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

TERRANCE BUTLER, JR., by Mother and next friend, Sylvia Brown Plaintiff, vs. JO ANNE B. BARNHART, Commissioner of Social Security, Defendant.	)	No. 01-2948 DV

REPORT AND RECOMMENDATION

The plaintiff, Terrance A. Butler, Jr., by and through his mother and next friend, Sylvia Brown, appeals from a decision of the Commissioner of Social Security ("Commissioner"), denying Butler's application for child supplemental security income ("SSI") benefits based on disability under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381 et seq. The appeal was referred to the United States Magistrate Judge for a report and recommendation pursuant to 18 U.S.C. § 636(b)(1)(B) and (C). For the reasons stated below, it is recommended that the decision of the Commissioner be affirmed.

PROPOSED FINDINGS OF FACT

A. Procedural History

Butler first applied for SSI benefits on November 17, 1998, citing disability due to attention deficit disorder, visual-motor-perceptual disorder, written expression problems, reading and

phonics disorder, urinary frequency problems, and visual problems. (R. at 51-61, 71.) His application was denied initially and upon reconsideration. (R. at 67, 71, 77, 81.) Butler then filed a request for a hearing on his application for disability benefits. (R. at 96.) A hearing was duly held before Judge Timothy O'Leary, an Administrative Law Judge with the Office of Hearings and Appeals, on November 17, 1999, and another hearing was held on February 29, 2000 before Administrative Law Judge Anthony Fava ("ALJ"). (R. at 20.) The ALJ denied Butler's application for benefits on May 19, 2000. (*Id.*) Butler appealed to the Appeals Council of the Social Security Administration, which denied Butler's request for review and left the ALJ's decision as the final decision of the Commissioner of Social Security. (R. at 3.) Butler filed suit in federal district court on November 26, 2001, pursuant to 42 U.S.C. § 405(g), to review the Commissioner's final decision. His suit alleges that the ALJ's decision was not supported by substantial evidence.

B. Factual Background

Butler was born on July 28, 1990, and at the time of the second hearing before the ALJ, he was nine years old and in the third grade. (R. at 42.) He lives at home with his mother and younger sister. (R. at 41-42.) Before attending school, Butler's progress as a child was average; however he experienced delays in speech. (R. at 26, 173.) He continues to have trouble pronouncing some words. (R. at 173.) Additionally, he has poor vision in his left eye and wears eyeglasses. (R. at 118, 173.) At the time of the second hearing, he attended class in a regular classroom but

had to take resource and special education classes. (R. at 42.)

The only person who testified before the ALJ at the hearings was the claimant's mother, Sylvia Brown. Brown testified that she first noticed that her son had developmental problems when he began attending school as a kindergartner at Sheffield Elementary School. (R. at 26, 43.) She noted that he had a pattern of behavior involving physical and academic problems. (R. at 26.) Brown sought a team evaluation of her son during his first year of school and learned from the evaluation that he had learning disabilities, including written disorder of expression, phonics disorder of expression, and visual motor disorder of expression. (R. at 43.) Brown enrolled Butler at a different school in 1997. At Newberry Elementary School, Butler had to repeat the second grade and was tested for special education classes because he was having trouble mastering second grade work. (*Id.*) At the time of the original hearing, Butler was in the third grade yet read on a first grade level. (R. at 27.) Brown testified that she has to assist Butler with his written homework assignments because of Butler's "written disorder." (R. at 27.) She will either ask Butler questions and record the answers on a cassette tape or write out his answers for him. (*Id.*)

Besides trouble with academic tasks, Butler also has difficulty performing other tasks at home because he does not follow directions. (R. at 28, 46.) He does not always tell the truth and sometimes steals from his home and other children at school. (R. at 28-29, 33-35, 45.) Brown also testified that Butler will do odd things and noted as an example that her son had

caked Vaseline in his hair before coming to the hearing before the ALJ. (R. at 45.) When asked about Butler's interaction with other children, Brown testified that Butler gets along well with other children but mostly plays by himself. (R. at 47.) Butler entertains himself by watching television, playing computer games, and skating during his leisure time. (R. at 48, 172.)

