disagreed with *Cirko*" and concluded that SSA claimants forfeited Appointments Clause challenges when they failed to present them during administrative proceedings. *Ibid.* (citing *Carr* v. *Commissioner*, 961 F.3d 1267 (10th Cir.), cert. granted, No. 19-1442 (Nov. 9, 2020), and *Davis* v. *Saul*, 963 F.3d 790 (8th Cir.), cert. granted, No. 20-105 (Nov. 9, 2020)). The court analyzed the decisions of the other circuits and, agreeing with the Third Circuit's decision in *Cirko*, the majority ruled that administrative forfeiture principles do not apply to Appointments Clause challenges to the appointment of Social Security ALJs. See App., *infra*, 4a; see also *id.* at 17a ("[Because] the characteristics of this particular administrative scheme and the nature of the claim weigh against implying an exhaustion requirement, we agree with the claimants that their failure to raise the Appointments Clause challenge before the agency does not foreclose their ability to seek judicial review of that claim.").*

Judge Siler dissented. App., *infra*, 20a-21a. He explained that he would "choose to follow the reasoning" of *Carr* and *Davis* rather than the reasoning of *Cirko*. *Id.* at 21a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that a claimant may raise an Appointments Clause challenge to the appointment of a Social Security ALJ for the first time in district court after failing to raise it at any point in the administrative proceedings. In *Carr* v. *Saul*, No. 19-1442 (oral

---

* After the court of appeals issued its decision in this case, the Fourth Circuit joined the circuit conflict, agreeing with the courts that have entertained the Appointments Clause claims despite the lack of a timely objection. See *Probst* v. *Saul*, 980 F.3d 1015 (2020).

argument scheduled for Mar. 3, 2021), and *Davis* v. *Saul*, No. 20-105 (oral argument scheduled for Mar. 3, 2021), this Court has granted review to decide the same question that is presented here. The Court therefore should hold this petition for a writ of certiorari pending its decision in *Carr* and *Davis*, and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

This Court should hold the petition for a writ of certiorari in this case pending its decision in *Carr* v. *Saul*, No. 19-1442 (oral argument scheduled for Mar. 3, 2021), and *Davis* v. *Saul*, No. 20-105 (oral argument scheduled for Mar. 3, 2021), and then dispose of the petition as appropriate in light of its decision in those cases.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
VIVEK SURI
AUSTIN L. RAYNOR
Assistants to the Solicitor General
MARK B. STERN
JOSHUA M. SALZMAN
DANIEL AGUILAR
AMANDA L. MUNDELL
Attorneys

FEBRUARY 2021

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 19-1579/1581/1586/1889/1977/3886

JOYCE RAMSEY (19-1579); JOSEPH FORTIN (19-1581); MICHAEL SHOOPS (19-1586); ANTHONY HUTCHINS (19-1889); VICKY HARRIS (19-1977); SUSAN FLACK (19-3886), PLAINTIFFS-APPELLANTS

v.

COMMISSIONER OF SOCIAL SECURITY, DEFENDANT-APPELLEE

Argued: May 1, 2020
Decided and Filed: Sept. 1, 2020

Appeals from the United States District Court
for the Eastern District of Michigan at Detroit

19-1579: No. 2:17-cv-13713—Nancy G. Edmunds, District Judge; 19-1581: No. 2:18-cv-10187—David M. Lawson, District Judge; 19-1586: No. 2:18-cv-10444—Nancy G. Edmunds, District Judge; 19-1889: No. 2:18-cv-10182—Robert H. Cleland, District Judge; 19-1977: No. 2:18-cv-11042—Stephen J. Murphy, III, District Judge

United States District Court
for the Southern District of Ohio at Columbus

19-3886: No. 2:18-cv-00501—Sarah Daggett Morrison, District Judge

OPINION

Before: SILER, WHITE, and DONALD, Circuit Judges.

HELENE N. WHITE, Circuit Judge. Plaintiffs-Appellants Social Security disability benefit and supplemental security income benefit claimants ("claimants") appeal from district court orders rejecting their Appointments Clause challenges to the administrative law judges (ALJ) who heard their cases, on the basis that they forfeited the issue by not raising it during their administrative proceedings. For the reasons that follow, we **VACATE** the judgments of the district courts and **REMAND** these consolidated cases to the Social Security Administration for new hearings before constitutionally appointed ALJs other than the ALJs who presided over claimants' first hearings.

I.

Claimants in these consolidated cases sought Social Security disability and/or supplemental security income (SSI) benefits. In each case, the application for benefits was denied, and an ALJ upheld the decision to deny benefits. After requesting review by the Appeals Council and being denied relief, claimants sought judicial review of the denial of benefits. While the appeals were pending, claimants moved to raise an issue they had not raised during the administrative hearing process—an Appointments Clause challenge to the ALJs' appointments. In the wake of the Supreme Court's decision in *Lucia v. Securities & Exchange Commission*, 138 S. Ct.

2044 (2018), that the ALJs of the Securities and Exchange Commission ("SEC") had not been appointed in a constitutionally legitimate manner and therefore remand for a de novo hearing before a different ALJ was required, the claimants argued that a similar constitutional problem exists here that entitles them to new hearings before different ALJs.[1]

The Commissioner did not contest the merits of claimants' Appointments Clause challenge; rather, the Commissioner argued that the claimants forfeited review of the issue because they failed to raise it during their administrative hearings. The district courts agreed with the Commissioner that the Appointments Clause challenges were forfeited and affirmed the denial of benefits on the merits. The claimants now appeal.

---

[1] In *Lucia*, the Court held that because SEC ALJs exercise "significant discretion" in carrying out their "important functions," the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, requires that they be appointed by the President, a court of law, or a head of department. 138 S. Ct. at 2053. Because SEC ALJs had not been so appointed, the Court held that the proper remedy was a de novo hearing before a constitutionally appointed officer other than the officer who first heard the case. *Id.* at 2055. Like SEC ALJs, Social Security ALJs were not appointed by the President, a court, or the head of department. Rather, they were hired by the Office of Personnel Management. In anticipation of claimants making similar arguments in Social Security cases, the Acting Commissioner of Social Security ratified the appointments of all Social Security ALJs on July 16, 2018, thereby foreclosing any future Appointments Clause challenges to ALJ decisions after that date. However, the ALJs' decisions upholding the denial of benefits in claimants' cases were made before the ALJs' appointments were ratified.

II.

A.

The question is one of issue exhaustion: must the claimants have raised their Appointments Clause challenge before the ALJ in order to preserve that challenge for judicial review. As we explained in *Jones Brothers, Inc. v. Secretary of Labor*, 898 F.3d 669 (6th Cir. 2018) and again in *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 745 (6th Cir. 2019), to "resolve an agency's argument that a party failed to exhaust a post-*Lucia* constitutional challenge[,]" we ask three questions. *Island Creek*, 937 F.3d at 745-46. First, must a party seeking judicial review of the agency's decision exhaust issues with that agency? If so, did the party properly exhaust their claim? Finally, "[i]f not, do these constitutional claims nevertheless fall within an exception to the exhaustion requirement?" *Id.* at 746.

Although we are presented with an issue not yet addressed in this circuit, three other circuits have recently considered this precise issue. In *Cirko v. Commissioner of Social Security*, 948 F.3d 148 (3d Cir. 2020), the Third Circuit held that issue exhaustion of an Appointments Clause challenge is not required in Social Security proceedings. *Id.* at 159. Recently, the Tenth and Eighth Circuits disagreed with *Cirko* in *Carr v. Commissioner of Social Security*, 961 F.3d 1267 (10th Cir. 2020), and *Davis v. Commissioner of Social Security*, 963 F.3d 790 (8th Cir. 2020). We find *Cirko* to be the best reasoned and most persuasive opinion, and we agree with *Cirko* that exhaustion of Appointments Clause challenges in this particular administrative scheme is not required.

We note initially that we have rejected categorical arguments that "longstanding principles of administrative law" compel the enforcement of a "universal exhaustion requirement across all federal statutes in common-law fashion." *Island Creek*, 937 F.3d at 746. As we explained in *Island Creek*, "exhaustion primarily raises a question of statutory interpretation about 'the particular administrative scheme at issue.'" *Id.* (quoting *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975)). Thus, an analysis of whether exhaustion is required cannot be divorced from the administrative scheme under review. *See, e.g.*, *id.* ("On closer inspection, though, the Department of Labor's generic framing—unconnected, as it is, to any specific statute—overstates things.").

The "Supreme Court has identified three categories of statutory schemes [to aid courts] when deciding if a specific statute contains an issue-exhaustion mandate." *Id.* The first category of issue-exhaustion requirements are "creatures of statute." *Sims v. Apfel*, 530 U.S. 103, 107 (2000). In *Jones Brothers*, we found that the Mine Act required exhaustion because the statute specifically stated that "[n]o objection that has not been urged before the [Federal Mine Safety and Health Review] Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 30 U.S.C. § 816(a)(1). The second category of issue-exhaustion requirements involves statutes that do not explicitly require exhaustion "but permit agencies to adopt regulations detailing their internal claims-processing rules." *Island Creek*, 937 F.3d at 747. Where this is the case, "it is common for an agency's regulations to require issue exhaustion in administrative appeals."

Sims, 530 U.S. at 108. As long as the exhaustion regulation comports with the governing statute from which it arises and the agency does not misinterpret it or apply it in an arbitrary manner, courts generally enforce the regulation by refusing to consider unexhausted issues. *Island Creek*, 937 F.3d at 747. For example, we concluded in *Island Creek* that the Black Lung Benefits Act fell into this second category of exhaustion because a regulation required parties "to file petitions for review identifying 'specific issues to be considered' by the Board." *Id.* at 749. Because of this regulation, we concluded that a claimant must exhaust an Appointments Clause challenge before the Board in order for it to be the subject of later judicial review.

The Commissioner concedes that there are no statutory or regulatory exhaustion requirements governing Social Security proceedings.[2] This leaves us with the

---

[2] Despite the concession, portions of the Commissioner's briefing could be construed as suggesting that such a regulatory-exhaustion requirement exists. For instance, in describing the regulations governing adjudication of Social Security cases, the Commissioner notes the regulation requiring that "[t]he claimant must identify all objections at the earliest possible juncture." Comm'r Br. at 17 (citing 20 C.F.R. § 416.1433(a)(3)). But, that regulation governs how a claimant requests an initial hearing before an ALJ, so its statement that a claimant "should" include in her request "the reasons [she] disagree[s] with the *previous* determination or decision" concerns the agency's initial decision and is not a directive that a claimant should *prospectively* argue against the legitimacy of an as-yet-unassigned ALJ's appointment. *See* 20 C.F.R. § 416.1433(a)(3) (emphasis added). The Commissioner additionally cites 20 C.F.R. §§ 404.940, 416.1440 in support of the assertion that the regulations require claimants to notify the ALJ at the earliest opportunity of any objections to the ALJ who will conduct the hearing. Those sections, however, deal with the disqualification of ALJs and are

final category—judicially imposed exhaustion requirements. The Supreme Court has held that "a court may still impose an *implied* exhaustion rule as long as the rule comports with the statutory scheme." *Id.* at 747. In *Sims*, the Court explained that "[t]he basis for a judicially imposed issue-exhaustion requirement is an analogy to the rule that appellate courts will not consider arguments not raised before trial courts." 530 U.S. at 108. "In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion." *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992). This inquiry is "intensely practical . . . because attention is directed to both the nature of the claim presented and the characteristics of the particular administrative procedure provided." *Id.* (internal quotation marks and citations omitted). Here, both factors weigh against imposing an exhaustion requirement for Appointments Clause challenges in Social Security proceedings.

---

plainly directed at allegations of bias or special interest, not to allegations that the hearing officer has been appointed in a constitutionally infirm manner. *See* 20 C.F.R. § 404.940 ("An administrative law judge shall not conduct a hearing if he or she is prejudiced or partial with respect to any party or has any interest in the matter pending for decision."). Even if this regulation could encompass challenges to an ALJ's appointment, the remedy contemplated by the regulation is reassignment to another ALJ who might also have been improperly appointed at the time. Therefore, we agree with the parties that Social Security regulations do not require exhaustion.

Characteristics of the Particular Administrative Scheme

The parties appropriately focus much of their briefing on the Supreme Court's decision in *Sims*, which is the Court's latest opinion on exhaustion requirements in Social Security proceedings. There, the Court considered whether issue exhaustion is required at the Appeals Council level. The Court held that a claimant who exhausts administrative remedies "need not also exhaust issues in a request for review by the Appeals Council in order to preserve judicial review of those issues." 530 U.S. at 112. The votes in *Sims* were fractured, however, and no rationale for why a claimant need not exhaust issues at the Appeals Council commanded the votes of five Justices. We summarize the positions below.

Five Justices agreed that "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." 530 U.S. at 109. Thus, the Court noted, in typical adversarial proceedings, "courts require administrative issue exhaustion as a general rule because it is usually appropriate under an agency's practice for contestants in an adversary proceeding before it to develop fully all issues there." *Id.* (cleaned up). Where the onus is on the parties to develop the issues to be decided, "the rationale for requiring issue exhaustion is at its greatest." *Id.* at 110. "Where, by contrast, an administrative proceeding is not adversarial . . . the reasons for a court to require issue exhaustion are much weaker." *Id.*

Justice Thomas's plurality opinion concluded that issue exhaustion should not be required at the Appeals Council because the analogy to judicial proceedings is at its weakest in Social Security cases for several reasons. First, "Social Security proceedings are inquisitorial rather than adversarial." *Id.* at 110-11. The ALJ, not the parties, is responsible for developing the administrative record by "investigat[ing] the facts and develop[ing] the arguments both for and against granting benefits." *Id.* The Commissioner does not have a representative appear—either at the initial hearing before the ALJ or at the Appeals Council—to oppose the claimant's request for benefits. And the regulations specifically state that the Administration's review process is informal and non-adversarial. *Id.* at 111.

Additionally, the regulations suggest that the Social Security Administration (SSA) does not depend on individual claimants to flag issues for review. A claimant requesting review by the Appeals Council is provided a form with only three lines for the "request for review," and a notice included with the form explains that it can be completed in approximately 10 minutes. *Id.* at 112. Although a claimant is allowed to present a brief with this request, the claimant is not required to do so. The Appeals Council, unlike some other agencies, is not specifically limited by the regulations to addressing only those issues raised by the claimant. Indeed, the Appeals Council's review is plenary, and the Appeals Council may conduct such a review *sua sponte* without a request from the claimant. The *Sims* plurality noted that the encouragement of agency-driven development of the issues in Social Security cases is understandable given the large number of claimants who proceed *pro se* or

who are represented by non-attorneys. For these reasons, the plurality concluded that the "adversarial development of issues by the parties . . . simply does not exist" and that "the general rule [of issue exhaustion] makes little sense in this particular context." *Id.*

Justice O'Connor concurred in part and in the judgment that exhaustion is not required at the Appeals Council, but did not join the part of the plurality opinion that concluded exhaustion should not be required because the analogy to adversarial proceedings is at its weakest in Social Security cases. In her view, "the agency's failure to notify claimants of an issue exhaustion requirement in this context is a sufficient basis for [the] decision." *Id.* at 113 (O'Connor, J., concurring in part and in the judgment). Justice O'Connor noted that "[r]equiring issue exhaustion is particularly inappropriate here, where the regulation and procedures of the Social Security Administration (SSA) affirmatively suggest that specific issues need not be raised before the Appeals Council." *Id.* In support, Justice O'Connor observed that the regulations do not require claimants to file a brief with the Appeals Council. Moreover, claimants using the form provided by the agency are "provide[d] only three lines (roughly two inches) for the statement of issues and grounds for appeal, and the SSA estimates that it should take a total of 10 minutes to read the instructions, collect the relevant information, and complete the form." *Id.* Because the agency's regulations "provide no notice that claimants must also raise specific issues before the Appeals Council to reserve them for review in federal court," Justice O'Connor concluded additional exhaustion requirements are inappropriate. *Id.* at 113-14.

All agree that *Sims* does not dictate the result here because the *Sims* Court made clear that it was only deciding the issue before it—whether issue exhaustion is required at the Appeals Council—and explained that "[w]hether a claimant must exhaust issues before the ALJ is not before us." *Id.* at 107. We are presented with the question *Sims* specifically reserved. In addressing that question, we agree with the Third and Tenth Circuits that the *Marks* rule requires us to treat Justice O'Connor's concurrence as the holding of the Court, as it reached the same result on the narrowest grounds. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (quotations marks omitted)); *Carr*, 961 F.3d at 1272; *Cirko*, 948 F.3d at 155 n.4 (3d Cir. 2020).

As it turns out, however, both approaches yield the same result. Under Justice O'Connor's approach, an implied exhaustion requirement is inappropriate because the agency's regulations provide no notice to claimants that their failure to raise an Appointments Clause challenge at the ALJ level will preclude them from later seeking a judicial decision on the issue. In fact, just as with appeals to the Appeals Council, the regulations do not require claimants to state their case or present written arguments during ALJ hearings. *See* 20 C.F.R. § 404.949; *Cirko*, 948 F.3d at 156. The regulations also confirm agency-driven development of the issues. Although the regulations allow any party to raise a new issue if the ALJ does not do so, there is nothing in the

regulations explaining that failing to raise the issue precludes the claimant from seeking a judicial decision on that issue.

The one difference in the regulations governing ALJ hearings is the regulation that a claimant "should" state "the reasons [she] disagree[s] with the *previous* determination or decision" when requesting an initial hearing before an ALJ. 20 C.F.R. § 416.1433(a)(3) (emphasis added). Although that regulation might provide greater justification for requiring issue exhaustion at the ALJ level of claims of error in the agency's initial decision, it is plainly not a directive requiring claimants to prospectively raise arguments about the constitutional inadequacy of an as-yet-unassigned ALJ's appointment. Therefore, because Social Security regulations "provide no notice that claimants must also raise specific issues before the [ALJ] to reserve them for review in federal court," 530 U.S. at 113-14, Justice O'Connor's approach would not require exhaustion of an Appointments Clause challenge before the ALJ.

Similarly, the reasons the *Sims* plurality rejected an issue-exhaustion requirement for Appeals Council hearings apply just as strongly to proceedings before an ALJ. The analogy to normal adversarial litigation remains at its weakest because the proceeding is inquisitorial rather than adversarial. On this point, we disagree with the Tenth Circuit's *Carr* decision's assertion that "even if SSA ALJ review of disability claims is largely non-adversarial, Appointments Clause challenges are adversarial." 961 F.3d at 1275. This position is belied by the Commissioner's ratification of all SSA ALJ appointments and the SSA's decision not to contest the merits of claimants' Appointments Clause challenge here or in

any similar case. In the wake of *Lucia*, the Commissioner issued Social Security Ruling 19-1p (effective March 15, 2019), which was intended to grant relief to any claimant who "(1) timely requests Appeals Council review of an ALJ's decision or dismissal issued before July 16, 2018 [the date the Commissioner ratified the appointments]; and (2) raises before us (either at the Appeals Council level or previously had raised at the ALJ level) a challenge under the Appointments Clause to the authority of the ALJ who issued the decision or dismissal in the case." Although that Ruling[3] does not aid the claimants here, it underscores that there is little about the SSA's response to the claimants' Appointments Clause challenges that has been adversarial. Thus, under either approach, the characteristics of this particular administrative scheme weigh against implying an issue-exhaustion requirement for Appointments Clause challenges.

---

[3] This ruling also undermines the Commissioner's argument that requiring exhaustion would have furthered one of the principal justifications for requiring exhaustion: providing the agency with an opportunity to correct its own mistakes. In fact, before this ruling, the Commissioner had instructed ALJs *not* to take any action on Appointments Clause challenges. *See* U.S. SOC. SEC. ADMIN., EM-180003: *Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process* 1-2 (eff. Jan. 30, 2018). Until March 2019, there was no evidence that the agency had taken any corrective action, despite the mounting number of Appointments Clause challenges around the country and the agency's awareness that SSA ALJs' appointments might have been constitutionally inadequate. *See Cirko*, 948 F.3d at 159 n.12.

The Nature of the Claim Presented

Because "agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer[,] [e]xhaustion concerns apply with particular force when the action under review involves the exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise." *McCarthy*, 503 U.S. at 145. This rationale explains why the circuit courts in many of the cases cited by the Commissioner concluded that issues particularly within the agency's expertise were forfeited when not raised during administrative proceedings. For example, in *Maloney v. Commissioner of Social Security*, 480 F. App'x 804 (6th Cir. 2012), we held that a claimant "ha[d] waived any argument stemming from the exclusion of [claimant's sister-in-law's testimony]" because the claimant failed to raise that issue before the Social Security Appeals Council. *Id.* at 810. And, in *Anderson v. Barnhart*, 344 F.3d 809 (8th Cir. 2003), the Eighth Circuit held that a claimant waived any argument that the ALJ failed to consider the claimant's morbid obesity as an impairment because "[the claimant] never alleged any limitation in function as a result of his obesity in his application for benefits or during the hearing." *Id.* at 814. That decision relied on earlier Eighth Circuit precedent holding that an ALJ is under no "obligation to investigate a claim not presented at the time of the application for benefits and not offered at the hearing as a basis for disability." *Id.* (citing *Pena v. Chater*, 76 F.3d 906, 909 (8th Cir. 1996)). And, in *Shaibi v. Berryhill*, 883 F.3d 1102 (9th Cir. 2017), the court held that a claimant could not challenge a vocational expert's testimony by seeking to introduce

new evidence for the first time in the district court to rebut that testimony, at least when the claimant was represented by counsel. *Id.* at 1109. Finally, in *Mills v. Apfel*, 244 F.3d 1 (1st Cir. 2001), the First Circuit refused to allow a claimant to argue in the district court that the ALJ erred by improperly applying a particular regulation because the claimant had not made the argument to the ALJ or the Appeals Council." *Id.* at 8.

These cases are distinguishable because an Appointments Clause challenge involves neither an exercise of discretion, nor an issue within the agency's special expertise.[4] Rather, it involves a question of constitutional law, and we agree with the Third Circuit that "exhaustion is generally inappropriate where a claim serves to vindicate structural constitutional claims like Appointments Clause challenges, which implicate both individual constitutional rights and the structural imperative of separation of powers." *Cirko*, 948 F.3d at 153

---

[4] To the extent these appeals ask us to predict whether the Supreme Court would extend *Sims* to the initial ALJ hearing, it is noteworthy that even the four dissenting Justices in *Sims* conceded that constitutional challenges are a recognized exception to the "ordinary principle[] of administrative law" that a litigant must raise issues below in order to obtain court review. *See Sims*, 530 U.S. at 114-15 (Breyer, J., dissenting) ("Although the rule has exceptions, it applies with particular force where resolution of the claim significantly depends upon specialized agency knowledge or practice. In this case, petitioner asked the reviewing court to consider arguments of the kind that clearly fall within the general rule, namely, whether an administrative law judge should have ordered a further medical examination or asked different questions of a vocational expert. No one claims that any established exception to this ordinary 'exhaustion' or 'waiver' rule applies. *See, e.g.*, . . . *Mathews v. Eldridge*, 424 U.S. 319, 329 n.10 (1976) (constitutional claims).").

(citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 536-37 (1962)); *see also Mathews v. Eldridge*, 424 U.S. 319, 30 (1976) ("It is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context."); *Freytag v. C.I.R.*, 501 U.S. 868, 879 (1991) (declining to enforce exhaustion of an Appointments Clause challenge). The importance of the constitutional claim weighs in favor of providing a forum in which the claim can be adjudicated and against implying an exhaustion requirement. This is especially so given the substantial number of claimants who appear before an ALJ pro-se or through non-attorney representatives. While pro-se claimants or non-attorney representatives might be able to make cogent arguments about why the initial agency decision denying disability benefits was incorrect, they are unlikely to recognize that there is a structural constitutional error affecting the legitimacy of the ALJ who is to hear the initial appeal of that decision. And, as we noted above, they are not given notice by SSA regulations that the failure to raise such a claim forecloses them from doing so in the future.

The Commissioner responds that our decisions in *Jones Brothers* and *Island Creek* foreclose any argument that the constitutional nature of the Appointments Clause challenge affects whether exhaustion is appropriate. But, those decisions hold only that the constitutional nature of the claimants' Appointments Clause challenge cannot override explicit statutory- or regulatory-exhaustion requirements. Because there are no such requirements here, these decisions do not control our analysis. To the contrary, they support our decision

that a greater number of factors bear on the question whether exhaustion should be required (or whether an exception to exhaustion applies) in the absence of explicit statutory- or regulatory-exhaustion requirements. *See, e.g.*, *Island Creek*, 937 F.3d at 751 ("When it comes to exceptions, a sharp divide separates statutory from prudential exhaustion. For exhaustion rules that originate with a clear *statutory command*, courts have 'refus[ed] to add unwritten' exceptions on top of those in the text itself . . . [but], [f]or exhaustion rules that originate with *judicial prudence*, courts have felt free to adopt 'judge-made exceptions' in the same prudential fashion."). Indeed, in *Island Creek*, we distinguished the Supreme Court's decision in *Freytag*, which excused a forfeited Appointments Clause claim because of the constitutional nature of the challenge, on the grounds that "*Freytag* treated the exhaustion mandate in that tax context as arising on purely prudential grounds, which allowed it to adopt any purely prudential exception that it felt proper." *Id.* at 754. Not only is an implied exhaustion requirement inappropriate for Appointments Clause challenges in Social Security proceedings, but the recognition of constitutional claims as an exception to prudential exhaustion requirements further supports our conclusion.

Because both the characteristics of this particular administrative scheme and the nature of the claim weigh against implying an exhaustion requirement, we agree with the claimants that their failure to raise the Appointments Clause challenge before the agency does not foreclose their ability to seek judicial review of that claim. Our holding is narrow. Because the inquiry whether to imply an exhaustion requirement depends in

part on the nature of the claim presented, we hold only that a claimant does not forfeit an Appointments Clause challenge in a Social Security proceeding by failing to raise that claim before the agency.[5] We do not "opine on any issue-exhaustion requirement in this context beyond Appointments Clause challenges, as that is the question before us today." *Cirko*, 948 F.3d at 153 n.3.

---

[5] Because our holding is narrow, we disagree with the Commissioner that our ruling would greatly burden the SSA. *See Cirko*, 948 F.3d at 159 (noting that, because of the procedural rules governing the timeline for seeking review of an ALJ's decision, "[t]he effect of our decision today, then, is limited to the hundreds (not hundreds of thousands) of claimants whose cases are already pending in the district courts, a drop in the bucket relative to the thousands of claims that the SSA has voluntarily ordered (and thus apparently has the resources enabling) the [SSA] to review"). We also disagree with the Commissioner's broader argument that such a rule would encourage "sandbagging" by allowing a claimant to sit on an Appointments Clause challenge and only raise it in district court should the claimant suffer an adverse decision before the agency. As an initial matter, the Commissioner's ratification of SSA ALJs has cured any Appointments Clause problem with SSA ALJs, so the Commissioner's argument must refer instead to Appointments Clause challenges to ALJs of other administrative agencies. As we have explained, however, whether an implied exhaustion requirement is appropriate depends in part upon the specific administrative scheme at issue. Therefore, our holding today in no way decides whether a similar result would be appropriate for Appointments Clause challenges to the ALJs of other administrative agencies. In *Sims*, the Court wrote that "[a]lthough the question is not before us, we think it likely that the Commissioner could adopt a regulation that did require issue exhaustion." 530 U.S. at 108. The agency's decision not to impose such a requirement in the twenty years since *Sims* was decided does not persuade us that it is prudent for us to imply an unwritten exhaustion requirement for Appointments Clause challenges now.

B.

In *Lucia*, the Supreme Court held that the SEC's ALJs are inferior officers who must be appointed consistently with the Appointments Clause in part because they hold "continuing office[s] established by law" and exercised "significant discretion when carrying out . . . important functions." 138 S. Ct. at 2053 (quotations omitted). The Commissioner has not contested—either here or before the Third, Eighth, or Tenth Circuits—the merits of the claimants' argument that SSA ALJs are also inferior officers who were required to be, but were not, appointed consistently with that clause. Because the Commissioner has effectively "conceded the premise," *Cirko*, 948 F.3d at 152, claimants are entitled to the remedy that *Lucia* held was appropriate: a new hearing before ALJs other than the ALJs who conducted their original hearings.

III.

For the foregoing reasons, we **VACATE** the judgments of the district courts and **REMAND** these cases to the Social Security Administration for new hearings before ALJs other than the ALJs who presided over claimants' original hearings.

DISSENT

SILER, Circuit Judge, dissenting. In spite of a very engaging and thoughtful majority opinion, I respectfully dissent. I would find that the claimants for benefits from the Social Security Administration (SSA) were obligated to assert their objections to the Administrative Law Judges (ALJs) at or before the time of the ALJ hearing and their failure to assert those objections con-

stitutes a forfeiture of their challenges to the legal authority of the ALJs to preside in the case. Thus, when the cases came before the district court on appeal from the ALJs, claimants were precluded from objecting to the legality of the ALJs. As the majority explains, other circuits have considered this exact issue. I choose to follow the reasoning from *Carr v. Comm'r*, 961 F.3d 1267, 1274-76 (10th Cir. 2020), and *Davis v. Saul*, 963 F.3d 790, 794-95 (8th Cir. 2020).

I agree with the analysis of the majority that from *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 745-46 (6th Cir. 2019), there is a three-step procedure to analyze the question before us. That is basically the same test from *Jones Brothers, Inc. v. Sec'y of Lab.*, 898 F.3d 669, 673-77 (6th Cir. 2019). *Island Creek* was different because, there, a regulation required the parties to file petitions for review identifying "specific issues to be considered by the Board." 937 F.3d at 749 (citation omitted). As recognized by the majority, the decision in *Sims v. Apfel*, 530 U.S. 103 (2000), is significant to this decision, but there was no majority decision which controls this case. The concurring opinion from Justice O'Connor is considered the most cited part of the fractured opinion, but the majority here admits that *Sims* does not control our present case, because *Sims* involved whether issue exhaustion is required at the Appeals Council.

I would follow the reasoning in *Carr*. As *Carr* indicates, the Social Security ALJs must notify claimants of the specific issues to be decided at each hearing, pursuant to 20 C.F.R. § 404.938(b)(1), but the court decided that the exhaustion of the Appointments Clause chal-

lenges "is necessary even without a statutory or regulatory requirement." *Carr*, 961 F.3d at 1275 n.7. I agree with the conclusions in *Carr* and *Davis* that the exhaustion requirement promotes both judicial and agency efficiency. Had the claimants raised the question at the ALJ level, the Commissioner could have quickly rectified the problem and avoided the situation we have here, that is, having to rehear all cases after the proper appointments of the ALJs.

Unlike the majority, I am concerned that not requiring exhaustion would encourage "sandbagging." *See Carr*, 961 F.3d at 1275 n.9; *Davis*, 963 F.3d at 795. Failing to object at the ALJ level allows the claimant to get two bites at the apple. The wiley lawyer knows that she can let the case proceed through the administrative level. If the claimant receives benefits, then the lawyer need not object to the appointment of the ALJ. However, if the claimant loses at the ALJ level, that lawyer would raise the issue before the district court, forcing a new hearing before another ALJ.

I respectfully dissent and would affirm the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 18-10182

ANTHONY HUTCHINS, PLAINTIFF

v.

NANCY A. BERRYHILL, DEFENDANT

Filed: Mar. 26, 2019

OPINION AND ORDER REJECTING REPORT AND RECOMMENDATION, GRANTING DEFENDANT'S OBJECTIONS, AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This is a Social Security appeal stemming from the denial of disability benefits. The case was referred to a magistrate judge for a report and recommendation (ECF No. 3.) Both Plaintiff and Defendant filed motions for summary judgment. (ECF No. 12, 14.) The magistrate judge considered these motions and issued a Report and Recommendation ("R&R") that recommends granting Plaintiff's motion and remanding the case for *de novo* consideration. (ECF No. 20.) Defendant timely filed two objections to the R&R. (ECF No. 21.) After reviewing the R&R and the parties' filings, the court concludes that a hearing is unnecessary. *See* E.D. Mich. LR 7.1(f)(2). For the reasons stated below, the

court will overrule the R&R, grant Defendant's objections, and grant Defendant's motion for summary judgment.

I. STANDARD

The filing of timely objections to an R&R requires the court to "make a *de novo* determination of those portions of the report or specified findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); *see also United States v. Raddatz*, 447 U.S. 667 (1980); *United States v. Winters*, 782 F.3d 289, 295 n.1 (6th Cir. 2015); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). This *de novo* review requires the court to re-examine all the relevant evidence previously reviewed by the magistrate judge to determine whether the recommendation should be accepted, rejected, or modified in whole or in part. 28 U.S.C. § 636(b)(1).

II. DISCUSSION

Defendant raises two objections to the R&R. First, Defendant challenges the report's recommendation that Plaintiff's Appointments Clause argument was not forfeited. Second, Defendant challenges the report's treatment of the opinion of Plaintiff's treating psychiatrist, Dr. Johnathan Henry. Both objections are well taken. The court addresses each in turn.

A. Forfeiture of Appointments Clause Argument

In connection with his summary judgment briefing, Plaintiff filed a supplemental brief in which he argues for the first time that his claim should be remanded in light of the Supreme Court case of *Lucia v. SEC*, 138 S. Ct. 2044 (2018). (ECF No. 18.) In *Lucia*, the peti-

tioner's case was initially heard by a Security and Exchange Commission ALJ appointed by Commission staff members. On appeal before the Commission, the petitioner argued that the ALJ's ruling was invalid because the ALJ was an officer and was not properly appointed pursuant to the Appointments Clause of the United States Constitution. *Id.* at 2050. The Appointments Clause mandates that "only the President, 'Courts of Law,' or 'Heads of Departments' can appoint 'Officers.'" *Id.* (*citing* U.S. Const. art. II, § 2, cl. 2.) Both the administrative appellate board and the U.S. Court of Appeals rejected this argument, but the Supreme Court reversed. The Court held that the ALJ was an officer subject to the Appointments Clause and explained that "'[o]ne who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief. *Lucia*, 138 S. Ct. at 2048 (*quoting Ryder v. United States*, 515 U.S. 177, 182 (1995)).

Plaintiff analogies his case to *Lucia* and argues for remand because the Social Security ALJ assigned to his case was not properly appointed. Defendant does not contest the invalidity of the ALJ's appointment, but only that Plaintiff forfeited his Appointments Clause argument by failing to raise it during his administrative proceedings. The magistrate judge recommends that the court agree with Plaintiff.

She correctly observes that "[t]he Commissioner's forfeiture argument is overwhelmingly endorsed by district courts across the country." (*Id.* at 1399.) Indeed, it appears that the majority, if not all, of the district courts to address this issue in the Sixth Circuit have held that a plaintiff forfeits an Appointments Clause argument by

failing to raise it during administrative proceedings.[1] The overwhelming majority of district courts across the country to address this issue have reached the same conclusion.[2] However, the magistrate judge here would

---

[1] *See Ramsey v. Comm'r of Soc. Sec.*, No. 17-13713 (E.D. Mich. Feb. 25, 2019) (Dawkins Davis, M.J.); *Shoops v. Comm'r of Soc. Sec.*, No. 18-10444 (E.D. Mich. Feb. 14, 2019) (Majzoub, M.J) ("Plaintiff has forfeited his Appointments Clause challenge by failing to raise it in a timely manner"); *Axley v. Comm'r, SSA*, No. 1:18-cv-1106, 2019 WL 489998 (W.D. Tenn. Feb. 7, 2019) (Anderson, J.); *Faulkner v. Comm'r of Soc. Sec.*, No. 1:17-cv-01197, 2018 WL 6059403 (W.D. Tenn. Nov. 19, 2018) (Anderson, J.); *Pugh v. Comm'r of Soc. Sec.*, No. 1:18-78, ECF No. 18, PageID 787 (W.D. Mich. Nov. 8, 2018) (Carmody, M.J.); *Blackburn v. Berryhill*, No. 17-120, ECF No. 23, PageID 630-31 (E.D. Ky. Oct. 18, 2018) (Reeves, J.); *Gothard v. Comm'r of Soc. Sec.*, No. 17-cv-13638, 2018 WL 7254254, at *15 (E.D. Mich. Oct. 10, 2018) (Morris, M.J.), *R&R adopted*, 2019 WL 396785, at *3 (E.D. Mich. Jan. 31, 2019) (Ludington, J.); *Davidson v. Comm'r of Soc. Sec.*, No. 2:16-cv-00102, 2018 WL 4680327, at *2 (M.D. Tenn. Sept. 28, 2018) (Crenshaw, J.).

[2] *See Catherine V. v. Berryhill*, No. 17-3257, 2019 WL 568349, at *2 (D. Minn. Feb. 12, 2019) (Frank, J.); *Sprouse v. Berryhill*, No. 17-04922, ECF No. 15, PageID 704 (D.N.J. Feb. 6, 2019) (Hart, M.J.); *Martin v. Berryhill*, No. 18-00115 ECF 17, PageID at *10-12 (M.D.N.C. Dec. 11, 2018) (Webster, M.J.), *R&R adopted*, Order and J. ECF 19 (M.D.N.C. Jan 4, 2019) (Eagles, J.); *Byrd v. Berryhill*, No. 1:17-01619-SKO, 2019 WL 95461, at *6 n.10 (E.D. Cal. Jan. 3, 2019) (Oberto, M.J.); *Velasquez v. Berryhill*, No. 17-17740, 2018 WL 6920457, at *2-3 (E.D. La. Dec. 17, 2018) (Wilkinson, Jr., M.J.), *R&R adopted*, 2019 WL 77248 (E.D. La. Jan. 2, 2019) (Africk, J.); *Cox v. Berryhill*, No. 16-05434, ECF No. 26, at *3-4 (E.D. Pa. Dec. 18, 2018) (Diamond, J.); *Bowman v. Berryhill*, No. 18-157, ECF No. 12, at *24 (S.D. Iowa Dec. 13, 2018) (Pratt, J.); *Abbington v. Berryhill*, No. 1:17-00552-N, 2018 WL 6571208, at *7-9 (S.D. Ala. Dec. 13, 2018) (Nelson, M.J.); *Nickum v. Berryhill*, No. 17-2011-SAC, 2018 WL 6436091, at *5-6 (D. Kan. Dec. 7, 2018) (Crow, J.); *Field v. Comm'r of Soc. Sec.*, No. 18-00119, at *2 (M.D. Fla. Oct. 15, 2018) (Spaulding,

depart from this trend, joining one judge in the Eastern District of Pennsylvania. (ECF No. 20, PageID 1401 (citing *Muhammad v. Berryhill*, No. 18-172 (E.D. Pa., Nov. 2, 2018) (Rice, M.J.)).) The magistrate judge recommends this conclusion primarily based on the Supreme Court decisions of *Freytag v. Comm'r*, 501 U.S. 868 (1991) and *Sims v. Apfel*, 530 U.S. 103 (2000). (ECF No. 20, PageID 1401-07.)

In *Freytag*, the Supreme Court considered an Appointments Clause challenge in the context of the United States Tax Court. The petitioners in *Freytag* challenged a tax deficiency ruling issued by a Special Trial Judge appointed by the Chief Judge of the Tax Court. *Freytag*, 501 U.S. at 871. Petitioners consented to the Special Trial Judge's jurisdiction after the original tax court judge retired during their case. *Id*. at 872. Petitioners appealed the deficiency finding to the Fifth Circuit and argued, for the first time, that assignment of their case to a Special Trial Judge violated the Appointments Clause. *Id*. at 872. The Fifth Circuit held that the petitioners waived their constitutional challenge by consenting to the jurisdiction of the Trial Judge, but the Supreme Court disagreed. *Id.* at 872-

---

M.J.); *Garrison v. Berryhill*, No. 1:17-00302-FDW, 2018 WL 4924554, at *2 (W.D.N.C. Oct. 10, 2018) (Whitney, J.); *Deidre T. v. Comm'r of Soc. Sec. Admin.*, No. 17-00650, ECF No. 17 at *55-56 (N.D. Ga. Sept. 28, 2018) (Vineyard, M.J.); *Williams v. Berryhill*, No. 2:17-87-KS-MTP, 2018 WL 4677785, at *2-3 (S.D. Miss. Sept. 28, 2018) (Starrett, J.); *Stearns v. Berryhill*, No. C17-2031-LTS, 2018 WL 4380984, at *5-6 (N.D. Iowa Sept. 14, 2018) (Strand, J.); *Hugues v. Berryhill*, No. CV 17-3892-JPR, 2018 WL 3239835, at *2 n.2 (C.D. Cal. July 2, 2018) (Rosenbluth, M.J.). *But see contra Bizarre v. Berryhill*, No. 1:18-CV-48, 2019 WL 1014194 (M.D. Pa. Mar. 4, 2019) (no waiver) (Conner, J.).

73. The Court noted that while "as a general matter, a litigant must raise all issues and objections at trial[,]" the Court concluded that this case was "one of those rare cases" in which the Court should exercise its discretion to hear the constitutional argument. *Id.* at 879. Here, Plaintiff makes no argument that the procedural posture or facts of this case render it equivalent to the "rare" case contemplated in *Freytag*.

The magistrate judge acknowledges that *Freytag* did not create a categorical rule excusing Appointments Clause challenges from general waiver and forfeiture principles. (ECF. No. 20, PageID 1403 (*citing In re DBC*, 545 F.3d 1373, 1380 (Fed. Cir. 2008).) In fact, a mere five years after deciding *Freytag*, the Court issued *Ryder v. United States*, 515 U.S. 177 (1995), a case involving a petitioner who initially raised an Appointments Clause challenge before the Court of Military Review, in which the Court held that Appointments Clause challenges must be timely raised to be considered. *Id.* at 183 ("We think that one who makes a *timely* challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question[.]") (emphasis added). The Court later incorporated this "timely challenge" language in *Lucia*. *See Lucia v. SEC*, 138 S. Ct. at 2055 (citing *Ryder*, 515 U.S. at 183). In recognition of this precedent, the magistrate judge does not suggest that Appointments Clause challenges are categorically exempted from forfeiture principles but recommends nonetheless that normal rules governing waiver and forfeiture ought not apply to Social Security cases. (ECF No. 20, PageID 1402-03.) The argument is founded on *Sims v. Apfel*, 530 U.S. 103 (2000).

In *Sims*, the Court held that Social Security claimants do not waive an issue for judicial review by failing to present it during administrative appeal. *Id.* at 105. The Court explicitly acknowledged that its holding was limited to administrative appeal: "Whether a claimant must exhaust issues before the ALJ is not before us." *Sims,* 530 U.S. at 107. Here, the recommendation elides the Court's limited holding in *Sims* by reasoning that "it is hard to reconcile *Sims's* reasoning that Social Security proceedings before an ALJ are non-adversarial and thus profoundly dissimilar to court litigation with a finding that a judicially-created issue-exhaustion requirement is compatible with *Sims's* holding." (ECF No. 20, PageID 1404.) The court disagrees. This analysis overextends *Sims's* limited holding. This case is distinguishable because Plaintiff failed to raise his Appointments Clause issue at *any* point during his administrative proceedings, not simply on administrative appeal.

In finding that the cases relied on in the report and recommendation are distinguishable, the court recognizes that the result of this case would likely be different had Plaintiff raised his Appointments Clause argument at some point during his administrative proceedings. *See, e.g., Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018) (considering a forfeited Appointments Clause argument that plaintiff raised, but did not develop, before the Mine Commission). Because Plaintiff here failed to raise his argument at any point in his administrative proceedings, the court will not entertain the argument at this time. *See Maloney v. Comm'r of Soc. Sec.*, 480 F. App'x 804, 810 (6th Cir. 2012) ("It is axiomatic that a court should not consider an argument

that has not been raised in the agency proceeding that preceded the appeal.") (internal citation omitted). Accordingly, the court joins the majority of district courts to address this issue and concludes that Plaintiff forfeited his Appointments Clause argument. The court grants Defendant's objection.

B. Treating Source Argument

Defendant also challenges the magistrate judge's proposed finding that the ALJ erred in giving only partial weight to the opinion of Plaintiff's treating psychiatrist, Dr. Jonathan Henry. In analyzing the opinions of a treating source,

> An ALJ is required to give controlling weight to a treating physician's opinion so long as that opinion is supported by clinical and laboratory diagnostic evidence not inconsistent with other substantial evidence in the record. But if the ALJ concludes that a treating source's medical opinion is not entitled to controlling weight, she must weigh the opinion in light of several factors. The ALJ need not perform an exhaustive, step-by-step analysis of each factor; she need only provide "good reasons" for both her decision not to afford the physician's opinion controlling weight and for her ultimate weighing of the opinion.

Biestek v. Comm'r of Soc. Sec., 880 F.3d 778, 785 (6th Cir. 2017) (internal citation omitted). An ALJ may properly consider a claimant's ability to perform daily activities, as well as a claimant's testimony regarding his abilities, in discounting the opinions of a treating source. *See Miller v. Comm'r of Soc. Sec.*, 524 F. App'x 191, 194 (6th Cir. 2013) (discounting opinions of treating source

that conflicted with other treatment records and evidence that the plaintiff could perform significant daily activities); *Maloney v. Comm'r of Soc. Sec.*, 480 F. App'x 804, 809 (6th Cir. 2012) (discounting opinions of treating source that conflicted with the claimant's own testimony regarding her abilities).

After summarizing evidence in the record, the magistrate judge concludes that ALJ failed to provide such "good reasons" for discounting Dr. Henry's opinion. (ECF No. 20, PageID 1419.) The court cannot agree. The ALJ considered Dr. Henry's opinion as follows:

> Johnathan Henry, M.D., opined that the claimant had marked and moderate limitations, and that his impairments would cause him to be absent from work three days a month (23F). This opinion is inconsistent with the claiming's activities of daily living and clinical observations. The claimant testified that he plays Scrabble up to three times a month, reads books, and pays video games. These activities require the claimant to display a fair degree of concentration, a fact that the claimant acknowledged during his testimony. . . . I only accord this opinion partial weight, as it is generally inconsistent with the objective medical record and the claimant's reported activities.

(ECF No. 8-2, PageID 27-28.)

The ALJ also considered treatment records that demonstrated Plaintiff's ability to live independently, complete tasks of daily living, and engage in social activities in addition to Plaintiff's "unremarkable" mental evaluations and "relatively static and conservative" course of treatment. (ECF. No. 8-2, PageID 69.) The

court finds that the ALJ's opinion, read as a whole, provides a sufficient explanation and good reasons for partially discounting the inconsistent opinion of Dr. Henry. Substantial evidence supports the ALJ's finding of no disability.

The magistrate judge details evidence related to Plaintiff's mental health issues and contends that the normal results outlined in the ALJ's report "do not contradict the overwhelming evidence" of Plaintiff's mental health impairments. (ECF No. 20, PageID 1418.) However, the fact that some evidence suggests impairment does not invite the court to reweigh the evidence and reach its own conclusion. In fact, the ALJ's decision "cannot be overturned if substantial evidence, or even a preponderance of the evidence supports the claimant's position, so long as substantial evidence also supports the conclusion reached by the ALJ." *Jones v. Comm'r of Soc. Sec.*, 336 F.3d 469, 477 (6th Cir. 2003). Thus, an ability to cite evidence in support of Dr. Henry's opinion is not relevant to the court's inquiry at this stage. Substantial evidence also supports the ALJ's opinion, so the court will not disturb that opinion. The court will grant Defendant's objection.[3]

[3] In passing, Plaintiff mentions that the magistrate judge did not address his "mental residual functional capacity" and "subjective statements," and that these issues warrant remand. (ECF No. 22, PageID 1639.) Plaintiff failed to properly raise and develop these issues through formal objections, so the court will dispose of them without analysis.

III. CONCLUSION

Plaintiff forfeited his Appointments Clause challenge by failing to raise it at the administrative level, and the court concludes that the ALJ properly considered the opinions of Plaintiff's treating source. Accordingly,

IT IS ORDERED that Defendant's objections (ECF No. 21) to the Report and Recommendation (ECF No. 20) are SUSTAINED in full.

IT IS FURTHER ORDERED that Defendant's motion for summary judgment (ECF No.14) is GRANTED and the Plaintiff's motion for summary judgment (ECF No. 12) is DENIED. A separate judgment will issue.

/s/ ROBERT H. CLELAND
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: Mar. 26, 2019

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, March 26, 2019, by electronic and/or ordinary mail.

/s/ LISA WAGNER
Case Manager and Deputy Clerk
(810) 292-6522

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 17-13713

JOYCE RAMSEY, PLAINTIFF

v.

NANCY BERRYHILL, COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

Filed: Mar. 28, 2019

ORDER ACCEPTING AND ADOPTING THE MAGISTRATE JUDGE'S FEBRUARY 25, 2019 REPORT AND RECOMMENDATION [23]

Pending before the Court is the Magistrate Judge's February 25, 2019 Report and Recommendation. (ECF No. 23.) The Magistrate Judge recommends that the Court deny Plaintiff's motion for summary judgment, grant Defendant's motion for summary judgment, and affirm the findings of the Commissioner of Social Security. Plaintiff raises two objections to the Magistrate Judge's Report and Recommendation. (ECF No. 24.) Defendant opposes Plaintiff's objections. (ECF No. 26.) The Court has conducted a *de novo* review of Plaintiff's objections. For the reasons set forth below, the Court **OVERRULES** Plaintiff's objections, **ACCEPTS**

and **ADOPTS** the Magistrate Judge's Report and Recommendation, and **GRANTS** Defendant's motion for summary judgment, **DENIES** Plaintiff's Motion for Summary Judgment, and **AFFIRMS** the decision of the Commissioner of Social Security.

I. Standard of Review

This Court performs a *de novo* review of those portions of the Magistrate Judge's Report and Recommendation to which Plaintiff has objected. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b). The Court need not and does not perform a de novo review of the report's unobjected-to findings. *Thomas v. Arn*, 474 U.S. 140, 150, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985). Moreover, an objection that "does nothing more than state a disagreement with a magistrate's suggested resolution, or simply summarizes what has been presented before, is not an 'objection' as that term is used in this context." *Aldrich v. Bock*, 327 F. Supp. 2d. 743, 747 (E.D. Mich. 2004). Indeed, the purpose of an objection to a report and recommendation is to provide the Court "with the opportunity to consider the specific contentions of the parties and to correct any errors immediately." *Id.* (quoting *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981)).

II. Analysis

A. Plaintiff's Appointments Clause Challenge

In supplemental briefing before the Magistrate Judge, Plaintiff argued that her case should be remanded because the presiding ALJ was not appointed in accordance with the United States Constitution. (*See* ECF Nos. 16, 17.) This argument stems from the Supreme Court's opinion in *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2055, 201 L. Ed. 2d 464 (2018) (opinion entered

June 21, 2018), which holds that ALJs of the Securities and Exchange Commission are "officers of the United States" within the meaning of the Appointments Clause who must be appointed by the President, a court of law, or department head. In *Lucia*, the Supreme Court found that the plaintiff raised a timely challenge to the constitutionality of the ALJ's appointment while the case was at the administrative level and was therefore entitled to a remand for a hearing by a properly appointed ALJ. *Id.* ("'[O]ne who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief.").

Relying on *Lucia* and the Sixth Circuit's related decision in *Jones Brothers v. Sec'y of Labor,* 898 F.3d 669 (6th Cir. 2018), Plaintiff argued to the Magistrate Judge that: (1) ALJs in the Social Security Administration are similarly subject to the Appointments Clause; (2) the ALJ in her administrative proceeding was not properly appointed; and therefore (3) her case should be remanded so that her claim can proceed before a properly appointed ALJ. Plaintiff's opening brief, which was submitted to the Magistrate Judge on February 28, 2018, did not raise the Appointments Clause issue. (*See* Plaintiff's Motion for Summary Judgment, ECF No. 13.) Plaintiff also did not question, note, or challenge the ALJ's authority during the administrative proceedings.

The Magistrate Judge found that Plaintiff forfeited and waived the Appointments Clause issue by failing to raise it during her administrative proceedings and recommends the Court deny Plaintiff's request for remand. The Magistrate Judge did not, however, address whether *Lucia* expressly applies to Social Security ALJs, whether

Plaintiff met her burden to demonstrate that the ALJ in her proceeding was not properly appointed, or whether Plaintiff waived the argument by raising it for the first time in a supplemental brief submitted several months after she filed her motion for summary judgment.

Plaintiff objects to the Magistrate Judge's recommendation that Plaintiff forfeited and waived her Appointments Clause challenge. Plaintiff contends that the Magistrate Judge's analysis conflicts with two recent report and recommendations from the Eastern District of Michigan and a recent decision from the Middle District of Pennsylvania addressing this very issue. Plaintiff argues that these three cases reflect a "trend" among the courts in finding that social security claimants are not required to raise Appointments Clause challenges during their administrative proceedings. Plaintiff further argues that it was not possible for her to raise the Appointments Clause challenge during her administrative proceedings because *Lucia* was decided almost two years after her hearing before the ALJ. Citing *Jonas Brothers*, Plaintiff asserts that her failure to raise the constitutional issue at the administrative level should be excused, and urges this Court to remand her claims.

Plaintiff's objection is overruled. The Magistrate Judge's recommendation followed the decisions of the overwhelming majority of courts in this circuit and around the country who have addressed this exact issue and reached the same conclusion. *See, e.g.*, *Page v. Comm'r of Soc. Sec.*, 344 F. Supp. 3d 902, 905 (E.D. Mich. 2018); *Gothard v. Comm'r of Soc. Sec.*, No. 1:17-CV-13638, 2018 WL 7254254, at *15 (E.D. Mich. Oct. 10, 2018), *report and recommendation adopted*, No.

1:17-CV-13638, 2019 WL 396785 (E.D. Mich. Jan. 31, 2019); *Foster v. Comm'r of Soc. Sec.*, No. 1:18-CV-478, 2019 WL 1324008, at *4 (W.D. Mich. Mar. 25, 2019) (report and recommendation pending); *Pugh v. Comm'r of Soc. Sec.*, No. 1:18-CV-78, 2018 WL 7572831, at *1 (W.D. Mich. Nov. 8, 2018); *Willis v. Comm'r of Soc. Sec.*, No. 1:18-CV-158, 2018 WL 6381066, at *3 (S.D. Ohio Dec. 6, 2018); *Garrison v. Berryhill*, No. 17-302, 2018 WL 4924554, at *2 (W.D.N.C. Oct. 10, 2018); *Salmeron v. Berryhill*, No. 17-3927, 2018 WL 4998107, at *3 n.5 (C.D. Cal. Oct. 15, 2018); *Davidson v. Comm'r of Soc. Sec.*, No. 16-102, 2018 WL 4680327, at *2 (M.D. Tenn. Sept. 28, 2018); *Stearns v. Berryhill*, No. 17-2031, 2018 WL 4380984, at *4-5 (N.D. Iowa Sept. 14, 2018). As one court from this district recently observed, "nearly every court to address the [Appointments Clause] issue in the context of the Social Security Administration ("SSA") has summarily denied the claim without analysis, citing a claimant's forfeiture by failing to first raise the claim before the ALJ." *Gothard v. Comm'r of Soc. Sec.*, 2019 WL 396785, at *3 (E.D. Mich. Jan. 31, 2019).

The Court is not persuaded by Plaintiff's selected authorities. As an initial matter, Plaintiff mischaracterizes the magistrate judge's report and recommendation in *Shoops v. Comm'r of Soc. Sec.*, No. 18-10444, ECF No. 31 (E.D. Mich. Feb. 14, 2019). The magistrate judge in *Shoops* expressly did not reach a conclusion as to whether a claimant waives her appointment clause challenge by failing to raise the issue during the administrative proceedings. *Id.* Instead, the magistrate judge recommends rejecting the plaintiff's Appointments Clause argument because: (1) the plaintiff failed to develop the record as to whether the ALJ was not properly

appointed; and (2) the plaintiff waived the issue by not presenting it in her opening brief before the magistrate judge. *See id. Shoops*, therefore, provides no support to Plaintiff's argument that courts are departing from the majority view on this issue. And the Court declines to adopt the reasoning of the magistrate judge in *Fortin v. Comm'r of Soc. Sec.*, No. CV 18-10187, 2019 WL 421071, at *4 (E.D. Mich. Feb. 1, 2019). *See also Hutchins v. Berryhill*, No. 18-10182, 2019 WL 1353955, at *3 (E.D. Mich. Mar. 26, 2019) (granting the Commissioner's objection to the magistrate judge's recommendation and holding that the plaintiff forfeited his Appointments Clause argument by failing to raise it during the administrative proceedings).

Plaintiff failed to make an argument or even note a split of authority pertaining to the appointment of the ALJ at any point during her administrative proceedings. Plaintiff failed to do so even though the split in authority on the Appointments Clause issue was recognized while Plaintiff's claim was pending before the Appeals Council. *See Page*, 344 F. Supp. 3d at 905 (finding that the plaintiff failed to raise the Appointments Clause issue where split in authority on appointments of ALJs was acknowledged in December 2016, which was prior to the plaintiff's application of benefits being considered by the Appeals Council). The Court therefore accepts the analysis of the Magistrate Judge and the majority of courts addressing this issue, and finds that Plaintiff forfeited and waived her Appointments Clause challenge because she failed to present it at the administrative level.

B. Plaintiff's Treating Physician

Plaintiff objects to the Magistrate Judge's recommendation that the ALJ properly discounted the opinion of Dr. Kovan, Plaintiff's treating physician. Plaintiff contends that Dr. Kovan's opinions were consistent with his treatment records and that his opinion was entitled to controlling weight. Plaintiff argues that ALJ committed reversible error by failing to properly assess Dr. Kovan's opinion using all of the factors listed in 20 C.F.R. § 404.1527, and the Magistrate Judge erred by concluding that any error by the ALJ was harmless.

Defendant responds that the Magistrate Judge correctly found that even if the ALJ did not discuss all of the factors listed 20 C.F.R. § 404.1527, the ALJ satisfied the regulations by providing the reasons for not giving controlling weight to Dr. Kovan's opinions and an explanation of those reasons. Defendant contends that there is substantial evidence in the record supporting the ALJ's finding that Dr. Kovan's opinions were inconsistent with other evidence in the record. Defendant also argues that Plaintiff's objection should be deemed waived because Plaintiff's objection is essentially a rehash of the argument made to the Magistrate Judge on this same issue. Having reviewed the record this issue, the Court agrees with Defendant and the Magistrate Judge that the ALJ did not commit reversible error in declining to give controlling weight to Plaintiff's treating physician's opinion.

An ALJ is required to give controlling weight to a treating physician's opinion so long as that opinion is supported by clinical and laboratory diagnostic evidence not inconsistent with other substantial evidence in the record. 20 C.F.R. § 404.1527(c)(2); *Biestek v. Comm'r*

of Soc. Sec., 880 F.3d 778, 785 (6th Cir. 2017), *cert. granted sub nom.*, 138 S. Ct. 2677, 201 L. Ed. 2d 1070 (2018). When the ALJ concludes that a treating physician's medical opinion does not deserve controlling weight, the ALJ considers the opinion in light of the factors listed in 20 C.F.R. § 404.1527(c). *See Biestek*, 880 F.3d at 785. However, "the ALJ need not perform an exhaustive, step-by-step analysis of each factor; she need only provide 'good reasons' for both her decision not to afford the physician's opinion controlling weight and for her ultimate weighing of the opinion." *Id.*

Ultimately, the ALJ's written decision must contain good reasons for the weight given to the treating source's opinion, and the explanation must be sufficiently specific to make clear to any subsequent reviewers the weight given to the treating source's medical opinion and the reasons for that weight. *Francis v. Comm'r Soc. Sec. Admin.*, 414 F. App'x 802, 804 (6th Cir. 2011) (internal quotations omitted). The ALJ's failure to specifically discuss each of the factors listed in 20 C.F.R. § 404.1527(c) is harmless error so long as the ALJ's decision provides "the claimant and a reviewing court a clear understanding of the reasons for the weight given a treating physician's opinion." *Id.* at 805 (quoting *Friend v. Comm'r of Soc. Sec.*, 375 Fed. Appx. 543, 551 (6th Cir. 2010) (per curiam)).

Here, as the Magistrate Judge found, the ALJ sufficiently discussed the inconsistencies between Dr. Kovan's opinions and the other evidence in the record. The ALJ attacked both the consistency and supportability of Dr. Kovan's opinion, and provided specific details of the medical evidence which contradicts Dr. Kovan's opinions. To this end, the Magistrate Judge provides a

detailed summary of the medical evidence that the ALJ found to be either inconsistent or at least partially inconsistent with Dr. Kovan's opinions. In sum, the ALJ's decision presents both good reasons and a thorough explanation as to why Dr. Kovan's opinions were not given controlling weight. The ALJ's decision therefore satisfies the procedural safeguards and any failure to specifically follow the letter of the regulations is harmless error.

In addition, the Magistrate Judge found that the Dr. Kovan's July 2016 opinion was patently deficient. This finding means that the ALJ's alleged failure to discuss all of the "good reasons" for not giving to controlling weight to Dr. Kovan's opinion is harmless error. *See Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 547 (6th Cir. 2004) ("If a treating source's opinion is so patently deficient that the Commissioner could not possibly credit it, a failure to observe § 1527(d)(2) may not warrant reversal."); *see, e.g.*, *Phillips v. Comm'r of Soc. Sec.*, 972 F. Supp. 2d 1001, 1008 (N.D. Ohio 2013) (finding that treating source's opinion was so patently deficient that it could not be credited). Plaintiff failed to object to the Magistrate Judge's finding that Dr. Kovan's July 2016 opinion is patently deficient, and has therefore waived her objection on this issue. But even if Plaintiff did raise an objection to this portion of the Report and Recommendation, the Court agrees with the Magistrate Judge's analysis. As a result, the ALJ's purported failure to discuss all of the "good reasons" for giving Dr. Kovan's opinion less than controlling weight is harmless error.

III. Conclusion

For the above-stated reasons, and for the reasons provided in the Magistrate Judge's Report and Recommendation, the Court **OVERRULES** Plaintiff's objections, **ACCEPTS** and **ADOPTS** the Magistrate Judge's Report and Recommendation, **DENIES** Plaintiff's Motion for Summary Judgment; **GRANTS** Defendant's Motion for Summary Judgment, and **AFFIRMS** the decision of the Commissioner.

SO ORDERED.

/s/ NANCY G. EDMUNDS
NANCY G. EDMUNDS
UNITED STATES DISTRICT JUDGE

Dated: Mar. 28, 2019

I hereby certify that a copy of the foregoing document was served upon counsel of record on March 28, 2019, by electronic and/or ordinary mail.

/s/ LISA BARTLETT
Case Manager

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case Number 18-10187

JOSEPH A. FORTIN, PLAINTIFF

v.

COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

Filed: Mar. 29, 2019

OPINION AND ORDER ADOPTING IN PART AND REJECTING IN PART MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION, DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AFFIRMING THE FINDINGS OF THE COMMISSIONER, AND DISMISSING COMPLAINT

Honorable DAVID M. LAWSON

Magistrate Judge ELIZABETH A. STAFFORD

The plaintiff filed the present action seeking review of the Commissioner's decision denying his claim for disability benefits under Title II of the Social Security Act. The case was referred to United States Magistrate Judge Elizabeth A. Stafford under 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 judgment to reverse the decision of the Commissioner and remand the case for an award of benefits or for further consideration by the administrative law judge (ALJ). The defendant filed a motion for summary judgment requesting affirmance of the decision of the Commissioner. The plaintiff then filed a supplemental brief arguing that the ALJ's appointment violated the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2, and therefore he is entitled to a remand for a new hearing before a different, properly-appointed ALJ. Magistrate Judge Stafford filed a report on February 1, 2019 recommending that the plaintiff's motion for summary judgment be granted on that ground, and the matter should be remanded for a fresh administrative hearing. Judge Stafford recommended in the alternative that the Court grant the Commissioner's motion for summary judgment and affirm the decision of the Commissioner if the Court disagrees with the proposed resolution of the Appointments Clause issue. Both sides filed timely objections and responses.

I.

The plaintiff, who is now 66 years old, filed his application for disability insurance benefits on October 21, 2014, when he was 62. In the application that is the subject of the present appeal, the plaintiff alleged a disability onset date of March 13, 2014. The plaintiff was involved in an automobile accident on his disability onset date and a second collision in December 2014. The plaintiff alleged disability due to spinal fusion of cervical vertebrae, right shoulder rotator cuff surgery, multiple breaks to his left arm and wrist, and back and hip pain.

The plaintiff's application for disability benefits was denied initially on December 23, 2014. He timely filed

a request for an administrative hearing, and on July 19, 2016, the plaintiff appeared before ALJ Timothy J. Christensen. ALJ Christensen, it appears, was appointed from a pool of applicants maintained by the Office of Personnel Management, s*ee Menoken v. McGettigan*, 273 F. Supp. 3d 188, 192 (D.D.C. 2017), and not by a head of a department.

On September 28, 2016, ALJ Christensen issued a written decision in which he found that the plaintiff was not disabled. On November 28, 2017, the Appeals Council denied the plaintiff's request for review of the ALJ's decision. The plaintiff then filed his complaint seeking judicial review.

ALJ Christensen reached his conclusion that the plaintiff was not disabled by applying the five-step sequential analysis prescribed by the Secretary in 20 C.F.R. § 404.1520(a). He found that the plaintiff had not engaged in substantial gainful activity since March 13, 2014 through the date he was last insured of December 31, 2014 (step one); the plaintiff suffered from spine disorder and dysfunction of the major joints, impairments which were "severe" within the meaning of the Social Security Act (step two); and that none of those impairments alone or in combination met or equaled a listing in the regulations (step three).

Before proceeding further, the ALJ determined that the plaintiff retained the functional capacity (RFC) to perform light work, except that the plaintiff: (1) cannot engage in occasional "postural" such as bending and stooping; (2) can only frequently handle and grasp with the left upper extremity; (3) cannot reach overhead with the left, non-dominant upper extremity; and (4) would be off-task for less than 10 percent of the workday.

At step four, the ALJ found that the plaintiff's RFC allowed him to perform the duties required for his past relevant work as a program planner, which was performed at the sedentary exertional level. Based on those findings, the ALJ did not proceed to the fifth step and concluded that the plaintiff was not disabled within the meaning of the Social Security Act.

The plaintiff raised three arguments in his motion for summary judgment regarding the ALJ's assessment of his RFC. He said that the ALJ should have adopted a more restrictive RFC based on the plaintiff's upper extremity limitations; the ALJ improperly discounted the opinions of the plaintiff's treating physician regarding his limitations; and the ALJ did not consider the side effects of the plaintiff's medications in formulating the RFC. In a supplemental brief, the plaintiff for the first time challenged the validity of ALJ Christensen's appointment and requested a remand and a *de novo* hearing before a different ALJ.

The magistrate judge suggested that the constitutional challenge had merit. She recommended, on that basis, that the case be remanded for a new hearing before a different ALJ.

Alternatively, the magistrate judge rejected each of the plaintiff's merits arguments. She concluded that the ALJ appropriately accorded little weight to the opinion of the plaintiff's treating physician, based on the absence of clinical or diagnostic evidence and in light of the conservative treatment the plaintiff received following his car accidents. The magistrate judge then found that the ALJ did not err by crafting a less restrictive RFC based on the plaintiff's conservative treatment during the relevant period, his continued ability to drive

and shop, and the consulting physician's opinion that the plaintiff required no manual restrictions for his left upper extremity. And lastly, the magistrate judge concluded, contrary to the plaintiff's contention, that the ALJ considered the side effects of the plaintiff's pain medication and specifically noted that the plaintiff's ability to drive was inconsistent with his claim that his medication's side effects, including drowsiness, prevented him from performing light work.

II.

Both parties filed objections to the report and recommendation. The filing of timely objections to a report and recommendation requires the court to "make a de novo determination of those portions of the report or specified findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); *see also United States v. Raddatz*, 447 U.S. 667 (1980); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). This *de novo* review requires the court to re-examine all of the relevant evidence previously reviewed by the magistrate judge in order to determine whether the recommendation should be accepted, rejected, or modified in whole or in part. 28 U.S.C. § 636(b)(1).

"The filing of objections provides the district court with the opportunity to consider the specific contentions of the parties and to correct any errors immediately," *Walters*, 638 F.2d at 950, enabling the court "to focus attention on those issues-factual and legal-that are at the heart of the parties' dispute," *Thomas v. Arn*, 474 U.S. 140, 147 (1985). As a result, "'[o]nly those specific objections to the magistrate's report made to the district court will be preserved for appellate review; making some objections but failing to raise others will not

preserve all the objections a party may have.'" *McClanahan v. Comm'r of Soc. Sec.*, 474 F.3d 830, 837 (6th Cir. 2006) (quoting *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987)).

A. Commissioner's Objection

The Commissioner objects to the magistrate judge's recommendation that the Court remand the case for a *de novo* hearing to remedy the Appointments Clause violation. The foundation of the magistrate judge's recommendation was *Lucia v. S.E.C.*, — U.S. —, 138 S. Ct. 2044 (2018), where the Supreme Court addressed an Appointments Clause challenge in a case originating with the Securities and Exchange Commission (SEC). ALJs who heard administrative proceedings under the Securities and Exchange Act of 1934 were appointed not by the Commission itself, but by SEC staff members. 138 S. Ct. at 2049. The Court held that those ALJs were "Officers of the United States" within the meaning of the Appointments Clause, and therefore must be appointed as that Clause prescribes. *Id.* at 2054. Because the ALJ's were "inferior Officers," Congress could vest authority for their appointment "in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.* at 2050 (quoting U.S. Const. Art. II, § 2, cl. 2). Although the Court believed that the Commission was a "Head[] of Department[]," SEC staff members were not. Therefore, the Court concluded, the ALJ was not properly appointed, and Lucia was entitled to a new hearing before a different and properly-appointed ALJ. *Id.* at 2055.

The Commissioner here does not quarrel with the argument that ALJ Christensen was improperly appointed in violation of the Appointments Clause. She

also concedes "that 'one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief." *Lucia*, 138 S. Ct. at 2055 (quoting *Ryder v. United States,* 515 U.S. 177, 182-83 (1995)). Instead, she insists that the plaintiff forfeited his Appointments Clause argument because it was not "timely": he never raised it at the administrative level. The magistrate judge suggested, however, that the plaintiff was not required to do so, and he did not forfeit his argument. The Commissioner objects to that conclusion.

This issue is not novel. It has come up in dozens of Social Security cases since *Lucia* was decided. The magistrate judge acknowledged that district courts across the country "overwhelmingly" have endorsed the Commissioner's position. She nevertheless adopted the reasoning of Magistrate Judge Timothy Rice of the Eastern District of Pennsylvania, who concluded that general waiver and forfeiture principles do not apply to Social Security cases at the administrative level. *See Muhammad v. Berryhill*, No. 18-172 (E.D. Pa. Nov. 2, 2018).

This conclusion collides with a fundament of administrative law "that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). Nonetheless, Judge Rice and the magistrate judge in this case found authority to depart from this basic principle in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), and *Sims v. Apfel*, 530 U.S. 103 (2000).

In *Freytag*, the Supreme Court rejected an Appointments Clause challenge to the authority of the Chief Judge of the United States Tax Court to appoint special trial judges to hear certain tax cases. Before reaching the merits of that inquiry, the Court concluded that the petitioners did not waive their right to raise that issue by failing to raise a timely objection before the special tax court judge. The Court explained that "Appointments Clause objections to judicial officers in the category of nonjurisdictional structural constitutional objections [may] be considered on appeal whether or not they were ruled upon below." 501 U.S. at 878-79 (citing *Glidden Co v. Zdanok*, 370 U.S. 530 (1962)). The Court noted that the challenge is "neither frivolous nor disingenuous" and that the "alleged defect in the appointment of the Special Trial Judge goes to the validity of the Tax Court proceeding that is the basis for this litigation." *Id.* at 879. In allowing the claim to proceed, the Court cautioned that "this is one of those rare cases in which we should exercise our discretion to hear petitioners' challenge to the constitutional authority of the Special Trial Judge." *Ibid.*

Four years later, in *Ryder v. United States*, 515 U.S. 177 (1995), the Court sustained an Appointments Clause challenge by a member of the United States Coast Guard to the composition of the Coast Guard Court of Military Review. On the way to the merits, the Court considered three cases where unsuccessful litigants raised Appointments Clause challenges on appeal for the first time, only to have them rejected. The Court noted, "Unlike the defendants in *Ball*, *McDowell*, and *Ward*, petitioner raised his objection to the judges' titles before those very judges and prior to their action on his

case. . . . We think that one who makes a *timely* challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred. Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments." 515 U.S. at 182-83 (emphasis added). The Court imported the "timely challenge" language into *Lucia*. *Lucia*, 138 S. Ct. at 2055.

The magistrate judge acknowledged that *Freytag* did not create a categorical exception for Appointments Clause challenges. Indeed, the Supreme Court found it to be a "rare case." *Freytag*, 501 U.S. at 879. She was persuaded, however, that language in *Sims v. Apfel* counseled in favor of relaxing the requirement of issue exhaustion in Social Security cases. The issue presented in *Sims* was whether an unsuccessful Social Security claimant was required to raise to the Social Security Appeals Council all the issues he presented for review in a later judicial proceeding. The Court held that "[Social Security claimants] who exhaust administrative remedies need not also exhaust issues in a request for review by the Appeals Council in order to preserve judicial review of those issues." 530 U.S. at 112. The Court initially noted that the Social Security Act and its accompanying regulations do not require issue exhaustion. *Id.* at 108. But it acknowledged that it previously had "imposed an issue-exhaustion requirement even in the absence of a statute or regulation." *Ibid.* In siding with the Eighth Circuit, the Court explained that "the general rule of issue exhaustion makes little sense in this particular context" where the non-

adversarial nature of the proceeding vests in the Council, not the claimant, the "primary responsibility for identifying and developing the issues." *Ibid.* (internal marks omitted) (citing *Harwood v. Apfel*, 186 F.3d 1039, 1042 (8th Cir. 1999)). The plurality had observed earlier in the opinion that "[S]ocial Security proceedings are inquisitorial rather than adversarial. It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits . . . and the Council's review is similarly broad." *Id.* at 110-11. But the plurality expressly, albeit parenthetically, noted that "[w]hether a claimant must exhaust issues before the ALJ is not before us," *id.* at 107, leaving open the premise that judicially-created issue exhaustion at the ALJ level makes good sense.

The Commissioner argues that the magistrate judge impermissibly expanded *Sims*'s limited holding. For several reasons, the Court agrees. First, *Sims* addressed the issue-exhaustion requirement in a vastly different substantive and procedural setting. The issues Sims raised on judicial review all concerned the ALJ's disposition of the evidentiary material before him. *Id.* at 105-06 ("[T]hat (1) the ALJ had made selective use of the record; (2) the questions the ALJ had posed to a vocational expert to determine petitioner's ability to work were defective because they omitted several of petitioner's ailments; and (3) in light of certain peculiarities in the medical evidence, the ALJ should have ordered a consultative examination."). The Court noted that because the Appeals Council was charged with the responsibility for developing the issues when it reviewed the ALJ's decision, the analogy to "normal adversarial litigation" was weak and undercut the benefits

served by the issue-exhaustion rule. *Id.* at 109-110, 112. That would be particularly true where the issues that the claimant sought to raise in judicial proceedings focused directly on the disability determination. However, where the challenge is to the structural integrity of the process itself, the adversarial nature of the litigation reemerges. It only makes sense that such challenges should be made "before those very judges and prior to their action on his case," *Ryder*, 515 U.S. at 182, while the agency "has opportunity for correction." *L.A. Tucker Truck Lines, Inc.*, 344 U.S. at 37.

Second, as noted earlier, the *Sims* Court addressed issue exhaustion at the administrative appeal level. At that stage of administrative proceedings, "the regulations provide no notice that claimants must . . . raise specific issues before the Appeals Council to reserve them for review in federal court. To the contrary, the relevant regulations and procedures indicate that issue exhaustion before the Appeals Council is *not* required." *Sims*, 530 U.S. at 113 (O'Connor, J., concurring in part and concurring in the judgment) (citations omitted). The parties agree that in this case, the plaintiff did not raise his Appointments Clause challenge at *any* administrative level, and only brought it up in a supplemental brief filed after the summary judgment briefing had closed. *Sims* specifically did not consider the wisdom of requiring issue exhaustion at the ALJ level, nor did it furnish a justification for departing from the general rule requiring it.

Third, the *Sims* claimant presented issues to the district court for judicial review that the Appeals Council naturally would have had to consider in making its "in-

quisitorial" disability determination. There is no reason that the Appeals Council would have questioned the qualifications of the ALJ to entertain the case. Although nothing in *Sims* ties the application of the issue-exhaustion rule to the nature of the issues raised, it does establish an exception to an "ordinary principle[] of administrative law," *id.* at 114 (Breyer, J., dissenting), that deserves some measure of justification. Certainly, extending that exception would require a corresponding measure of justification that is absent here.

And there is good reason not to extend that exception. As one court observed, "*Ryder*'s rule that relief is due for 'timely' challenges was created as an incentive 'to raise Appointments Clause challenges with respect to questionable judicial appointments.'" *Abbington v. Berryhill*, No. 17-00552, 2018 WL 6571208, at *7 (S.D. Ala. Dec. 13, 2018) (quoting *Ryder*, 515 U.S. at 182-83). "Regularly permitting unsuccessful claimants to raise Appointments Clause challenges for the first time on judicial review, especially when the arguments underlying those challenges were available at the administrative level, would 'encourage the practice of "sandbagging": suggesting or permitting, for strategic reasons, that the [adjudicative entity] pursue a certain course, and later —if the outcome is unfavorable—claiming that the course followed was reversible error.'" *Ibid.* (quoting *Freytag*, 501 U.S. at 895 (Scalia, J., concurring in part and concurring in the judgment)).

Judge Rice made one other point in his report and recommendation that requires comment. He believed that ALJs lack the requisite authority to address Appointments Clause questions, based on an emergency message issued by the Social Security Administration in

January 2018 that "ALJs were powerless to decide constitutional issues." *Muhammad* at 11. And Judge Stafford expressed similar concern based on the updated emergency message issued by the SSA's Office of Hearings Operations on August 6, 2018, approximately two years after ALJ Christensen issued his decision. The message directed ALJs who are or have been presented with Appointments Clause challenges after July 16, 2018 —the date on which the Acting Commissioner ratified the appointment of ALJs by approving the appointments as her own to cure any constitutional error—only to respond orally at the hearing that "the hearing decision will acknowledge that the argument was raised" and to acknowledge in the written determination that the ratification of the ALJ's appointment renders the argument meritless. *See Social Security Administration EM-18003 REV 2*, Important Information Regarding Possible Challenges to the Appointment of Administrative Law Judges in SSA's Administrative Process—UPDATE. If the challenge was raised before July 16, 2018, however, the message indicated that the challenge was "acknowledged in the record and entered into the agency's case processing systems for any necessary action." *Ibid.* *See also Bizarre v. Berryhill*, — F. Supp. 3d —, 2019 WL 1014194, at *3 (M.D. Penn. Mar. 4, 2019) ("The Commissioner does not suggest (and we have found no authority indicating) that a Social Security ALJ would be authorized to resolve or redress a constitutional challenge to his or her own authority.").

The Supreme Court has offered good reasons why a seemingly rigid agency policy against a litigant's position should not excuse the requirement to raise objections at the administrative level:

> It is urged in this case that the Commission had a predetermined policy on this subject which would have required it to overrule the objection if made. While this may well be true, the Commission is obliged to deal with a large number of like cases. Repetition of the objection in them might lead to a change of policy, or, if it did not, the Commission would at least be put on notice of the accumulating risk of wholesale reversals being incurred by its persistence. Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

L.A. Tucker Truck Lines, Inc., 344 U.S. at 37 (footnote omitted).

Moreover, *Jones Brothers, Incorporated v. Secretary of Labor*, 898 F.3d 669 (6th Cir. 2018), decided approximately one month after *Lucia*, supports the conclusion that Social Security ALJs have the power to resolve Appointments Clause claims. The court explained that ALJs have the power to decide as-applied challenges to their appointments, but they cannot adjudicate facial challenges. *See id.* at 674-75. Admittedly, that case is not squarely on point, as it dealt with a statutory requirement to exhaust issues at the administrative level under the Mine Act. *Id.* at 673 (quoting 30 U.S.C. § 823(d)(2)(A)(ii)). But the court noted that "administrative agencies may [not] look the other way when it comes to as-applied constitutional challenges and constitutional-avoidance arguments." *Id.* at 674. It

found no exception to the general rule that "[a]dministrative exhaustion is thus typically required so long as there is 'the possibility of some relief for the action complained of,' even if it is not the petitioner's preferred remedy." *Id.* at 676 (quoting *Booth v. Churner*, 532 U.S. 731, 738 (2001)).

For these reasons, the Court must respectfully disagree with the magistrate judge's suggestion that Social Security claimants, including the plaintiff here, have no obligation to raise and exhaust Appointments Clause challenges at the administrative level before seeking judicial review. Other courts overwhelmingly agree, albeit for somewhat different reasons. *See e.g.*, *Page v. Comm'r Soc. Sec.*, 344 F. Supp. 3d 902, 904 (E.D. Mich. Oct. 31, 2018) (Whalen, M.J.) (denying leave to file amended complaint and noting that "[a]s in *Jones Brothers*, the current challenge pertains to the Defendant's appointment duties under the applicable statutes as applied."); *Hutchins v. Berryhill*, No. 18-10182, 2019 WL 1353955, at *3 (E.D. Mich. Mar. 26, 2019) (Cleland, J.) ("Because Plaintiff here failed to raise his argument at any point in his administrative proceedings, the court will not entertain the argument at this time."); *Axley v. Comm'r Soc. Sec.*, No. 18-1106, 2019 WL 489998, at *2 (W.D. Tenn. Feb. 7, 2019) ("Plaintiff's failure to assert a challenge to the ALJ's appointment at any point in the administrative proceedings forfeited his Appointments Clause claim."); *Gothard v. Comm'r Soc. Sec.*, No. 17-13638, 2019 WL 396785, at *3 (E.D. Mich. Jan. 31, 2019) (Ludington, J.) (declining to address whether Plaintiff "waived her [A]ppointments [C]lause challenge by failing to raise it before the ALJ . . . because Plaintiff's argument concerning the applicability of *Lucia* has no

merit."); *Dierker v. Berryhill*, No. 18-145, 2019 WL 246429, at *4 (S.D. Cal. Jan. 16, 2019) ("Plaintiff raised his challenge for the first time in his October 4, 2018 letter brief. . . . Plaintiff's failure to timely raise his Appointments Clause challenge forfeits the claim as untimely."), *adopted by Dierker v. Berryhill*, No. 18-145, 2019 WL 446231 (S.D. Cal. Feb. 5, 2019); *Nickum v. Berryhill*, No. 17-2011, 2018 WL 6436091, at *6 (D. Kan. Dec. 7, 2018) ("Unlike the case in *Lucia*, plaintiff in the case before the court never raised the Appointments Clause issue before the agency."); *Blocker v. Colvin*, No. 14-02602, 2018 WL 6424706, *6 (W.D. Tenn. Dec. 6, 2018) ("Here, whether the ALJ had the constitutional authority to adjudicate Plaintiff's dispute would be an as-applied challenge. . . . Because Plaintiff failed to assert the challenge at the administrative level, the Court finds that the challenge is forfeited."); *Willis v. Comm'r Soc. Sec.*, No. 18-158, 2018 WL 6381066, at *3 (S.D. Ohio Dec. 6, 2018) ("Plaintiff did not raise the Appointments Clause issue before the ALJ or the Appeals Council; therefore, the undersigned finds that she has forfeited this argument."); *Faulkner v. Comm'r Soc. Sec.*, No. 17-01197, 2018 WL 6059403, at *3 (W.D. Tenn. Nov. 19, 2018) ("Plaintiff's failure to raise his Appointments Clause challenge at any point in the administrative process or show good cause why he did not do so forfeits his claim."); *Flack v. Comm'r Soc. Sec.*, No. 18-501, 2018 WL 6011147, at *4 (S.D. Ohio Nov. 16, 2018) ("In light of the Supreme Court's decision in *Lucia* and subsequent courts' analyses of the issue, the Court finds that, even considering the directive of the emergency message, Plaintiff has forfeited her Appointment Clause claim."); *Davidson v. Comm'r Soc. Sec.*, No. 16-00102, 2018 WL 4680327, at *2 (M.D. Tenn. Sept. 28, 2018)

("Because Plaintiff did not raise her as applied constitutional challenge at the administrative level or argue that she had good cause for her failure to do so, Plaintiff has waived her challenge to the appointment of her Administrative Law Judge.").