Butler testified that from a physical standpoint her son's health was "fine." (R. at 44.) However, she noted that her son has difficulty going to sleep at night and has banged his head against his pillow at night since he was baby. (R. at 30, 49-50.) He does this for approximately thirty minutes every night. (R. at 31.) Brown testified that Butler was diagnosed with attention deficit disorder ("ADD") and was prescribed Ritalin by his general physician, Dr. Michael Zanone. (R. at 32.) Although she administered the medication to her son for approximately six or seven months, Brown testified that she did not notice any change in his behavior and that Dr. Zanone instructed her to discontinue it. (R. at 33, 46, 51.) At the time of the second hearing, Brown testified that her son was no longer taking any medication. (R. at 46.)

C. Evidence Presented in Support of Butler's Claim

In addition to the testimony at the hearings, the ALJ considered reports, evaluations, and forms that were submitted by the claimant in support of his claim. Specifically, the ALJ considered the following evidence:

> On January 29, 1998, Rosalind Carroll, M.S.S.W., and Cynthia L. Nash, M.S., Memphis City Schools Division of Mental Health, reported that the claimant had been experiencing academic problems in school and that

preliminary testing by the school guidance counselor resulted in a standard score of 66 on the Peabody Picture Vocabulary Test and 82 in word recognition, 93 in spelling and 103 in arithmetic on the Wide Range Achievement Test 3. His mother noted that he had difficulty processing information and took longer than his peers to grasp new concepts. Interestingly, the child had good grades while in the first grade in another school. Also, the examiners noted that the child was well groomed and he wore corrective lenses throughout the examination. Furthermore, Terrance was cooperative and friendly and there were no difficulties or disruptive behavior observed on that occasion. His attention and effort were good and his activity level was within normal limits for his age range. Additionally, when new tasks or instructions were presented, the claimant had no difficulty in adjusting or responding appropriately.

On completion of the mental status testing, the evaluators concluded that the claimant's adaptive behavior was not significantly impaired. His overall achievement ability score was in the low average range as measured by the WIAT Screener score, with a full-scale IQ score of 73. The examiners noted that the WIAT scores were commensurate with his overall level of cognitive ability in all areas tested. Therefore, based on the evaluation data, the claimant did not meet the state psychometric guidelines for the special education diagnosis of a learning disability (Exhibit 14).

The claimant underwent speech and language evaluation on December 4, 1998 by Ann H. Welch, CCC/SLP, who noted that the child was receiving academic support through an instructional resource program. Also noted, the claimant had been having severe headaches which subsided after he obtained prescription eye glasses. Additionally, Terrance was wearing glasses throughout the examination and demonstrated a focused, cooperative attitude at all times. Ms. Welch observed that the claimant's vocal functioning and speech fluency were not remarkable; language testing showed a one to two year delay in four out of the six subtests administered. Interestingly, on the picture fragments subtest, the claimant's age equivalent was 14 years and 9 months. His articulation skills were with in normal limits. Ms.

Welch concluded that the claimant should receive language therapy designed to address the delays in his language development (Exhibit 15).

The record further reveals that the claimant was evaluated on June 1, 1999 by a pediatric, psychologist, and social worker assessment team, who concluded that he was a normal child with problems of urinary frequency, astigmatism with mild myopia, and dental caries. Psychologically, the claimant was found to have a disorder of written expression, reading disorder, phonics disorder, visual-motor-perceptual disorder, and average intelligence. The team recommended resource assistance and accommodations for the claimant's reading disorder and written expression disorder (Exhibit 18).