Because the plaintiff did not raise his Appointments Clause challenge until he sought judicial review, and late in this proceeding at that, he has forfeited the issue. The Commissioner's objection will be sustained.

B. Plaintiff's Objections

The plaintiff filed three objections to the magistrate judge's alternate recommendation.

1. First Objection

The plaintiff argues that the magistrate judge's conclusion that the ALJ properly discounted the weight of the treating physician's opinion is not persuasive and that the report did not adequately address the points raised in the plaintiff's motion for summary judgment. The plaintiff asserts that neither the magistrate judge nor the ALJ adequately discussed the implications of the plaintiff's long-term relationship with his treating physician, Dr. Perez, which gave Dr. Perez a "unique, longitudinal understanding" of the plaintiff's functional capacity.

The Commissioner responds that the ALJ in fact considered the nature and length of Dr. Perez's relationship with the plaintiff, and although those factors weigh in favor of crediting Dr. Perez's opinion, the ALJ appropriately relied on the other factors enumerated in 20

C.F.R. § 404.1527. And in any event, the ALJ is not required to perform a step-by-step analysis of each factor so long as his finding is supported by "good reasons."

The Sixth Circuit has held that reversal is required in a Social Security disability benefits case where the ALJ rejects a treating physician's opinion as to the restrictions on a claimant's ability to work and fails to give good reasons for not giving weight to the opinion. *Wilson v. Comm'r of Social Sec.*, 378 F.3d 541, 544 (6th Cir. 2004). There, the court stated that "pursuant to [20 C.F.R. § 404.1527(c)(2)], a decision denying benefits 'must contain specific reasons for the weight given to the treating source's medical opinion, supported by the evidence in the case record, and must be sufficiently specific to make clear to any subsequent reviewers the weight the adjudicator gave to the treating source's medical opinion and the reasons for that weight.'" *Id.* at 544 (quoting Soc. Sec. Rul. 96-2p, 1996 WL 374188, at *5 (1996)).

The magistrate judge found that the ALJ gave adequate reasons for not affording Dr. Perez's opinion controlling weight. The plaintiff does not take issue with that determination in his objections.

The magistrate judge also found justification for the ALJ giving the opinion only "limited weight." See Tr. 25. The plaintiff objects to that finding, contending that the ALJ did not assess all the required factors, including the length of Dr. Perez's treatment relationship with the plaintiff. The regulations require the ALJ to consider the "[l]ength of the treatment relationship and the frequency," and the "[n]ature and extent of the treatment relationship" when determining what weight to give the opinion of a treating source. 20 C.F.R.

§ 404.1527(c)(2)(1)(i), (ii). The plaintiff insists that the ALJ did not comply with that directive. However, "[t]he ALJ need not perform an exhaustive, step-by-step analysis of each factor; []he need only provide 'good reasons' for both [his] decision not to afford the physician's opinion controlling weight and for [his] ultimate weighing of the opinion." *Biestek v. Comm'r of Soc. Sec.*, 880 F.3d 778, 785 (6th Cir. 2017), *cert. granted sub nom. Biestek v. Berryhill*, 138 S. Ct. 2677 (2018) (citing *Francis v. Comm'r of Soc. Sec.*, 414 F. App'x 802, 804-05 (6th Cir. 2011); *Blakley v. Comm'r of Soc. Sec.*, 581 F.3d 399, 406-07 (6th Cir. 2009); 20 C.F.R. § 404.1527(c)(2)).

Here, the ALJ noted that Dr. Perez was the plaintiff's "family physician," Tr. 25, which indicates an acknowledgement of an ongoing physician-patient relationship. He noted that Dr. Perez's "documented treatment" was limited to conservative care. And he discussed other evidence in the record that was inconsistent with Dr. Perez's opinion. Tr. 25-26. The magistrate judge correctly concluded that the ALJ did all he was required to do when assessing Dr. Perez's opinion.

The plaintiff's first objection will be overruled.

2. Second Objection

The plaintiff's second objection flows from the first. He argues that the magistrate judge should have found that the ALJ failed to accord Dr. Perez's opinion appropriate weight, and failed to consider other evidence, when formulating the RFC, especially for upper extremity limitations. As noted earlier, he believes his RFC was overstated.

The ALJ's specific determination of RFC must be supported by substantial evidence, but the claimant

bears the burden of demonstrating the need for a more restrictive RFC. *Jordan v. Comm'r of Soc. Sec.*, 548 F.3d 417, 423 (6th Cir. 2008) (noting that "[t]he claimant . . . retains the burden of proving her lack of residual functional capacity") (citing *Her v. Comm'r of Soc. Sec.*, 203 F.3d 388, 392 (6th Cir. 1999)). As noted above, the magistrate judge correctly determined that the ALJ appropriately assessed Dr. Perez's opinion. And the plaintiff has not identified what "other" evidence the ALJ should have considered. He has not met his burden of showing a need for a more restrictive RFC, and his second objection will be overruled.

3. Third Objection

The plaintiff argues that the magistrate judge erred by approving the ALJ's assessment of the impact (or lack of it) of the plaintiff's medication's side effects. The plaintiff contends that the ALJ failed to address the plaintiff's testimony that he experiences drowsiness in the first hour and slowed thought for two hours after taking his medication. He argues that the ALJ's finding based on the plaintiff's ability to drive was insufficient in light of his own testimony and Dr. Perez's opinion regarding the side effects.

Much of what the plaintiff argues here ignores the timing of the evidence he references. For instance, Dr. Perez did not complete his August 2016 assessment of the plaintiff until almost two years after the plaintiff's insured status expired, that is, well after the relevant time period. The medical records do not contain *any* complaints about his medication's side effects before the date last insured.

To qualify for disability insurance benefits, the plaintiff must not only establish that he is disabled, but also that he was insured within the meaning of the Social Security Act, and became disabled while enjoying insured status. *See* 42 U.S.C. §§ 416(i), 423(d)(1)(A); *Higgs v. Bowen*, 880 F.2d 860, 862 (6th Cir. 1988). Medical evidence is relevant to prove a disability only while the claimant enjoyed insured status. *Estep v. Weinberger*, 525 F.2d 757, 757-58 (6th Cir. 1975). Medical evidence that postdates the insured status date may be, and ought to be, considered, but only insofar as it bears on the claimant's condition before the expiration of insured status. *Begley v. Mathews*, 544 F.2d 1345, 1354 (6th Cir. 1976) ("Medical evidence of a subsequent condition of health, reasonably proximate to a preceding time, may be used to establish the existence of the same condition at the preceding time."); *Higgs*, 880 F.2d at 863.

The evidence of later-experienced medication side effects here has little to do with the plaintiff's condition during the relevant period. And the ALJ's discounting of the plaintiff's complaints of drowsiness is justified by his observation that the plaintiff admitted driving and taking care of his daughter. Tr. 25. As the Commissioner noted, the plaintiff testified that he took medication every four hours and had side effects for "four hours after taking it, three hours after taking it," and within "four hours I'm already taking the next [pill]." Tr. 49. That testimony is inconsistent with the plaintiff's professed ability to drive, and that inconsistency properly was considered by the ALJ.

The plaintiff's third objection will be overruled.

III.

The plaintiff forfeited his right to challenge the appointment of ALJ Christensen by not raising his Appointments Clause objection during the administrative process and before coming to court. The magistrate judge properly reviewed the administrative record and applied the correct law in reaching her conclusion that the ALJ's determination was supported by substantial evidence.

Accordingly, it is **ORDERED** that the Commissioner's objection to the report and recommendation (ECF No. 26) is **SUSTAINED**, and the magistrate judge's report and recommendation (ECF No. 24) is **ADOPTED IN PART AND REJECTED IN PART**.

It is further **ORDERED** that the plaintiff's objections (ECF No. 27) are **OVERRULED**.

It is further **ORDERED** that the plaintiff's motion for summary judgment (ECF No. 11) is **DENIED**.

It is further **ORDERED** that the defendant's motion for summary judgment (ECF No. 15) is **GRANTED**. The findings of the Commissioner are **AFFIRMED**.

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

Dated: Mar. 29, 2019

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 18-10444

MICHAEL JOHN SHOOPS, PLAINTIFF

v.

COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

Filed: Mar. 29, 2019

OPINION AND ORDER ACCEPTING AND ADOPTING IN PART THE MAGISTRATE JUDGE'S FEBRUARY 14, 2019 REPORT AND ACCEPTING AND ADOPTING HER RECOMMENDATION [26]

Honorable NANCY G. EDMUNDS

I. Background

Plaintiff filed this action seeking review of the Commissioner of Social Security's decision denying his applications for disability insurance and supplemental security income. The Court referred the matter to the Magistrate Judge, who recommends denying Plaintiff's motion for summary judgment, granting Defendant's motion for summary judgment, and affirming the Commissioner's decision. (Dkt. 26.) Plaintiff has filed two objections to the Magistrate Judge's report and recom-

mendation, and Defendant has responded to those objections. (Dkts. 27, 28, 31.) Having conducted a *de novo* review of the parts of the Magistrate Judge's report to which specific objections have been filed, the Court OVERRULES Plaintiff's objections. With regard to Plaintiff's first objection, the Court agrees with the Magistrate Judge's conclusion but does so on alternative grounds. The Court agrees with the Magistrate Judge's analysis regarding the remaining issues addressed in her report. Therefore, the Court ACCEPTS AND ADOPTS IN PART the Magistrate Judge's report; ACCEPTS AND ADOPTS her recommendation; DENIES Plaintiff's motion for summary judgment (dkt. 13); GRANTS Defendant's motion for summary judgment (dkt. 17); and AFFIRMS the decision of the Commissioner of the Social Security pursuant to 42 U.S.C. § 405(g).

II. Standard of Review

Under Federal Rule of Civil Procedure 72(b)(3), "[t]he district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." *See also* 28 U.S.C. § 636(b)(1).

III. Analysis

Plaintiff raises two objections to the Magistrate Judge's report and recommendation. First, Plaintiff argues the Magistrate Judge erred when she found that he had waived his right to pursue an Appointments Clause challenge in this case. Second, Plaintiff argues

the Magistrate Judge erred when she found that the administrative law judge ("ALJ") had adequately explained her findings.

A. Whether Plaintiff Waived His Appointments Clause Challenge

In supplemental briefing before the Magistrate Judge, in September of 2018, Plaintiff raised for the first time an Appointments Clause challenge in this case. His claim stems from the Supreme Court case of *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2055 (2018) (opinion entered June 21, 2018), which held that ALJs of the Securities and Exchange Commission are "Officers of the United States" within the meaning of the Appointments Clause and thus must be appointed by the President, a court of law, or department head. Because the ALJ in that case was not properly appointed and the plaintiff had raised a timely Appointments Clause challenge at the administrative level, the Supreme Court found he was entitled to relief in the form of a new hearing by a properly appointed ALJ. *Id.*

Relying on *Lucia*, Plaintiff argued that the ALJ who presided over his case was not appointed in a way consistent with the Appointments Clause, and thus the Court should remand this matter for a new hearing by a properly appointed ALJ. Defendant responded by arguing that Plaintiff had waived this claim by failing to raise it at the administrative level, noting, in part, that the Supreme Court itself had stated in *Lucia* that "'one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief." *See id.* at 2055 (quoting *Ryder v. United States*, 515 U.S. 177, 182-83 (1995)).

The Magistrate Judge found that Plaintiff's Appointments Clause challenge in this case should be denied because he had failed to satisfy his burden of proving that the ALJ who presided over his hearing was unconstitutionally appointed. (Dkt. 26, Pg ID 1253.) The Magistrate Judge then went on to address the issue of whether Plaintiff also forfeited his claim by failing to raise it at the administrative level. Contrary to Plaintiff's assertions, the Magistrate Judge did not find in his favor on this point. Rather, after discussing the issue at length and recognizing that "the overwhelming majority of courts nationwide" are aligned with the position that Appointments Clause challenges not raised at the administrative level are untimely, (*see id.* at Pg ID 1257-58 (collecting cases)), the Magistrate Judge concluded that she "need not attempt to resolve this issue," because Plaintiff waived his claim by failing to bring it in his initial brief filed in support of his motion for summary judgment, (*id.* at Pg ID 1259).

This Court, in another case, had the opportunity to consider the question of whether a plaintiff waives his Appointments Clause challenge by failing to raise it at the administrative level and decided to join the majority of courts that have answered this question in the affirmative. *See Ramsey v. Berryhill*, No. 17-13713, 2019 U.S. Dist. LEXIS 52640, at *7 (E.D. Mich. Mar. 28, 2019). That holding applies here. As in *Ramsey*, Plaintiff failed to raise, let alone develop, the argument pertaining to the appointment of the ALJ at any point during the administrative proceedings. *See also Hutchins v. Berryhill*, No. 18-10182, 2019 U.S. Dist. LEXIS 50180, at *7 (E.D. Mich. Mar. 26, 2019) (concluding that the plaintiff forfeited his Appointments Clause

argument by failing to raise it "at *any* point during his administrative proceedings") (emphasis in original). Plaintiff failed to do so despite the circuit split being recognized several months prior to his case being heard by the ALJ in August of 2017 and considered by the Appeals Council. *See Page v. Comm'r of Soc. Sec.*, 344 F. Supp. 3d 902, 905, 905 n.4 (E.D. Mich. 2018) (noting that the plaintiff failed to raise the Appointments Clause issue despite the split in authority being acknowledged in December of 2016, which was prior to his application being considered by the Appeals Council). Thus, the Court finds that Plaintiff similarly forfeited and waived his Appointments Clause challenge.

Due to the Court's finding that Plaintiff's failure to raise his challenge at the administrative level is fatal to his claim, the Court need not address the Magistrate Judge's analysis regarding whether Plaintiff also waived this claim by failing to raise it in his motion for summary judgment. Nor does the Court need to discuss the substantive issue of whether the ALJ in this case was unconstitutionally appointed. In sum, the Court adopts the Magistrate Judge's conclusion that Plaintiff's Appointments Clause challenge is waived but does so based on his failure to raise it at the administrative level.

B. Whether the ALJ Adequately Explained Her Findings

Plaintiff argues the Magistrate Judge erred when she found that the ALJ had adequately explained her findings in steps two and three of the five-step sequential analysis. *See* 20 C.F.R. § 404.1520(a)(4). The ALJ in this case had failed to delete the boilerplate instructions from the agency's decision template several times in her discussion of both of these steps.

In step two, the ALJ considers whether a claimant suffers from a severe impairment. Here, the ALJ found that Plaintiff has the following severe impairments: history of vagus nerve dysfunction, heart disorder, history of foot injury (bilateral), depression, anxiety, and history of substance abuse. (Tr. 166.) In his motion for summary judgment, Plaintiff argued that the ALJ erred when she did not explain why she found these impairments severe and why she did not consider Plaintiff's remaining impairments—hypothyroidism, hypotension, bipolar disorder, chronic headaches, and neuropathy—severe.

The Magistrate Judge noted that Plaintiff did not cite to any authority requiring an ALJ to provide a certain amount or quality of explanation at step two. (Dkt. 26, Pg ID 1236.) And even if the ALJ's failure to include an explanation was erroneous, the Magistrate Judge found that error harmless because the ALJ went on to consider all of Plaintiff's impairments in her discussion of Plaintiff's residual functional capacity ("RFC") at step four. (*See* tr. 168-172.) Plaintiff now objects, arguing that the ALJ did not properly consider the limitations stemming from his non-severe impairments.

As the Magistrate Judge noted, however, Plaintiff bears the burden of proving that he has a more restrictive RFC than that assessed by the ALJ. *See Jordan v. Comm'r of Soc. Sec.*, 548 F.3d 417, 423 (6th Cir. 2008). Here, Plaintiff did not indicate what additional functional limitations his non-severe impairments impose. Moreover, the ALJ concluded that Plaintiff only retains the ability to perform sedentary work, (tr. 168), which is the most restrictive of the physical exertional levels, *see* 20 C.F.R. §§ 404.1567, 416.967. The ALJ also placed

the following restrictions on Plaintiff's RFC: he is limited to lifting/carrying and pushing/pulling up to 10 pounds occasionally and less than 10 pounds frequently and is limited to sitting up to 6 hours and standing/walking up to 2 hours during an 8-hour workday; he requires the opportunity to alternate, at will, between sitting for 15 minutes and standing for 5 minutes throughout the day; he is able to climb ladders, ropes, or scaffolds occasionally and stoop and crouch frequently; he is never able to work at unprotected heights or with moving mechanical parts; and he is limited to simple, routine tasks and simple work-related decisions. (Tr. 168.) Thus, the Court agrees that any error in step two was harmless.

In step three, the ALJ considers the medical severity of the impairments. Here, the ALJ found that Plaintiff's mental impairments posed only mild to moderate limitations. (Tr. 167.) Plaintiff argues that the ALJ's failure to cite to the evidence to explain how she reached these findings precludes meaningful judicial review.

The Magistrate Judge recognized that the ALJ's explanations of her step three findings were not "models of excellence," but did not find them so deficient as to preclude meaningful review. (Dkt. 26, Pg ID 1240, 1242.) As the Magistrate Judge noted, the Sixth Circuit has upheld an ALJ's step three discussion, even though the analysis was sparse, in part because "the ALJ made sufficient factual findings elsewhere in his decision to support his conclusion at step three." *See Forrest v. Comm'r of Soc. Sec.*, 591 F. App'x 359, 365-66 (6th Cir. 2014). Here, the ALJ's discussion of the record evidence in assessing Plaintiff's RFC explained and clarified her step three findings that Plaintiff's mental impairments pose only mild to moderate limitations.

For example, the ALJ explained that Plaintiff's symptoms improved after receiving two rounds of inpatient mental health treatment in 2015. (Tr. 170.) Moreover, the ALJ's findings were consistent with the opinion of the state agency psychologist, which the ALJ accorded great weight. (Tr. 172.) In sum, the Court agrees that the ALJ adequately explained her step three findings.

IV. Conclusion

For the foregoing reasons, the Court OVERRULES Plaintiff's objections. The Court ACCEPTS AND ADOPTS IN PART the Magistrate Judge's report and ACCEPTS AND ADOPTS her recommendation. The Court therefore DENIES Plaintiff's motion for summary judgment (dkt. 13); GRANTS Defendant's motion for summary judgment (dkt. 17); and AFFIRMS the decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).

SO ORDERED.

/s/ NANCY G. EDMUNDS
NANCY G. EDMUNDS
United States District Judge

Dated: Mar. 29, 2019

I hereby certify that a copy of the foregoing document was served upon counsel of record on March 29, 2019, by electronic and/or ordinary mail.

/s/ LISA BARTLETT
Case Manager

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 2:18-cv-501

SUSAN FLACK, PLAINTIFF

v.

COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

Filed: July 22, 2019

ORDER

This matter is before the Court for consideration of a Report and Recommendation issued by the Magistrate Judge on June 27, 2019. (ECF No. 28). The time for filing objections has passed, and no objections have been filed. Therefore, the Court **ADOPTS** the Report and Recommendation. For the reasons set forth in the Report and Recommendation, the Court **OVERRULES** Plaintiff's statement of specific errors and **AFFIRMS** the Commissioner's decision. The Clerk is **DIRECTED** to **ENTER JUDGMENT** in accordance with this Order and terminate this case from the docket records of the United States District Court for the Southern District of Ohio, Eastern Division.

IT IS SO ORDERED.

/s/ SARAH D. MORRISON
SARAH D. MORRISON
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 2:18-cv-11042

VICKY LYNN HARRIS, PLAINTIFF

v.

COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

Filed: Aug. 28, 2019

OPINION AND ORDER OVERRULING OBJECTIONS [30], ADOPTING REPORT AND RECOMMENDATION [29], DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [13], AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [14]

The Commissioner of the Social Security Administration ("SSA") denied the application of Vicky Lynn Harris for supplemental security income and disability insurance benefits in a decision issued by an Administrative Law Judge ("ALJ"). After the SSA Appeals Council declined to review the ruling, Harris appealed. ECF 1. The Court referred the matter to Magistrate Judge R. Steven Whalen, and the parties filed cross-motions for summary judgment. ECF 3, 13, 14. The magistrate judge issued a Report and Recommendation ("Report") advising the Court to deny Harris's motion and

grant the Commissioner's motion. ECF 29. Harris filed timely objections to the Report. ECF 30. After examining the record and considering Harris's objections de novo, the Court concludes that her arguments lack merit. The Court will therefore overrule the objections, adopt the Report, deny Harris's motion for summary judgment, and grant the Commissioner's motion for summary judgment.

BACKGROUND

The Report properly details the events giving rise to Harris's action against the Commissioner. ECF 29, PgID 1070-79. The Court will adopt that portion of the Report.

LEGAL STANDARD

Civil Rule 72(b) governs the review of a magistrate judge's report. A district court's standard of review depends upon whether a party files objections. The Court need not undertake any review of portions of a Report to which no party has objected. *Thomas v. Arn*, 474 U.S. 140, 149-50 (1985). De novo review is required, however, if the parties "serve and file specific written objections to the proposed findings and recommendations." Fed. R. Civ. P. 72(b)(2). In conducting a de novo review, "[t]he district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

Individuals who receive an adverse final decision from the Commissioner of Social Security may appeal the decision to a federal district court. 42 U.S.C. § 405(g). When reviewing a case under § 405(g), the

Court "must affirm the Commissioner's conclusions absent a determination that the Commissioner has failed to apply the correct legal standards or has made findings of fact unsupported by substantial evidence in the record." *Walters v. Comm'r of Soc. Sec.*, 127 F.3d 525, 528 (6th Cir. 1997) (citations omitted). Substantial evidence consists of "more than a scintilla of evidence but less than a preponderance" such that "a reasonable mind might accept [the evidence] as adequate to support a conclusion." *Cutlip v. Sec'y of Health & Human Servs.*, 25 F.3d 284, 286 (6th Cir. 1994) (citation omitted). An ALJ may consider the entire body of evidence without directly addressing each piece in his decision. *Loral Def. Sys. - Akron v. N.L.R.B.*, 200 F.3d 436, 453 (6th Cir. 1999) (citation omitted). "Nor must an ALJ make explicit credibility findings as to each bit of conflicting testimony, so long as his factual findings as a whole show that he implicitly resolved such conflicts." *Id.* (internal quotations and citation omitted) (alteration omitted).

DISCUSSION

Harris raises two objections. The Court will address each in turn.

I. Dr. Magnatta's Opinions

First, Harris objects to the magistrate judge's recommendation "that the ALJ cited acceptable reasons for rejecting the opinions of Plaintiff's long-time treating physician, Dr. Magnatta." ECF 30, PgID 1098. Harris argues that the Report "is incorrect that the ALJ's rejection of [Dr.] Magnatta's opinions is well-supported, when in fact, the medical evidence of record was consistent with Dr. Magnatta's opinions." *Id.* at 1104. Harris largely rehashes arguments she made regarding

the ALJ's opinion and takes issue with the Report because it upholds the ALJ's opinion. *See id.* at 1098-1104. "Objections that are merely recitations of the identical arguments that were before the magistrate judge do not constitute specific written objections to the proposed findings and recommendations," and the Court is therefore "not obligated to address" such objections. *England v. Comm'r of Soc. Sec.*, No. 15-12818, 2016 WL 5939288, at *3 (E.D. Mich. Oct. 13, 2016) (internal quotations and citations omitted).

Harris does, however, present a few specific objections to the Report that do not merely rehash her summary judgment argument. Her first specific objection is that the magistrate judge's characterization of the results of her electromyography and electrodiagnosis study ("EMG") "as mild isolated membrane irritabilities . . . misstates the evidence." ECF 30, PgID 1102. Harris argues that the magistrate judge misstates the evidence because "the study did show 'bilateral posterior primary rami compromise secondary to degenerative changes of the lumbosacral spine.'" *Id.* (quoting ECF 11-10, PgID 660). But the magistrate judge did not misstate the evidence. The EMG results state: "The examination demonstrated mild muscle membrane irritabilities isolated in the bilateral lower lumbosacral paraspinals without any electromyographic abnormality noted in either the right or left lower extremity." ECF 11-10, PgID 660. The attached comments explain that "[t]he above noted electrodiagnostic abnormality is consistent with isolated bilateral posterior primary rami compromise secondary to degenerative changes of the lumbar spine." *Id.* It is therefore the "mild muscle

membrane irritabilities" that the magistrate judge referenced that Dr. Tashjan, who wrote the EMG report, found consistent with the "bilateral posterior rami compromise" that Harris mentions. The magistrate judge accurately stated the EMG report's findings.

Harris's second specific objection is that the magistrate judge repeated the ALJ's mistake of failing to address the special consideration merited by a treating physician's opinion because "treating physicians have unique perspectives about the medical evidence beyond the objective clinical findings alone." ECF 30, PgID 1102-03. But the magistrate judge correctly stated the law—that a well-supported opinion of a treating physician "must be given controlling weight," but that the ALJ may reject an opinion of a treating physician that is contradicted by substantial evidence if he provides good reasons for rejecting the opinion. ECF 29, PgID 1081-82 (quoting *Hensley v. Astrue*, 573 F.3d 263, 266 (6th Cir. 2009); *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 546[1] (6th Cir. 2004); citing *Warner v. Comm'r of Soc. Sec.*, 375 F.3d 387, 391-92 (6th Cir. 2004)). The magistrate judge then addressed the limitations of Dr. Magnatta's opinions and the substantial evidence—the EMG report, the clinical signs reported in Harris's mental health records, and Dr. Magnatta's own recommendations to Harris in the treating records. ECF 29, PgID 1083. And Harris's further challenge to two of the pieces of evidence that the magistrate judge cited as contradicting Dr. Magnatta's opinions is unpersuasive.

---

[1] The Report cites page 547 of *Wilson*, but the proposition and language is actually located on page 546.

Harris takes issue with the magistrate judge's characterization of Dr. Adam McKenzie's findings as "wholly unremarkable," arguing that "[t]he one-time consultant report is the only other medical record regarding Plaintiff's physical condition." ECF 30, PgID 1103. But Harris admits Dr. McKenzie "did not report abnormalities regarding the spine" and only reported "moderate loss of her activities of daily living" from her arthritis in her hips and left elbow. *Id.* (quoting ECF 11-7, PgID 356). And Harris does not further explain what she would have the magistrate judge do differently regarding Dr. McKenzie's report. The magistrate judge's conclusion that Dr. McKenzie's report—which notes that Harris "exhibited a normal gait" and "was able to tolerate all activities asked of her [during the examination] without difficulty," including "no difficulty getting on and off the examination table and no difficulty heel and toe walking"—"fail to support a finding of disability" is correct. ECF 11-7, PgID 355-56; ECF 29, PgID 1083.

Harris also takes issue with the magistrate judge's reference to "mental health records noting a normal gait and unremarkable physical appearance" as one piece of evidence contradicting "Plaintiff's claim that she experienced severe physical restriction." ECF 29, PgID 1082-83. But even if the references are "infrequent" or "incidental," they are just one of several pieces of evidence contradicting Dr. Magnatta's opinions. *See* ECF 30, PgID 1103. And Harris's contention that Dr. Magnatta's failure to report normal gait means that a report of normal gait "does not undermine his opinions" is unpersuasive. *Id.* at 1104. Dr. Magnatta indicated that Harris could only stand or walk for two to four hours per

workday, and a report of normal gait contributes to the evidence that his conclusion is erroneous. Harris's arguments regarding (1) the magistrate judge's alleged failure to address the special considerations merited by a treating physician's opinion and (2) the magistrate judge's treatment of certain pieces of evidence when determining that the ALJ's rejection of Dr. Magnatta's opinions was supported by substantial evidence are meritless.

Regardless, the Court agrees with the magistrate judge's determination that the ALJ's decision to reject Dr. Magnatta's opinions was supported by substantial evidence in the record. Dr. Magnatta's assessment is a checklist on which he checked that Harris could sit for only two to four hours per workday, could stand or walk for only two to four hours per workday, and would need a fifteen-minute break every hour. ECF 11-10, PgID 661-62. His only written additions to the checklist, however, are repeated statements that the limitations are based on "back pain." *Id.* And there is substantial evidence in the record supporting the ALJ's conclusion that Dr. Magnatta's conclusory limitations findings are contradicted by substantial evidence. Harris's EMG revealed only "isolated" "mild muscle membrane irritabilities." ECF 11-10, PgID 660. Her cervical spine and lumbar spine radiographs revealed only "[m]ild degenerative changes." ECF 11-7, PgID 310-11. With all included tests revealing only mild problems and no additional evidence supporting the extreme limitations in Dr. Magnatta's checklist assessment, a reasonable mind could accept the evidence as adequate to support the ALJ's rejection of Dr. Magnatta's opinions. The Court will therefore overrule Harris's first objection.

II. Appointments Clause

Second, Harris objects to the magistrate judge's recommendation that the Court find that Harris waived her Appointments Clause argument when she failed to raise it at the administrative level. ECF 30, PgID 1104-09. Harris is again merely rehashing arguments she made prior to the Report. *See* ECF 18, PgID 749-50 (Harris's supplemental brief raising her Appointments Clause argument and specifically addressing the question of waiver). And regardless, her argument lacks merit. "[T]he majority, if not all, of the district courts to address [the] issue in the Sixth Circuit" and "[t]he overwhelming majority of district courts across the country to address [the] issue" have concluded "that a plaintiff forfeits an Appointments Clause argument by failing to raise it during administrative proceedings." *Hutchins v. Berryhill*, 376 F. Supp. 3d 775, 777-78 (E.D. Mich. 2019).

Contrary to Harris's contention, "*Freytag* did not create a categorical rule excusing Appointments Clause challenges from general waiver and forfeiture principles." *Id.* at 779 (citation omitted). And, like the plaintiff in *Hutchins*, Harris "makes no argument that the procedural posture or facts of [the] case render it equivalent to the 'rare' case contemplated in *Freytag*." *Id.* at 778-79. Harris argues only that social security cases as a category are the type of case contemplated by *Freytag*. ECF 30, PgID 1106. But the argument "that normal rules governing waiver and forfeiture ought not apply to Social Security cases" is precisely the argument that *Hutchins* rejected. *Hutchins*, 376 F. Supp. 3d at 779 (citation omitted).

Harris relies on the same Supreme Court and Sixth Circuit cases relied on by the plaintiff in *Hutchins*, and

her argument fails for the same reasons articulated by the court in its opinion there. Neither *Sims v. Apfel*, 530 U.S. 103 (2000) nor *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018) justify Harris's failure "to raise [her] Appointments Clause issue at *any* point during [her] administrative proceedings." *Id.* (emphasis in original). *Sims* explicitly limits its holding to whether "a Social Security claimant, to obtain judicial review of an issue," must "not only . . . obtain a final decision on his claim for benefits, but also . . . specify that issue in [her] request for review by the Counsel," and notes that "[w]hether a claimant must exhaust issues before the ALJ is not before us." *Sims*, 530 U.S. at 107. Harris's reliance on *Sims* for the broader proposition that issue exhaustion requirements do not apply to social security cases is therefore misplaced. Like the plaintiff in *Hutchins*, Harris failed to raise her Appointments Clause argument at any point in the administrative process—distinguishing her from the plaintiff in *Jones Bros.*, who "raised, but did not develop" his claim before the administrative agency. *See Hutchins*, 376 F. Supp. 3d at 779 (citing *Jones Bros.*, 898 F.3d at 677). "It is axiomatic that 'a court should not consider an argument that has not been raised in the agency proceeding that preceded the appeal'" and Harris has not established an exception based on which the Court should permit her Appointments Clause argument to proceed here. *Maloney v. Comm'r of Soc. Sec.*, 480 F. App'x 804, 810 (6th Cir. 2012) (quoting *City of Riverview v. Surface Transp. Bd.*, 398 F.3d 434, 443-44 (6th Cir. 2005)). The Court will therefore overrule Harris's second objection.

CONCLUSION

The Court has carefully reviewed the parties' motions, the Report, and Harris's objections. The Court finds Harris's objections unconvincing and agrees with the Report's recommendation to grant the Commissioner's motion for summary judgment and deny Harris's motion for summary judgment.

ORDER

WHEREFORE, it is hereby **ORDERED** that Harris's Objections [30] are **OVERRULED**.

IT IS FURTHER ORDERED that the magistrate judge's Report and Recommendation [29] is **ADOPTED**.

IT IS FURTHER ORDERED that Harris's Motion for Summary Judgment [13] is **DENIED**.

IT IS FURTHER ORDERED that the Commissioner's Motion for Summary Judgment [14] is **GRANTED**.

SO ORDERED.

/s/ STEPHEN J. MURPHY, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: Aug. 28, 2019

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on August 28, 2019, by electronic and/or ordinary mail.

/s/ DAVID P. PARKER
Case Manager

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action 2:18-cv-501

SUSAN FLACK, PLAINTIFF

v.

COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

Filed: Nov. 16, 2018

REPORT AND RECOMMENDATION AND ORDER

Judge ALGENON L. MARBLEY

Magistrate Judge JOLSON

This matter is before the Court on Plaintiff's Motion for Leave to File First Amended Complaint (Doc. 10). For the reasons that follow, it is **RECOMMENDED** that Plaintiff's Motion for Leave to File First Amended Complaint be **DENIED** as futile. Further, the parties are **DIRECTED** to meet and confer regarding a proposed scheduling order and shall file their proposed scheduling order by November 23, 2018.

I. PROCEDURAL HISTORY

In 2014, Plaintiff filed an application for Disability Insurance Benefits ("DIB") and a period of disability

under Title II of the Social Security Act ("SSA"), alleging disability beginning on January 5, 2012. (Tr. 408-414, PAGEID #: 465-71). After initial administrative denials of Plaintiff's claims, Administrative Law Judge Patricia Carey ("the ALJ") heard the case on April 20, 2017. (Tr. 80-130, PAGEID #: 134-184). On August 16, 2017, the ALJ issued a decision, finding that Plaintiff was not disabled within the meaning of the Social Security Act. (Tr. 9-30, PAGEID #: 63-84). Plaintiff requested a review of the Hearing, and the Appeals Council denied review, making the ALJ's decision the final decision of the Commissioner. (Tr. 1-6, PAGEID #: 55-60).

Plaintiff then filed this case. (Doc. 1). Roughly three months later, on August 31, 2018, Plaintiff filed a Motion for Leave to File First Amended Complaint ("Motion for Leave to Amend"), challenging the constitutional authority of the ALJ who heard her social security disability case. (Doc. 10). Plaintiff then filed an Unopposed Motion for Extension of Time to file her Statement of Errors. (Doc. 11). On September 11, 2018, the Undersigned stayed the proceedings for 45 days. (Doc. 14). Defendant filed an opposition to Plaintiff's Motion for Leave to Amend on October 11, 2018 (Doc. 15), and Plaintiff filed a reply brief (Doc. 16). Accordingly, the Motion for Leave to Amend is now ripe for review.

II. STANDARD

Rule 15(a)(2) of the Federal Rules of Civil Procedure governs motions for leave to amend. The Rule provides that a court may "freely give leave [to amend a pleading] when justice so requires," and supports the

principle that cases should be tried on their merits "rather than [on] the technicalities of pleadings." *Moore v. City of Paducah*, 790 F.2d 557, 559 (6th Cir. 1986) (internal quotation marks omitted). Despite this generally liberal standard, if a proposed amendment would not survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court may also disallow the amendment as futile. *See Thiokol Corp. v. Dept. of Treasury*, 987 F.2d 376, 382 (6th Cir. 1993).

III. ANALYSIS

In her Motion for Leave to Amend, Plaintiff contends that the ALJ who decided her claim was an "inferior officer[] within the meaning of the Constitution's Appointments Clause" and thus seeks to challenge the constitutional authority the ALJ had to her disability case. (*See generally* Doc. 10). Plaintiff relies primarily on *Lucia v. S.E.C.*, — U.S. —, 138 S. Ct. 2044, 201 L. Ed. 2d 464 (2018), which held that the administrative law judges for the Securities and Exchange Commission ("SEC") are "Officers of the United States," and, therefore, are subject to the Appointments Clause. 138 S Ct. at 2055. Plaintiff asserts that, under *Lucia*, social security ALJS are also "inferior officers" within the meaning of the Appointments Clause and that her ALJ "had not been properly appointed according to Constitutional requirements." (Doc. 10 at 2-3).

In response, Defendant argues that Plaintiff's challenge is untimely. (Doc. 15 at 4 (citing *Lucia*, 138 S. Ct. at 2055)). According to Defendant, Plaintiff "fail[ed] to assert a challenge to the ALJ's appointment before the agency at any point in the administrative proceedings[.]" (*Id.*). Defendant thus argues that because Plaintiff failed to raise a timely challenge to the ALJ's

constitutional authority, she has forfeited her Appointments Clause challenge. (*Id.*). The Court agrees.

As an initial matter, the Court notes that while courts and jurists often use the terms "waiver" and "forfeiture" interchangeably, Plaintiff's argument in this case would be forfeited rather than waived because forfeiture involves the "failure to make the timely assertion of a right, whereas waiver is the 'intentional relinquishment or abandonment of a known right.'" *U.S. v. Olano*, 507 U.S. 725, 733, 113 S. Ct. 1770, 1777 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). This is so here because the "right" was not known until the Supreme Court's June 21, 2018 decision in *Lucia*.

In *Lucia*, the Supreme Court held that "'one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief." 138 S. Ct. at 2055 (quoting *Ryder v. United States*, U.S. 177, 182-83, 115 S. Ct. 2031, 132 L. Ed. 2d 136 (1995)). The Court found that the plaintiff had "made just such a timely challenge: He contested the validity of [the presiding ALJ's] appointment before the Commission, and continued pressing the claim in the Court of Appeals and this Court." *Id.*

Unlike the plaintiff in *Lucia*, Plaintiff did not contest the validity of the Social Security Administration ALJ who decided her case during the administrative process. Instead, this Court is the first forum in which Plaintiff has made the claim. Plaintiff defends her timing in a few ways.

First, Plaintiff contends that she was unable to raise her Appointments Clause challenge earlier because *Lu-*

cia had not yet been decided. (Doc. 10 at 3). In support, Plaintiff turns to the Sixth Circuit's decision in *Jones Brothers, Inc. v. Secretary of Labor, Mine Safety, and Health Administration*, 898 F.3d 669 (6th. Cir. 2018). In *Jones Brothers*, a company hired to perform road repairs disputed civil penalties imposed by the Mine Safety and Health Administration for failing to comply with the agency's safety requirements. 898 F.3d at 671-72. Although Plaintiff had not raised an Appointments Clause challenge before the ALJ, it did so later before the commission by noting a circuit split over whether ALJs not appointed by the President may constitutionally decide cases. *Id.* at 673. In considering the case, the Sixth Circuit first noted the general rule that Appointments Clause challenges can be forfeited if not raised during administrative proceedings. *Id.* at 675-77. Applying this general rule, the Sixth Circuit held that the plaintiff had forfeited its Appointments Clause challenge at the administrative level by failing to "press" the issue. *Id.* at 677. But the Court went on to excuse the forfeiture, explaining that the plaintiff was unsure whether the commission had authority to rule on the constitutional claim. *Id.* at 678. Accordingly, the Sixth Circuit found that the plaintiff's "reasonable" uncertainty, along with its acknowledgment of the circuit split before the commission, provided grounds for excusing the forfeiture. *Id.* at 678. The Sixth Circuit then applied *Lucia*, vacated the commission's decision, and remanded the case to the administrative level "[b]ecause the administrative law judge was an inferior officer of the United States because she was not appointed by the President, a court of law, or the head of a department, as the Constitution demands." *Id.* at 672.

The Court finds that *Jones Brothers* is distinguishable here, and a district court in this circuit recently explained why. *See Page v. Comm'r of Soc. Sec.*, No. 17-13716, 2018 WL 5668860 (E.D. Mich. Oct. 31, 2018). In *Page v. Commissioner of Social Security*, the plaintiff, like Plaintiff here, relied on both *Lucia* and *Jones Brothers* to test the authority of the ALJ who decided her case. *Id.* at *2. Specifically, she cited *Jones Brothers* in arguing that her failure to raise the constitutional issue at the administrative level should be excused. *Id.* The Court rejected the plaintiff's argument, holding that the particular facts of the case did "not warrant making an exception to the general rule that the failure to bring as-applied claims at the administrative level results in waiver." *Id.* at *3. In so holding, the Court found the plaintiff's argument that she was "unaware of the constitutional inadequacy of the presiding ALJ" to be "unavailing." *Id.* Although *Jones Brothers* predated the plaintiff's case, the plaintiff in *Jones Brothers* noted a circuit split regarding the appointment of ALJs while the case was still at the administrative level. *Id.* On the other hand, the plaintiff in *Page*, like Plaintiff here, "failed to raise, much less develop the Appointments Clause issue at the administrative level although the split in authority occurred long before the application for benefits was considered by the Appeals Council." *Id.* In short, the plaintiff could have made an argument like the plaintiff in *Jones Brothers* did. But because the plaintiff in *Page* "failed to make an argument or even note a split of authority pertaining to the appointment of the ALJ at any point in the administrative proceeding," the court concluded that "the *Jones Brothers* holding [could not] be extended to the facts" of the case. *Id.*

So too here. Like the plaintiff in *Page*, Plaintiff failed to make any noise regarding her Appointments Clause challenge during the administrative proceedings. Therefore, because Plaintiff did not raise her Appointments Clause challenge before the ALJ or the Appeals Council, the Court finds that Plaintiff has forfeited this argument. *See id.*

Second, Plaintiff argues that the Commissioner is improperly requiring her to exhaust. (*See* Doc. 16 at 2-5). In support, she relies on the Supreme Court's decision in *Sims v. Apfel*, maintaining that *Sims* stands for the broad proposition that issue exhaustion is not required in social security cases. (*See* Doc. 16 at 2-5 (citing 530 U.S. 103, 120 S. Ct. 2080, 147 L. Ed. 2d 80 (2000)). The Supreme Court in *Sims* held, "Claimants who exhaust administrative remedies need not also exhaust issues in a request for review by the [Social Security] Appeals Council in order to preserve judicial review of those issues." *Id.* at 2086. Importantly, the Court expressly noted that "[w]hether a claimant must exhaust issues before the ALJ is not before us." *Id.* at 107. Courts to have considered the issue uniformly have concluded that *Sims* should not be read so broadly as to mean that a claimant need not exhaust issues before the ALJ. *See, e.g.*, *Stearns v. Berryhill*, No. C17-2031-LTS, 2018 WL 4380984, at *5 (N.D. Iowa Sept. 14, 2018) (rejecting social security claimant's reliance on *Sims* and holding that she forfeited her Appointments Clause challenge because she did not raise it before or during the ALJ's hearing, or at any time before the ALJ's decision became final); *Davis v. Comm'r of Soc. Sec.*, No. 17-cv-80-LRR, 2018 WL 4300505, at *9 (N.D. Iowa Sept. 10, 2018) (rejecting social security claimant's reliance on *Sims*

and noting that *Sims* "concerned only whether a claimant must present all relevant issues to the *Appeals Council* to preserve them for judicial review") (emphasis in original); *Iwan v. Comm'r of Soc. Sec.* No. 17-cv-97-LRR, 2018 WL 4295202, at *9 (N.D. Iowa Sept. 10, 2018) (same); *Thurman v. Comm'r of Soc. Sec.*, No. 17-cv-35-LRR, 2018 WL 4300504, at *9 (N.D. Iowa Sept. 10, 2018) (same). Accordingly, *Sims* is inapposite here.

As such, the Court finds that Plaintiff's proposed interpretation of *Sims* is too broad. *Sims* left untouched the general rule that a claimant forfeits a claim on appeal that she failed to raise during the administrative process. *See Stevens v. Comm'r of Soc. Sec.*, No. 14-2186, 2016 WL 692546, at *11 & n.6 (S.D. Ohio Feb. 22, 2016) (noting that failure to raise issue before ALJ constitutes waiver), *report and recommendation adopted*, No. 14-2186, 2016 WL 1156518 (S.D. Ohio Mar. 24, 2016); *Davidson v. Comm'r of Soc. Sec.*, 2018 WL 4680327, at *2 (M.D. Tenn. Sept. 28, 2018) (finding that plaintiff waived her Appointments Clause challenge by failing to raise it at the administrative level); *Shaibi v. Berryhill*, 883 F.3d 1102, 1109 (9th Cir. 2017) ("[W]hen claimants are represented by counsel, they must raise all issues and evidence at their administrative hearings in order to preserve them on appeal.") (internal quotation marks omitted); *Anderson v. Barnhart*, 344 F.3d 809, 814 (8th Cir. 2003) (finding that a claimant's failure to raise a disability claim during the administrative process "waived [the claim] from being raised on appeal"); *Trejo v. Berryhill*, No. EDCV 17-0879-JPR, 2018 WL 3602380, at *3 (C.D. Cal. July 25, 2018) ("To the extent *Lucia* applies to Social Security ALJs, [the] [p]laintiff has forfeited the issue by failing to raise it during her

administrative proceedings."). Because Plaintiff failed to present her Appointments Clause challenge before the ALJ *or* the Appeals Council, she forfeited her Appointments Clause challenge. *See Stearns*, 2018 WL 4380984, at *5; *Davis*, 2018 WL 4300505, at *9; *Iwan*, 2018 WL 4295202, at *9; *Thurman*, 2018 WL 4300504, at *9.

Third, Plaintiff maintains that it would have been futile to present her Appointments Clause challenge to an ALJ. (Doc. 16 at 6). She explains that while her claim was pending before the Appeals Counsel, the SSA issued an emergency message which stated that the Appeals Council "will not acknowledge, make findings related to, or otherwise discuss the Appointments Clause issue." (*Id.*). She further notes that "ALJs were then instructed by the Office of General Counsel that they will not otherwise discuss or make any findings related to the Appointments Clause issue." (*Id.* (internal quotation marks omitted)). According to Plaintiff, the emergency message "unquestionably declared that any Appointments Clause challenges raised administratively would be futile." (*Id.*). What Plaintiff fails to consider, however, is that regardless of the memorandum, she still could have raised her Appointments Clause challenge before the ALJ.

A district court recently considered and rejected a plaintiff's attempt to rely on a substantively similar SSA emergency message issued in June. *See Stearns*, 2018 WL 4380984, at *4-5. In *Stearns*, the plaintiff, relying on *Lucia*, "pointe[d] out that the Commissioner has released an emergency message directing ALJs to note on the record whether an Appointments Clause challenge is made at the administrative level, but '[b]ecause SSA

lacks the authority to finally decide constitutional issues such as these, ALJs will not discuss or make any findings related to the Appointments Clause issue on the record.'" *Id.* at *4 (quoting EM-18003 REV, effective June 25, 2018). The Court held that the plaintiff had forfeited her Appointments Clause challenge, explaining:

> In *Lucia*, the Supreme Court acknowledged the challenge was timely because it was made before the Commission. In the context of Social Security disability proceedings, that means the claimant must raise the issue before the ALJ's decision becomes final. . . . *Lucia* makes it clear that this particular issue must be raised at the administrative level.
>
> Because [plaintiff] did not raise an Appointments Clause issue before or during the ALJ's hearing, or at any time before the ALJ's decision became final, I find that she has forfeited the issue for consideration on judicial review.

Id. at *5-6. In light of the Supreme Court's decision in *Lucia* and subsequent courts' analyses of the issue, the Court finds that, even considering the directive of the emergency message, Plaintiff has forfeited her Appointment Clause claim. *See id.*

Finally, the Court notes that as of this date, the courts to have considered the issue have all agreed: To challenge the validity of the ALJ's appointment under the Appointments Clause, a plaintiff must raise the claim at the administrative level; otherwise, the claim is forfeited. *See Page*, 2018 WL 5668850, at *4; *Stearns*, 2018 WL 4380984, at *6; *Salmeron v. Berryhill*, No. cv 17-3927-JPR, 2018 WL 4998107, at * 3 (C.D. Cal. Oct. 15,

2018); *Garrison v. Berryhill*, No. 1:17-cv-00302-FDW, 2018 WL 4924554, at *2 (W.D.N.C. Oct. 10, 2018); *Davidson*, 2018 WL 4680327, at *2; *Davis*, 2018 WL 4300505, at *9; *Thurman*, 2018 WL 4300504, at *9; *Iwan*, 2018 WL 4295202, at *9.

In sum, the Court finds that the facts of this case do not warrant an exception to the general rule that the failure to bring an as-applied claim at the administrative level results in forfeiture. *See Page*, 2018 WL 5668860, at *3. Accordingly, Plaintiff's request to amend her complaint to add a challenge to the ALJ's authority under the Appointments Clause is futile.

IV. CONCLUSION

For the above reasons, it is **RECOMMENDED** that Plaintiff's Motion for Leave to File First Amended Complaint be **DENIED** as futile. Further, the parties are **DIRECTED** to meet and confer regarding a proposed scheduling order and shall file their proposed scheduling order by November 23, 2018.

V. PROCEDURE ON OBJECTIONS

If any party objects to this Report and Recommendation, that party may, within fourteen (14) days of the date of this Report, file and serve on all parties written objections to those specific proposed finding or recommendations to which objection is made, together with supporting authority for the objection(s). A District Judge of this Court shall make a de novo determination of those portions of the Report or specific proposed findings or recommendations to which objection is made. Upon proper objection, a District Judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further

evidence or may recommit this matter to the Magistrate Judge with instructions. 28 U.S.C. § 636(b)(1).

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to have the district judge review the Report and Recommendation de novo, and also operates as a waiver of the right to appeal the decision of the District Court adopting the Report and Recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

IT IS SO ORDERED.

Nov. 16, 2018

/s/ KIMBERLY A. JOLSON
KIMBERLY A. JOLSON
UNITED STATES MAGISTRATE JUDGE

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No.: 18-10187

JOSEPH FORTIN, PLAINTIFF

v.

COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

Filed: Feb. 1, 2019

REPORT AND RECOMMENDATION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT [ECF NOS. 11, 15]

Plaintiff Joseph Fortin appeals the final decision of defendant Commissioner of Social Security (Commissioner), which denied his application for disability income benefits (DIB) under the Social Security Act. Both parties have filed summary judgment motions, referred to this Court for a report and recommendation under 28 U.S.C. § 636(b)(1)(B). After review of the record, the Court finds that the administrative law judge's (ALJ) decision properly applied the treating physician rule and evaluated the side-effects of Fortin's medication and that the RFC was supported by substantial evidence.

The parties also filed supplemental briefing on whether a remand for a *de novo* administrative hearing is necessary because the ALJ below was not properly appointed under the appointments clause of the Constitution. [ECF No. 18, 20, 21, 22, 23]. As described below, the Court finds that Supreme Court precedent compels a finding that Fortin is entitled to remand for a *de novo* hearing.

The Court therefore **RECOMMENDS** that:

- Fortin's motion **[ECF No. 11]** be **GRANTED;**
- the Commissioner's motion **[ECF No. 15]** be **DENIED**; and
- this matter be **REMANDED** for a *de novo* hearing.

I. BACKGROUND

A. Fortin's Background and Disability Application

Born July 8, 1952, Fortin was 61 at the alleged disability on-set date and 62 on his date last insured (DLI), December 31, 2014. [ECF No. 11, PageID. 345-46]. He alleges a disability onset date of March 13, 2014. [ECF No. 9-2, Tr. 22].

After a hearing on July 19, 2016, during which Fortin and a vocational expert (VE) testified, the ALJ found that Fortin was not disabled. [ECF No. 9-2, Tr. 20-27, 31-56]. The Appeals Council denied review, making the ALJ's decision the final decision of the Commissioner. [*Id.*, Tr. 1-4]. Fortin timely filed for judicial review. [ECF No. 1].

It is undisputed that Fortin raised no Appointments Clause challenge before the Commissioner.

II. ANALYSIS

A. Appointments Clause Challenge

1.

The Court will begin by addressing Fortin's argument that his case should be remanded for a *de novo* administrative hearing because the ALJ below was not properly appointed according to the Appointments Clause. U.S. Const., Art. II, § 2, cl. 2 Fortin's argument flows from the recently-decided *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018), which held that ALJs are "Officers of the United States" under the Appointments Clause, and thus must be appointed by "the President, a court of law, or a head of department." *Lucia* dictates that a party making "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief." *Lucia*, 138 S. Ct. at 2055. Although *Lucia* specifically addressed only SEC ALJs, the Solicitor General has acknowledged that the Supreme Court's holding encompassed all ALJs, and the Acting Commissioner of Social Security ratified the appointment of its ALJ's in July 2018 to address any Appointments Clause deficiency going forward. *Page v. Comm'r of Soc. Sec.*, 344 F. Supp. 3d 902, 2018 WL 5668850, at *1[1] (E.D. Mich., Oct. 31, 2018). And here, the Commissioner does not argue that the ALJ below was properly appointed at the time of Fortin's hearing; it contends only that Fortin has forfeited this claim for relief by failing to present it at the administrative level.

---

[1] At the time of this report and recommendation, only star pages of *Page* are available.

The Commissioner's forfeiture argument is overwhelmingly endorsed by district courts across the country. *See Velasquez on Behalf of Velasquez v. Berryhill*, No. CV 17-17740, 2018 WL 6920457, at *2 (E.D. La. Dec. 17, 2018), *adopted*, No. CV 17-17740, 2019 WL 77248 (E.D. La. Jan. 2, 2019) (collecting cases). For example, in *Page*, an opinion from this district, the court held that a claimant who failed to raise the appointment clause issue at the administrative level waived her argument that the ALJ charged to adjudicate her claim was unconstitutionally appointed. 2018 WL 5668850, at *2-3. As here, the *Page* plaintiff "failed to raise, much less develop the Appointments Clause issue at the administrative level although the split in authority over the constitutional adequacy of presiding ALJs occurred long before [Page's] application for benefits was considered by the Appeals Council." *Id.* at *3.

The *Page* plaintiff cited an August 6, 2018 Social Security memorandum stating that ALJ's are "not to respond" to constitutional challenges to their appointments as a defense to her failure to raise the issue at the administrative level. *Id.* The court rejected that argument because the same memorandum states that such challenges may be brought before the Appeals Council. *Id.* "Moreover, a regulation in effect long prior to the events in question states that claimants may receive an expedited appeals process to challenge a 'provision in the law that you believe is unconstitutional.'" *Id.* (quoting 20 C.F.R. § 404.924(d)).

The *Page* court also pointed out that courts considering "the issue have unanimously rejected attacks on the validity of the ALJ's appointment under *Lucia* brought under 42 U.S.C. 405(g) where the claimant failed to

make a constitutional challenge at the administrative level." *Id.* (citing *Stearns v. Berryhill*, 2018 WL 4380984, at *6 (N.D. Iowa September 14, 2018); *Garrison v. Berryhill*, 2018 Wl 4924554, at *2 (W.D.N.C. October 10, 2018); *Davidson v. Comm'r of Soc. Sec.*, 2018 WL 4680327, at *2 (M.D. Tenn., Sept. 28, 2018); *Salmeron v. Berryhill*, 2018 WL 4998107, at *3 (C.D. Cal. October 15, 2018)).

Bucking this trend, a magistrate judge in the Eastern District of Pennsylvania recommended in November 2018 that two cases be remanded for proceedings before properly appointed ALJ's. *Muhammad v. Berryhill*, No. 18-172 (E.D. Pa., Nov. 2, 2018); *Godschall v. Comm'r of Soc. Sec.*, No. 18-1647 (E.D. Pa., Nov. 2, 2018). [ECF Nos. 22-1, 22-2]. Judge Rice disagreed with every other opinion that relied on forfeiture to reject the claimant's requests for remand, with his reasoning mainly spelled out in *Muhammad*. [ECF No. 22-1].

2.

Judge Rice cited *Freytag v. Comm'r*, 501 U.S. 868 (1991), as holding that Appointments Clause objections are structural constitutional objections that can be considered on appeal even if they were not ruled on below. [*Id.*, PageID. 525]. In *Freytag*, the petitioners argued that the assignment of their complex case to a special trial judge of the Tax Court violated the Appointments Clause. 501 U.S. at 878. The Commissioner had argued that the petitioners waived their constitutional challenge by failing to timely object to the assignment of their cases to the special trial judge and even consenting to the assignment. *Id.* at 878. Rejecting this argument, the Court emphasized that the petitioners' consti-

tutional challenge was "neither frivolous nor disingenuous," and raised an important separation-of-powers concern. *Id.* at 878-79.

> The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political. Our separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch. The Appointments Clause not only guards against this encroachment but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.

Id. at 878 (citation omitted).

The *Freytag* Court cited its precedent as "expressly includ[ing] Appointments Clause objections to judicial officers in the category of nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below." *Id.* at 878-79. And although the Court acknowledged that litigants must generally raise all issues and objections at trial, it concluded that the strong interest in maintaining separation of powers deemed this "one of those rare cases in which we should exercise our discretion to hear petitioners' challenge to the constitutional authority of the Special Trial Judge." *Id.* at 879.

The Commissioner emphasizes the *Freytag* Court's description of it being a "rare case" and argues that it created no categorical rule excusing Appointments Clause challenges from general waiver and forfeiture principles. [ECF No. 20, PageID. 436]. As a general matter, this argument has support. *See, e.g, In re DBC*,

545 F.3d 1373, 1380 (Fed. Cir. 2008) ("The Supreme Court has never indicated that such challenges must be heard regardless of waiver."). But the Commissioner's argument is flawed here because it presumes that general waiver and forfeiture principles apply to Social Security cases at the administrative level; they do not. As Judge Rice pointed out in *Muhammad*, the Supreme Court has in fact held that claimants need not exhaust issues before the Appeals Council to preserve them for judicial review. *Sims v. Apfel*, 530 U.S. 103 (2000).

3.

To reach its holding, *Sims* first noted that exhaustion requirements are "largely creatures of statute," and that "the Commissioner does not contend that any statute requires issue exhaustion in the request for review." *Id.* at 107-08. And while the Court has at times created issue-exhaustion requirements, "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Id.* at 108-09.

The *Sims* Court found that Social Security proceedings are dissimilar to normal adversarial litigation. In fact, "[t]he differences between courts and agencies are nowhere more pronounced than in Social Security proceedings." *Id.* at 110. That is because Social Security proceedings are "inquisitorial rather than adversarial"; no representative of the Commissioner appears before the ALJ to oppose benefits and the ALJ's duty is "to investigate the facts and develop the arguments both for and against granting benefits." *Id.* at 110-11. At the Appeals Council level, the Commissioner acts as an advisor rather than litigant. *Id.* at 111. And the Council

reviews the entire record instead of depending on the claimant to identify issues, which makes sense because some claimants are unrepresented or are represented by nonlawyers. *Id.* at 111-12. "Accordingly, we hold that a judicially created issue-exhaustion requirement is inappropriate. Claimants who exhaust administrative remedies need not also exhaust issues in a request for review by the Appeals Council in order to preserve judicial review of those issues." *Id.* at 112.

The Commissioner notes that the *Sims* majority expressly did not decide whether a claimant must exhaust issues before an ALJ. [ECF No. 20, PageID. 44, (citing *Sims*, 530 U.S. at 106)]. While true, it is hard to reconcile *Sims's* reasoning that Social Security proceedings before an ALJ are non-adversarial and thus profoundly dissimilar to court litigation with a finding that a judicially-created issue-exhaustion requirement is compatible with *Sims's* holding. And the Commissioner does not show that the ALJ had any authority to address Fortin's constitutional challenge. Indeed, in August 2018, ALJs were instructed not to respond to constitutional challenges. *Page*, 2018 WL 5668850 at *3. *Page* noted that a regulation allows claimants to receive an expedited appeals process to challenge a "provision in the law that you believe is unconstitutional." § 404.924(d)). But the *Page* court did not address *Sims's* holding that a claimant's failure to raise an issue before the Appeals Council does not act as a waiver. *Sims*, 530 U.S at 112.

4.

The Commissioner cites *Mills v. Apfel*, 244 F.3d 1, 4 (1st Cir. 2001) and other opinions as holding that, despite *Sims,* claimants who fail to raise arguments before the ALJ waive them. [ECF No. 20, PageID. 440-41 & n.6]. Those opinions, however, referred to matters quintessentially within the jurisdiction of the ALJ. For example, *Mills* had to do with the court's discretion to consider new evidence not presented to the ALJ; this issue was "entirely different" from *Sims's* decision to "reject[ ] a waiver claim and allow[ ] a social security applicant to raise in court an issue not raised at the Appeals Council stage." *Mills,* 244 F.3d at 4. And given *Sims's* holding that claimants need not exhaust issues at the Appeals Council level in Social Security cases, the Commissioner's citation to opinions requiring Appointments Clause challenges to be made at the administrative level are distinguishable. *See, e.g., Kabani & Co. v. SEC*, No. 17-70786, 2018 WL 3828524, at *1 (9th Cir. Aug. 13, 2018) (distinguishable because of the SEC's statutory exhaustion requirement (15 U.S.C. § 78y(c)); *N.L.R.B. v. RELCO Locomotives, Inc.*, 734 F.3d 764, 798 (8th Cir. 2013) (distinguishable because NLRA as an "explicit jurisdictional exhaustion requirement includes an exhaustion requirement."). Given *Sims*, this is indeed that rare type of case described in *Freytag* in which a court should entertain an Appointments Clause challenge despite it not being raised at the administrative level. *Freytag*, 501 U.S. at 879.

This Court is unsatisfied with the reasoning of other opinions that have considered and rejected *Sims's* applicability to the issue here. In *Gothard v. Comm'r of Social Security*, 17-13638 (E.D. Mich. October 10, 2018),

the court found persuasive the reasoning of those opinions that the claimant could have raised an Appointments Clause argument before the ALJ. [ECF No. 23-1]. But as noted in *Sims*, the hearing before the ALJ is non-adversarial and the ALJ's duty is "to investigate the facts and develop the arguments both for and against granting benefits." 503 U.S. at 110-11. Claimants appearing before the ALJ may not even be represented by an attorney. *Id.* at 111-12. *Page* recognized that ALJs lack authority to decide constitutional challenges. *Page*, 2018 WL 5668850 at *3. The Court agrees with *Muhammad* that "it makes little sense to require a claimant to raise an issue before an ALJ who is powerless to resolve it." [ECF No. 22-1, PageID. 529].

Compelled by *Sims* and *Freytab*, the Court recommends that this matter be remanded to the Commissioner for a *de novo* hearing. This recommendation is not made lightly or without concern for its potential the impact on the Commissioner.

B. The ALJ's Decision

The Court will next address Fortin's argument that the ALJ erred in deciding that Fortin is not disabled.

1.

A "disability" is 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. § 1382c(a)(3)(A).

The Commissioner determines whether an applicant is disabled by analyzing five sequential steps. First, if

the applicant is "doing substantial gainful activity," he or she will be found not disabled. 20 C.F.R. § 416.920(a)(4). Second, if the claimant has not had a severe impairment or a combination of such impairments[2] for a continuous period of at least 12 months, no disability will be found. *Id.* Third, if the claimant's severe impairments meet or equal the criteria of an impairment set forth in the Commissioner's Listing of Impairments, the claimant will be found disabled. *Id.* If the fourth step is reached, the Commissioner considers its assessment of the claimant's residual functional capacity (RFC), and will find the claimant not disabled if he or she can still do past relevant work. *Id.* At the final step, the Commissioner reviews the claimant's RFC, age, education and work experiences, and determines whether the claimant could adjust to other work. *Id.* The claimant bears the burden of proof throughout the first four steps, but the burden shifts to the Commissioner if the fifth step is reached. *Preslar v. Sec'y of Health & Human Servs.*, 14 F.3d 1107, 1110 (6th Cir. 1994).

Applying this framework, the ALJ concluded that Fortin was not disabled. At the first step, he found that Fortin had not engaged in substantial gainful activity since the alleged onset date in March 2014. [ECF No. 9-2, Tr. 22]. At the second step, he found that Fortin had the severe impairments of "spine disorder and dysfunction of major joints." [*Id.*]. Next, the ALJ concluded

---

[2] A severe impairment is one that "significantly limits [the claimant's] physical or mental ability to do basic work activities." § 920(c).

that none of his impairments, either alone or in combination, met or medically equaled the severity of a listed impairment. [*Id.*].

Between the third and fourth steps, the ALJ found that Fortin had the RFC to perform light work, except that he can only occasionally bend and stoop; "can only frequently handle and grasp with the left upper extremity; cannot reach overhead with the left, non-dominant upper extremity; and will be off-task for less than 10 percent of the workday." [*Id.*, Tr. 23]. At step four, the ALJ found that Fortin was capable of performing his past relevant work as a Program Planner, and thus not disabled. [*Id.*, Tr. 26].

2.

Under § 405(g), this Court's review is limited to determining whether the Commissioner's decision is supported by substantial evidence and was made in conformity with proper legal standards. *Gentry v. Comm'r of Soc. Sec.*, 741 F.3d 708, 722 (6th Cir. 2014). Substantial evidence is "more than a scintilla of evidence but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rogers v. Comm'r of Soc. Sec.*, 486 F.3d 234, 241 (6th Cir. 2007) (internal quotation marks and citation omitted). Only the evidence in the record below may be considered when determining whether the ALJ's decision is supported by substantial evidence. *Bass v. McMahon*, 499 F.3d 506, 513 (6th Cir. 2007).

Fortin argues that the RFC finding that he was capable of frequent handling and grasping with his left arm, despite suffering multiple comminuted fractures to his left ulna and the aggravation of pre-existing arthritis

in his wrist in a March 2014 automobile accident, was not supported by substantial evidence. He contends that the ALJ erroneously concluded that he could handle and grasp with his left arm frequently when the evidence shows that, at most, he could handle and grasp with his left upper extremity only occasionally, a distinction Fortin argues would have prevented him from performing his past work and thereby been work-preclusive under the Grid Rules. [ECF No. 11, PageID. 351-55]. Fortin also argues that the ALJ did not give proper weight to the opinions of treating physician Herminio Perez, M.D., about the frequency with which Fortin could handle and grasp with his left arm and hand. [*Id.*, PageID. 356-59]. Fortin contends that the ALJ erred by failing to evaluate the impact of the side-effects of his medication. [*Id.*, PageID. 359-61]. The Court disagrees, finding that these arguments lack merit.

3.

Fortin claims that the ALJ failed to give proper weight to Dr. Perez's opinion. The "treating physician rule" requires an ALJ to give controlling weight to a treating physician's opinions about the nature and severity of a claimant's condition when those opinions are well-supported by medically acceptable clinical and diagnostic evidence, and not inconsistent with other substantial evidence. *Gentry*, 741 F.3d at 723, 727-29; *Rogers*, 486 F.3d at 242-43. To assess a treating physician's opinion properly, an ALJ must analyze it under both prongs of the controlling weight test. *See Gayheart v. Comm'r of Soc. Sec.*, 710 F.3d 365, 376 (6th Cir. 2013). "Even when not controlling, however, the ALJ must consider certain factors, including the length, frequency, na-

ture, and extent of the treatment relationship; the supportability of the physician's conclusions; the specialization of the physician; and any other relevant factors," and give appropriate weight to the opinion. *Gentry*, 741 F.3d at 723.

Here, Dr. Perez's opinion followed injuries Fortin sustained from two accidents. First, in March 2014, Fortin suffered a fractured left distal ulna and other injuries from a car accident. [ECF No. 9-2, Tr. 23-24]. Treatment records reflect that Fortin underwent several weeks of physical therapy and received prescription medication and a TENS unit for pain. [ECF No. 9-7, Tr. 220-21]. Pre-existing arthritis in Fortin's left wrist was likely aggravated by the auto accident, as well. [*Id.*, Tr. 194]. By July 2014, the fracture was healed and not "clinically significant." [*Id.*] Upper extremity strength on the left was 4/5, grip strength was 5/5 bilaterally. [*Id.*, Tr. 222]. Continued symptoms and restricted ability to supinate, pronate, palmar and dorsiflex were linked to the prior degenerative changes in the wrist. [*Id.*, Tr. 194]. The records reflect that Fortin received no further treatment relating to his left arm fracture and degenerative wrist condition after July 2014. [*Id.*, Tr. 248].

Fortin's second car accident was in December 2014, just before his DLI. [*Id.*] He began experiencing increasing neck and left shoulder pain after that second accident. [*Id.*, Tr. 256, 259]. Fortin first sought treatment for the increased neck and left shoulder pain in February 2015. [*Id.*]. He was diagnosed with a left torn rotator cuff, and underwent physical therapy and subacromial steroid injections in 2015 and 2016. [*Id.*, Tr. 289]. An ultrasound of his left shoulder in August 2015

revealed a 1.5cm tear in the rotator cuff; the tear grew to 2.5cm x 2cm by June 2016, when a follow-up ultrasound was performed. [*Id.*, Tr. 296]. Arthroscopic RTC repair surgery was scheduled for two weeks after the hearing. [*Id.* Tr. 297].

Dr. Perez, Fortin's primary care provider, completed a physical functional assessment in August 2016. [*Id.*, Tr. 301-02]. On the form, Dr. Perez indicated that Fortin could not perform any reaching above shoulder, grasping, holding, fine manipulation, pushing or pulling with his left arm, and that these limitations began in December 2014. [*Id.*]

After noting many of the restrictions set forth in Perez's opinion, the ALJ "accorded it limited weight," reasoning that Dr. Perez did not sufficiently cite objective signs, symptoms, or laboratory findings from the relevant period to support his conclusions about Fortin's limitations. [ECF No. 9-2, Tr. 25-26]. The ALJ also noted that Dr. Perez's opinion was inconsistent with Fortin's history of conservative treatment of physical therapy and medication and reported activities of daily living, including driving and shopping, and that the treatment records for the relevant period, March through December 2014, were very limited. [*Id.*]

4.

Fortin accuses the ALJ of substituting his own opinions for those of Dr. Perez, and discounting the doctor's opinions without good reason supported by the evidence from the record. [ECF No. 11, PageID. 356-57]. But, in giving Dr. Perez's opinions less than controlling weight, the ALJ rightly identified the lack of supporting clinical and diagnostic findings within the relevant period. [ECF

No. 9-2, Tr. 25-26]. A review of the records reveals Fortin did not seek treatment for his left arm or wrist after July 2014, after his treating orthopedic surgeon determined that the ulna had healed and was not clinically significant, and that he should consult a hand specialist for any further treatment of his wrist. [ECF No. 9-7, Tr. 194.] And Fortin did not seek treatment for increased neck and left shoulder pain, attributed to his December 2014 car accident until February 6, 2015, about six weeks after his DLI. [*Id.*, Tr. 259].

As the ALJ assessed, Dr. Perez's opinion about the severity of Fortin's limitations was also inconsistent with other substantial evidence. The ALJ emphasized treatment notes showing successful completion of physical therapy and the clinical resolution of the fractured left arm, 4/5 left arm strength and 5/5 grip strength. [*Id.*, Tr. 24]. As noted, Fortin did not seek treatment for exacerbations to his condition from the second car accident until February 2015. And January 2016 treatment records reflect he had had only one session of physical therapy and no injections for the torn rotator cuff injury to his left shoulder, diagnosed in August 2015. [*Id.*, Tr. 286-288].

The ALJ's decision also shows that he properly considered the regulatory factors—the length, frequency, nature, and extent of the relationship between Fortin and Dr. Perez, and the supportability and consistency of his conclusions with the other substantial evidence of record—and his decision to give little weight to Dr. Perez's opinion was supported by those factors. *See Gentry*, 743 F.3d at 727-28; *Gayheart*, 710 F.3d at 376.

The ALJ noted that Fortin's treatment records for March through December are very limited. [ECF No.

9-2, Tr. 24]. Fortin provided records[3] of treatment for his fractured left arm from March 13, 2014 to July 13, 2014. [ECF No. 9-7, Tr. 193-212, 215-24]. His records also reflect an office visit to Dr. Perez for low back pain in September 2014 and for an annual checkup in November 2014. [*Id.*, Tr. 224-39]. The November record notes only low back tenderness and erratic sleep as ongoing problems from the March 2014 auto accident. [*Id.*, Tr. 231].

Substantial evidence supports the ALJ's conclusion that Dr. Perez's findings were unsupported by clinical or diagnostic evidence and were inconsistent with the conservative treatment Fortin received and his continued ability to manage activities like driving and shopping. The Court thus finds no error in the weight the ALJ gave to Dr. Perez's opinion.

5.

Fortin also argues that the ALJ erred in crafting an RFC requiring frequent handling and grasping with his left arm, as opposed to only occasional handling and grasping. Fortin bears the burden of establishing more restrictive RFC limitations than those assessed by the ALJ. *See Jordan v. Comm'r of Soc.Sec.*, 548 F.3d 417, 423 (6th Cir. 2008). The only evidence Fortin relies on to support a more restrictive left arm use limitation is Dr. Perez's opinion, and the Court has already concluded that the ALJ did not err in giving that opinion limited weight. Fortin argues that the significant nature of his March 2014 left arm fractures justifies greater

---

[3] These records are from orthopedist Benedetto Pellerito, M.D., not Dr. Perez.

restriction, but he cannot rest on diagnoses alone; a diagnosis says nothing about its disabling effects. *Higgs v. Bowen*, 880 F.2d 860, 863 (6th Cir. 1988).

The ALJ's RFC assessment reflects his consideration of the limited and conservative treatment Fortin received during the relevant period, his continued ability to drive and shop, as well as the opinion of the State agency consultant B. D. Choi, M.D., that Fortin required no manual restrictions for his left upper extremity. [ECF No. 9-2, Tr. 25; ECF No. 9-3, Tr. 62]. Fortin has not sustained his burden of showing that he required a more restrictive RFC.

6.

Fortin argues that the ALJ failed to explain how or if he considered Fortin's medication side-effects in reaching his conclusion. To the contrary, the ALJ specifically noted that Fortin's continued ability to drive was inconsistent with his claim that medication side-effects, like drowsiness, prevented him from performing light work. [ECF No. 9-2, Tr. 25].

III. CONCLUSION

Because of the Appointments Clause violation described above, the Court **RECOMMENDS** that Fortin's motion [ECF No. 11] be **GRANTED,** the Commissioner's motion [ECF No. 15] be **DENIED**; and that this matter be remanded so that Fortin may receive a *de novo* hearing in front of a properly appointed ALJ. If the Court's determinations about the Appointments Clause are not adopted, the Commissioner's decision should be affirmed.

/s/ ELIZABETH A. STAFFORD
ELIZABETH A. STAFFORD
United States Magistrate Judge

Dated: Feb. 1, 2019

NOTICE TO THE PARTIES REGARDING OBJECTIONS

Either party to this action may object to and seek review of this Report and Recommendation, but must act within fourteen days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Secretary of HHS*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Filing objections which raise some issues but fail to raise others with specificity will not preserve all objections that party might have to this Report and Recommendation. *Willis v. Secretary of HHS*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). A copy of any objection must be served upon this Magistrate Judge. E.D. Mich. LR 72.1(d)(2).

Each **objection must be labeled** as "Objection #1," "Objection #2," etc., and **must specify** precisely the provision of this Report and Recommendation to which it pertains. Not later than fourteen days after service of objections, **the non-objecting party must file a response** to the objections, specifically addressing each issue raised in the objections in the same order and labeled as "Response to Objection #1," "Response to Objection #2," etc. The response must be **concise and proportionate in**

length and complexity to the objections, but there is otherwise no page limitation. If the Court determines that any objections are without merit, it may rule without awaiting the response.

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No.: 18-10182

ANTHONY HUTCHINS, PLAINTIFF

v.

COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

Filed: Feb. 1, 2019

REPORT AND RECOMMENDATION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT [ECF NOS. 12, 14]

Honorable ROBERT H. CLELAND

Magistrate Judge ELIZABETH A. STAFFORD

Plaintiff Anthony Hutchins appeals the final decision of defendant Commissioner of Social Security (Commissioner), which denied his application for disability insurance benefits (DIB) under the Social Security Act. Both parties have filed summary judgment motions, referred to this Court for a report and recommendation under 28 U.S.C. § 636(b)(1)(B). The parties also filed supplemental briefing on whether a remand for a *de novo* administrative hearing is necessary because the ALJ below was not properly appointed under the appointments clause of the Constitution. [ECF No. 18,

19]. As described below, the Court finds that Supreme Court precedent compels a finding that Hutchins is entitled to remand for a *de novo* hearing and that the ALJ violated the treating physician rule.

The Court therefore **RECOMMENDS** that:

- Hutchins' motion **[ECF No. 12]** be **GRANTED**;
- the Commissioner's motion **[ECF No. 14]** be **DENIED**; and
- this matter be **REMANDED** for a *de novo* hearing.

I. BACKGROUND

Born March 28, 1971, Hutchins was 43 years old on September 22, 2014, the date of his application for benefits. [ECF No. 8-5, Tr. 172]. He has completed two years of college education and has past relevant work as a cashier, tire service supervisor and tire builder. [ECF No. 8-2, Tr. 28; ECF No. 8-6, Tr. 202]. Hutchins claimed disability due to "brittle diabetes impairment, hypertensive cardiovascular disease/hypertension, [and] cervical spine impairment." [ECF No. 8-6, Tr. 201].

After a hearing on February 1, 2017, during which Hutchins and a vocational expert (VE) testified, the ALJ found that Hutchins was not disabled. [ECF No. 8-2, Tr. 30, 37-79]. The Appeals Council denied review, making the ALJ's decision the final decision of the Commissioner. [*Id.*, Tr. 1-3]. Hutchins timely filed for judicial review. [ECF No. 1].

It is undisputed that Hutchins raised no Appointments Clause challenge before the Commissioner.

II. ANALYSIS

A. Appointments Clause Challenge

1.

The Court will begin by addressing Hutchins' argument that his case should be remanded for a *de novo* administrative hearing because the ALJ below was not properly appointed according to the Appointments Clause. U.S. Const., Art. II, § 2, cl. 2 Hutchins' argument flows from the recently-decided *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018), which held that ALJs are "Officers of the United States" under the Appointments Clause, and thus must be appointed by "the President, a court of law, or a head of department." *Lucia* dictates that a party making "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief." *Lucia*, 138 S. Ct. at 2055. Although *Lucia* specifically addressed only SEC ALJs, the Solicitor General has acknowledged that the Supreme Court's holding encompassed all ALJs, and the Acting Commissioner of Social Security ratified the appointment of its ALJ's in July 2018 to address any Appointments Clause deficiency going forward. *Page v. Comm'r of Soc. Sec.*, 344 F. Supp. 3d 902 (E.D. Mich., Oct. 31, 2018). And here, the Commissioner does not argue that the ALJ below was properly appointed at the time of Hutchins' hearing; it contends only that Hutchins has forfeited this claim for relief by failing to present it at the administrative level.

The Commissioner's forfeiture argument is overwhelmingly endorsed by district courts across the country. *See Velasquez on Behalf of Velasquez v. Berryhill*, No. CV 17-17740, 2018 WL 6920457, at *2 (E.D. La. Dec.

17, 2018), *adopted*, No. CV 17-17740, 2019 WL 77248 (E.D. La. Jan. 2, 2019) (collecting cases). For example, in *Page*, an opinion from this district, the court held that a claimant who failed to raise the appointment clause issue at the administrative level waived her argument that the ALJ charged to adjudicate her claim was unconstitutionally appointed. 344 F. Supp. 3d at 904-05. As here, the *Page* plaintiff "failed to raise, much less develop the Appointments Clause issue at the administrative level although the split in authority over the constitutional adequacy of presiding ALJs occurred long before [Page's] application for benefits was considered by the Appeals Council." *Id.*

The *Page* plaintiff cited an August 6, 2018 Social Security memorandum stating that ALJ's are "not to respond" to constitutional challenges to their appointments as a defense to her failure to raise the issue at the administrative level. *Id.* at 905. The court rejected that argument because the same memorandum states that such challenges may be brought before the Appeals Council. *Id.* "Moreover, a regulation in effect long prior to the events in question states that claimants may receive an expedited appeals process to challenge a 'provision in the law that you believe is unconstitutional.'" *Id.* (quoting 20 C.F.R. § 404.924(d)).

The *Page* court also pointed out that courts considering "the issue have unanimously rejected attacks on the validity of the ALJ's appointment under *Lucia* brought under 42 U.S.C. 405(g) where the claimant failed to make a constitutional challenge at the administrative level." *Id.* (citing *Stearns v. Berryhill,* 2018 WL 4380984, at *6 (N.D. Iowa September 14, 2018); *Garrison v. Berryhill*, 2018 Wl 4924554, at *2 (W.D.N.C. October 10,

2018); *Davidson v. Comm'r of Soc. Sec.*, 2018 WL 4680327, at *2 (M.D. Tenn., Sept. 28, 2018); *Salmeron v. Berryhill*, 2018 WL 4998107, at *3 (C.D. Cal. October 15, 2018)).

Bucking this trend, a magistrate judge in the Eastern District of Pennsylvania recommended in November 2018 that two cases be remanded for proceedings before properly appointed ALJ's. *Muhammad v. Berryhill*, No. 18-172 (E.D. Pa., Nov. 2, 2018); *Godschall v. Comm'r of Soc. Sec.*, No. 18-1647 (E.D. Pa., Nov. 2, 2018). Magistrate Judge Timonthy R. Rice disagreed with every other opinion that relied on forfeiture to reject the claimant's requests for remand, with his reasoning mainly spelled out in *Muhammad*.[1]

2.

Judge Rice cited *Freytag v. Comm'r*, 501 U.S. 868 (1991), as holding that Appointments Clause objections are structural constitutional objections that can be considered on appeal even if they were not ruled on below. [*Id.*, PageID.525]. In *Freytag*, the petitioners argued that the assignment of their complex case to a special trial judge of the Tax Court violated the Appointments Clause. 501 U.S. at 878. The Commissioner had argued that the petitioners waived their constitutional challenge by failing to timely object to the assignment of their cases to the special trial judge and even consenting to the assignment. *Id.* at 878. Rejecting this argument, the Court emphasized that the petitioners' consti-

---

[1] For the same reasons explained here, this Court followed Judge Rice's reasoning in *Fortin v. Comm'r of Soc. Sec.*, No. CV 18-10187, 2019 WL 421071, at *1 (E.D. Mich. Feb. 1, 2019).

tutional challenge was "neither frivolous nor disingenuous," and raised an important separation-of-powers concern. *Id.* at 878-79.

> The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political. Our separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch. The Appointments Clause not only guards against this encroachment but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.

Id. at 878 (citation omitted).

The *Freytag* Court cited its precedent as "expressly includ[ing] Appointments Clause objections to judicial officers in the category of nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below." *Id.* at 878-79. And although the Court acknowledged that litigants must generally raise all issues and objections at trial, it concluded that the strong interest in maintaining separation of powers deemed this "one of those rare cases in which we should exercise our discretion to hear petitioners' challenge to the constitutional authority of the Special Trial Judge." *Id.* at 879.

The Commissioner emphasizes the *Freytag* Court's description of it being a "rare case" and argues that it created no categorical rule excusing Appointments Clause challenges from general waiver and forfeiture principles. [ECF No. 19, PageID. 1279]. As a general matter, this argument has support. *See, e.g, In re DBC*,

545 F.3d 1373, 1380 (Fed. Cir. 2008) ("The Supreme Court has never indicated that such challenges must be heard regardless of waiver."). But the Commissioner's argument is flawed here because it presumes that general waiver and forfeiture principles apply to Social Security cases at the administrative level; they do not. As Judge Rice pointed out in *Muhammad*, the Supreme Court has in fact held that claimants need not exhaust issues before the Appeals Council to preserve them for judicial review. *Sims v. Apfel*, 530 U.S. 103 (2000).

3.

To reach its holding, *Sims* first noted that exhaustion requirements are "largely creatures of statute," and that "the Commissioner does not contend that any statute requires issue exhaustion in the request for review." *Id.* at 107-08. And while the Court has at times created issue-exhaustion requirements, "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Id.* at 108-09.

The *Sims* Court found that Social Security proceedings are dissimilar to normal adversarial litigation. In fact, "[t]he differences between courts and agencies are nowhere more pronounced than in Social Security proceedings." *Id.* at 110. That is because Social Security proceedings are "inquisitorial rather than adversarial"; no representative of the Commissioner appears before the ALJ to oppose benefits and the ALJ's duty is "to investigate the facts and develop the arguments both for and against granting benefits." *Id.* at 110-11. At the Appeals Council level, the Commissioner acts as an advisor rather than litigant. *Id.* at 111. And the Council

reviews the entire record instead of depending on the claimant to identify issues, which makes sense because some claimants are unrepresented or are represented by nonlawyers. *Id.* at 111-12. "Accordingly, we hold that a judicially created issue-exhaustion requirement is inappropriate. Claimants who exhaust administrative remedies need not also exhaust issues in a request for review by the Appeals Council in order to preserve judicial review of those issues." *Id.* at 112.