The evidence of record shows that the claimant was again evaluated for attention and focus problems along with moodiness, poor sleep, and reported learning problems on March 13, 2000 by Ron Lynn, M.D.. On that occasion, the claimant was noted to be an alert, fairly impulsive child who had difficulty focusing and sitting still. He was mildly clumsy but no specific focal deficit were observed. The claimant demonstrated some right/left confusion and he did not follow multi-part instructions well. Otherwise, his strength, tone, reflexes, coordination and cranial nerves (2 through 12) were intact and the optic discs were flat with no papilloedema. Notably, his speech was generally clear.

Dr. Lynn concluded that the claimant had encephalopathy with attention deficit disorder and hyperactivity; impulse control disorder; learning disorder; auditory and visual processing problem and dysomnia. In his mental residual functional capacity assessment of the claimant, dated March 21, 1999, Dr. Lynn stated that the claimant was moderately limited in ability to sustain concentration and persistence for extended periods but was not significantly limited in the ability to understand, remember and carry out very short and simple instructions. Also, the claimant had moderate limitations in ability to accept instructions and respond appropriately to criticism from supervisors and to get along with peers without distracting them or exhibiting unusual behavioral extremes (Exhibit 23).

(R. at 12-14.)

D. The ALJ's Decision

Using the three-step disability analysis for children,[1] the ALJ concluded at step one that Butler was not engaged in substantial gainful activity during any part of the period under adjudication. (R. at 14.) The ALJ further determined that Butler suffered from learning disabilities in reading and writing. (*Id.*) As such, the ALJ found at step two of the analysis that Butler had a severe impairment within the meaning of 20 C.F.R. § 416.929(c) because his learning disabilities were "more than slight abnormalities and cause more than minimal functional limitations." (*Id.*) However, the ALJ found at step three that Butler's impairments did not meet or medically equal in severity the criteria for any impairment listed at 20 C.F.R., part 404, subpart P, appendix 1. (*Id.*) Therefore, the ALJ had to determine whether

[1] Entitlement to SSI benefits for children with disability is determined by a three-step sequential analysis set forth in the Social Security Regulations. 20 C.F.R. 416.924. First, the claimant must not be engaged in substantial gainful activity. 20 C.F.R. § 416.924(b). Second, a finding must be made that the claimant suffers from a severe impairment. 20 C.F.R. § 416.924(c). Third, the ALJ determines whether the claimant's impairment meets, medically equals, or is the functional equivalent to the severity criteria set forth in the Listing of Impairments contained in the Social Security Regulations. 20 C.F.R. § 416.924(d). If a child's impairment does not meet or medically equal the requirements of a listing, the ALJ must assess all of the functional limitations caused by the child's impairment or combination of impairments. 20 C.F.R. §§ 416.926(a), 416.926a. If the functional limitations caused by the child's impairment or combination of impairments are not equivalent to the disabling functional limitations caused by a listed impairment, the ALJ will find that the child is not disabled. 20 C.F.R. § 416.924(d)(2).

Butler had an impairment that was functionally equivalent in severity to any listed impairment.

After comparing the functional limitation of Butler's impairments with the functional limitations which result from listed impairments,[2] the ALJ concluded that Butler did not "have a condition which results in extreme limitation of functioning in one or more specific functions." (R. at 15.) The ALJ then assessed whether Butler had functional limitations resulting from his impairments in several broad areas of functioning, which were "extreme" in at least one area of functioning or "marked" in at least two areas.[3] (*Id.*) The ALJ found that Butler had "severe 'less than marked' limitation of functioning" in the cognition/communication area of development based on the personal statements of his mother, the conclusions of Dr. Lynn, and Butler's continued placement in special education classes. (R. at 16.) Additionally, the ALJ noted that Butler is receiving help for his severe impairment that should place him in a position to "benefit greatly . . . throughout his school career." (*Id.*) The ALJ did not find that Butler had "marked" or "extreme" limitations in any

---

[2] The Social Security Regulations provide the following four methods by which functional equivalence to a listed impairment may be established: (1) limitation of specific functions; (2) broad areas of development or functioning; (3) episodic impairments; and (4) limitations related to treatment or medication effects. *See* 20 C.F.R. § 416.926a(b)(1)-(4).