The Commissioner notes that the *Sims* majority expressly did not decide whether a claimant must exhaust issues before an ALJ. [ECF No. 19, PageID.1283, (citing *Sims*, 530 U.S. at 107)]. While true, it is hard to reconcile *Sims's* reasoning that Social Security proceedings before an ALJ are non-adversarial and thus profoundly dissimilar to court litigation with a finding that a judicially-created issue-exhaustion requirement is compatible with *Sims's* holding. And the Commissioner does not show that the ALJ had any authority to address Hutchins' constitutional challenge. Indeed, in August 2018, ALJs were instructed not to respond to constitutional challenges. *Page*, 2018 WL 5668850 at *3. *Page* noted that a regulation allows claimants to receive an expedited appeals process to challenge a "provision in the law that you believe is unconstitutional." § 404.924(d)). But the *Page* court did not address *Sims's* holding that a claimant's failure to raise an issue before the Appeals Council does not act as a waiver. *Sims*, 530 U.S at 112.

4.

The Commissioner cites *Mills v. Apfel*, 244 F.3d 1, 8 (1st Cir. 2001) and other opinions as holding that, despite *Sims,* claimants who fail to raise arguments before

the ALJ waive them. [ECF No. 19, PageID. 1284 & n. 5]. Those opinions, however, referred to matters quintessentially within the jurisdiction of the ALJ. For example, *Mills* had to do with the court's discretion to consider new evidence not presented to the ALJ; this issue was "entirely different" from *Sims's* decision to "reject[ ] a waiver claim and allow[ ] a social security applicant to raise in court an issue not raised at the Appeals Council stage." *Mills,* 244 F.3d at 4. And given *Sims's* holding that claimants need not exhaust issues at the Appeals Council level in Social Security cases, the Commissioner's citation to opinions requiring Appointments Clause challenges to be made at the administrative level are distinguishable. *See, e.g., Kabani & Co. v. SEC*, No. 17-70786, 2018 WL 3828524, at *1 (9th Cir. Aug. 13, 2018) (distinguishable because of the SEC's statutory exhaustion requirement (15 U.S.C. § 78y(c)); *N.L.R.B. v. RELCO Locomotives, Inc.*, 734 F.3d 764, 798 (8th Cir. 2013) (distinguishable because NLRA as an "explicit jurisdictional exhaustion requirement includes an exhaustion requirement."). Given *Sims*, this is indeed that rare type of case described in *Freytag* in which a court should entertain an Appointments Clause challenge despite it not being raised at the administrative level. *Freytag*, 501 U.S. at 879.

This Court is unsatisfied with the reasoning of other opinions that have considered and rejected *Sims's* applicability to the issue here. In *Gothard v. Comm'r of Social Security*, 17-13638 (E.D. Mich. October 10, 2018), the court found persuasive the reasoning of those opinions that the claimant could have raised an Appointments Clause argument before the ALJ. [ECF No. 23-1]. But as noted in *Sims*, the hearing before the ALJ is

non-adversarial and the ALJ's duty is "to investigate the facts and develop the arguments both for and against granting benefits." 503 U.S. at 110-11. Claimants appearing before the ALJ may not even be represented by an attorney. *Id.* at 111-12. *Page* recognized that ALJs lack authority to decide constitutional challenges. *Page*, 2018 WL 5668850 at *3. The Court agrees with *Muhammad* that "it makes little sense to require a claimant to raise an issue before an ALJ who is powerless to resolve it." *Muhammad*, at 11.

Compelled by *Sims* and *Freytab*, the Court recommends that this matter be remanded to the Commissioner for a *de novo* hearing. This recommendation is not made lightly or without concern for its potential impact on the Commissioner.

B. The ALJ's Decision

The Court will next address Hutchins' argument that the ALJ erred in deciding that Hutchins is not disabled.

1.

A "disability" is 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)(A).

The Commissioner determines whether an applicant is disabled by analyzing five sequential steps. First, if the applicant is "doing substantial gainful activity," he or she will be found not disabled. 20 C.F.R. § 404.1520(a)(4). Second, if the claimant has not had a

severe impairment or a combination of such impairments[2] for a continuous period of at least 12 months, no disability will be found. *Id.* Third, if the claimant's severe impairments meet or equal the criteria of an impairment set forth in the Commissioner's Listing of Impairments, the claimant will be found disabled. *Id.* If the fourth step is reached, the Commissioner considers its assessment of the claimant's residual functional capacity ("RFC"), and will find the claimant not disabled if he or she can still do past relevant work. *Id.* At the final step, the Commissioner reviews the claimant's RFC, age, education and work experiences, and determines whether the claimant could adjust to other work. *Id.* The claimant bears the burden of proof throughout the first four steps, but the burden shifts to the Commissioner if the fifth step is reached. *Preslar v. Sec'y of Health & Human Servs.*, 14 F.3d 1107, 1110 (6th Cir. 1994).

Applying this framework, the ALJ concluded that Hutchins was not disabled. At the first step, she found that Hutchins had not engaged in substantial gainful activity since February 23, 2014, the alleged onset date. [ECF No. 8-2, Tr. 21]. At the second step, she found that Hutchins had the severe impairments of "degenerative changes of the cervical spine, and cervical radiculopathy, status post fusion; diabetes, tendinosis of the left shoulder, osteoarthritis of the left AC joint, bursitis of the left shoulder, ADD/ADHD, major depressive disorder; generalized anxiety disorder, and cannabis abuse in remission." [*Id.*]. Next, the ALJ concluded that

---

[2] A severe impairment is one that "significantly limits [the claimant's] physical or mental ability to do basic work activities." § 920(c).

none of Hutchins's impairments, either alone or in combination, met or medically equaled the severity of a listed impairment. [*Id.*, Tr. 22-24].

Between the third and fourth steps, the ALJ found that Hutchins had the RFC to perform light work, except that:

> [H]e can lift and/or carry 10 pounds occasionally and less than 10 pounds frequently. He can stand and/or walk 6 hours and sit 6 hours in an 8-hour workday. He can push and pull only occasionally with the non-dominant left upper extremity. He can never climb ladders, ropes, or scaffolds. He can occasionally climb ramps or stairs. He can occasionally stoop, kneel, and crouch. He can never crawl. He can never reach overhead with the bilateral upper extremities, but can frequently reach in all other directions with the bilateral upper extremities. He can occasionally handle and finger with the left upper extremity. He can perform work in an environment with a moderate noise level, as defined by the Selected Characteristics of Occupations (OSC). He can tolerate occasional exposure to extreme cold and humidity in the work setting, but should have no use of vibratory hand tools. He can perform no work at unprotected heights or in the vicinity of unprotected dangerous machinery. He can perform no commercial driving. He can tolerate frequent interactions with co-workers and supervisors. He can have occasional interactions with the general public. He can perform routine tasks and simple tasks, defined as those that can be learned in 30 days. He can tolerate occasional changes in the work setting.

[*Id.*, Tr. 24]. At step four, the ALJ found that Hutchins was unable to perform past relevant work. [*Id.*, Tr. 28]. At the final step, after considering Hutchins's age, education, work experience, RFC, and the testimony of the VE, the ALJ determined that there were jobs that existed in significant numbers that Hutchins could perform, including positions as a document preparer, an inspector-table worker, and a final assembler, rendering a finding that he was not disabled. [*Id.*, Tr. 28-29].

2.

Under § 405(g), this Court's review is limited to determining whether the Commissioner's decision is supported by substantial evidence and was made in conformity with proper legal standards. *Gentry v. Comm'r of Soc. Sec.*, 741 F.3d 708, 722 (6th Cir. 2014). Substantial evidence is "more than a scintilla of evidence but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rogers v. Comm'r of Soc. Sec.*, 486 F.3d 234, 241 (6th Cir. 2007) (internal quotation marks and citation omitted). Only the evidence in the record below may be considered when determining whether the ALJ's decision is supported by substantial evidence. *Bass v. McMahon*, 499 F.3d 506, 513 (6th Cir. 2007).

Hutchins' arguments focus solely on the ALJ's analysis of his mental impairments. He argues that the ALJ violated the treating physician rule by according only partial weight to the opinion of his treating psychiatrist, Jonathan Henry, M.D.; that her subjective symptom analysis was improper; and that she did not adequately account for his moderate limitations in concentration, persistence, and pace in the mental RFC.

[ECF No. 12]. The Court finds that the ALJ erred in giving only partial weight to Dr. Henry's opinion and recommends remand for that reason.

3.

In April 2016, Dr. Henry, who is a psychiatrist with Community Mental Health for Central Michigan (CMH), began seeing Hutchins every six to eight weeks, and he completed a Mental Impairment Questionnaire for Hutchins in August 2016. [ECF No. 8-19, Tr. 998]. Dr. Henry diagnosed Hutchins with major depressive disorder, recurrent, severe; generalized anxiety disorder; and attention deficit hyperactivity disorder (ADHD). [*Id.*]. He also noted the psychosocial factors of poor finances and unemployment, and listed Hutchins' medications as Buspar, Concerta, and Wellbutrin. [*Id.*]. Dr. Henry noted that Hutchins had been hospitalized for his mental symptoms in 1995. [*Id.*]. He opined that Hutchins was not a malingerer and that his limitations would last at least twelve months. [*Id.*].

Supporting his assessment, Dr. Henry cited Hutchins' depressed mood, anxiety, constricted affect, feelings of guilt or worthlessness, hostility or irritability, anhedonia, decreased energy, social withdrawal or isolation, and excessive sleep. [*Id.*, Tr. 999]. As to Hutchins' attention and concentration, Dr. Henry noted difficulty thinking or concentrating and easy distractibility. [*Id.*]. Dr. Henry found that Hutchins' "most frequent and/or severe" symptoms were "chronic depression" and "attention and concentration problems," and that, "[a]s is very common generally, [Hutchins'] depression aggravates [his] pain." [*Id.*, Tr. 1000]. He also stated that Hutchins had "episodes of decompensation or deterioration in a work or work-like setting which causes

[him] to withdraw from the situation and/or experience an exacerbation of symptoms," and explained that work-related stress aggravated his depression and anxiety. [*Id.*].

Dr. Henry opined that Hutchins had "marked" limitations in maintaining attention and concentration for extended periods; performing activities within a schedule and consistently being punctual; working in coordination with or near others without being distracted by them; completing a workday without interruptions from psychological symptoms; performing at a consistent pace without rest periods of unreasonable length or frequency; and accepting instructions and responding appropriately to criticism from supervisors. [*Id.*, Tr. 1001]. He had "moderate to marked" limitations in understanding and remembering detailed instructions; carrying out detailed instructions; sustaining ordinary routine without supervision; making simple work-related decisions; and responding appropriately to workplace changes. [*Id.*]. And he had "moderate" limitations in every other category except one.[3] [*Id.*]. Lastly, Dr. Henry opined that Hutchins would miss work more than three times per month and that Hutchins' symptoms dated back to February 2014. [*Id.*, Tr. 1002].

The ALJ gave Dr. Henry's August 2016 opinion only partial weight, finding that it was inconsistent with Hutchins' activities of daily living and with the clinical observations of record. [ECF No. 8-2, Tr. 26-27]. She noted that Hutchins testified to playing Scrabble up to three times a month, reading books and playing video

---

[3] Hutchins had "none-to-mild" limitation in asking simple questions or requesting assistance. [ECF No. 8-19, Tr. 1001].

games, and that he acknowledged in testimony that such activities require a fair degree of concentration. [*Id.*]. The ALJ also recounted in another part of the decision that Hutchins engaged in social events, drove, handled his financial matters, and could cook simple meals. [*Id.*, Tr. 23]. And she cited clinical evidence that Hutchins had stated that he could perform independently all activities of daily living; that his affect, behavior, and appearance were appropriate; that his judgment and reason were within normal limits; that he denied hallucinations; and that he had relevant thought content and thought process that was within normal limits. [*Id.*, Tr. 26]. She further noted that Hutchins had denied depression at times, and that he denied suicidal or homicidal ideation. [*Id.*].

4.

The "treating physician rule" requires an ALJ to give controlling weight to a treating physician's opinions about the nature and severity of a claimant's condition when those opinions are well-supported by medically acceptable clinical and diagnostic evidence, and not inconsistent with other substantial evidence. *Gentry*, 741 F.3d at 723, 727-29; *Rogers*, 486 F.3d at 242-43. To assess a treating physician's opinion properly, an ALJ must analyze it under both prongs of the controlling weight test. *See Gayheart v. Comm'r of Soc. Sec.*, 710 F.3d 365, 376 (6th Cir. 2013). "Even when not controlling, however, the ALJ must consider certain factors, including the length, frequency, nature, and extent of the treatment relationship; the supportability of the physician's conclusions; the specialization of the physician; and any other relevant factors," and give appropriate weight to the opinion. *Gentry*, 741 F.3d at 723.

For claims of mental disability, the Sixth Circuit requires that the ALJ to give deference to the diagnoses and observations of professionals who are trained in psychotherapy.

> [W]hen mental illness is the basis of a disability claim, clinical and laboratory data may consist of the diagnosis and observations of professionals trained in the field of psychopathology. The report of a psychiatrist should not be rejected simply because of the relative imprecision of the psychiatric methodology or the absence of substantial documentation, unless there are other reasons to question the diagnostic techniques.

Blankenship v. Bowen, 874 F.2d 1116, 1121 (6th Cir. 1989) (citations and internal quotation marks omitted).

Here, Hutchins contends that Dr. Henry's opinion is supported by his treatment records. Those records show that, in June 2016, Hutchins reported that his mood was "under generally at least fair control," but that he had ongoing problems with anhedonia[4] and dysphoria on a "fairly regular basis." [ECF No. 8-16, Tr. 801]. Those symptoms were also said to be "under some degree of reasonable control." [*Id.*]. He also reported problems with energy, motivation and self-esteem, precipitated by chronic physical pain. [*Id.*]. Upon mental status examination, Hutchins had a depressed and anxious mood, somewhat labile affect, and limited insight and judgment. [*Id.*, Tr. 804]. At that

---

[4] "Anhedonia is the inability to feel pleasure. It's a common symptom of depression as well as other mental health disorders." https://www.webmd.com/depression/what-is-anhedonia#1 (lasted visited on February 12, 2019).

time, he was taking Vyvanse for ADHD, but it was not helping, so he was switched to a Methylphenidate-based product. [*Id.*, Tr. 805].

After his June and August visits, Hutchins returned to Dr. Henry in October 2016, reporting that his depressed mood persisted and seemed to be getting worse, and that he also had sleep and appetite disturbance, poor self-esteem and poor concentration. [ECF No. 8-20, Tr. 1007]. He was assessed with a depressed mood, attenuated affect, and limited insight and judgment. [*Id.*, Tr. 1010]. Because of the persistence of his symptoms, Dr. Henry added Pristiq to help address his depression, while tapering him off of Concerta, which Hutchins reported was not helping his symptoms. [*Id.*, Tr. 1011]. He remained on Buspar and Wellbutrin. [*Id.*]. In November, he continued to be assessed with depressed mood, attenuated affect, and limited insight and judgment. [ECF No. 8-21, Tr. 1096].

Dr. Henry next saw Hutchins in January 2017, with Hutchins reporting his depression as "somewhat worse," noting dysphoria and anhedonia "more days than not," sleeping more than usual, and having worse than typical concentration issues. [*Id.*, Tr. 1099]. He described being most bothered by his ADHD symptoms, including hyperactivity, which reportedly prevented him from being able to sit through a movie from beginning to end. [*Id.*]. As before, examination revealed a depressed mood, attenuated affect, and limited insight and judgment. [*Id.*, Tr. 1102]. Dr. Henry discontinued Hutchins' recently prescription of Pristiq and noted that trials of a methylphenidate product, an amphetamine-based product, and tricyclic antidepressants had all failed to alleviate Hutchins' symptoms. [*Id.*, Tr. 1103].

Dr. Henry started Hutchins on a trial of Catapres. [*Id.*, Tr. 1103]. This was his last visit with Dr. Henry before his February 1, 2017 hearing date.

Hutchins also points to records from CMH that preceded his treatment with Dr. Henry. He began reporting ongoing depression and anxiety in September 2014, stating that he felt depressed at least two or three days per week, which had been ongoing for the past year. [ECF No. 8-9, Tr. 431]. A social work with CMH assessed Hutchins as having depression and anxiety with a global assessment of functioning (GAF) score of 45.[5] [*Id.*, Tr. 466]. The records showed that Hutchins experienced decreased energy and appetite, difficulty with sleep, depression, and some constriction in affect. [*Id.*, Tr. 464; ECF No. 8-12, Tr. 591, 630]. Hutchins continued with therapy throughout 2014, continuing to report feelings of depression, anxiety, and a lack of concentration. [ECF No. 8-9, Tr. 467-78; ECF No. 8-10, Tr. 480; ECF No. 8-12, Tr. 633-35].

In 2015, Hutchins began seeing Victor Vasquez, D.O., another CMS psychiatrist, who diagnosed Hutchins with major depressive disorder, recurrent, moderate; generalized anxiety disorder; and cannabis abuse. [ECF No. 8-12, Tr. 591]. Hutchins reported being unable to sit through a movie due to poor concentration, and after a few visits Dr. Vasquez increased his ADHD medication

---

[5] "The GAF scale is a method of considering psychological, social, and occupational function on a hypothetical continuum of mental health. The GAF scale ranges from 0 to 100, with serious impairment in functioning at a score of 50 or below." *Norris v. Comm'r of Soc. Sec.*, No. 11-5424, 461 Fed. Appx. 433, 436 n.1 (6th Cir. 2012) (citations omitted).

to help with his "concentration/attention." [ECF No. 8-11, Tr. 547, 578, 583].

Thus, Dr. Henry's opinion was based on a substantial amount of clinical and laboratory data—diagnoses and observations of professionals of CMH who were trained in psychotherapy. *Blankenship,* 874 F.2d at 1121.

The Commissioner defends the ALJ's decision by noting that the ALJ cited record evidence of normal affect, behavior, appearance, judgment, reason, thought content, and thought process, in addition to denial of hallucinations, suicidal and homicidal ideation, and above average intellectual functioning. [ECF No. 8-2, Tr. 26]. But these normal results do not contradict the overwhelming evidence of Hutchins' persistent depression, anxiety and concentration issues, limited judgment and insight, and abnormal affect. And a claimant need not suffer hallucinations, or have suicidal or homicidal ideation, in order to have disabling mental impairments. By emphasizing only the normal results throughout the record, which any detailed medical record would be expected to contain, the ALJ did not give good reasons for limiting the weight given to Dr. Henry's opinion.

Similarly, the ALJ noted that Hutchins "consistently stated that he could independently perform all activities of daily living," [ECF No. 8-2, Tr. 26, citing ECF No. 8-9, Tr. 432, 456-457; ECF No. 8-10, Tr. 482; ECF No. 8-11, Tr. 547; ECF No. 8-16, Tr. 812], and testified that he plays Scrabble, reads books, and plays video games, [ECF No. 8-2, Tr. 26-27, citing Tr. 50-51]. But Hutchins also testified that he could not complete a game of Scrabble without taking breaks often, [ECF No. 8-2, Tr. 57], reported that he could not sit through an entire movie in one sitting, [ECF No. 8-11, Tr. 547, 578, 583;

ECF No. 8-21, Tr. 1099], and could only prepare simple frozen or prepackaged meals [ECF No. 8-6, Tr. 219].

The Sixth Circuit has ruled that a claimant's ability to do daily activities such as "drive, clean her apartment, care for two dogs, do laundry, read, do stretching exercises, and watch the news" constitute no more than "minimal daily functions are not comparable to typical work activities." *Rogers v. Comm'r of Soc. Sec.*, 486 F.3d 234, 248 (6th Cir. 2007). Likewise, Hutchins' ability to prepare frozen meals, do a limited amount of driving, shop for groceries, read books for an indeterminate amount of time, and play video games and Scrabble do not contradict Dr. Henry's medical opinion or show that Hutchins can work. If anything, Hutchins' inability to complete a game of Scrabble in one sitting or watch an entire movie from start to finish underscore his limitations in concentration and attention span.

The ALJ's analysis failed to show that Dr. Henry's August 2016 opinion was inconsistent with other substantial evidence. *Gentry*, 741 F.3d at 723. Thus, she should have given the opinion controlling weight under the treating physician rule, which would have resulted in a different RFC. The Court thus recommends remand and that the ALJ also be instructed to reassess Hutchins' subjective symptom allegations.

5.

Hutchins also argues that the ALJ proposed a flawed hypothetical question to the VE by accounting for Hutchins' moderate limitation in concentration, persistence, and pace (CPP) with a mere limitation in performing routine and/or simple tasks and tolerating only occasional changes in the work setting. [ECF No. 8-2, Tr.

69]. As this hypothetical restriction is identical to a portion of the RFC, Hutchins' challenge of the hypothetical is a collateral attack on the RFC itself. *See Casey v. Sec'y of Health and Human Servs.*, 987 F.2d 1230, 1235 (6th Cir. 1993) ("It is well established that an ALJ may pose hypothetical questions to a vocational expert and is required to incorporate only those limitations accepted as credible by the finder of fact."); *Kirchner v. Colvin*, No. 12-CV-15052, 2013 WL 5913972, at *11 (E.D. Mich. Nov. 4, 2013) (Plaintiff's step five argument is a "veiled attack" on the RFC when the hypothetical is identical to the RFC assessment). So Hutchins retains the burden to prove that he requires a more restrictive mental RFC. *Her v. Comm'r of Soc. Sec.*, 203 F.3d 388, 391 (6th Cir. 1999); *Jordan v. Comm'r of Soc. Sec.*, 548 F.3d 417, 423 (6th Cir. 2008).

Supporting his argument, Hutchins cites *Ealy v. Comm'r of Soc. Sec.*, 594 F3d. 504, 516-17 (6th Cir. 2010), in which the court held that limiting a claimant to simple, repetitive jobs in a non-public work setting did not account for a moderate limitation in CPP. "However, *Ealy* does not hold that the terms 'simple, repetitive,' 'routine' or similar modifiers are intrinsically inadequate to address moderate CPP deficiencies." *Smith v. Comm'r of Soc. Sec.*, No. 13-11610, 2014 WL 4605826, at *11 (E.D. Mich. Sept. 15, 2014). Indeed, there is nothing inconsistent with a finding of moderate difficulties with CPP at step three and an RFC limiting the claimant to simple, routine tasks. *Southworth v. Comm'r of Soc. Sec.*, No. 12-12243, 2013 WL 3388946, at *16 (E.D. Mich. July 8, 2013 (collecting cases)).

Hutchins does not elaborate on the reason that his moderate limitation in CPP would require a more restrictive RFC, as is his burden. Thus, this argument does not constitute an independent reason for remand. But having recommended remand of this matter for other reasons, the ALJ should be required to reassess Hutchins' limitations in CPP and craft an RFC with restrictions fully accounting for his limitations.

III. CONCLUSION

The Court **RECOMMENDS** that Hutchins's motion [ECF No. 12] be **GRANTED,** the Commissioner's motion [ECF No. 14] be **DENIED**; and that this matter be remanded for a *de novo* hearing in front of a properly appointed ALJ and for further consideration consistent with this report and recommendation.

/s/ ELIZABETH A. STAFFORD
ELIZABETH A. STAFFORD
United States Magistrate Judge

Dated: Feb. 13, 2019

NOTICE TO THE PARTIES REGARDING OBJECTIONS

Either party to this action may object to and seek review of this Report and Recommendation, but must act within fourteen days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Secretary of HHS*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638

F.2d 947 (6th Cir. 1981). Filing objections which raise some issues but fail to raise others with specificity will not preserve all objections that party might have to this Report and Recommendation. *Willis v. Secretary of HHS*, 931 F.2d 390, 401 (6th Cir. 1991); *Hutchins v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). A copy of any objection must be served upon this Magistrate Judge. E.D. Mich. LR 72.1(d)(2).

Each **objection must be labeled** as "Objection #1," "Objection #2," etc., and **must specify** precisely the provision of this Report and Recommendation to which it pertains. Not later than fourteen days after service of objections, **the non-objecting party must file a response** to the objections, specifically addressing each issue raised in the objections in the same order and labeled as "Response to Objection #1," "Response to Objection #2," etc. The response must be **concise and proportionate in length and complexity to the objections**, but there is otherwise no page limitation. If the Court determines that any objections are without merit, it may rule without awaiting the response.

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 18-cv-10444

MICHAEL JOHN SHOOPS, PLAINTIFF

v.

COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

Filed: Feb. 14, 2019

REPORT AND RECOMMENDATION

District Judge NANCY G. EDMUNDS

Magistrate Judge MONA K. MAJZOUB

Plaintiff Michael John Shoops seeks judicial review of Defendant Commissioner of Social Security's determination that he is not entitled to social security benefits for his physical and mental impairments under 42 U.S.C. § 405(g). (Docket no. 1.) Before the Court are Plaintiff's Motion for Summary Judgment (docket no. 13) and Defendant's Motion for Summary Judgment (docket no. 17). Plaintiff has also filed a reply brief in support of his Motion for Summary Judgment. (Docket no. 18.) With leave of court, the parties have filed supplemental briefing regarding new case law decided after Plaintiff filed his Motion for Summary Judgment in this case, *Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018) and *Jones Bros., Inc.*

v. Sec'y of Labor, 898 F.3d 669 (6th Cir. 2018), which Plaintiff contends "represents a significant change in the controlling law" and "directly implicates the outcome of this case." (*See* docket no. 19 at 4, 6; docket nos. 20, 21.) Plaintiff filed an additional supplemental brief in reply to Defendant's supplemental brief, albeit without leave of court, and the parties have also filed notices of recently-issued decisions related to the issue raised in the supplemental briefing. (Docket nos. 22, 23, 24, 25.) This case has been referred to the undersigned for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). (Docket no. 3.) The Court has reviewed the pleadings, dispenses with a hearing pursuant to Eastern District of Michigan Local Rule 7.1(f)(2), and issues this Report and Recommendation.

I. RECOMMENDATION

For the reasons that follow, it is recommended that Plaintiff's Motion for Summary Judgment (docket no. 13) be **DENIED** and Defendant's Motion for Summary Judgment (docket no. 17) be **GRANTED**.

II. PROCEDURAL HISTORY

Plaintiff protectively filed applications for a period of disability, disability insurance benefits, and supplemental security income on October 27, 2016, alleging that he has been disabled since July 3, 2015, due to conditions related to his vagus nerve, feet, and heart. (TR 164, 361-74, 400, 405.) The Social Security Administration denied Plaintiff's claims on March 7, 2017, and Plaintiff requested a *de novo* hearing. (TR 208-37, 292-94.) On August 31, 2017, Plaintiff appeared with a representative and testified at the hearing before Administrative Law Judge (ALJ) Nicole Quandt. (TR 179-207.) The

ALJ subsequently issued an unfavorable decision on September 18, 2017, and the Appeals Council declined to review the ALJ's decision. (TR 1-6, 164-74.) Plaintiff then commenced this action for judicial review, and the parties filed cross motions for summary judgment, which are currently before the Court.

III. HEARING TESTIMONY AND MEDICAL EVIDENCE

Plaintiff (docket no. 13 at 10-14) and the ALJ (TR 169-72, 174) have set forth detailed, factual summaries of Plaintiff's medical record and the hearing testimony. Defendant set forth a short paragraph of facts and otherwise adopts the ALJ's recitation of the facts. (Docket no. 17 at 4-5.) Having conducted an independent review of Plaintiff's medical record and the hearing transcript, the undersigned finds that there are no material inconsistencies between Plaintiff's and the ALJ"s recitations of the record. Therefore, in lieu of re-summarizing this information, the undersigned will incorporate the above-cited factual recitations by reference and will also make references and citations to the record as necessary to address the parties' arguments throughout this Report and Recommendation.

IV. ADMINISTRATIVE LAW JUDGE'S DETERMINATION

The ALJ found that Plaintiff had not engaged in substantial gainful activity since the alleged onset date of July 3, 2015, and that Plaintiff suffered from the following severe impairments: history of vargus [sic] nerve dysfunction, heart disorder, history of foot injury (bilateral), depression, anxiety, and history of substance abuse.

(TR 166.) The ALJ also found that Plaintiff's impairments did not meet or medically equal the severity of an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. (TR 166-68.) The ALJ then found that Plaintiff had the following residual functional capacity (RFC):

> [C]laimant has the residual functional capacity to perform sedentary work as defined in 20 CFR 404.1567(a) and 416.967(a) except that the claimant is limited to lifting/carrying and pushing/pulling up to 10 pounds occasionally and less than 10 pounds frequently and is limited to sitting up to 6 hours and standing/walking up to 2 hours during an 8-hour workday. The claimant also requires the opportunity to alternate, at will, between sitting for 15 minutes and standing for 5 minutes throughout that day. Furthermore, the claimant is able to climb ladders, ropes or scaffolds occasionally, stoop frequently and crouch frequently. The claimant is never able to work at unprotected heights or with moving mechanical parts. In addition, the claimant is limited to simple, routine tasks and simple work-related decisions.

(TR 168-73.) Subsequently, in reliance on the vocational expert's (VE's) testimony, the ALJ determined that Plaintiff was capable of performing a significant number of jobs in the national economy. (TR 173-74.) Therefore, the ALJ found that Plaintiff was not disabled under the Social Security Act at any time from July 3, 2015, through the date of the decision. (TR 164, 174.)

V. LAW AND ANALYSIS

A. Standard of Review

Pursuant to 42 U.S.C. § 405(g), this Court has jurisdiction to review the Commissioner's final decisions. Judicial review of the Commissioner's decisions is limited to determining whether his findings are supported by substantial evidence and whether he employed the proper legal standards. *See Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Walters v. Comm'r*, 127 F.3d 525, 528 (6th Cir. 1997). Substantial evidence is more than a scintilla but less than a preponderance; it is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson*, 402 U.S. at 401 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *Walters*, 127 F.3d at 528. It is not the function of this Court to try cases *de novo*, resolve conflicts in the evidence, or decide questions of credibility. *See Brainard v. Sec'y of Health and Human Servs.*, 889 F.2d 679, 681 (6th Cir. 1989); *Garner v. Heckler*, 745 F.2d 383, 387 (6th Cir. 1984).

In determining the existence of substantial evidence, the court must examine the administrative record as a whole. *See Kirk v. Sec'y of Health and Human Servs.*, 667 F.2d 524, 536 (6th Cir. 1981), *cert. denied*, 461 U.S. 957 (1983). If the Commissioner's decision is supported by substantial evidence, it must be affirmed, even if the reviewing court would decide the matter differently, *Kinsella v. Schweiker*, 708 F.2d 1058, 1059 (6th Cir. 1983), and even if substantial evidence also supports the opposite conclusion. *See Her v. Comm'r*, 203 F.3d 388, 389-90 (6th Cir. 1999); *Mullen v. Bowen*, 800 F.2d 535, 545 (6th Cir. 1986) (en banc) (noting that the substantial evidence standard "presupposes that there is a zone of

choice within which the decisionmakers can go either way, without interference by the courts"). "But '[a]n ALJ's failure to follow agency rules and regulations denotes a lack of substantial evidence, even where the conclusion of the ALJ may be justified based upon the record.'" *Gayheart v. Comm'r of Soc. Sec.*, 710 F.3d 365, 374 (6th Cir. 2013) (quoting *Cole v. Astrue,* 661 F.3d 931, 937 (6th Cir. 2011)).

B. Framework for Social Security Determinations

Plaintiff's Social Security disability determination was made in accordance with a five-step sequential analysis. In the first four steps, Plaintiff was required to show that:

(1) Plaintiff was not presently engaged in substantial gainful employment; and

(2) Plaintiff suffered from a severe impairment; and

(3) the impairment met or was medically equal to a "listed impairment;" or

(4) Plaintiff did not have the residual functional capacity (RFC) to perform relevant past work.

See 20 C.F.R. § 404.1520(a)-(f). If Plaintiff's impairments prevented Plaintiff from doing past work, the Commissioner, at step five, would consider Plaintiff's RFC, age, education, and past work experience to determine if Plaintiff could perform other work. If not, Plaintiff would be deemed disabled. *See id.* at § 404.1520(g). The Commissioner has the burden of proof only on "the fifth step, proving that there is work available in the economy that the claimant can perform." *Her*, 203 F.3d at 391. To meet this burden, the Commissioner must make a finding "supported by substantial evidence

that [the claimant] has the vocational qualifications to perform specific jobs." *Varley v. Sec'y of Health and Human Servs.,* 820 F.2d 777, 779 (6th Cir. 1987). This "substantial evidence" may be in the form of vocational expert testimony in response to a hypothetical question, "but only 'if the question accurately portrays [the claimant's] individual physical and mental impairments.'" *Id.* (citations omitted).

C. Analysis

The Social Security Act authorizes "two types of remand: (1) a post judgment remand in conjunction with a decision affirming, modifying, or reversing a decision of the [Commissioner] (a sentence-four remand); and (2) a pre-judgment remand for consideration of new and material evidence that for good cause was not previously presented to the [Commissioner] (a sentence-six remand)." *Faucher v. Sec'y of Health and Human Servs.*, 17 F.3d 171, 174 (6th Cir. 1994) (citing 42 U.S.C. § 405(g)). Under a sentence-four remand, the Court has the authority to "enter upon the pleadings and transcript of the record, a judgment affirming, denying, or reversing the decision of the [Commissioner], with or without remanding the cause for a hearing. 42 U.S.C. § 405(g). Where there is insufficient support for the ALJ's findings, "the appropriate remedy is reversal and a sentence-four remand for further consideration." *Morgan v. Astrue*, 10-207, 2011 WL 2292305, at *8 (E.D. Ky. June 8, 2011) (citing *Faucher*, 17 F.3d at 174).

Plaintiff asserts that this matter should be reversed and/or remanded under sentence four because (1) "[t]he court is unable to provide meaningful review because the ALJ failed to explain her reasoning for the conclu-

sions made in her decision;" (2) "[t]he ALJ erred by discounting the opinions of Plaintiff's former treating psychiatrists in favor of the opinion of a non-treating, non-examining, state agency consultant;" (3) "[t]he ALJ failed to properly address Plaintiff's bilateral foot condition;" and (4) "the original administrative proceeding was held before an Administrative Law Judge who was not properly appointed pursuant to the appointments clause of the constitution." (Docket no. 13 at 4, 7, 19-31, docket no. 20 at 2, 4-8.)

1. The Sufficiency of the ALJ's Explanations at Steps Two and Three of the Sequential Evaluation Process

Plaintiff argues that the ALJ's decision is patently deficient and that the court is unable to conduct a meaningful review thereof because the ALJ provided no explanation for her determination at step two of the sequential evaluation process and the ALJ failed to adequately explain her determination related to Plaintiff's mental impairments at step three. (Docket no. 13 at 19-24; docket no. 18 at 4-6.) Plaintiff points out that the sentence "**[EXPLAIN WHY THE ABOVE IMPAIRMENT(S) IS SEVERE]**" appears in the place of any explanation at step two. (Docket no. 13 at 20 (citing TR 166).) And the sentence "**[EXPLAIN HOW EVIDENCE SUPPORTS THIS DEGREE OF LIMITATION]**" appears four times in the ALJ's analysis of Plaintiff's mental impairments at step three. (TR 167; *see also* TR 168.) Defendant explains that the ALJ plainly failed to delete the instructions from the agency's decision template and argues that Plaintiff has failed to show that the ALJ was required to provide any

greater explanation at steps two and three. (Docket no. 17 at 6-14.)

a. Step Two

At step two of the sequential evaluation process, the ALJ found that Plaintiff had the following severe impairments: history of vargus [sic] nerve dysfunction, heart disorder, history of foot injury (bilateral), depression, anxiety, and history of substance abuse. (TR 166.) Plaintiff argues that "[t]he ALJ's failure to explain why she found these impairments to be severe, and perhaps more importantly, why she found other documented impairments to be non-severe, renders the decision patently deficient." (Docket no. 13 at 20.) Plaintiff asserts that he suffers from other conditions that the ALJ did not consider at step two, including hypothyroidism, hypotension, bipolar disorder, a history of chronic headaches, and neuropathy. (*Id.* at 21-22.) Plaintiff argues that the ALJ's failure to explain why she did not consider these impairments to be severe or whether she considered any limitations related thereto in the assessment of Plaintiff's RFC constitutes reversible harmful error. (*Id.* at 22.)

A severe impairment or combination of impairments is one that significantly limits the claimant's physical or mental ability to perform basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). An impairment will be considered non-severe only if it is a "slight abnormality which has such a minimal effect on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education and work experience." *Farris v. Sec'y of Health & Human Servs.*, 773 F.2d 85, 90 (6th Cir. 1985) (citation omitted). But the step-two severity analysis is simply a threshold

determination. It is well established that "once any one impairment is found to be severe, the ALJ must consider both severe and nonsevere impairments in the subsequent steps," and it becomes "legally irrelevant" that other impairments are not considered severe. *McGlothin v. Comm'r of Soc. Sec.*, 299 F. App'x 516, 522 (6th Cir. 2008) (citing *Anthony v. Astrue*, 266 F. App'x 451, 457 (6th Cir. 2008)). This is so because the second step is designed simply to screen out and dispose of baseless claims. *Anthony*, 266 F. App'x at 457. Stated differently, as long as the ALJ considers all of a claimant's impairments in the remaining steps of the disability determination, the ALJ's failure to find additional severe impairments at step two does not constitute reversible error. *See Maziarz v. Sec'y of Health & Human Servs.*, 837 F.2d 240, 244 (6th Cir. 1987).

Plaintiff has not cited any regulation or binding authority that specifically requires an ALJ to provide a certain amount or quality of explanation for the determination at step two of the sequential evaluation process. However, to the extent that an ALJ's failure to provide an explanation at step two is erroneous, any error committed by the ALJ in this case is harmless because the ALJ considered all of Plaintiff's impairments, including those she did not mention at step two, in her assessment of Plaintiff's RFC. Specifically, the ALJ noted that records from Plaintiff's treatment at Genesys Medical Center in April 2016 indicated that Plaintiff's symptoms appeared typical for a vasovagal event and were likely influenced by other factors including Plaintiff's hypothyroidism, marijuana use, and frequent plasma donations causing hypovolemia. (TR 169.) The ALJ also considered Plaintiff's records from Plaintiff's visit

to Genesys Medical Center in July 2016 and noted that Plaintiff was discharged with diagnoses of atypical chest pain, likely nonischemic, dizziness with recurrent transient hypotension, asymptomatic sinus bradycardia, possible obstructive sleep apnea, hypothyroidism, generalized anxiety disorder, and cocaine use. (TR 170.) The ALJ also discussed the treatment records provided by Plaintiff's podiatrist, Jeffery Noroyan, DPM, including Dr. Noroyan's note that Plaintiff was experiencing mild neuropathic discomfort in the ball of his foot. (TR 170.) Additionally, the ALJ noted that Plaintiff was diagnosed with migraines during his inpatient treatment at Arrowhead Behavioral Health in July 2015. (TR 171.) And finally, the ALJ discussed the records related to Plaintiff's inpatient treatment at McLaren Medical Center in September 2015 for increased symptoms of depression and noted that Plaintiff's psychiatrist diagnosed him with bipolar disorder. (TR 171.) It is therefore legally irrelevant that the ALJ did not indicate whether these impairments were severe or nonsevere, with or without proper explanation at step two of the sequential evaluation process. Accordingly, under *McGlothin* and *Maziarz*, Plaintiff's step-two challenge fails.

To the extent that Plaintiff argues that the ALJ failed to properly consider his hypothyroidism, hypotension, bipolar disorder, headaches, and neuropathy in assessing his RFC, Plaintiff's argument lacks merit. Plaintiff bears the burden of proving the existence and severity of limitations caused by his impairments through step four of the sequential evaluation process. *Jones v. Comm'r of Soc. Sec.*, 336 F.3d 469, 474 (6th Cir. 2003);

Her, 203 F.3d at 391. Accordingly, it is Plaintiff's burden to prove that he has a more restrictive RFC than that assessed by the ALJ. *See Jordan v. Comm'r of Soc. Sec.*, 548 F.3d 417, 423 (6th Cir. 2008) (citing *Her*, 203 F.3d at 392). Plaintiff, however, does not indicate what additional functional limitations the ALJ should have assessed to account for these impairments. Moreover, Plaintiff cites no medical evidence to show that he has any limitations related to these impairments. Plaintiff has not met his burden in this regard.

b. Step Three

Plaintiff challenges the ALJ's explanation for her determination at step three of the sequential evaluation process that Plaintiff's mental impairments pose only mild to moderate limitations. (Docket no. 13 at 22-24; docket no. 18 at 5-6.) At the third step of the sequential evaluation process, a claimant will be deemed presumptively disabled and eligible for benefits if his impairment meets or medically equals one of the listings in the Listing of Impairments. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). A claimant must satisfy all of the criteria to meet a listing, or have impairments that are medically equivalent to or equal in severity and duration to the criteria of a listed impairment. *Id.*; *Rabbers v. Comm'r*, 582 F.3d 647, 653 (6th Cir. 2009). It is the claimant's burden to demonstrate that he meets or equals a listed impairment at the third step of the sequential evaluation process. *Foster v. Halter*, 279 F.3d 348, 354 (6th Cir. 2001). ("A claimant must demonstrate that her impairment satisfies the diagnostic description for the listed impairment in order to be found disabled thereunder."). "When considering presumptive disability at Step Three, an ALJ must analyze the claimant's

impairments in relation to the Listed Impairments and give a reasoned explanation of his findings and conclusions in order to facilitate meaningful review." *Christephore v. Comm'r of Soc. Sec.*, No. 11-13547, 2012 WL 2274328, at *6 (E.D. Mich. June 18, 2012) (citing *Reynolds v. Comm'r of Soc. Sec.*, 424 F. App'x 411, 416 (6th Cir. 2011)).