[3] In making his assessment, the ALJ noted that for a child Butler's age, the following five areas of development of functioning are evaluated and assessed: (1) cognition/communication development; (2) motor development; (3) social development; (3) personal development; and (4) development in concentration, persistence, and pace. (R. at 16-18.)

other area of functioning. Because Butler did not have an "extreme" limitation in one area of functioning or "marked" limitation in two areas, the ALJ concluded that Butler was not "disabled" for purposes of eligibility for SSI. (R. at 18.)

PROPOSED CONCLUSIONS OF LAW

On appeal, Butler contends that the Commissioner's decision should be reversed because the ALJ improperly found that Butler's impairments were not functionally equivalent to a listed impairment. Butler contends that he has "marked limitations" in two areas – cognition/communication and concentration, persistence or pace – which would render him disabled under the revised Social Security Act of 1996. (Pl.'s Br. at 5.) Butler therefore asserts that the ALJ's factual findings at the third step of the child disability analysis were unsupported by substantial evidence.

A. Standard of Review

Judicial review of the Commissioner's decision is limited to whether there is substantial evidence to support the decision, and whether the Commissioner used the proper legal criteria in making the decision. 42 U.S.C. § 405(g); *Barker v. Shalala*, 40 F.3d 789, 794 (6th Cir. 1994); *Abbott v. Sullivan*, 905 F.2d 918, 922 (6th Cir. 1990). Substantial evidence is more than a scintilla of evidence but less than a preponderance and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Kirk v. Sec'y of Health & Human Servs.*, 667 F.2d 524, 535 (6th Cir. 1981) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In determining whether substantial evidence exists, the

reviewing court must examine the evidence in the record taken as a whole and must take into account whatever in the record fairly detracts from its weight. *Abbott*, 905 F.2d at 923. If substantial evidence is found to support the Commissioner's decision, however, the court must affirm that decision and "may not even inquire whether the record could support a decision the other way." *Barker*, 40 F.3d at 794 (quoting *Smith v. Sec'y of Health & Human Servs.*, 893 F.2d 106, 108 (6th Cir. 1989)). Similarly, the court may not try the case *de novo*, resolve conflicts in the evidence, or decide questions of credibility. *Cutlip v. Sec'y of Health & Human Servs.*, 25 F.3d 284, 286 (6th Cir. 1994).

B. <u>Determination of "Marked" Limitation</u>

Under step three of the child disability determination analysis, if a child has "extreme" limitations in one broad area of functioning or "marked" limitations in two broad areas of functioning, a finding of functional equivalence to a listed impairment will be found. 20 C.F.R. § 416.926a(b)(2), (c). A "marked" limitation is defined in the regulations as follows:

> **(A) When standardized tests are used as the measure of functional abilities, a valid score that is two standard deviations or more below the norm for the test (but less than three standard deviations); or**
> **(B) For children from birth to attainment of age 3, functioning at more than one-half but not more than two-thirds of chronological age; or**
> **(C) For children from age 3 to attainment of age 18, "more than moderate" and "less than extreme." Marked limitation may arise when several activities or functions are limited or even when only one is limited as long as the degree of limitation is such as to interfere seriously with the child's functioning.**

20 C.F.R. § 416.926a(c)(3)(i). The regulations also provide a

definition of an "extreme" limitation:

> (A) When standardized tests are used as the measure of functional abilities, a valid score that is three standard deviations or more below the norm for the test; or
> (B) For children from birth to attainment of age 3, functioning at one-half chronological age or less; or
> (C) For children from birth to attainment of age 18, no meaningful functioning in a given area. There may be extreme limitation when several activities or functions are limited or even when only one is limited.