Here, the ALJ found that the severity of Plaintiff's mental impairments, considered singly and in combination, did not meet or medically equal the criteria of listings 12.04 and 12.06. (TR 167-68.) Specifically, in evaluating the "paragraph B" criteria of these listings, the ALJ found that Plaintiff's mental impairments posed only mild to moderate limitations:

> In understanding, remembering, or applying information, the claimant has mild limitations. **[EXPLAIN HOW EVIDENCE SUPPORTS THIS DEGREE OF LIMITATION]** The record does not establish marked limitations in this area, due to the claimant's mental impairments. Overall, the undersigned finds that the claimant's mental impairments have resulted in a mild level of impairment in this area and that he retains the capacity for simple, routine work, as described in the established residual functional capacity.
>
> In interacting with others, the claimant has moderate limitations. **[EXPLAIN HOW EVIDENCE SUPPORTS THIS DEGREE OF LIMITATION]** The record does not reveal significant limitations in this area, such as difficulty interacting with others or large groups. The record also does not suggest marked problems getting along with others.

> With regard to concentrating, persisting, or maintaining pace, the claimant has moderate limitations. **[EXPLAIN HOW EVIDENCE SUPPORTS THIS DEGREE OF LIMITATION]** The medical evidence of record reveals symptoms of depression, anxiety and continued pain symptoms, which could be expected to cause a moderate level of limitation with regard to this area.
>
> As for adapting and managing oneself, the claimant has experienced moderate limitations. **[EXPLAIN HOW EVIDENCE SUPPORTS THIS DEGREE OF LIMITATION]** The claimant's [sic] continues to engage in substance abuse. However, the record also does not reveal a history of recurrent exacerbation of symptoms and he appears capable of managing his own medical care and personal care.

(TR 167-68.)

Plaintiff's step-three argument directly relates to the undeleted template instructions—he argues that the ALJ failed to explain why the medical evidence supports her conclusions. (Docket no. 13 at 22-23.) He further argues that this alleged error "permeated" throughout the rest of the ALJ's decision, particularly when the ALJ discounted the opinions of Plaintiff's treating psychiatrists on the basis that the record documented only a moderate level of impairment due to Plaintiff's mental impairments. (*Id.* at 23 (citing TR 172).) According to Plaintiff, this alleged error renders the ALJ's decision unreliable and prevents the court from conducting a meaningful review. (*Id.* at 22-23.)

The ALJ's explanations for finding that Plaintiff had only mild to moderate limitations in the "paragraph B"

criteria as a result of his mental impairments are not models of excellence, as the ALJ failed to cite any record evidence in support of her findings, which is highlighted by the undeleted template language. However, the ALJ's findings are based on an absence of record evidence to support marked or significant limitations in the first two criteria, so the ALJ's failure to cite any medical evidence related to those findings is not illogical. Additionally, the ALJ provides brief, but sound, explanations for her findings related to the last two criteria. Notably, Plaintiff has not cited to any record evidence to show that the ALJ's findings in this regard are flawed or inaccurate. Accordingly, the undersigned is not convinced that the ALJ's explanations are insufficient under *Christephore, supra.*

Moreover, "[t]he Sixth Circuit has expressly declined to adopt a blanket rule that remand is required whenever an ALJ 'provides minimal reasoning at step three of the five-step inquiry.'" *Wischer v. Comm'r of Soc. Sec.*, No. 1:13-cv-810, 2015 WL 518658, at *12 (S.D. Ohio Feb. 6, 2015), *report and recommendation adopted sub nom. Wischer ex rel. Ernst v. Comm'r of Soc. Sec.*, No. 1:13-cv-810, 2015 WL 1107543 (S.D. Ohio Mar. 11, 2015) (quoting *Forrest v. Comm'r of Soc. Sec.*, 591 F. App'x 359, 365 (6th Cir. 2014))). In *Forrest*, the court upheld the ALJ's step-three determination, despite the fact that the ALJ's supporting analysis was sparse, because the ALJ "made sufficient factual findings elsewhere in his decision to support his conclusion at step three." *Id.*, 591 F. App'x at 366 (citing *Bledsoe v. Barnhart*, 165 F. App'x 408, 411 (6th Cir. 2006) ("looking to findings elsewhere in the ALJ's decision to affirm a step-three medical equivalency determination, and finding no need

to require the ALJ to 'spell out every fact a second time'") and *Burbridge v. Comm'r of Soc. Sec.*, 572 F. App'x 412, 417 (6th Cir. 2014) (Moore, J., dissenting) ("acknowledging that an ALJ's step-three analysis was 'cursory' but suggesting that, under our precedent, it is enough for the ALJ to support his findings by citing an exhibit where the *exhibit* contained substantial evidence to support his conclusion") (emphasis in original)).

Here, the ALJ discussed Plaintiff's mental impairments in specific enough terms later in her decision to make her step-three determination that Plaintiff experienced only mild to moderate limitations as a result of her mental impairments clear. For example, the ALJ considered Plaintiff's two rounds of inpatient mental health treatment in July and September 2015. With regard to the July 2015 treatment, the ALJ noted that Plaintiff was assessed with a Global Assessment of Functioning (GAF) score of 25 at the time of admission, but Plaintiff's symptoms improved with medication, and upon release from the hospital five days later, a GAF score of 55 was assessed. (TR 171.) "A GAF of 51-60 indicates moderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks), or moderate difficulty in social, occupational, or school functioning (e.g., few friends, conflicts with peers or co-workers)." *Kornecky v. Comm'r of Soc. Sec.*, 167 F. App'x 496, 503 (6th Cir. 2006) (citation and internal quotation marks omitted). With regard to Plaintiff's September 2015 treatment, the ALJ pointed out that Plaintiff's symptoms improved with treatment and after five days Plaintiff was discharged from the hospital to a partial hospitalization program, during which Plaintiff's condition remained stable. (TR 171.) The ALJ also noted that

Plaintiff did not complete that program and left against medical advice a few weeks later. (TR 171.) The ALJ further noted that the record does not document any additional formal mental health treatment. (TR 171.)

The ALJ's discussion of the record evidence related to Plaintiff's mental impairments in evaluating Plaintiff's RFC sufficiently explains and clarifies the ALJ's step-three finding that Plaintiff's mental impairments pose only mild to moderate limitations. The ALJ's discussion is not so deficient as to preclude meaningful review and is supported by substantial evidence in the record. Notably, and as discussed in detail below, the ALJ's step-three determination is supported by the opinion of the state-agency psychologist. (*See* TR 214.) Plaintiff's Motion should therefore be denied with regard to this issue.

2. The ALJ's Assessment of the Medical Opinion Evidence

Plaintiff argues that "[t]he ALJ erred by discounting the opinions of Plaintiff's former treating psychiatrists in favor of the opinion of a non-treating, non-examining, state agency consultant." (Docket no. 13 at 24-28; docket no. 18 at 6-9.) It is well settled that the opinions of treating physicians are generally accorded substantial deference. In fact, the ALJ must give a treating physician's opinion complete deference if it is supported by clinical and laboratory diagnostic evidence and it is not inconsistent with the other substantial evidence in the record. 20 C.F.R. §§ 404.1527(c)(2), 416.927(c)(2). When an ALJ determines that a treating source's medical opinion is not controlling, he must determine how much weight to assign that opinion in light of several factors: (1) length of the treatment relationship and

the frequency of examination; (2) nature and extent of the treatment relationship; (3) supportability of the opinion; (4) consistency of the opinion with the record as a whole; (5) specialization of the treating source; and (6) other factors. 20 C.F.R. §§ 404.1527(c)(2)-(6), 416.927(c)(2)-(6).

Plaintiff's treating psychiatrists have very offered little in the form of opinion evidence, except for the GAF scores of 25 and 55 assessed by Kenneth Adler, M.D., and the GAF score of 50 assessed by Kutty Mathew, M.D. (TR 477-78, 660.) The ALJ acknowledged and assessed the GAF scores as follows:

> As noted above, treatment records provided by Dr. Kenneth Adler and Matthew Kutty [sic], former treating psychiatrists, indicate GAF scores ranging from the 20s to the 50s (Ex. 1F and 5F). 20 CFR 416.927(d) provides that the undersigned consider the opinions of physicians of record and that controlling weight must be given to the medical opinion of a treating physician if it is well supported by medical evidence and if it is not inconsistent with other substantive evidence. The undersigned notes that the GAF score is a subjective determination that represents the clinician's judgment of the individual's overall level of functioning. GAF ratings are opinion evidence and need supporting evidence to give them weight. Unless the GAF rating is well supported and consistent with other evidence in the file, it does not provide a reliable longitudinal picture of a claimant's mental functioning for disability analysis. In this case, the findings documented in the record reveal a moderate

> level of impairment due to the claimant's mental impairments. Therefore, the GAF scores reported above, have been given little weight.

(TR 172.)

Plaintiff argues that the ALJ's analysis is perfunctory and insufficient under the regulations and that the ALJ's "conclusory dismissal" of the GAF scores was incorrect. (Docket no. 13 at 26.) "A GAF score may help an ALJ assess mental RFC, but it is not raw medical data." *Kennedy v. Astrue*, 247 F. App'x 761, 766 (6th Cir. 2007). In fact, neither the Commissioner nor the Sixth Circuit requires the Commissioner to give GAF scores any weight, and the Commissioner has '"declined to endorse the [GAF] score for use in the Social Security and [Supplemental Security Income] disability programs.'" *Lee v. Comm'r of Soc. Sec.*, 529 F. App'x 706, 716 (6th Cir. 2013) (quoting *DeBoard v. Comm'r of Soc. Sec.*, 211 F. App'x 411, 415 (6th Cir. 2006)). Thus, the ALJ was under no obligation to credit the GAF scores assessed by Drs. Adler and Mathew, and the little weight that she did assign to them is not erroneous.

Plaintiff argues that the GAF scores do provide a longitudinal picture of Plaintiff's functioning and that they are supported by objective medical evidence—"namely the fact that Plaintiff was hospitalized multiple times for periods of significant decompensation in mental functioning." (Docket no. 13 at 26.) But the record reflects that Dr. Adler treated Plaintiff for less than a week in July 2015, and Plaintiff was under the treatment of Dr. Mathew for a little under a month between September and October 2015, which are the only two times that Plaintiff was hospitalized for his mental impairments during the alleged disability period, according to

the record. As the ALJ indicated, there is no record evidence that Plaintiff received formal mental health treatment after October 2015. Plaintiff's argument that the three GAF scores represent a longitudinal picture of Plaintiff's mental health functioning lacks merit where the scores were assessed over a period of three months, and that was the only time that Plaintiff received formal mental health treatment over the two-year period of alleged disability considered by the ALJ.

Plaintiff also argues that the ALJ's reasoning for discounting the GAF scores on the basis that "the findings documented in the record reveal a moderate level of impairment due to the claimant's mental impairments" is insufficient. (Docket no. 13 at 27.) He claims that "this shortcoming" flows from the ALJ's failure to explain her reasoning at step three. Plaintiff acknowledges that the ALJ later recited portions of the medical record related to his mental impairments, but he argues that recitation does not equal analysis. As discussed above, however, the ALJ's reasoning at step three of the sequential evaluation process, when read in conjunction with the ALJ's subsequent discussion of Plaintiff's mental health records, sufficiently explains and clarifies the ALJ's finding that Plaintiff's mental impairments posed only a moderate level of impairment.

Additionally, Plaintiff argues that the ALJ's analysis of the GAF scores did not address all of the regulatory factors. (Docket no. 13 at 27.) To the extent that the ALJ was required to consider the regulatory factors in her assessment of the GAF scores, there is no *per se* rule that requires an articulation of each of the six regulatory factors listed in 20 C.F.R. §§ 404.1527(c)(2)-(6), 416.927(c)(2)-(6). *Norris v. Comm'r of Soc. Sec.*, No.

11-CV-11974, 2012 WL 3584664, at *5 (E.D. Mich. Aug. 20, 2012) (citing *Tilley v. Comm'r of Soc. Sec.*, 394 F. App'x 216, 222 (6th Cir. 2010)). Nevertheless, the ALJ explicitly addressed most of the factors by noting that Drs. Adler and Mathew were Plaintiff's former treating psychiatrists (nature and extent of relationship, specialization), discussing the nature of the GAF scores (other), and finding the scores to be unsupported by and inconsistent with the record evidence showing a moderate level of impairment (supportability, consistency). There is no error here.

Plaintiff further argues the ALJ erred by crediting the opinion of the state-agency psychologist, Blaine Pinaire, Ph.D., over the opinions of her treating psychiatrists. Generally, the opinion of a treating source is entitled to greater weight than the opinion of a non-examining source. 20 C.F.R. § 404.1527(c). However, the Social Security Administration has instructed that opinions from state-agency medical and psychological consultants may be entitled to greater weight than the opinions of treating or examining sources in appropriate circumstances, *e.g.*, where the treating source's opinion is not supported by the evidence. SSR 96-6p, 1996 WL 374180, at *3; *Dyer v. Soc. Sec. Admin.*, 568 F. App'x 422, 428 (6th Cir. 2014) (citing *Gayheart* at 379-80). Here, Drs. Adler and Mathew only provided limited opinions regarding Plaintiff's GAF scores, which are not entitled to any deference, are not endorsed for use in the Social Security disability programs, and which the ALJ properly found to be unsupported by and inconsistent with the record evidence. Conversely, Dr. Pinaire examined Plaintiff's complete medical record, assessed

Plaintiff's mental impairments under the listings, assessed Plaintiff's mental RFC, and rendered an opinion regarding Plaintiff's functional limitations, which the ALJ found to be supported by and consistent with the record. Under these circumstances, the ALJ appropriately assigned greater weight to Dr. Pinaire's opinion.

Plaintiff further argues that the ALJ failed to address Dr. Pinaire's opinion in accordance with the regulations. Social Security Ruling 96-6p states that an ALJ must consider the findings made by State agency medical consultants regarding the nature and severity of an individual's impairments as expert opinion evidence of a non-examining source. SSR 96-6p, 1996 WL 374180, at *2 (July 2, 1996). The Ruling further states that ALJs are not bound by findings made by State agency physicians, but they may not ignore these opinions and must explain the weight given to these opinions in their decisions. *Id.* The opinions of State agency medical consultants "can be given weight only insofar as they are supported by evidence in the case record, considering such factors as the supportability of the opinion in the evidence . . . , [and] the consistency of the opinion with the record as a whole. . . . " *Id.*

The ALJ provided the following assessment of Dr. Pinaire's opinion:

> Dr. Blain [sic] Pinaire, a State Agency psychologist, performed a psychiatric review of the medical evidence of record on March 7, 2017. Dr. Pinaire notes that the claimant's mental impairments cause the following degree of limitation in the broad areas of functioning set out in the disability regulations for evaluating mental disorders and in the mental disorders

> listing. Dr. Pinaire notes mild limitation with regard to the ability to understand, remember, or apply information, moderate limitations with regard to interacting with others and moderate limitations with regard to the ability to concentrate, persist, or maintain pace and adapt or manage oneself (Ex. 1A and 2A).
>
> Dr. Pinaire also provided an assessment of the claimant's functioning. Dr. Pinaire notes that the claimant is able to understand, remember, and carry out simple instructions; make judgments that are commensurate with the functions of unskilled tasks, i.e., work-related decisions; respond adequately to supervision, coworkers and work situations; and deal with most changes in a routine work setting. Dr. Pinaire notes some issues with concentration, but the claimant retains sufficient concentration to perform simple 1-2 step tasks, all on a routine and regular basis (Ex. 1A and 2A).
>
> The undersigned has given great weight to Dr. Pinaire's opinion. The undersigned notes that the medical evidence of record reveals a moderate level impairment with regard to the claimant's mental impairments.

(TR 172.) Here, while brief, the ALJ's assessment clearly indicates that she found Dr. Pinaire's opinion to be supported by and consistent with the record. This is sufficient reason to give great weight to Dr. Pinaire's opinion under SSR 96-6p, particularly in light of the limited value of Dr. Adler's and Dr. Mathew's GAF scores and the absence of any other medical opinion evidence regarding Plaintiff's non-exertional limitations. Accordingly, Plaintiff's Motion for Summary Judgment

should be denied with respect to the ALJ's assessment of the medical opinion evidence.

3. The ALJ's Consideration of Plaintiff's Bilateral Foot Condition

Plaintiff argues that the ALJ failed to properly address his bilateral foot condition. (Docket no. 13 at 29-31.) In the decision, the ALJ first addressed Plaintiff's testimony regarding his foot condition:

> At the hearing, the claimant reported a history of bilateral foot pain after a bucket was dropped on his feet in 2012. The claimant reported that he was working in New York at that time and was doing repairs after Hurricane Sandy. The claimant also reported undergoing surgery on his left foot, fusion/joint replacement, in August 2017. The claimant testified that he would require a total of 3 surgeries on his right foot and one surgery on the left.

(TR 169.) The ALJ also discussed the medical records related to Plaintiff's foot condition:

> The claimant also has a history of bilateral foot pain, due to an injury in 2012. Treatment records do not indicate significant treatment related to this condition until 2016. Treatment records provided by Dr. Jeffery Noroyan DPM on February 5, 2016 indicate complaints of tenderness and soreness in the right forefoot area, which was thought to be secondary to swelling of the "common digital nerve deep in the 2" & 3' interspace areas". Dr. Noroyan also notes mild neuropathic discomfort in the ball of the foot. Some mild forefoot edema was also noted on the plantar aspect of the foot beneath the metatarsal heads. The

> claimant was treated with injection therapy (therapeutic nerve block) performed in the 2" & 3' internetatarsal [sic] spaces and along the course of the digital nerve to help reduce some of the swelling. Dr. Noroyan notes that if conservative therapy failed "possible surgical intervention may be necessary in the future" (Ex. 7F, p. 8). An MRI of the claimant's right foot performed on October 17, 2016 reveals no evidence of fracture, with some mild degenerative changes of the first metatarsal phalangeal joint (Ex. 7F, p, 5). Additional treatment records provided by Dr. Noroyan into 2017 reveal continued pain symptoms. More recent treatment records provided by Noroyan on January 23, 2017 indicate pain and soreness heels of both feet. Dr. Noroyan notes marked tenderness to palpation plantar medial calcaneal tuberosity of the bilateral heels and along the medial band of the plantar fascia of the mid arches. No pain or paresthesia of the posterior tibial tendons or nerves was noted. Dr. Noroyan recommended rest, ice, stretch, arch supports, and anti-inflammatory medication. The claimant was treated with "a local injection for relief of pain and discomfort today" (Ex. 8F, p. 2). The claimant testified that surgery was elected as treatment option with regard to his left foot, with a procedure performed on August 21, 2017. The claimant also testified that he would require an additional 3 surgeries on his right foot.

(TR 170-71.)

Plaintiff argues that the ALJ's consideration of his foot condition is not supported by substantial evidence because the ALJ did not review or rely upon the medical

records related to Plaintiff's August 21, 2017 foot surgery. (Docket no. 13 at 29-30.) Plaintiff's foot surgery occurred ten days before the administrative hearing. At the hearing, Plaintiff's counsel explained that he had been unable to obtain the medical records of the surgery from the hospital in time for the hearing. (TR 183.) In response, the ALJ informed that she would take the hearing testimony and then make a decision on whether she needed the records and whether she would hold the case open post-hearing to wait for the records. (TR 183.) At the end of the hearing, Plaintiff's counsel asked the ALJ if she wanted to keep the case open in post. (TR 206.) The ALJ responded that she would not keep the case open, but if counsel received the records and wanted to submit them, she would consider the records if she received them before she issued her decision. (TR 206). Plaintiff's counsel replied, "Okay." (TR 206.)

Plaintiff has not shown that the ALJ's failure to consider the medical records regarding his foot surgery constitutes reversible error. In fact, it is evident that the ALJ considered Plaintiff's August 2017 surgery and his need for future foot surgeries (TR 169, 171), and she credited this information by limiting Plaintiff to sedentary work (TR 171-72). Furthermore, Plaintiff has provided no information or analysis regarding the records of his foot surgery to show that the ALJ's review of those records would have resulted in additional functional limitations. Plaintiff's argument fails in this regard.

Plaintiff also argues that the ALJ erred because she did not address all of Plaintiff's testimony regarding his foot condition. (Docket no. 13 at 30.) Specifically,

Plaintiff argues that the ALJ failed to address Plaintiff's testimony that his foot pain worsened in 2015, he experiences foot pain regardless of whether he is standing or sitting, he received only minimal relief from medication but some relief from elevating his feet, and his physicians linked Plaintiff's vagus nerve response to episodes of tremendous pain in his feet. (*Id.* (citing TR 189-98).) Plaintiff argues that the ALJ's failure to address this testimony, particularly the testimony regarding his need to elevate his feet, is critical and undermines the reliability of the ALJ's credibility determination. (*Id.* at 30-31.) This argument fails for two reasons.

First, "it is well settled that '[a]n ALJ can consider all the evidence without directly addressing in his written decision every piece of evidence submitted by a party.'" *Kornecky v. Comm'r of Soc. Sec.*, 167 F. App'x 496, 507-08 (6th Cir. 2006) (quoting *Loral Def. Sys.-Akron v. N.L.R.B.*, 200 F.3d 436, 453 (6th Cir. 1999)). Second, it is Plaintiff's burden to prove that he suffers from additional functional limitations as a result of his foot condition and that he has a more restrictive RFC than that assessed by the ALJ. *See Jones*, 336 F.3d at 474; *Her*, 203 F.3d at 391; *Jordan*, 548 F.3d at 423. Plaintiff cites his testimony that he needs to elevate his feet above his heart for most of the hours of the day between 8:00 a.m. and 5:00 p.m. (TR 197.) Plaintiff, however, has not cited any medical opinion evidence to support such a limitation. As the ALJ pointed out, in Dr. Noroyan's most recent treatment note in the record, he recommended rest, ice, stretching, arch supports, and anti-inflammatory medication. (TR 171 (citing TR 857).) Moreover, there is no medical opinion in the record from

Plaintiff's treating sources that assesses greater physical functional limitations than those assessed by the ALJ. The ALJ was not required to accept Plaintiff's subjective complaints, and she did not do so here. *See Jones*, 336 F.3d at 476.[1] Accordingly, Plaintiff's Motion should be denied with regard to this issue

4. Plaintiff's Appointments Clause Challenge

In his supplemental briefing, Plaintiff asserts that this matter should be remanded for a *de novo* administrative hearing because the original administrative proceeding was conducted by an ALJ that was not properly appointed under the Appointments Clause of the United States Constitution. (Docket no. 20.) Plaintiff raises this issue as a result of what he characterizes as an "important change in the controlling law" that "has significant implications for Plaintiff's claim for Social Security Benefits." (*Id.* at 4.) Specifically, Plaintiff relies on the decisions recently decided by the Supreme Court in *Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018) and the Sixth Circuit Court of Appeals in *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018).

"The Appointments Clause of the Constitution lays out the permissible methods of appointing "Officers of

---

[1] To the extent that Plaintiff intends to state an argument in the last paragraph of his brief regarding the ALJ's comprehensive credibility determination, it will not be considered as Plaintiff has failed to develop any substantive legal argument in support. (*See* docket no. 13 at 30-31.) "[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones." *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997) (citation and internal quotation marks omitted).

the United States," a class of government officials distinct from mere employees." *Lucia*, 138 S. Ct. at 2049 (citing Art. II, § 2, cl. 2). In *Lucia*, the Supreme Court held that ALJs of the Securities and Exchange Commission, are "Officers of the United States," and they therefore must be appointed by the President, a court of law, or ahead of department, in accordance with the Appointments Clause. *Id.* at 2055. The Court reiterated that the "'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official," *Id.* (quoting *Ryder v. United States,* 515 U.S. 177, 183, 188 (1995)), and added that that official cannot be the same official as before, even if he receives a constitutional appointment in the future, because "[h]e cannot be expected to consider the matter as though he had not adjudicated it before," *Id.* In *Jones Bros.*, the Sixth Circuit held that the ALJs of the Federal Mine Safety and Health Review Commission are officers subject to the Appointments Clause and remanded the matter for a new hearing in accordance with *Lucia*. 898 F.3d at 679.

Plaintiff asserts that the Social Security Administration (SSA) quickly acknowledged that its ALJs are subject to the Appointments Clause and had therefore been unconstitutionally hired to preside over administrative hearings and that the Commissioner then acquiesced to the ruling in *Lucia* by correcting the constitutional defect in the ALJ hiring process by approving the ALJs' appointments as her own. (Docket no. 20 at 5; docket no. 22 at 4 n.1.) In support of this assertion, Plaintiff cites to an Emergency Message issued by the SSA to instruct ALJs and administrative appeals judges (AAJs) on how to address Appointments Clause challenges.

(*Id.* at 5 n.3 (citing https://secure.ssa.gov/apps10/reference.nsf/links/08062018021025PM).) The Emergency Message indicates that on July 16, 2018, the Acting Commissioner of Social Security "ratified the appointment of ALJs and AAJs and approved their appointments as her own in order to address any Appointments Clause questions involving SSA claims." This language does not support Plaintiff's assertion. As a court in this district recently stated, "the mere fact that the commissioner ratified the ALJ's appointments in response to *Lucia* does not constitute an admission that the appointments prior to the ratification were unconstitutional or that *Lucia*'s decision regarding SEC ALJ's is applicable to SSA ALJ's. Rather, the Commissioner simply took steps to head off future appointments clause challenges, irrespective of whether those future challenges would be meritorious." *Gothard v. Comm'r of Soc. Sec.*, No. 1:17-cv-13638, 2019 WL 396785, at *3 (E.D. Mich. Jan. 31, 2019) (Ludington, J.).

Another court in this district discussed a memorandum released by the Solicitor General on July 23, 2018, which acknowledged that *Lucia* addressed only the "constitutional status" of ALJs for the SEC but indicated that "the Department of Justice understands the Court's reasoning . . . to encompass all ALJs in traditional and independent agencies who preside over adversarial administrative proceedings and possess the adjudicative powers highlighted by the *Lucia* majority." The memorandum instructed that going forward, "ALJs must be appointed (or have their prior appointments ratified) in a manner consistent with the Appointments Clause. . . . " *Page v. Comm'r of Soc. Sec.*, 344 F. Supp. 3d 902, 903 (E.D. Mich. 2018) (Whalen, M.J.).

This guidance issued by the Solicitor General could also support Plaintiff's assertion regarding SSA ALJs, but it is not binding legal authority. Moreover, it is well settled that Social Security proceedings are non-adversarial in nature. *Sims v. Apfel*, 530 U.S. 103, 110-11 (2000).

Defendant explicitly declines to argue whether SSA ALJs are subject to the Appointments Clause for purposes of this matter. (Docket no. 21 at 3 n.2.) But she does point out that the Supreme Court's decision in *Lucia* does not address the constitutional status of ALJs appointed under 5 U.S.C. § 3105, who, like SSA ALJs, do not possess powers equivalent to those of the SEC ALJs at issue in *Lucia*. (*Id.*) In a footnote, Plaintiff attempts to apply *Lucia* to SSA ALJs. He asserts that the Supreme Court made its decision in *Lucia* because ALJs exercise "significant discretion," which he claims is particularly relevant here because his substantive appeal in this case addresses the issue of whether the ALJ properly exercised her discretion in reviewing and weighing the record evidence. (Docket no. 20 at 5 n.2 (citing *Lucia*, 138 S. Ct. at 2053).)

Plaintiff's mere assertion in this regard minimalizes the extent of the examination and analysis of the nature of the SEC ALJs' duties that the Supreme Court performed in determining that those ALJs were officers subject to the Appointments Clause. *See Lucia*, 138 S. Ct. at 2051-55. And in the absence of any developed argument from Plaintiff on the subject, this court need not engage in such an examination here. *See McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997) (citation and internal quotation marks omitted) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed

waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones."). Ultimately, Plaintiff has failed to show, through substantive legal argument or the presentation of binding legal authority, that the ALJ who presided over his administrative hearing was subject to the Appointments Clause or unconstitutionally appointed in violation thereof. This is fatal to Plaintiff's Appointments Clause challenge, and it should be denied on this basis alone. *See Gothard, supra*, 2019 WL 396785, at *3 (rejecting Appointments Clause challenge because the plaintiff's argument concerning the applicability of *Lucia* to SSA ALJs had no merit).

Even if the holding in *Lucia* does apply to the ALJs of the Social Security Administration, Plaintiff has forfeited his Appointments Clause challenge by failing to raise it in a timely manner. Appointments Clause "challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture." *Jones Bros.*, 898 F.3d at 678 (citing *Freytag v. Comm'r*, 501 U.S. 868, 894 (1991) (Scalia, J., concurring in part and concurring in the judgment)). In *Jones Bros.*, the Mine Safety and Health Administration imposed civil penalties on the plaintiff for failing to comply with safety requirements, which penalties were upheld by an ALJ from the Federal Mine Safety and Health Review Commission. *Id.* at 672. The plaintiff mentioned the Appointments Clause issue regarding ALJs to the Commission for the first time on review of the ALJ's decision, stating only that there was a split among the Circuit Courts of Appeals regarding whether ALJs not appointed by the President may constitutionally decide cases brought before them. *Id.* at 673.

The Sixth Circuit held that the plaintiff forfeited its Appointments Clause challenge by failing to make or press an argument related thereto before the Commission. *Jones Bros.*, 898 F.3d at 677. The court also recognized, however, that the Mine Act's statutory exhaustion requirements allowed courts to excuse forfeiture "because of extraordinary circumstances." *Id.* The court noted that it was not prepared to say that the nature of an Appointments Clause challenge constituted an extraordinary circumstance, but it held that the absence of legal authority addressing whether the Commission could entertain the challenge did constitute an extraordinary circumstance. *Id.* The court characterized the plaintiff's statement to the Commission regarding the split of authority among the Circuit Courts on the Appointments Clause issue as "a reasonable statement from a petitioner who wishes to alert the Commission of a constitutional issue but is unsure . . . just what the Commission can do about it." *Id.* at 678. The court therefore excused the forfeiture, found that the Commission's ALJs were subject to the Appointments Clause, and held that the plaintiff was entitled to a new administrative hearing before a constitutionally appointed ALJ. *Id.* at 677-79.

Plaintiff argues that *Jones Bros.* defined the "extraordinary circumstances" necessary to excuse an Appointments Clause forfeiture as "the lack of authority on the question of the constitutionality of ALJ appointments," and he argues that his failure to raise the issue before the SSA "should clearly be excused, given the extraordinary circumstances here." (Docket no. 20 at 6; docket no. 22 at 8-9.) Plaintiff misinterprets the *Jones Bros.* ruling. As discussed above, *Jones Bros.* did not

find that the lack of authority on the constitutionality of ALJ appointments constituted "extraordinary circumstances;" it found that the lack of legal authority addressing whether the Commission could entertain Appointments Clause challenges constituted the "extraordinary circumstances" necessary to excuse the forfeiture under the Mine Act. *See Jones Bros.*, 898 F.3d at 677. Plaintiff's argument therefore fails in this regard. Moreover, Plaintiff does not assert that the extraordinary circumstances that existed in *Jones Bros.* exist in this case. That is, Plaintiff does not assert that his failure to assert an Appointments Clause challenge at the administrative level was due to his uncertainty regarding whether the ALJ or the Appeals Council had the authority to entertain or rule on such a claim. Thus, to the extent that the *Jones Bros*. ruling regarding the extraordinary circumstances required to excuse a forfeiture under the Mine Act could be extended to forfeitures under the Social Security Act, *Jones Bros.* does not apply here.

In an about face, Plaintiff seemingly concedes that *Jones Bros*. does not apply to the forfeiture of issues under the Social Security Act by arguing that the ruling in *Jones Bros*. was based on the statutory exhaustion requirements of the Mine Act and that the Social Security Act does not contain such exhaustion requirements. (Docket no. 20 at 7.) In support of this argument, Plaintiff relies on *Sims v. Apfel*, 530 U.S. 103, 108 (2000), and correctly points out that "SSA regulations do not require issue exhaustion." (Docket no. 20 at 7 (quoting *Sims*, 530 U.S. at 108).) Plaintiff also argues that the Supreme Court in *Sims* declined to impose a judicial is-

sue exhaustion requirement on Social Security proceedings because they are non-adversarial in nature. (*Id.* (citing *Sims* at 109-10).) Therefore, Plaintiff argues, he was not required to raise his Appointments Clause challenged before the administrative agency. (*Id.*)

Plaintiff mischaracterizes the Supreme Court's ruling in *Sims*. In *Sims*, the Supreme Court addressed the narrow issue of whether a social security claimant was required to exhaust issues for review before the Appeal Council. 530 U.S. at 107. In analyzing the issue, the Court stated that "[w]here . . . an administrative proceeding is not adversarial, . . . the reasons for a court to require issue exhaustion are much weaker" than in adversarial administrative proceedings. *Id.* at 110. The Court reasoned that those reasons are weakest in the area of Appeals Council review because the SSA regulations permit, but do not require, the filing of a brief with the Appeals Council, the Council's review is plenary unless it states otherwise, and the form used by a claimant to request a review before the Appeals Council provides only three lines for that request, which "strongly suggests that the Council does not depend much, if at all, on claimants to identify issues for review." *Id.* at 111-12. The Court therefore held that social security claimants "need not . . . exhaust issues in a request for review by the Appeals Council in order to preserve judicial review of those issues." *Id.* at 112. In making this ruling, the Court explicitly noted that the issue of whether a claimant must exhaust issues before an ALJ was not before it. *Id.* at 107.

While the Supreme Court did not rule on the matter of judicial issue exhaustion at the ALJ level in *Sims*, some Circuit Courts of Appeals have held that a social

security claimant waives any claims not raised before the ALJ. *See Anderson v. Barnhart,* 344 F.3d 809, 814 (8th Cir. 2003) (failure to raise a claim in an application for benefits or during the administrative hearing waives the claim); *Meanel v. Apfel,* 172 F.3d 1111, 1115 (9th Cir. 1999) (holding that "at least when claimants are represented by counsel, they must raise all issues and evidence at their administrative hearings in order to preserve them on appeal"); *Howard v. Astrue,* 330 F. App'x 128, 130 (9th Cir. 2009) (holding that argument not raised before the ALJ is waived, without addressing whether the claimant was represented by counsel). The Sixth Circuit has found waiver on a slightly broader scale—when the social security claimant fails to bring her issue in the "proceedings before the agency." *Reynolds v. Comm'r of Soc. Sec.,* 424 F. App'x 411, 416 (6th Cir. 2011); *Maloney v. Comm'r of Soc. Sec.,* 480 F. App'x 804, 809-10 (6th Cir. 2012) (ALJ and Appeals Council). Additionally, courts in this district, including this Court, have also found waiver where the claimant failed to raise an issue at the hearing level. *See Gilbert v. Comm'r of Soc. Sec.*, No. 15-CV-11325, 2016 WL 8114195, at *7 (E.D. Mich. Apr. 29, 2016) (Majzoub, M.J.), *report and recommendation adopted*, No. 15-11325, 2016 WL 4072476 (E.D. Mich. Aug. 1, 2016); *Spuhler v. Colvin*, No. 2:13-CV-12272, 2014 WL 4855743, at *22 (E.D. Mich. June 17, 2014) (Morris, M.J.), *report and recommendation adopted in part*, No. 2:13-cv-12272, 2014 WL 4856153 (E.D. Mich. Sept. 30, 2014); *Motin v. Comm'r of Soc. Sec.*, No. 09-CV-13354, 2010 WL 1754871, at *8-9 (E.D. Mich. Apr. 6, 2010) (Binder, M.J.), *report and recommendation adopted,* No. 09-13354, 2010 WL 1754821 (E.D. Mich. Apr. 30, 2010). In all of these cited cases, the issues

deemed waived were directly related to the claimants' claims of entitlement to benefits.

In the recent wave of Appointments Clause challenges to the ALJs of the Social Security Administration, the overwhelming majority of courts nationwide are aligned with the cases cited above—rejecting Appointments Clause challenges not raised at the administrative level as untimely and either forfeited or waived. *See, e.g.*, *Stearns v. Berryhill*, No. C17-2031-LTS, 2018 WL 4380984, at *5-6 (N.D. Iowa Sept. 14, 2018); *Davidson v. Comm'r of Soc. Sec.*, No. 2:16-cv-00102, 2018 WL 4680327, at *2 (M.D. Tenn., Sept. 28, 2018); *Gothard v. Comm'r of Soc. Sec.*, No. 1:17-cv-13638 (E.D. Mich. Oct. 10, 2018); *Page v. Comm'r of Soc. Sec.*, 344 F. Supp. 3d 902 (E.D. Mich. Oct. 31, 2018); *Flack v. Comm'r of Soc. Sec.*, No. 2:18-cv-501, 2018 WL 6011147, at *3 (S.D. Ohio Nov. 16, 2018); *Faulkner v. Comm'r of Soc. Sec.*, No. 1:17-cv-01197-STA-egb, 2018 WL 6059403, at *3 (W.D. Tenn. Nov. 19, 2018); *Abbington v. Berryhill*, No. 1:17-00552-N, 2018 WL 6571208, at *9 (S.D. Ala. Dec. 13, 2018); *Velasquez on Behalf of Velasquez v. Berryhill*, No. 17-17740, 2018 WL 6920457, at *3 (E.D. La. Dec. 17, 2018), *report and recommendation adopted*, No. 17-17740, 2019 WL 77248 (E.D. La. Jan. 2, 2019); *A.T. v. Berryhill*, No. 17-4110-JWB, 2019 WL 184103, at *7 (D. Kan. Jan. 14, 2019); *Shipman v. Berryhill*, No. 1:17-cv-00309-MR, 2019 WL 281313, at *3 (W.D.N.C. Jan. 22, 2019). *But see Muhammad v. Berryhill*, No. 18-172 (E.D. Pa., Nov. 2, 2018); *Fortin v. Comm'r of Soc. Sec.*, No. 18-10187, 2019 WL 421071 (E.D. Mich. Feb. 1, 2019).

However, the Supreme Court has suggested, albeit in addressing the exhaustion of administrative remedies under the Social Security Act, 42 U.S.C. § 405(g), that

failure to raise a constitutional claim before the Social Security Administration may not result in the forfeiture or waiver of that claim. In *Mathews v. Eldridge*, the Court recognized an exception to the exhaustion of administrative remedies requirement for colorful constitutional claims collateral to the substantive claim for entitlement of benefits. 424 U.S. 319, 328-33 (1976). In discussing the propriety of this exception, the Court discussed the futility of a constitutional challenge at the administrative level, reasoning that "[i]t is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context" and that "[t]he Secretary would not be required even to consider such a challenge." *Mathews*, 424 U.S. at 330. Significantly, the Court also noted that a social security claimant's failure to raise his constitutional claim at the administrative level would not bar him from asserting it later in a district court, regardless of whether he exhausted his administrative remedies. *Id.* at 329 n.10.

The Supreme Court reaffirmed its decision in *Mathews* shortly thereafter. In *Califano v. Sanders*, the Court described the *Mathews* decision as an application of the "well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence." 430 U.S. 99, 108-09 (1977) (citations and internal quotation marks omitted). The Court reasoned that "[c]onstitutional questions obvi-

ously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." *Id.* at 109. While *Mathews* and *Califano* involve jurisdictional issues related to the statutorily-prescribed exhaustion of administrative remedies under the Social Security Act, their principles and analysis are easily transferable to the instant matter of whether judicial issue exhaustion requirements exist at the ALJ level with regard to constitutional claims, and they suggest that such requirements should not exist.

Nevertheless, the undersigned need not attempt to resolve this issue, because Plaintiff failed to raise his Appointments Clause challenge in a timely manner before the court. In *Lucia*, the Supreme Court made clear that "'one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief." *Lucia*, 138 S. Ct. at 2055 (quoting *Ryder*, 515 U.S. at 182-83). Here, Plaintiff did not raise his Appointments Clause challenge in his Motion for Summary Judgment or in his reply brief in support of his Motion for Summary Judgment; he raised it in supplemental briefing filed seven months after he filed the Complaint in this matter and four months after he filed his Motion for Summary Judgment. (*See* docket nos. 1, 13, 18, 20.) It is well settled that arguments not raised in a party's initial brief are untimely and procedurally improper. *See Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 553 (6th Cir. 2008); *United States v. Perkins*, 994 F.2d 1184, 1191 (6th Cir. 1993). Supplemental briefs provide litigants an opportunity to inform the court about late authorities, new legislation, or other matters not available at the time of

the original brief; they "do not provide an opportunity to convert review of an agency order into a broadbased statutory and constitutional attack." *Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n*, 838 F.2d 536, 550-51 (D.C. Cir. 1988). Here, Plaintiff's brief is not supplemental but an attempt to raise an argument that he should have raised in his initial brief. Likewise, Plaintiff's argument that he could not have raised the Appointments Clause challenge until after *Lucia* and *Jones Bros.* were decided in June and July of 2018, respectively, is unavailing. A recent decision issued by the Sixth Circuit holding that an Appointments Clause challenge was forfeited because the plaintiff failed to raise it in its opening brief is instructive here:

> Island Creek also cannot hold the line on the ground that its Appointments Clause challenge lacked merit until the Supreme Court decided *Lucia v. Securities & Exchange Commission*, — U.S. —, 138 S. Ct. 2044, 201 L. Ed. 2d 464 (2018). No precedent prevented the company from bringing the constitutional claim before then. *Lucia* itself noted that existing case law "says everything necessary to decide this case." *Id.* at 2053. The Tenth Circuit, before *Lucia*, held that administrative law judges were inferior officers. *Bandimere v. SEC*, 844 F.3d 1168, 1188 (10th Cir. 2016). And many other litigants pressed the issue before *Lucia*. *See, e.g.*, *Tilton v. SEC*, 824 F.3d 276, 281 (2d Cir. 2016); *Bennett v. SEC*, 844 F.3d 174, 177-78 (4th Cir. 2016); *Burgess v. FDIC*, 871 F.3d 297, 299 (5th Cir. 2017); *Jones Bros.*, 898 F.3d at 672. That the Supreme Court once denied certiorari in a similar Appointments Clause case adds nothing because such decisions carry no precedential value. *See Teague*

> *v. Lane*, 489 U.S. 288, 296, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). All in all, Island Creek forfeited this Appointments Clause challenge, and we see no reasoned basis for forgiving the forfeiture.

Island Creek Coal Co. v. Wilkerson, 910 F.3d 254, 257 (6th Cir. 2018). *See also Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009) (declining to address Appointments Clause challenge to the Copyright Royalty Board members raised in supplemental briefing because it was "untimely"); *Dierker v. Berryhill*, No. 18cv145-CAB(MSB), 2019 WL 246429, at *4 (S.D. Cal. Jan. 16, 2019), *report and recommendation adopted*, No. 18cv145-CAB-MSB, 2019 WL 446231 (S.D. Cal. Feb. 5, 2019) (Appointments Clause challenge to SSA ALJ untimely where plaintiff did not raise it in his motion for summary judgment or reply brief in support thereof but for the first time in a subsequent letter brief).

To the extent that Plaintiff alleges that exceptional circumstances exist to excuse the forfeiture, *Island Creek* provides further guidance:

> Appointments Clause challenges, true enough, arise under the U.S. Constitution, making them special in one sense. But that does not make them special in this sense. We are not alone in refusing to consider constitutional challenges when the appellant failed to raise them in the opening brief. *See, e.g.*, *Am. Trim, LLC v. Oracle Corp.*, 383 F.3d 462, 478 (6th Cir. 2004); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755 (D.C. Cir. 2009). The obligation to identify the issues on appeal in the opening brief applies to arguments premised on the loftiest

> charter of government as well as the most down to earth ordinance.
>
> None of the explanations for excusing a forfeiture applies. This challenge does not affect our jurisdiction. As we recently explained, Appointments Clause challenges are "not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture." *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 678 (6th Cir. 2018).
>
> Nor has Island Creek identified any "exceptional circumstances" for looking the other way. *Freytag v. Comm'r*, 501 U.S. 868, 894, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991) (Scalia, J., concurring in part and concurring in the judgment); *see also id.* at 879, 111 S. Ct. 2631 (majority opinion) (holding that the Supreme Court may excuse forfeiture in "rare cases"). That we entertained an Appointments Clause challenge in *Jones Brothers* does not help Island Creek. In that case, we dealt with the subsidiary question whether the claimant must preserve his argument in the administrative process. Today's barrier is that Island Creek did not raise the claim in its opening brief *here*. No such problem infected the *Jones Brothers* case.

Island Creek, 910 F.3d at 256. In light of the above, Plaintiff's Appointments Clause challenge should be deemed forfeited as untimely.

VI. CONCLUSION

For the reasons stated herein, the court should **DENY** Plaintiff's Motion for Summary Judgment (docket no. 13) and **GRANT** Defendant's Motion for Summary Judgment (docket no. 17).

REVIEW OF REPORT AND RECOMMENDATION

Either party to this action may object to and seek review of this Report and Recommendation, but must act within fourteen (14) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Filing objections which raise some issues but fail to raise others with specificity will not preserve all objections that a party might have to this Report and Recommendation. *Willis v. Sec'y of Health and Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to Rule 72.1(d)(2) of the *Local Rules of the United States District Court for the Eastern District of Michigan*, a copy of any objection must be served upon this Magistrate Judge.

Within fourteen (14) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

Dated: Feb. 14, 2019

/s/ MONA K. MAJZOUB
MONA K. MAJZOUB
UNITED STATES MAGISTRATE JUDGE

PROOF OF SERVICE

I hereby certify that a copy of this Report and Recommendation was served upon counsel of record on this date.

Dated: Feb. 14, 2019

/s/ LEANNE HOSKING
LEANNE HOSKING
Case Manager

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 17-13713

JOYCE RAMSEY, PLAINTIFF

v.

COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

Filed: Feb. 25, 2019

REPORT AND RECOMMENDATION
CROSS-MOTIONS FOR SUMMARY JUDGMENT
(Dkts. 13, 14)

NANCY G. EDMUNDS, United States District Judge

STEPHANIE DAWKINS DAVIS, United States Magistrate Judge

I. PROCEDURAL HISTORY

A. Proceedings in this Court

On November 15, 2017, plaintiff Joyce Ramsey filed the instant suit. (Dkt. 1). Pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.1(b)(3), District Judge Nancy G. Edmunds referred this matter to the undersigned for the purpose of reviewing the Commissioner's unfavorable decision denying plaintiff's claim for supplemental security income benefits. (Dkt. 3). This

matter is before the Court on cross-motions for summary judgment. (Dkt. 13, 14).

B. Administrative Proceedings

Ramsey filed an application for supplemental security income on January 21, 2015, alleging disability beginning on November 19, 2013. (Tr. 10).[1] The claims were initially disapproved by the Commissioner on May 19, 2015. (*Id.*). Ramsey requested a hearing and on July 27, 2016, she appeared with counsel, before Administrative Law Judge ("ALJ") B. Lloyd Blair, who considered the case *de novo*. (Tr. 10-21). In a decision dated September 12, 2016, the ALJ found that plaintiff was not disabled. (Tr. 20). The ALJ's decision became the final decision of the Commissioner when the Appeals Council, on October 3, 2017, denied plaintiff's request for review. (Tr. 1-5); *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 543-44 (6th Cir. 2004).

For the reasons set forth below, the undersigned **RECOMMENDS** that plaintiff's motion for summary judgment be **DENIED**, that defendant's motion for summary judgment be **GRANTED**, and that the findings of the Commissioner be **AFFIRMED**.

II. FACTUAL BACKGROUND

A. ALJ Findings

Ramsey, born November 19, 1963, was 51 years old on the date the application was filed, January 21, 2015. (Tr. 19). She has a high school education and does not have past relevant work. (*Id.*). She claims she cannot

[1] The Administrative Record appears on the docket at entry number 11. All references to the same are identified as "Tr."

work because of a seizure disorder, anxiety, depression, IBS, gastroparesis, bulging discs, sciatica, and an injury to her right wrist that did not heal completely. (Tr. 32-33).

The ALJ applied the five-step disability analysis and found at step one that Ramsey had not engaged in substantial gainful activity since January 21, 2015, the application date. (Tr. 17). At step two, the ALJ found that Ramsey's lumbago with sciatica, gastroesophageal reflux disease (GERD), irritable bowel syndrome (IBS), borderline personality disorder/affective disorder/anxiety disorder/post-traumatic stress disorder (PTSD)/cannabis disorder, tobacco use, and a history of seizures were "severe" within the meaning of the second sequential step. (*Id.*). However, at step three, the ALJ found no evidence that plaintiff's impairments singly or in combination met or medically equaled one of the listings in the regulations. (Tr. 18).

Thereafter, the ALJ assessed plaintiff's residual functional capacity ("RFC") as follows:

> After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to perform light work as defined in 20 CFR 416.967(b) except she can never use ladders, ropes, and scaffolds; she could occasionally use ramp, stairs, stoop, kneel, crouch or crawl; she should avoid exposure to hazards including dangerous and unprotected machinery or heights; she could never use torque, pneumatic, or power tools; she could frequently but not constantly handle and finger with right upper extremity; she could never use left foot controls; she could not perform commercial driving; she should have no objects presented from the right;

> she could occasionally bend, twist and turn at the waist; she is limited to simple, unskilled work with 1, 2 or 3 step instruction [sic].

(Tr. 14-15). At step four, the ALJ found that Ramsey does not have past relevant work. (Tr. 19). At step five, the ALJ denied Ramsey benefits because he found that there were jobs that exist in significant numbers in the national economy that she can perform. (Tr. 19-20).

B. Plaintiff's Claims of Error

Ramsey argues that the ALJ improperly discounted her treating physician, Dr. Kovan's opinions. According to Ramsey, the ALJ erred in giving the opinions less than controlling weight according to the treating physician rule and did not give good reasons for the weight given. (Dkt. 13, at p. 12-18). Ramsey contends that the ALJ's analysis of Dr. Kovan's opinions is insufficient to comply with the treating physician rule and that the ALJ misrepresented the record. (*Id.* at p. 13). As to the latter contention, Ramsey points to "remarkable physical examination findings" in the record to rebut the ALJ's statement that Dr. Kovan's opinions are inconsistent with mild to moderate levels of limitation noted in physician examinations. (*Id.* at p. 13-14). Further, Ramsey contends that the ALJ did not discuss the requisite factors, or "good reasons," for giving the opinions little weight. (*Id.* at p. 17). Specifically, the ALJ did not discuss the length of the treatment relationship, the nature of the treatment relationship, Dr. Kovan's specialty, or the consistency of his opinion. She contends that the ALJ's decision does not provide enough "substance" for her to understand the reason for rejecting the opinion of her treating physician. (*Id.* at p. 18).

Ramsey next argues that the ALJ improperly evaluated her subjective complaints of pain. (*Id.* at p. 19). She contends that the ALJ provided perfunctory analysis, discounting her complaints of pain because she is able to perform basic household chores, she knits as a hobby, and she is able to drive. (*Id.* at p. 20). She contends that the ALJ mischaracterized the record and her statements about her ability to engage in activities of daily living and did not consider the record as a whole.

C. Commissioner's Motion for Summary Judgment

The Commissioner argues that substantial evidence supports the ALJ's decision to discount Dr. Kovan's opinions. According to the Commissioner, the ALJ was correct to discount Dr. Kovan's opinions because the opinions are inconsistent with the other evidence in the record. (Dkt. 14, at p. 5). For example, the Commissioner points to Dr. Kovan's last treatment note from April 2016. In this note he recorded that Ramsey had negative straight leg raising test, functional range of motion in her lower back, normal motor strength, and no obvious instability in her lower back and legs. (*Id.* at p. 7; Tr. 519-20). The Commissioner maintains this record, and records similar to it, are inconsistent with Dr. Kovan's opinion that Ramsey cannot lift more than 10 pounds or that she had very limited ability to sit, stand, or walk. The Commissioner contends that Dr. Kovan's opinions are also inconsistent with the MRIs in the record which showed disc bulges with no evidence of herniation and unobstructed spinal canal and neural foramen. (*Id.* at p. 8). According to the Commissioner, the ALJ's discussion of the medical evidence prior to weighing the medical opinion provided good reason to discount Dr. Kovan's opinion because the ALJ discussed the medical

evidence that is inconsistent with the opinions. (*Id.* at p. 12-13).

Alternatively, the Commissioner argues that if the ALJ did not provide good reasons, any error is harmless because the opinions from Dr. Kovan are patently deficient because they consist solely of checkboxes indicating various limitations and contain no explanation. (*Id.* at p. 14).

Finally, the Commissioner argues that substantial evidence supports the ALJ's decision not to accept Ramey's allegations of disabling symptoms. In declining to accept her subjective complaints, the ALJ considered her daily activities and medical evidence. (*Id.* at p. 15). The Commissioner contends that the ALJ did not rely on Ramsey's ability to knit, drive, and perform some basic household chores. Rather, the ALJ pointed to Ramsey's improvement with psychiatric medications, pain medications, injections, the fact that examinations did not show any disabling abnormalities, and the lack of evidence showing ongoing seizures or irritable bowel syndrome. (*Id.* at p. 15-16).

D. Supplemental Briefing and Authority

On leave of the Court, Ramsey filed a supplement brief arguing for remand of the ALJ decision for *de novo* review because the administrative proceeding was held before an ALJ who was not appropriately appointed pursuant to the Appointments Clause of the Constitution. (Dkt. 17). The Commissioner responded (Dkt. 18), Ramsey replied (Dkt. 19), and the parties filed supplemental authority on the issue thereafter (Dkts. 20, 21, 22).

III. DISCUSSION

A. Standard of Review

In enacting the social security system, Congress created a two-tiered system in which the administrative agency handles claims, and the judiciary merely reviews the agency determination for exceeding statutory authority or for being arbitrary and capricious. *Sullivan v. Zebley*, 493 U.S. 521 (1990). The administrative process itself is multifaceted in that a state agency makes an initial determination that can be appealed first to the agency itself, then to an ALJ, and finally to the Appeals Council. *Bowen v. Yuckert*, 482 U.S. 137 (1987). If relief is not found during this administrative review process, the claimant may file an action in federal district court. *Mullen v. Bowen*, 800 F.2d 535, 537 (6th Cir. 1986).

This Court has original jurisdiction to review the Commissioner's final administrative decision pursuant to 42 U.S.C. § 405(g). Judicial review is limited in that the court "must affirm the Commissioner's conclusions absent a determination that the Commissioner has failed to apply the correct legal standard or has made findings of fact unsupported by substantial evidence in the record." *Longworth v. Comm'r of Soc. Sec.*, 402 F.3d 591, 595 (6th Cir. 2005); *Walters v. Comm'r of Soc. Sec.*, 127 F.3d 525, 528 (6th Cir. 1997). In deciding whether substantial evidence supports the ALJ's decision, "we do not try the case de novo, resolve conflicts in evidence, or decide questions of credibility." *Bass v. McMahon*, 499 F.3d 506, 509 (6th Cir. 2007); *Garner v. Heckler*, 745 F.2d 383, 387 (6th Cir. 1984). "It is of course for the ALJ, and not the reviewing court, to evaluate the credibility of witnesses, including that of the

claimant." *Rogers v. Comm'r of Soc. Sec.*, 486 F.3d 234, 247 (6th Cir. 2007); *Jones v. Comm'r of Soc. Sec.*, 336 F.3d 469, 475 (6th Cir. 2003) (an "ALJ is not required to accept a claimant's subjective complaints and may . . . consider the credibility of a claimant when making a determination of disability."); *Walters*, 127 F.3d at 531 ("Discounting credibility to a certain degree is appropriate where an ALJ finds contradictions among medical reports, claimant's testimony, and other evidence."). "However, the ALJ is not free to make credibility determinations based solely upon an 'intangible or intuitive notion about an individual's credibility.'" *Rogers*, 486 F.3d at 247, quoting Soc. Sec. Rul. 96-7p, 1996 WL 374186, *4.

If supported by substantial evidence, the Commissioner's findings of fact are conclusive. 42 U.S.C. § 405(g). Therefore, this Court may not reverse the Commissioner's decision merely because it disagrees or because "there exists in the record substantial evidence to support a different conclusion." *McClanahan v. Comm'r of Soc. Sec.*, 474 F.3d 830, 833 (6th Cir. 2006); *Mullen v. Bowen*, 800 F.2d 535, 545 (6th Cir. 1986) (*en banc*). Substantial evidence is "more than a scintilla of evidence but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rogers*, 486 F.3d at 241; *Jones*, 336 F.3d at 475. "The substantial evidence standard presupposes that there is a 'zone of choice' within which the Commissioner may proceed without interference from the courts." *Felisky v. Bowen*, 35 F.3d 1027, 1035 (6th Cir. 1994) (citations omitted), citing, *Mullen*, 800 F.2d at 545.

The scope of this Court's review is limited to an examination of the record only. *Bass*, 499 F.3d at 512-13; *Foster v. Halter*, 279 F.3d 348, 357 (6th Cir. 2001). When reviewing the Commissioner's factual findings for substantial evidence, a reviewing court must consider the evidence in the record as a whole, including evidence which might subtract from its weight. *Wyatt v. Sec'y of Health & Human Servs.*, 974 F.2d 680, 683 (6th Cir. 1992). "Both the court of appeals and the district court may look to any evidence in the record, regardless of whether it has been cited by the Appeals Council." *Heston v. Comm'r of Soc. Sec.*, 245 F.3d 528, 535 (6th Cir. 2001). There is no requirement, however, that either the ALJ or the reviewing court discuss every piece of evidence in the administrative record. *Kornecky v. Comm'r of Soc. Sec.*, 167 Fed. Appx. 496, 508 (6th Cir. 2006) ("[a]n ALJ can consider all the evidence without directly addressing in his written decision every piece of evidence submitted by a party.") (internal citation marks omitted); *see also Van Der Maas v. Comm'r of Soc. Sec.*, 198 Fed. Appx. 521, 526 (6th Cir. 2006).

B. Governing Law

The "[c]laimant bears the burden of proving his entitlement to benefits." *Boyes v. Sec'y of Health & Human Servs.*, 46 F.3d 510, 512 (6th Cir. 1994); *accord*, *Bartyzel v. Comm'r of Soc. Sec.*, 74 Fed. Appx. 515, 524 (6th Cir. 2003). There are several benefits programs under the Act, including the Disability Insurance Benefits Program of Title II (42 U.S.C. §§ 401 *et seq.*) and the Supplemental Security Income Program of Title XVI (42 U.S.C. §§ 1381 *et seq.*). Title II benefits are available to qualifying wage earners who become disabled prior to the expiration of their insured status; Title XVI

benefits are available to poverty stricken adults and children who become disabled. F. Bloch, Federal Disability Law and Practice § 1.1 (1984). While the two programs have different eligibility requirements, "DIB and SSI are available only for those who have a 'disability.'" *Colvin v. Barnhart*, 475 F.3d 727, 730 (6th Cir. 2007). "Disability" means:

> 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)(A), 1382c(a)(3)(A) (DIB); *see also* 20 C.F.R. § 416.905(a) (SSI).

The Commissioner's regulations provide that disability is to be determined through the application of a five-step sequential analysis set forth at 20 C.F.R. §§ 404.1520, 416.920. Essentially, the ALJ must determine whether: (1) the plaintiff is engaged in significant gainful activity; (2) the plaintiff has any severe impairment(s); (3) plaintiff's impairments alone or in combination meet or equal a Listing; (4) the claimant is able to perform past relevant work; and (5) if unable to perform past relevant work, whether there is work in the national economy that the plaintiff can perform. (*Id.*). "If the Commissioner makes a dispositive finding at any point in the five-step process, the review terminates." *Colvin*, 475 F.3d at 730.

"Through step four, the claimant bears the burden of proving the existence and severity of limitations caused by her impairments and the fact that she is precluded from performing her past relevant work." *Jones*, 336

F.3d at 474, cited with approval in *Cruse*, 502 F.3d at 540. If the analysis reaches the fifth step without a finding rejecting the existence of disability, the burden transfers to the Commissioner. *Combs v. Comm'r of Soc. Sec.*, 459 F.3d 640, 643 (6th Cir. 2006). At the fifth step, the Commissioner is required to show that "other jobs in significant numbers exist in the national economy that [claimant] could perform given [his] RFC and considering relevant vocational factors." *Rogers*, 486 F.3d at 241; 20 C.F.R. §§ 416.920(a)(4)(v) and (g).

If the Commissioner's decision is supported by substantial evidence, the decision must be affirmed even if the court would have decided the matter differently and even where substantial evidence supports the opposite conclusion. *McClanahan*, 474 F.3d at 833; *Mullen*, 800 F.2d at 545. In other words, where substantial evidence supports the ALJ's decision, it must be upheld.

C. Analysis and Conclusions

1. Treating Physician

The opinion of a treating physician should be given controlling weight if it is: (1) "well-supported by medically acceptable clinical and laboratory diagnostic techniques," and (2) "not inconsistent with the other substantial evidence in [the] case record." *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 544 (6th Cir. 2004); 20 C.F.R. § 404.1527(c)(2). Once an ALJ has determined that a treating source opinion is not entitled to controlling weight, the ALJ must give good reasons for the weight accorded to the opinion. The reasons provided must be supported by the evidence in the case record and must be sufficiently specific to make clear to any subsequent reviewers the weight the adjudicator gave

to the treating source's medical opinion and the reasons for that weight. *Gayheart v. Comm'r of Soc. Sec.*, 710 F.3d 365, 376 (6th Cir. 2013). The ALJ is to discuss certain factors, which include, (1) the length of the treatment relationship and frequency of examination, (2) the nature and extent of the treatment relationship, (3) supportability of the opinion, (4) consistency of the opinion with the record as a whole, and (5) the specialization of the treating source. *Id.*; *see also Wilson,* 378 F.3d at 544; 20 C.F.R. § 404.1527(c). Failure to analyze a treating source opinion under the two-prong controlling weight test amounts to the failure to provide good reasons for giving that opinion less than controlling weight. *Gayheart* at 376-77.

"Violation of the rule constitutes harmless error if the ALJ has met the goals of the procedural requirement—to ensure adequacy of review and to permit the claimant to understand the disposition of his case—even though he failed to comply with the regulation's terms." *Coldiron v. Comm'r of Soc. Sec.*, 391 Fed. Appx. 435, 440 (6th Cir. 2010) (citing *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 547 (6th Cir. 2004). An ALJ may meet those goals by indirectly attacking the supportability of the treating physician's opinion or its consistency with other evidence in the record. *See Nelson v. Comm'r of Soc. Sec.*, 195 Fed. Appx. 462, 470-72 (6th Cir. 2006) (no error in ALJ's failure to explain weight given to two treating physicians or failure to give good reasons for discounting them where ALJ thoroughly explained other medical evidence that indirectly attacked the consistency of the treating physicians' opinions). In *Coldiron*, the court held that even if the ALJ's stated reasons for rejecting a physician's opinion were not "good reasons,"

the ALJ sufficiently indirectly attacked the supportability and consistency of the opinion such that any error was harmless. 391 Fed. Appx. at 440-41. The court found that the ALJ indirectly attacked the consistency of the opinion that the plaintiff could not lift or carry any weight at all, when the ALJ explained that the state agency physicians found that the plaintiff did not have a "diminished capacity for lifting/carrying." *Id.* And although the physician stated that plaintiff could walk for only twenty minutes in an eight-hour workday and his ability to sit was limited, other medical evidence showed that he could stand and sit for six hours out of eight. *Id.* at 441. Further, the plaintiff's own statements undermined the doctor's opinion. *Id.*

Dr. Kovan provided two opinions on Ramsey's ability to function in light of her back issues, one in July 2016 and the other in August 2016. (Tr. 621, 648-49). The first of these opinions is a one-page, two-question opinion in which Dr. Kovan indicated that Ramsey's bilateral low back pain with sciatica, lumbar radiculopathy, costochondral pain, seizures, depression, and debility constitute severe impairments, and that in his opinion Ramsey could not engage in light work as that term is defined in the Regulations. (Tr. 621). The second opinion is a two-page checkmark opinion. Dr. Kovan listed the complaints and symptoms for which he treated Ramsey as (as far as is legible) back pain, debility, and history of (possibly) sciatica. (Tr. 648). He listed the medically supported conditions that require his ongoing treatment as L5 radiculopathy, chronic back pain, costochondritis, depression/anxiety, and right elbow and wrist sprain. In this opinion, Dr. Kovan provided checkmark responses to a series of questions. He indicated that

Ramsey's medication side effects include diminished concentration/slowed thought, and somulence or lethargy. (Tr. 648). Dr. Kovan indicated that Ramsey's pain and the effects of her medication would not significantly interfere with the ability to do sustained tasks but that she would miss three or more days of work per month. (Tr. 649). Regarding her functional abilities, Dr. Kovan indicated that Ramsey could sit for 2-4 hours in a workday, stand/walk for 0-2 hours, lie-down/rest 1-2 hours, frequently lift or carry up to 10 pounds with the ability to lift a maximum of 6-10 pounds. (*Id.*). The ALJ analyzed Dr. Kovan's opinions as follows:

> As for the opinion evidence, the undersigned gives little weight to the assessment of the claimant's treatment provider, Dr. Kovan, DO, who opined the claimant is disabled and unable to perform light work. He further indicate [sic] the claimant could stand and walk for no more than 2 hours, sit for no more than 4 hours, and could lift no more than 6 pounds. (Exhibit 10F; 14F). The overall medical evidence does not support this assessment. As noted above, the claimant responded well to injections. Her physical examinations and psychiatric examinations noted normal to moderate levels of limitation. The claimant was observed with a normal gait when obtaining treatment in June 2016. The claimant reported improvement mental status with medications in 2016 as well. Her MRis [sic] did not indicate any herniation or stenosis. Accordingly, while the claimant is limited by her physical and mental impairments, she is not limited to the level suggested by Dr. Kovan based on the evidence as a whole.

(Tr. 18).

Having discussed the inconsistencies between Dr. Kovan's opinion and the other evidence in the record in his decision, the ALJ did not err in determining that the opinion was not entitled to controlling weight. *See Wilson*, *supra*. In discussing the inconsistency and lack of supportability between Dr. Kovan's opinion and the other medical records, the ALJ attacked both the consistency and supportability of the opinion, as discussed more fully below.

In the ALJ's decision, he discussed the record evidence. The ALJ then accurately observed that Dr. Kovan's opinion is inconsistent with the other record evidence. Regarding the fractures to her face and right wrist, the record does not establish disability due to these injuries. During a fall down the stairs in November 2013, Ramsey sustained fractures to the right side of her face and a distal radius fracture and ulnar styloid process fracture in her right wrist. (Tr. 243). In a consultation with a plastic surgeon following the fall, she denied back pain, neck pain, and joint pain. (Tr. 252). By January 2014, the swelling and injury to the right side of her face was reportedly "rapidly improving." (Tr. 255). Ramsey underwent a radiology examination of her right wrist in May 2014. The examination revealed diffuse osteopenia, post-traumatic deformity of the distal radius, fracture lucencies not clearly identified, redemonstrations displaced ulnar styloid fracture fragment. (Tr. 345). However, she had full range of motion at the wrist and in the thumb and fingers, could make a full fist and could touch her fingertips to her palm. (Tr. 368). During physical therapy for her right wrist Ramsey reported increasing mobility in the wrist, (Tr. 375, 377), and by July 2014 she reported that she

was feeling 100% better with symptoms in her wrist, that her range of motion and stiffness were improving, and she had no complaints. (Tr. 377). Thus, to the extent at least part of Dr. Kovan's opinions are based on the facial and wrist injuries, the medical evidence does not support his opinions.

Objective medical evidence is inconsistent with Dr. Kovan's opinion. In October 2014 she had no spinal tenderness and no tenderness in her extremities. (Tr. 388). Ramsey's primary care physician, Dr. Sack, did not note any physical examinations. (*See* Exhibits 4F and 5F). In November 2015 Ramsey was admitted to the hospital after making suicidal claims. A hospital physician observed Ramsey during this time and noted that, although she stated she was in significant pain and was asking for medication, she had been seen ambulating in the hallway without problems and appeared to be somewhat sedated. (Tr. 501). On the day of her discharge from the hospital she reported that she was feeling better and her pain was in much better control, (Tr. 506), and her gait was within normal limits (Tr. 507). Also in November 2015 she underwent an MRI of her back. The MRI revealed no evidence of disc herniation or significant spinal canal stenosis. However, the MRI did reveal slight S-shaped thoracolumbar curvature with subsequent L2-S1 disc degeneration. (Tr. 512). In January 2016 Ramsey presented to the hospital with complaints of back pain. Her paraspinal muscles were tender but the pain improved after pain medications were administered. (Tr. 656). In April 2016, she presented to the hospital again but with complaints of flank pain and pain with urination. On physical musculoskeletal examination, she had good range of motion and she

ambulated without difficulty. (Tr. 666). These objective medical findings, while perhaps indicating some impairment—the MRI results revealing slight abnormality —do not support and are inconsistent with Dr. Kovan's disabling opinions.

Dr. Kovan's own treatment records are also at least partially inconsistent with his own opinions. Overall, his records show improvement in her condition over time. For example, in March 2014, Dr. Kovan noted that Ramsey's neck and back were stable but that she was experiencing tenderness and good grip strength in the right wrist. (Tr. 425). In May 2015 Dr. Kovan noted 5/5 strength but tenderness in her neck and back area with multiple trigger points. (Tr. 428). In August 2014 he noted that Ramsey was doing better with her chronic pain and remained stable and had tenderness and multiple trigger points in her back, but ambulated with a normal gait. (Tr. 434). In October and November 2014 Ramsey was noted to have 5/5 strength, positive straight leg raise on the left, an antalgic gait, and limited forward flexion and extension. (Tr. 437, 440). By April and May 2015 Dr. Kovan noted that Ramsey was still experiencing neck spasms but also that she was "really doing well." (Tr. 554). On physical examination he noted 5/5 strength, tenderness in the lumbar area, negative straight leg raising test and negative Bragard's maneuver. (Tr. 552,[2] 554). In August 2015, her back pain and L5 radiculopathy were stable and she was doing better overall but was still experiencing pain. (Tr. 548). She was stretching and exercising at that time and was "doing much better." (*Id.*). Further,

[2] In this record Dr. Kovan notes both a negative and positive straight leg raise test.

physical examination revealed 5/5 strength in the lumbar and cervical areas, improved range of motion, and stable gait. (Tr. 549). In November and December 2015 Ramsey experienced some weakness in her lower extremities and an antalgic gait. (Tr. 542-43, 539-40). By March 2016, however, her strength was back at 5/5 but with a positive straight leg raising test on the left. (Tr. 526-27). Dr. Kovan noted that her L5 radiculopathy and sacroiliac pain were improving. (*Id.*). Notably, in April 2016 Dr. Kovan recorded a thorough physical examination which contradicts his later opinions. Ramsey's cervical and lumbar spine areas had normal spinal alignment, functional active and passive range of motion in all directions, no obvious instability, and normal strength, bulk and tone of muscles. (Tr. 519). Her upper extremities were normal with full range of motion except for tenderness in the right elbow with range of motion. (Tr. 520). Finally, her lower extremities had full functional range of motion, 5/5 strength, normal muscle bulk and tone, and no obvious instability. (Tr. 520). She was able to stand and ambulate independently with a normal gait pattern, no antalgia, and she was able to heel and toe walk without difficulty. (*Id.*). While some of Dr. Kovan's treatment notes are consistent with limitation due to back pain, and Dr. Kovan recorded some positive objective findings over time, his final treatment note in April 2016 stands in marked contrast to his ultimate opinion that Ramsey is disabled.

The ALJ's conclusion that Dr. Kovan's opinions were inconsistent with the medical evidence is thus supported by substantial evidence. As noted, although many of Dr. Kovan's notes indicate that Ramsey had tenderness

around her spine and sometimes indicated positive objective findings, Dr. Kovan's treatment notes do not support his disabling opinion. Further, treatment notes from other providers do not indicate that Ramsey is as physically limited as Dr. Kovan opined. The medical and other evidence outlined above provides substantial evidence in support of the ALJ's determination that Dr. Kovan's opinion is entitled to less than controlling weight.

Having discussed the medical evidence which contradicts and is inconsistent with Dr. Kovan's opinions, the ALJ provided good reasons for the weight determination. While the ALJ did not specifically address the nature and extent of the treating relationship (although the ALJ recognized Dr. Kovan as a treating physician), or any specialization in which Dr. Kovan practices, these omissions are harmless. As the Sixth Circuit held in *Francis v. Comm'r of Soc. Sec.*, 414 Fed. Appx. 802, 805 (6th Cir. 2011) (quoting *Friend v. Comm'r of Soc. Sec.*, 375 Fed. Appx. 543, 551 (6th Cir. 2010)), the treating physician rule is not "a procrustean bed, requiring an arbitrary conformity at all times." In *Francis*, the ALJ did not discuss several of the factors set out in 20 C.F.R. § 404.1527(d)(2), but the court held that he did not have to do an exhaustive factor-by-factor analysis. *Id.* at 804-05. As long as the goal of the regulation is met, i.e. providing a clear understanding of the reasons for the weight given to a treating physician's opinion, any procedural error will be harmless. As demonstrated above, the goal of the regulation has been met here. The reasons for giving Dr. Kovan's opinion little weight are sufficiently clear.

Ramsey faults the ALJ for not discussing more of the evidence that is inconsistent with Dr. Kovan's opinion in the paragraph in which the ALJ discounted the opinion. However, "[a]n ALJ can consider all the evidence without directly addressing in his written decision every piece of evidence submitted by a party." *Kornecky v. Comm'r of Soc. Sec.*, 167 Fed. Appx. 496, 508 (6th Cir. 2006) (internal citation marks omitted). Moreover, the ALJ's decision is to be read as a whole. In other words, when an ALJ reviews the record evidence and then weighs the opinion evidence, the ALJ does not have to repeat all the evidence already discussed. *See Athey v. Comm'r of Soc. Sec.*, 2014 WL 4537317 at *4 (E.D. Mich. 2014); *Rice v. Barnhart*, 384 F.3d 363, 370 n.5 (7th Cir. 2004) ("[I]t is proper to read the ALJ's decision as a whole . . . it would be a needless formality to have the ALJ repeat substantially similar factual analyses" in different parts of the decision"). And, finally, even if there were substantial evidence supporting her position, because there is substantial evidence supporting the ALJ's decision it must be affirmed. *McClanahan v. Comm'r of Soc. Sec.*, 474 F.3d 830, 833 (6th Cir. 2006) (This Court may not reverse the Commissioner's decision merely because it disagrees or because "there exists in the record substantial evidence to support a different conclusion.").

In addition, the undersigned tends to agree with the Commissioner that Dr. Kovan's opinions are patently deficient. As stated above, the regulations require an ALJ to provide good reasons for giving the opinion of a treating physician less than controlling weight. However, one instance where failure to discuss the "good reasons" factors qualifies as harmless error is where the

treating source's opinion fits the patently deficient level articulated in *Wilson*. Where a physician's opinion consists primarily of filling in check boxes without an explanation in support, such an opinion is of little practical use to an ALJ. *See Hernandez v. Comm'r of Soc. Sec.*, 644 Fed. Appx. 468, 474-75 (6th Cir. 2016) ("We have previously declined to give significant weight to rudimentary indications that lack an accompanying explanation."); *Keeton v. Comm'r of Soc. Sec.,* 583 Fed. Appx. 515, 525 (6th Cir. 2014) (quoting SSR 96-2p, at *1, which states that "[a] case cannot be decided in reliance on a medical opinion without some reasonable support for the opinion"); *see also Mason v. Shalala,* 994 F.2d 1058, 1065 (3d Cir. 1993) ("Form reports in which a physician's obligation is only to check a box or fill in a blank are weak evidence at best."); *Williams v. Comm'r of Soc. Sec.*, 2018 WL 1322396, at *7 (E.D. Mich. Feb. 26, 2018), *report and recommendation adopted*, 2018 WL 1316167 (E.D. Mich. Mar. 14, 2018) (Opinion entitled only to little or no weight where it consists of a "check-the-box" form that is unaccompanied by any meaningful explanation). In *Jackson v. Comm'r of Soc. Sec.*, 2017 WL 4699721 (E.D. Mich. Oct. 19, 2017), the opinion at issue was in check-box format. *Id.* at *7. Citing *Hernandez*, the court stated that, as such, the opinion was "an impotent addition to the record with little to no persuasive value—to hold otherwise would neglect its glaring lack of narrative analysis." *Id.*; *see also Mason v. Shalala*, 994 F.2d 1058, 1065 (3d Cir. 1993) ("Form reports in which a physician's obligation is only to check a box or fill in a blank are weak evidence at best.").

Here, Dr. Kovan's July 2016 opinion is simply two marks indicating that Ramsey's impairments are severe

medical impairments and that she is incapable of sustaining light work. (Tr. 621). He did not accompany these marks with any explanation as to why Ramsey cannot engage in light work except for a partially legible note indicating increased stress and that lifting increased symptoms.[3] In the August 2016 opinion he did little more; Dr. Kovan listed Ramsey's symptoms and medically supported conditions, including L5 radiculopathy and chronic back pain. (Tr. 648). He then checked off a series of functional limitations. (Tr. 648-49). When asked on what conditions the limitations were based, he wrote what appears to be back pain exacerbated by lifting/walking. (Tr. 649). This check-box opinion contains no other attempt at explaining the check marks or why or how plaintiff is so functionally limited in a work setting, especially considering that in April of that year—the last treatment note in the record from Dr. Kovan—Ramsey had full range of motion and no noted objective problems in her back and extremities. As such, the undersigned concludes that the opinions are "weak evidence at best" and thus are "so patently deficient that the Commissioner could not possibly credit it." Thus, to the extent there is any error in the ALJ's treatment of Dr. Kovan's opinion, it is harmless.

Lastly, Ramsey contends that the ALJ's discussion of her mental impairments was deficient because she had consistently low GAF scores in the record. (Dkt. 13, at p. 15). It is not clear how the ALJ's discussion of her mental impairments and GAF scores is connected to the ALJ's treatment of Dr. Kovan's opinion, although

---

[3] There is one other word in this handwritten list that is illegible. (Tr. 621).

even the ALJ cited normal to moderate levels of psychiatric limitation in the record when weighing Dr. Kovan's opinions. (*See* Tr. 18). Dr. Kovan was her pain management physician; he did not treat her mental impairments. In any event, the undersigned finds no error in the ALJ's discussion of Ramsey's GAF scores. On the one hand, it is true that the Social Security Administration does not endorse the GAF scale for "use in the Social Security and SSI disability programs" because a GAF score is not determinative of an individual's RFC and has concluded that GAF scores have no "direct correlation to the severity requirements in [the] mental disorders listings." *See* Revised Medical Criteria for Evaluating Mental Disorders and Traumatic Brain Injury, 65 Fed. Reg. 50746-01 (August 21, 2000). On the other hand, while GAF scores may not serve as the sole basis for making a disability determination, the Sixth Circuit has indicated that the scores may be taken into account in considering the record as a whole. *Howard v. Comm'r of Soc. Sec*., 276 F.3d 235,241 (6th Cir. 2002); *see also Kornecky v. Commissioner of Social Security*, 167 Fed. Appx. 496, 511 (6th Cir. 2006).

Here, the ALJ considered Ramsey's GAF score assessments as one factor amongst many in evaluating her disability. That is, the ALJ found the GAF scores were inconsistent with Ramsey's daily activities, social functioning, and concentration with regard to her mental functioning. (Tr. 19). The record reflects the following GAF scores: In October 2015, her psychiatric hospital admission GAF was 30 (Tr. 505), on December 15, 2015, her GAF score was 48 (Tr. 639), on February 12, 2016, she had a current GAF score of 25 and a recorded highest GAF score of 50 (Tr. 629). While she presented

to mental health professionals with low GAF scores at times and she suffers from conditions such as depression and anxiety, the record reflects that she far more often presented to various medical providers with good or neutral mood, appropriate affect, and normal thought content. (*See, e.g.,* Tr. 253, 251, 359, 409, 477, 489, 629). In her follow-up exam with Dr. Sack after her five-day psychiatric hospitalization in October to November 2015, Dr. Sack noted neutral mood and appropriate affect, logical thought processes and normal thought content. (Tr. 477). Thus, even taking into account the few low GAF scores in the record, substantial evidence supports the ALJ's determination that her mental impairments are not debilitating. The undersigned finds no error in the ALJ's assessment of Ramsey's mental impairment and GAF scores.

2. Credibility

"Credibility determinations concerning a claimant's subjective complaints are peculiarly within the province of the ALJ." *See Gooch v. Sec'y of Health & Human Servs.*, 833 F.2d 589, 592 (6th Cir. 1987). "Upon review, [the court must] accord to the ALJ's determinations of credibility great weight and deference particularly since the ALJ has the opportunity, which [the court] d[oes] not, of observing a witness's demeanor while testifying." *Jones v. Comm'r of Soc. Sec.*, 336 F.3d 469, 476 (6th Cir. 2003). Thus, an ALJ's credibility determination will not be disturbed "absent compelling reason." *Smith v. Halter*, 307 F.3d 377, 379 (6th Cir. 2001). The ALJ is not required to accept the testimony of a claimant if it conflicts with medical reports, the claimant's prior statements, the claimant's daily activities, and other evidence in the record. *See Walters v. Comm'r of Soc.*

Sec., 127 F.3d 525, 531 (6th Cir. 1997). Rather, when a complaint of pain or other symptoms is in issue, after the ALJ finds a medical condition that could reasonably be expected to produce the claimant's alleged symptoms, s/he must consider "the entire case record, including the objective medical evidence, statements and other information provided by treating or examining physicians . . . and any other relevant evidence in the case record" to determine if the claimant's claims regarding the level of her pain are credible. SSR 96-7p, 1996 WL 374186, at *1; *see also* 20 C.F.R. § 416.929. "Consistency between the plaintiff's subjective complaints and the record evidence tends to support the credibility of the [plaintiff], while inconsistency, although not necessarily defeating, should have the opposite effect." *Kalmbach v. Comm'r of Soc. Sec.*, 409 Fed. Appx. 852, 863 (6th Cir. 2011).

The ALJ found Ramsey's subjective complaints not entirely consistent with the medical and other evidence in the record. (Tr. 15-16). In doing so, the ALJ found that her allegations were not fully consistent with her statements "as a whole" and that the medical evidence does not support her allegations as to the level of limitation alleged. (Tr. 16). The parties disagree on the ALJ's characterization of Ramsey's daily activities. In discussing the inconsistency between Ramsey's reported activities and her allegations, the ALJ said the following:

> The claimant's allegations are not fully consistent with her statements as a whole. The claimant reported she experiences seizures every day, but also indicated she takes no medication for this condition. (Exhibit 3E). Additionally, although noting that she

> loses vision for 30 seconds when experiencing these daily seizures, she testified she drives. The claimant reported significant limitations in her activities of daily living, however, in her function report she indicated she is able to perform most personal care at a slower pace, she is able to prepare meals for herself daily, she is able to perform chores such as laundry, vacuuming, and loading the dishwasher. She also reported she enjoys crocheting as a hobby. This is inconsistent with her claims of wrist pain that makes buttoning buttons extremely difficult. She reported she is able to shop in stores, by phone, and by computer. She is able to drive and can go out alone. She is able to manage her finances. She alleged no social activities, but indicated she spends time with others once or twice a month talking and eating. (Exhibit 4E).

(Tr. 16).

In the view of the undersigned, there is no compelling reason to disturb the ALJ's credibility determination. The ALJ determined that Ramsey's reported activities are inconsistent with her allegations of disability. In her function report, Ramsey further explained some of her activities. For instance, she stated that she is able to prepare food daily in the microwave—although usually only once a day—and will prepare a non-microwave meal once every two weeks. (Tr. 179). She stated that she does the laundry, vacuums, and loads the dishwasher, but "sometimes" her daughter and her husband help with these chores. (*Id.*). She stated that she crochets about every two months. (Tr. 181). Although Ramsey provided more information in her function report than the ALJ recounted, it does not appear that the

ALJ mischaracterized her activities. Ramsey said she could take care of personal needs, make simple meals, drive, and crochet, just as the ALJ stated. The ALJ did not go so far as to say she was engaging in all of these activities every day or multiple times a day, which would have been a mischaracterization.

It is not inappropriate for an ALJ to discuss a claimant's daily activities and compare those activities to the allegations of disability. *Keeton v. Comm'r of Soc., Sec.*, 583 Fed. Appx. 515, 532 (6th Cir. 2014) (citing 20 C.F.R. § 404.1572 and quoting *Walters*, 127 F.3d at 532) ("Although the ability to [perform activities of daily living] is not direct evidence of an ability to do gainful work, an ALJ may . . . consider [such] activities . . . in evaluating a claimant's assertions of pain or ailments.") (internal quotations omitted). Here, it was not inappropriate for the ALJ to conclude that these activities were inconsistent with the allegations of disabling pain. *See, e.g., Downs v. Comm'r of Soc. Sec.*, 634 Fed. Appx. 551, 556-57 (holding that similar inconsistent statements reasonably supported the ALJ's conclusion that the claimant's allegations of the extent of her physical impairments were not credible); *Cruse v. Comm'r of Soc. Sec.*, 502 F.3d 532, 543-44 (6th Cir. 2007) (noting that the ALJ's adverse credibility finding was supported, among other things, by the claimant's ability to "do a variety of daily activities," such as washing "dishes, light cooking, talk[ing] on the telephone, shop[ping]" and occasionally going to church).

Further, the ALJ did not rely solely on Ramsey's daily activities; he also relied on the inconsistency between her allegations and the medical evidence. *Keeton*, 583 Fed. Appx. at 532. Notably, the ALJ did

not say that any of Ramsey's activities, individually or in combination, equated with an ability to sustain full-time work. Rather, the ALJ found that they showed that she was less limited in her functional abilities than she alleged, which is a permissible credibility consideration. *See Garcia v. Comm'r of Soc. Sec.*, 2018 WL 838371, at *15 (N.D. Ohio Feb. 12, 2018) (citing *Walters*, 127 F.3d at 532 (an ALJ may consider household activities in evaluating the credibility of the claimant's allegations of disabling symptoms); *Temples v. Comm'r of Soc. Sec.*, 515 Fed. Appx. 460, 462 (6th Cir. 2003) ("[T]he ALJ did not give undue consideration to Temples' ability to performing day-to-day activities. Rather, the ALJ properly considered this ability as one factor in determining whether Temples' testimony was credible."). The ALJ's determination that Ramsey's subjective complaints were inconsistent with the medical evidence is supported by substantial evidence, as demonstrated above. As stated, the medical evidence largely reveals normal examination and improvement in pain with medication. This is inconsistent with her complaints of disability. Again, while Ramsey is limited by her impairments, the record does not support that she is limited to a degree that prevents her from sustaining work activities. In light of the deference due an ALJ's credibility determination, the undersigned finds no compelling reason to disturb the ALJ's determination here.

3. Appointments Clause Challenge

Ramsey's argument for remand because the ALJ below was not properly appointed according to the Appointments Clause is based on *Lucia et al. v. SEC*, 138 S. Ct. 2044 (2018), which held that ALJs of the Securities and Exchange Commission are "Officers of the United

States" within the meaning of the Appointments Clause of the Constitution and must be appointed by the President, a court of law, or department head. *Lucia*, 138 S. Ct. at 2051. Ramsey contends that since the ALJ in her case was not properly appointed, her case should be remanded for *de novo* review by a properly appointed ALJ.

The *Lucia* Court held that the plaintiff raised a timely challenge to the constitutionality of the ALJ's appointment while the case was at the administrative level and was entitled to a remand for a hearing by a properly appointed ALJ. "'[O]ne who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief." *Id.* at 2055 (*citing Ryder v. United States*, 515 U.S. 177, 182, 115 S. Ct. 2031, 132 L. Ed. 2d 136 (1995)). Although *Lucia* specifically addressed only SEC ALJs, the Solicitor General has acknowledged that the Supreme Court's holding encompasses all ALJs, and the Acting Commissioner of Social Security ratified the appointment of the agency's ALJ's in July 2018 to address any Appointments Clause deficiency going forward. *Page v. Comm'r of Soc. Sec.*, 344 F. Supp. 3d 902, 903 (E.D. Mich. 2018).

Citing *Jones Brothers v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018), Ramsey contends that her failure to raise the constitutional issue at the administrative level should be excused. (Dkt. 17, at p. 3). In *Jones Brothers* the Sixth Circuit acknowledged that as-applied Appointments Clause challenges are nonjurisdictional and

are forfeited if not raised timely.[4] *Id.* at 676-77. However, the Court determined that, although the plaintiff had failed to "press" an Appointments Clause argument before the agency, the plaintiff had identified the issue and the existence of a split in authorities to the Mine Commission at the administrative level. *Id.* at 673, 678. Given the possible "confusion" created by the administrative review scheme of the Mine Act, the Sixth Circuit held that the plaintiff's approach—identifying the Appointments Clause issue but not pressing the argument—was "a reasonable statement from a petitioner who wishes to alert the Commission of a constitutional issue but is unsure (quite understandably) just what the Commission can do about it." *Id.* at 678. Thus, the Sixth Circuit vacated the Commission's decision and remanded the case to the administrative level "[b]ecause the administrative law judge was an inferior officer of the United States and because she was not appointed by the President, a court of law, or the head of a department, as the Constitution demands." *Id.* at 672.

Here, unlike in *Jones Brothers*, Ramsey did not identify her Appointments Clause challenge or even note a circuit split in any way at any point in the administrative proceedings and has not shown good cause for her failure to do so. *See Page*, 344 F. Supp. 3d at 904 ("The facts of this case do not warrant making an exception to the general rule that the failure to bring as-applied

---

[4] Ramsey's challenge here is an "as-applied" challenge. As stated in *Page*, "[b]ecause '[t]he Social Security Administration has not published a regulation or rule that governs how it appoints judges,' the current case is properly characterized as an 'as applied' challenge." 344 F. Supp. 3d at 904 (quoting *Davidson v. Comm'r of Soc. Sec.*, 2018 WL 4680327, at *2 (M.D. Tenn. Sept. 28, 2018).

claims at the administrative level results in waiver."). As in *Page*, "[b]ecause Plaintiff failed to make an argument or even note a split of authority pertaining to the appointment of the ALJ at any point in the administrative procedure, the *Jones Brothers* holding cannot be extended to the facts of the present case." *Id.* (quoting *Davidson v. Comm'r of Soc. Sec.*, 2018 WL 4680327, at *1 (M.D. Tenn. Sept. 28, 2018) ("Courts 'generally expect parties . . . to raise their as-applied or constitutional-avoidance challenges' at the administrative level and 'hold them responsible for failing to do so.'"); s*ee also Faulkner v. Comm'r of Soc. Sec.*, No. 1:17-cv-01197, 2018 WL 6059403, at *3 (W.D. Tenn. Nov. 19, 2018) (declining to apply *Jones Brothers* and finding that the plaintiff "did nothing to identify his Appointments Clause challenge at any point in the administrative proceedings and ha[d] not shown good cause for his failure to do so"). Ramsey did not raise the Appointments Clause issue before the ALJ or the Appeals Council; therefore, the undersigned finds that she has forfeited this argument.

Citing *Sims v. Apfel*, 530 U.S. 103, 108 (2000), Ramsey argues that she was not required to raise the constitutional challenge with the ALJ because Social Security regulations do not require issue exhaustion. (Dkt. 17, at p. 4). *Sims* held that "a claimant pursuing judicial review has [not] waived any issues that he did not include in [his or her] request" for review by the Appeals Council. *Id.* at 105. However, *Sims* did not "address[] whether the issue had to be raised before the ALJ," as opposed to being raised before the Council. *Stearns*, 2018 WL 4380984, at *5. Since *Sims* was decided,

"[c]ourts have considered the issue [of whether a claimant must exhaust issues before the ALJ] . . . have [in large part] concluded that *Sims* should not be read so broadly as to mean that a claimant need not exhaust issues before the ALJ." *Flack v. Comm'r of Soc. Sec.*, 2018 WL 6011147, at *3 (S.D. Ohio Nov. 16, 2018) (collecting cases). In addition, courts considering this issue of forfeiture have overwhelmingly concluded that where a claimant fails to raise the challenge at the administrative level the claimant forfeits the challenge in the district court. *See, e.g., Page*, *supra*; *Axley v. Comm'r of Soc. Sec.*, 2019 WL 489998 (W.D. Tenn. Feb. 7, 2019); *Willis v. Comm'r of Soc. Sec.*, 2018 WL 6381066 (S.D. Ohio Dec. 6, 2018); *Faulkner v. Comm'r of Soc. Sec.*, 2018 WL 6059403 (W.D. Tenn. Nov. 19, 2018); *Flack v. Comm'r of Soc. Sec.*, 2018 WL 6011147, at *4 (S.D. Ohio Nov. 16, 2018); *Stearns v. Berryhill*, 2018 WL 4380984, at *6 (N.D. Iowa September 14, 2018); *Garrison v. Berryhill*, 2018 WL 4924554, at *2 (W.D. N.C. October 10, 2018); *Salmeron v. Berryhill*, 2018 WL 4998107, at *3 (C.D. Cal. October 15, 2018).[5]

Finally, the undersigned disagrees with Ramsey's argument that raising such a challenge before the ALJ would have been futile because the ALJ did not have the authority to issue a ruling on matter. (Dkt. 19, at p. 1-

[5] Although there are a few decisions which recommend remand on Appointments Clause challenges such as Ramsey's, *see, e.g., Muhammad v. Berryhill*, No. 18-172 (E.D. Pa., Nov. 2, 2018); *Godschall v. Comm'r of Soc. Sec.*, No. 18-1647 (E.D. Pa., Nov. 2, 2018); *Fortin v. Comm'r of Soc. Sec.*, 2019 WL 421071 (Feb. 1, 2019), the undersigned is persuaded by the reasoning of the majority of courts that a plaintiff forfeits her Appointments Clause challenge by failing to raise it at the administrative level. The undersigned declines to follow the minority approach.

2). She cites no authority for her proposition that raising the argument before the ALJ would have been futile in particular because "[i]t is inconceivable that the ALJ in the underlying administrative proceeding would have ruled that his appointment was unconstitutional." (*Id.*). In any event, a regulation in effect prior to Ramsey's case here states that claimants may receive an expedited appeals process to challenge a "provision in the law that you believe is unconstitutional." 20 C.F.R. § 404.924(d). "Although the language of the [regulation] appears to refer to facial challenges to a statute, regulation, or rule, it establishes, at a minimum, that the Appeals Council is able to consider constitutional challenges." *Page*, 344 F. Supp. 3d at 905, n.6. Thus, the undersigned is not persuaded that it would have been futile for plaintiff to raise an Appointments Clause challenge during the administrative proceedings in this case.

For these reasons, the undersigned suggests that Ramsey's request for remand based on her Appointments Clause challenge be denied.

IV. RECOMMENDATION

For the reasons set forth above, the undersigned **RECOMMENDS** that plaintiff's motion for summary judgment be **DENIED**, that defendant's motion for summary judgment be **GRANTED**, and that the findings of the Commissioner be **AFFIRMED**.

The parties to this action may object to and seek review of this Report and Recommendation, but are required to file any objections within 14 days of service, as provided for in Federal Rule of Civil Procedure 72(b)(2) and Local Rule 72.1(d). Failure to file specific objections constitutes a waiver of any further right of appeal.

Thomas v. Arn, 474 U.S. 140 (1985); *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505 (6th Cir. 1981). Filing objections that raise some issues but fail to raise others with specificity will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Sec'y of Health and Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to Local Rule 72.1(d)(2), any objections must be served on this Magistrate Judge.

Any objections must be labeled as "Objection No. 1," "Objection No. 2," etc. Any objection must recite precisely the provision of this Report and Recommendation to which it pertains. Not later than 14 days after service of an objection, the opposing party may file a concise response proportionate to the objections in length and complexity. Fed. R. Civ. P. 72(b)(2), Local Rule 72.1(d). The response must specifically address each issue raised in the objections, in the same order, and labeled as "Response to Objection No. 1," "Response to Objection No. 2," etc. If the Court determines that any objections are without merit, it may rule without awaiting the response.

Date: Feb. 25, 2019

/s/ STEPHANIE DAWKINS DAVIS
STEPHANIE DAWKINS DAVIS
United States Magistrate Judge

APPENDIX M

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 18-11042

VICKY LYNN HARRIS, PLAINTIFF

v.

COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

Filed: Apr. 30, 2019

REPORT AND RECOMMENDATION

District Judge STEPHEN J. MURPHY

Magistrate Judge R. STEVEN WHALEN

Plaintiff Vicky Lynn Harris ("Plaintiff") brings this action under 42 U.S.C. § 405(g) challenging a final decision of Defendant Commissioner ("Defendant") denying her application for Supplemental Security Income ("SSI") and ("DIB") under the Social Security Act. The parties have filed cross-motions for summary judgment which have been referred for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons discussed below, I recommend that Defendant's Motion for Summary Judgment [Docket #14] be GRANTED and that Plaintiff's Motion for Summary Judgment [Docket #13] be DENIED.

PROCEDURAL HISTORY

On July 14, 2014, Plaintiff applied for SSI, alleging disability as of December 31, 2013 (Tr. 12). She later applied for DIB (Tr. 62-63). Following an initial non-disability finding, Plaintiff requested an administrative hearing, held on September 14, 2016 in Oak Park, Michigan (Tr. 18). Patricia S. McKay, Administrative Law Judge ("ALJ") presided. Plaintiff, represented by attorney William Turkish, testified (Tr. 25-39), as did Vocational Expert ("VE") Kelly A. Stroker (Tr. 39-43). On December 28, 2016, ALJ McKay found Plaintiff not disabled (Tr. 63-77). On March 12, 2018, the Appeals Council denied review (Tr. 1-3). Plaintiff filed her complaint in this Court on March 30, 2018.

BACKGROUND FACTS

Plaintiff, born July 25, 1963, was 53 when ALJ McKay issued her decision (Tr. 12, 77). She left school after 11th grade and worked previously as a self-employed painter (Tr. 182). She alleges disability as a result of schizophrenia, depression, anxiety, memory loss, and back, neck, and hip pain (Tr. 181).

A. Plaintiff's Testimony

Plaintiff offered the following testimony at the administrative hearing:

She lived in a single family home with a friend (Tr. 25). She worked formerly painting signs for restaurants and billboards (Tr. 25). The former work required her to stand for most of the work period and lift up to 40 pounds (Tr. 25). In addition to the work as a painter, she worked as a pizza maker for six months in 2013 (Tr. 26). She was right-handed (Tr. 34).

At present, Plaintiff was unable to perform significant lifting due to left arm and back problems and arthritis of the hip (Tr. 26). She experienced left arm problems since an injury at the age of 18 (Tr. 35). She also experienced pain radiating into her right leg (Tr. 28). She started using a cane for stability two months before the hearing (Tr. 27). She currently took Tramadol, Norco, and muscle relaxers for the physical conditions (Tr. 28). She had her back "crack[ed]" once a month (Tr. 36). In addition to the physical conditions, Plaintiff experienced memory problems and was currently receiving psychiatric treatment (Tr. 29-31). She took Zoloft and Risperdal for the conditions of bipolar disorder, depression, and schizophrenia (Tr. 29). Zoloft caused the side effect of nausea and mild dizziness (Tr. 32). She napped for an hour every day due to the medication side effect of tiredness (Tr. 33). She underwent inpatient mental health treatment in the past but could not remember when (Tr. 38).

Plaintiff was unable to sit for more than 20 minutes, walk for more than a quarter block, or lift more than seven pounds on a rare basis (Tr. 30). Due to the left arm problems, she experienced difficulty gripping (Tr. 31). She had experienced right finger numbness for the past three years (Tr. 37). She stopped riding a bike three months prior to the hearing because it had become too hard to pedal (Tr. 35). Plaintiff drank no more than twice a month and seldom used marijuana (Tr. 31). She relied on her housemate to clean, cook, and drive but she was able use a microwave oven (Tr. 32, 37). She was able to perform self-care tasks (Tr. 36).

Plaintiff testified that she was unable to work due to the inability to stand or sit for long periods; hip and leg

pain; and numbness of the right hand (Tr. 38). In response to questioning by her attorney, she testified that she would be unable to stand or walk for six hours in an eight-hour workday (Tr. 39).

B. Medical Evidence

1. Treating Sources

July, 2013 mental health counseling records note that Plaintiff was currently caring for her elderly mother (Tr. 413). September, 2013 counseling records note a normal affect and mood with full orientation (Tr. 423). The following month, Plaintiff reported once-weekly marijuana use (Tr. 408). Recommendations included walking, biking, swimming, and gardening (Tr. 406). Plaintiff exhibited a normal affect and speech (Tr. 397).

In December, 2013, Plaintiff related that her psychological problems stemmed from her bad romantic relationships (Tr. 390). Counseling records include a recommendation for "at least" monthly therapy sessions (Tr. 391).

Records by Craig Magnatta, M.D. indicate that April, 2014 imaging studies taken in response to Plaintiff's report of back pain showed mild degenerative changes of the cervical and lumbar spine (Tr. 249, 276-278). Bone density tests from the following month were normal (Tr. 271-272). July, 2014 imaging studies of the left elbow were negative (Tr. 268). The following month, Plaintiff reported ongoing back pain (Tr. 239). Mental health records from the same month note diagnoses/conditions of schizoaffective disorder; cannabis and alcohol dependence; and economic, occupational, and personal problems (Tr. , 298, 315). Plaintiff denied hallucinations or depression and exhibited a normal affect and

speech (Tr. 313). She denied medication side effects but reported that she continued to smoke daily (Tr. 295, 311). She exhibited a normal gait and reported normal concentration and energy (Tr. 294, 311). She indicated that she was currently in a healthy relationship and was confident in her ability to handle her financial affairs (Tr. 360, 362). In September, 2014, Plaintiff reported continued sleep disturbances due to body pain (Tr. 235). Dr. Magnatta's October, 2014 records note that Plaintiff was overusing Norco (Tr. 231).

Mental health treating records from the same month list a treatment goal of psychotropic medication compliance. Plaintiff was encouraged to continue treatment, exercise appropriately, maintain good sleep hygiene, and discontinue the use of alcohol and illicit substances (Tr. 291, 316). She reported only occasional alcohol use (Tr. 308). She reported that she was able to ride her bike to appointments but was not currently interested in seeking employment (Tr. 303-304). December, 2014 records note the prescribed medications of Risperdal and Zoloft (Tr. 316). Plaintiff exhibited a normal affect and mood with full orientation (Tr. 289). Dr. Magnatta's November, 2014 records note Plaintiff's claim of level "eight" out of ten back pain but note elsewhere that she had good control of pain symptoms (Tr. 550, 552). His December, 2014 records note abnormalities of the left elbow and wrist but an otherwise unremarkable examination (Tr. 547).

Dr. Magnatta's March, 2015 records note Plaintiff's report of tenderness of the spine (Tr. 539). The following month, Dr. Magnatta referred Plaintiff for physical therapy after she complained of weather-related back pain (Tr. 534-536). April, 2015 social work records note

a normal appearance and affect (Tr. 503). Plaintiff reported that she was not interested in individual or group therapy (Tr. 496). In June, 2015, Plaintiff denied an offer of transitional housing after she was unable to pay her rent on a leased property (Tr. 494). She demonstrated normal concentrational abilities (Tr. 478). In July, 2015, she denied recent auditory hallucinations or paranoid thoughts (Tr. 474). She reported that she was medically "stable" (Tr. 460). The following month, Plaintiff reported muscle weakness after riding her bike and walking (Tr. 514). EMG studies of the lower extremities from the same month showed "mild" isolated membrane irritabilities but no electroymyographic abnormalities of the lower extremities or evidence of nerve root irritation (Tr. 623). An October, 2015 psychological evaluation was unremarkable (Tr. 445). The same month, she demonstrated tenderness of the left shoulder and left thoracic spine (Tr. 579). In December, 2015, Plaintiff complained of right like pain and numbness (Tr. 575).

In April, 2016, Plaintiff reported left shoulder and right hip pain (Tr. 563). The following month, Dr. Magnatta noted that Plaintiff's report of ongoing pain was not attributable to an injury (Tr. 559). He noted that good symptom control with treatment (Tr. 561). The following month, Plaintiff reported increased pain after forgetting to take her pain medication on vacation (Tr. 555).

June, 2016 case manager records note that Plaintiff was "not interested in employment and/or volunteer opportunities" or psychological counseling (Tr. 607, 613). Plaintiff reported that she used marijuana on at least a

weekly basis (Tr. 592). The following month, she denied medication side effects (Tr. 589). In July, 2016, Plaintiff reported difficulty turning her head but reported good results from manipulative techniques (Tr. 621). The following month, Plaintiff requested a prescription for a cane (Tr. 615).

In September, 2016, Dr. Magnatta completed a work-related assessment on Plaintiff's behalf, stating she was limited to four hours of sitting and four hours of standing/walking in an eight-hour period (Tr. 624). He found that Plaintiff would be required to rest for up to one hour each day due to low back pain (Tr. 624). He limited her to carrying 10 pounds and found that she was unable to squat, crawl, or climb (Tr. 624). He limited her to occasional bending and use of foot controls (Tr. 624). He found that she was limited to occasionally manipulative activity except for frequent fine manipulation (Tr. 625). He found that Plaintiff needed to rest 15 minutes of every hour (Tr. 625). He stated that Plaintiff experienced the medication side effects of diminished concentration/drowsiness (Tr. 625).

2. Non-Treating Sources

In March, 2015, Adam McKenzie, D.O. performed a one-time consultative orthopedic examination on behalf of the SSA, noting Plaintiff's report of left upper extremity due to a childhood injury and arthritis of the bilateral hips (Tr. 320). She denied undergoing injections or surgery (Tr. 320). She reported that she had stopped using a bike regularly (Tr. 320). She reported only mild pain improvement with medication (Tr. 320). She reported that she was able to carry with both hands but had difficulty with overhead reaching on the left (Tr. 320).

Dr. McKenzie observed a normal gait (Tr. 321). Plaintiff demonstrated a loss of left elbow motion but normal grip strength and no limitation in fine manipulations (Tr. 321). He observed that she "was able to tolerate all activities asked of her . . . without difficulty" (Tr. 322).

The same month, Blaine Pinaire, Ph.D performed a non-examining review of the treating and consultative records, determining that due to affective and substance abuse disorders, Plaintiff experienced mild restrictions in daily living and moderate difficulty in social functioning and concentration, persistence, or pace (Tr. 51). Dr. Pinaire cited examination records noting good eye contact, a normal gait, a normal affect, and a cooperative attitude (Tr. 51).

C. Vocational Expert Testimony

The ALJ found that none of Plaintiff's former work activity rose to the level of past relevant work (Tr. 40).

ALJ McKay then posed the following question to the VE, describing an individual of Plaintiff's age, education, and lack of past relevant work with the following limitations:

> [L]ight[1] exertional work. . . . She could only occasionally climb stairs, crouch or crawl or kneel or

---

[1] 20 C.F.R. § 404.1567(a-d) defines *sedentary* work as "lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools; *light* work as "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds;" *medium* work as "lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds;" and that exertionally *heavy* work "involves lifting no more than 100 pounds at a time with frequent

> stoop or bend. She's not able to work near hazards which would be things like dangerous moving machinery or working at unprotected heights. So she's not able to climb ladders or ropes or scaffolding. With that left non-dominant upper extremity she can use it on a frequent basis for reaching forward. I would say no overhead reaching. With regard to her mental limitations she can only perform—or she could perform work that's only simple, routine, or repetitive in nature; that requires only occasional interaction with co-workers, supervisors or the public and work that would be considered low stress and by low-stress work I mean it's a self-paced job. She's not working at a production rate or in team or tandem with her co-workers. Since there's no past relevant work to consider, are there any unskilled jobs that exist that she could perform? (Tr. 40-41).

The VE testified that the above-stated limitations would allow for the light, unskilled work of an inspector (60,000 jobs in the national economy) and packager (60,000) (Tr. 41). She testified that if the hypothetical individual were also were limited to the occasional use of foot controls, or, limited to using the right hand for frequent (as opposed to *constant*) grasping or fingering, the job numbers would not change (Tr. 41). She testified that if the individual were limited to occasional reaching with the left arm, the packager position would be eliminated (Tr. 41). The VE stated that both the inspector and packager positions could be performed in

---

lifting or carrying of objects weighing up to 50 pounds. *Very Heavy* work requires "lifting objects weighing more than 100 pounds at a time with frequent lifting or carrying of objects weighing 50 pounds or more. § 404.1567(e).

either the sitting or standing position (Tr. 41-42). She stated that the further limitation of occasional fingering/fine manipulation in the upper right extremity would not change the original job numbers (Tr. 42). She testified that Plaintiff's allegations of severe back pain and a limited ability sit or stand, if fully credited, would direct a finding of disability (Tr. 43).

D. The ALJ's Decision

Citing Plaintiff's medical records, ALJ McKay found the severe impairments of "degenerative disc disease of the lumbar and cervical spine, history of fracture of distal left ulna and proximal radius and extremity/elbow, schizoaffective disorder, polysubstance dependence (alcohol and cannabis)" but that none of the conditions met or medically equaled any impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1 (Tr. 66-67). She found that the conditions of hypertension, idiopathic insomnia, allergic rhinitis, and tendinitis of the left shoulder were non-severe impairments (Tr. 66). The ALJ found that although the psychological conditions were not disabling, Plaintiff experienced moderate limitation in social functioning and concentration, persistence, or pace (Tr. 67).

The ALJ found that Plaintiff retained the residual functional capacity ("RFC") for light work with the following additional limitations:

> [She] is limited to occasional climbing of stairs, crouching, crawling, kneeling, stooping/bending; must avoid workplace hazards such as dangerous, moving machinery and unprotected heights such that the claimant would be unable to climb ladders, ropes,

> and scaffolds; is limited to occasional forward reaching with the non-dominant left upper extremity; no overhead reaching with the non-dominant left upper extremity; is limited to low stress work, which is work that is self-paced and not a production rate, and which is not in team/tandem with co-workers; can have occasional contact with supervisors, co-workers, and the general public; and is limited to simple, routine, repetitive work (Tr. 68-69).

Citing the VE's testimony, the ALJ found that Plaintiff could perform the light, unskilled job of inspector (Tr. 41, 76).

The ALJ discounted Plaintiff's allegations of disability, citing April, 2015 and August, 2016 treating records showing no gait abnormalities and normal reflexes (Tr. 70). The ALJ noted that the lower extremity studies were negative for lumbosacral radiculopathy or peripheral neuropathy (Tr. 70). She accorded "limited weight" to Dr. Magnatta's September, 2016 finding that Plaintiff would be required to take a work break 15 minutes every hour, noting that the treating opinion stood at odds with imaging studies showing only mild abnormalities and Dr. Magnatta's own records showing that Plaintiff received exclusively conservative treatment (Tr. 72).

STANDARD OF REVIEW

The district court reviews the final decision of the Commissioner to determine whether it is supported by substantial evidence. 42 U.S.C. § 405(g); *Sherrill v. Secretary of Health and Human Services,* 757 F.2d 803, 804 (6th Cir. 1985). Substantial evidence is more than a scintilla but less that a preponderance. It is "such rel-

evant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales,* 402 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971) (*quoting Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229, S. Ct. 206, 83 L. Ed. 126 (1938)). The standard of review is deferential and "presupposes that there is a 'zone of choice' within which decision makers can go either way, without interference from the courts." *Mullen v. Bowen,* 800 F.2d 535, 545 (6th Cir. 1986) (en banc). In determining whether the evidence is substantial, the court must "take into account whatever in the record fairly detracts from its weight." *Wages v. Secretary of Health & Human Services*, 755 F.2d 495, 497 (6th Cir. 1985). The court must examine the administrative record as a whole, and may look to any evidence in the record, regardless of whether it has been cited by the ALJ. *Walker v. Secretary of Health and Human Services*, 884 F.2d 241, 245 (6th Cir. 1989).

FRAMEWORK FOR DISABILITY DETERMINATIONS

Disability is defined in the Social Security Act 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)(A). In evaluating whether a claimant is disabled, the Commissioner is to consider, in sequence, whether the claimant: 1) worked during the alleged period of disability; 2) has a severe impairment; 3) has an impairment that meets or equals the requirements of an impairment listed in the regulations; 4) can return to past relevant work; and 5) if not, whether he or she can perform other work in the national economy. 20

C.F.R. § 416.920(a). The Plaintiff has the burden of proof at steps one through four, but the burden shifts to the Commissioner at step five to demonstrate that, "notwithstanding the claimant's impairment, he retains the residual functional capacity to perform specific jobs existing in the national economy." *Richardson v. Secretary of Health & Human Services,* 735 F.2d 962, 964 (6th Cir. 1984).

ANALYSIS

A. The Treating Physician Analysis

Plaintiff disputes the ALJ's conclusion that she was capable of exertionally light work (Tr. 68-69), contending, in effect, that the evidence supports the finding that she was capable of at most sedentary work.[2] *Plaintiff's Brief*, 7-18, *Docket #13,* Pg ID 679. She notes that Dr. Magnatta's September, 2016 treating opinion supports the conclusion that she was incapable of exertionally light work and argues that the ALJ's erred by according only "limited weight" to Dr. Magnatta's opinion. *Id.*

Plaintiff is correct that for the period under consideration, the opinion of a treating physician which is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and not inconsistent with the other substantial evidence in [the] case record, it must be given controlling weight."[3] *Hensley v. Astrue*,

---

[2] Plaintiff, 53 at the time of administrative determination was categorized as an individual "closely approaching advanced age" (Tr. 75). A finding that the she was capable of only unskilled, sedentary work would have directed a finding of disability. 20 C.F.R. part 404, subpart P, App. 2, Rule 201.14.

[3] For claims filed on or after March 17, 2017, the ALJs will weigh both treating *and* non-treating medical evaluations based on how

573 F.3d 263, 266 (6th Cir. 2009) (internal quotation marks omitted) (*citing Wilson v. Commissioner of Social Security*, 378 F.3d 541, 544 (6th Cir.2004)); 20 C.F.R. § 404.1527(c). However, in the presence of contradicting substantial evidence, the ALJ may reject all or a portion of the treating source's findings, *see Warner v. Commissioner of Social Sec.*, 375 F.3d 387, 391-392 (6th Cir. 2004), provided that he supplies "good reasons" for doing so. *Wilson*, at 547.

The ALJ's rationale for largely discounting Dr. Magnatti's September, 2016 opinion is well supported and explained. She noted that Dr. Magnatti's finding of disability level limitation was undermined by the fact that Plaintiff's treatment for the alleged body pain was exclusively conservative and that she had not been referred for orthopedic or neurologic evaluations (Tr. 72). The ALJ noted that the objective studies failed to show more than minor spine degeneration and that an EEG showed no nerve root impingement (Tr. 72). She cited the treating records showing a normal gait and normal clinical signs (Tr. 72). She noted that the disability opinion was undermined by "Dr. Magnatta's own recommendations" for walking and aerobic exercise found in the treating records (Tr. 72).

While Plaintiff notes that the EEG studies actually made "abnormal" findings, the cited studies show that the only "abnormalities" were "mild" isolated membrane irritabilities (Tr. 623). Other imaging studies show

---

well they are supported by the remainder of the record. 20 C.F.R. §§ 404.1520b; 416.920c. Because Plaintiff applied for benefits well before that date, the current rule does not apply.

only mild degenerative changes of the cervical and lumbar spine, inconsistent with Dr. Magnatta's finding that Plaintiff's back problems precluded even sedentary work (Tr. 276-278,624). While Plaintiff contends that Dr. Magnatta's recommendation to walk and exercise referred only to home-based physical therapy, none of the treating records note a restriction on the ability to walk or exercise. Plaintiff's claim that she experienced severe physical restriction is also undermined by mental health records noting a normal gait and unremarkable physical appearance. (Tr. 294, 311, 406). Dr. McKenzie's wholly unremarkable consultative findings also fail to support a finding of disability (Tr. 321-322). Accordingly, the ALJ's well supported rejection of the treating opinion is not subject to remand.

Likewise, the Plaintiff's claim that the ALJ did not take into consideration all of the factors to be considered in rejecting a treating physician's opinion does not warrant a remand. In explaining the reasons for giving less than controlling weight to a treating opinion, the ALJ must consider (1) "the length of the . . . relationship" (2) "frequency of examination," (3) "nature and extent of the treatment," (4) the "supportability of the opinion," (5) "consistency . . . with the record as a whole," and, (6) "the specialization of the treating source." *Wilson*, at 544; § 404.1527(c). As to the first three factors, the ALJ noted that Dr. Magnatta's treatment predated the administrative opinion by over two-and-a-half years; Plaintiff sought treatment multiple times each year; and that under Dr. Magnatta's care, Plaintiff was prescribed pain medication, massage, exercise, ice/heat, and spinal manipulation (Tr. 70). As to factors four and five, discussed above, the ALJ observed

that Dr. Magnatta's September, 2016 disability opinion stood at odds with own treating records, the consultative findings, and the objective studies (Tr. 72). Regarding the final factor, the ALJ noted that Dr. Magnatta (a family physician) had not referred Plaintiff or orthopedic or neurologic evaluation (Tr. 72).

For the these reasons, the ALJ's accord of limited weight to Dr. Magnatta's assessment should remain undisturbed.

B. The Supplemental Argument for Remand

Plaintiff also asks for a remand for a "constitutionally appointed" ALJ pursuant to the Supreme Court's June, 2018 decision in *Lucia et al. v. SEC*, — U.S. —, 138 S. Ct. 2044, 201 L. Ed. 2d 464 (2018). *Docket #18* at 3, Pg ID 748. Plaintiff excuses her failure to raise the issue in her original brief by noting that the supplemental argument is based an "'intervening change in controlling law.'" *Docket #18* at 4 (*citing Leisure Caviar, LLC v. U.S. Fish and Wildlife Service,* 616 F.3d 612, 615 (6th Cir. 2010)).

Lucia holds that ALJs of the Securities and Exchange Commission are "Officers of the United States" within the meaning of the Appointments Clause of the Constitution and must be appointed by the President, a court of law, or department head. *Id.*, 138 S. Ct. at 2051.[4] The Court held that Lucia raised a timely challenge to the constitutionality of the ALJ's appointment while the case was at the administrative level and was

[4] Article II § 2 of the Constitution states in relevant part that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

entitled to a remand for a hearing by a properly appointed ALJ. "'[O]ne who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief." *Id.* at 2055 (*citing Ryder v. United States*, 515 U.S. 177, 182, 115 S. Ct. 2031, 132 L. Ed. 2d 136 (1995)). On July 23, 2018, the Solicitor General released a memorandum acknowledging that while *Lucia* addressed only the "constitutional status" of ALJs for the SEC, "'the Department of Justice understands the Court's reasoning . . . to encompass all ALJs in traditional and independent agencies who preside over adversarial administrative proceedings and possess the adjudicative powers highlighted by the *Lucia* majority.'" *Page v. Commissioner of Social Security*, 344 F. Supp. 3d 902, 903 (E.D. Mich., 2018) (*citing July 23, 2018 memorandum*). The memorandum states that going forward, "ALJs must be appointed (or have their prior appointments ratified) in a manner consistent with the Appointments Clause . . . " *Id.*

Under the statute at issue here, the "Commissioner of Social Security is permitted to 'assign duties, and delegate, or authorize successive redelegations of, authority to act and to render decisions, to such officers and employees of the Administration as the Commissioner may find necessary.'" *Davidson v. Commissioner of Social Security*, 2018 WL 4680327, at *2 (M.D. Tenn. September 28, 2018)) (*citing* 42 U.S.C. § 902(a)(7)) (holding that the plaintiff had waived her "as applied" claim under the Appointments Clause by failing to raise it at the administrative level). "The Social Security Administration may 'appoint as many administrative law judges

as are necessary for proceedings required to be conducted. . . . '" *Id.* (citing 5 U.S.C. § 3105). Because "'[t]he Social Security Administration has not published a regulation or rule that governs how it appoints judges,'" the current case is properly characterized as an "as applied" challenge to the above-cited statutes. *Id.* (*citing Lucia*, 138 S. Ct. at 2058 (Thomas, J., concurring)).

In *Page, supra,* this Court denied the plaintiff's motion to amend her pleadings to argue that the ALJ deciding her case at the administrative level was unconstitutionally appointed pursuant to the Appointments Clause. 344 F. Supp. 3d at 905. *Page* held that the plaintiff forfeited this argument by failing to challenge the validity of the ALJ's appointment in her prehearing brief, at the hearing, or before the Social Security Administration's Appeals Council. The Court observed that while the split in authority regarding the appointment of ALJs was acknowledged on December 27, 2016, the plaintiff had "failed to raise, much less develop the Appointments Clause issue at the administrative level although the [circuit] split in authority [was noted] long before the application for benefits was considered by the Appeals Council." *Id.* at 905, fn 4 (*citing Bandimere v. Securities and Exchange Commission,* 844 F.3d 1168 (10th Cir. 2016)).[5]

---

[5] *Page* distinguishes *Jones Brothers v. Sec'y of Labor*, 898 F.3d 669, 2018 WL 369059 (6th Cir. July 31, 2018), where the Sixth Circuit excused the forfeiture of the Appointments Clause argument at the administrative level where the plaintiff failed to "press" but nonetheless acknowledged the pre-*Lucia* circuit split regarding whether the appointment procedure for ALJs was constitutional as applied. *Id.* at 677.

For the same reasons as in *Page*, Plaintiff's failure to raise her constitutional claim at the administrative level is fatal to her claim. Although the administrative opinion was issued only one day after the circuit split was noted, the Appeals Council did not deny review of the application until March 12, 2018 (Tr. 1). A Social Security regulation in effect long prior to the events in question states that claimants may receive an expedited appeals process to challenge a "provision in the law that you believe is unconstitutional." 20 C.F.R. § 404.924(d). Although the language of the statute appears to refer to facial challenges to a statute, regulation, or rule, it establishes, at a minimum, that the Appeals Council is able to consider constitutional challenges. Moreover, although Plaintiff's original summary judgment motion was filed over one month after *Lucia*, it does not include argument that the ALJ was unconstitutionally appointed.

In support of the contention that she is entitled to raise the Appointments Clause for the first time in a supplemental brief during judicial review, Plaintiff cites *Sims v. Apfel*, 530 U.S. 103, 108, 120 S. Ct. 2080, 147 L. Ed. 2d 80 (2000), which holds that under the Social Security Act the exhaustion of administrative remedies does not include "issue exhaustion." *Fortin v. Commissioner of Social Security,* — F. Supp. 3d —, 2019 WL 1417161 (March 29, 2019) (Lawson, J.) (*citing Sims* at 108). However, *Fortin* holds that the lack of an "issue exhaustion" requirement in Social Security cases as stated in *Sims* (pertaining to evidentiary disputes) could not be extended to Fortin's Appointments Clause challenge. "[W]here the challenge is to the structural integrity of the process. . . . [i]t only makes sense that

such challenges should be made 'before those very judges and prior to their action on his case,'" *Fortin* at *4 (*citing Ryder,* 515 U.S. 177, 182, 115 S. Ct. 2031, 132 L. Ed. 2d 136 (1995)) "while the agency 'has opportunity for correction.'" *Id.* (*citing L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37, 73 S. Ct. 67, 97 L. Ed. 54 (1952); *see also Hutchins v. Berryhill*, 2019 WL 1353955, at *3 (E.D. Mich. March 26, 2019) (Cleland, J.) (declining to extent *Sim's* "limited holding" to the Hutchins' failure to raise his Appointments Clause issue at any point during his administrative proceedings . . . ").[6] For the identical reasons, Plaintiff's reliance on a recently issued Social Security Ruling is unavailing. SSR 19-1p,

---

[6] Plaintiff cites *Bizarre v. Berryhill*, — F. Supp. 3d —, 2019 WL 1014194, at *3 (M.D. Penn. 2019) in support of her argument that she was not required to raise the Appointments Clause claim at the administrative level. However, Plaintiff is not entitled to a remand on this basis. First, *Bizarre* (remanding for further hearing on the basis of the Appointments Clause argument) notes that while the plaintiff failed to raise the Appointments Clause claim at the administrative level, "[he] *did* raise the issue at the earliest opportunity—within weeks of a Supreme Court decision potentially calling into question all ALJ appointments that do not comport with the Appointments Clause." *Id.* In contrast here, Plaintiff did not include the constitutional argument in her motion for summary judgment, which was filed over one month after *Lucia* was issued. She did not raise the Appointments Clause issue until almost three months after *Lucia* and after Defendant submitted her own summary judgment motion.

Second, *Fortin* (challenges to the "structural integrity of the [administrative] process" should be made first at the administrative level) is the better reasoned case; particularly because a regulation allowing constitutional claims to the heard by the Appeals Council was already on the books at the time Plaintiff was exhausting her administrative remedies. § 404.924(d)

Effect of the Decision in Lucia v. Securities and Exchange Commission ("SEC") On Cases Pending at the Appeals Council, states as follows:

> The Appeals Council will grant the claimant's request for review in cases where the claimant: (1) Timely requests Appeals Council review of an ALJ's decision or dismissal issued before July 16, 2018; and (2) raises before us (either at the Appeals Council level, or previously had raised at the ALJ level) a challenge under the Appointments Clause to the authority of the ALJ who issued the decision or dismissal in the case. 84 FR 9582-02, 2019 WL 1202036 (March 15, 2019).

While Plaintiff argues, in effect, that she was not able to raise her Appointments Clause argument until SSR 19-1p went into effect last month, the regulation allowing her to expedite the appeals process to challenge a "provision in the law" that she believed to be "unconstitutional" at the administrative level was in effect well before the December 28, 2016 decision by ALJ McKay. § 404.924(d). Accordingly, Plaintiff has forfeited her argument under the Appointments Clause.

In summary, as to Plaintiff's first argument, because the ALJ's rejection of the treating physician's opinion was well supported, well articulated, and well within the "zone of choice" accorded to the fact-finder at the administrative level, it should not be disturbed. *Mullen v. Bowen*, *supra.* As to her supplemental argument for remand under the Appointments Clause, she has forfeited her argument by failing to raise a "timely" claim under *Lucia.*

CONCLUSION

For these reasons, I recommend that Defendant's Motion for Summary Judgment [Docket #14] be GRANTED and that Plaintiff's Motion for Summary Judgment [Docket #13] be DENIED.

Any objections to this Report and Recommendation must be filed within 14 days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn,* 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *Howard v. Secretary of HHS,* 932 F.2d 505 (6th Cir. 1991); *United States v. Walters,* 638 F.2d 947 (6th Cir. 1981). Filing of objections which raise some issues but fail to raise others with specificity will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Secretary of HHS,* 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231,* 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within 14 days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than twenty (20) pages in length unless by motion and order such page limit is extended by the court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

/s/ R. STEVEN WHALEN
R. STEVEN WHALEN
UNITED STATES MAGISTRATE JUDGE

Dated: Apr. 30, 2019