20 C.F.R. § 416.926a(c)(3)(ii).

In this case, Butler first argues that the ALJ's finding that his limitation of functioning in the area of cognition/communication[4] was severe but "less than marked," is not supported by substantial evidence. He claims that the ALJ "ignored

---

[4] The regulations describe the developmental area of cognition/communication as:

> The ability or inability to learn, understand, and solve problems through intuition, perception, verbal and nonverbal reasoning, and the application of acquired knowledge; the ability to retain and recall information, images, events, and procedures during the process of thinking. The ability or inability to comprehend and produce language (e.g., vocabulary and grammar) in order to communicate (e.g., to respond, as in answering questions, following directions, acknowledging the comments of others); to request, as in demanding action, meeting needs, seeking information, requesting clarification, initiating interaction; to comment, as in sharing information, expressing feelings and ideas, providing explanations, describing events, maintaining interaction, using hearing that is adequate for conversation, and using speech (articulation, voice, and fluency) that is intelligible.

20 C.F.R. § 416.926a(c)(4)(i) (2000).

the overwhelming evidence of record, both expert and lay, that Terrance Butler experienced very difficult cognitive and communication problems which placed him at a borderline level in most areas of functioning." (Pl.'s Br. at 7.) Specifically, Butler notes that his non-verbal reasoning abilities are best described by his score on the perceptional organization index, which is above approximately one percent of the students his age. (*Id.*) Additionally, he claims that his impairment in the cognition/communication area may be influenced by his visual-motor ability. (*Id.* at 8.)

The court finds the claimant's argument to be without merit. Although a review of the record did indicate that Butler has significant difficulties in the cognitive/communication area, substantial evidence exists to support the ALJ's finding that Butler's limitations were severe but not "marked." Butler's score on the perceptional organization index was just one subpart of an evaluation by the Mental Health Division of the Memphis City Schools-an evaluation that indicated that Butler's test results considered together did not meet the state psychometric guidelines for the special education diagnosis of a learning disability. (*See* R. at 177.) During that same evaluation, the evaluators noted that Butler had a late birthday and was probably one of the younger students in the second grade. (*Id.*) While the claimant's test results did indicate that he was on a borderline level in most areas of functioning, the test for "marked" limitation under the Social Security Regulations is not whether the claimant has borderline functioning. The test for "marked" limitation is

whether several activities or functions are limited in such a degree as to "interfere seriously with the child's functioning" or whether the claimant's scores on standardized tests result in "two standard deviations or more below the norm for the test." 20 C.F.R. 416.926a(c)(3)(i). In reaching his decision, the ALJ based his conclusions on the statements of Butler's mother, the conclusions of the pediatric neurologist, and Butler's continued placement in special education classes. (R. at 16.) Accordingly, substantial evidence supports the ALJ's determination that Butler suffers from a severe but not "marked" limitation in the cognitive/communication area of functioning.

Butler also argues that the ALJ erred by not finding that Butler had a "marked" limitation of functioning in the area of concentration, persistence, or pace.[5] The ALJ found Butler had no limitation of functioning with respect to concentration, persistence, or pace. (R. at 18.) Butler asserts that "there is no basis whatsoever in the record for this finding." (Pl.'s Br. at 8.) In support of his argument, Butler indicates that his second grade teacher reported that Butler displayed a short attention span; had difficulty with second grade work; had difficulty following directions; appeared to daydream in class; wrote slowly; copied inaccurately; exhibited poor retention; failed to complete assignments; and required individual assistance on tests. (*Id.*)

---

[5] The regulations describe the concentration, persistence, or pace area of functioning as "[t]he ability or inability to attend to, and sustain concentration on, an activity or task, such as playing, reading, or practicing a sport, and the ability to perform the activity or complete the task at a reasonable pace." 20 C.F.R. § 416.926a(c)(4)(vi).

Additionally, Dr. Lynn noted that Butler had difficulty focusing and sitting still. (*Id.*)

After considering the evidence presented by the claimant, it appears to this court that Butler has demonstrated that he does have functional limitation in the area of concentration, persistence, or pace. It is noted that the Commissioner in her response acknowledges that the evidence presented by Butler demonstrates that Butler has some limitation of functioning in the area of concentration, persistence, and pace. The Commissioner points out, however, that the record also contains evidence that indicates that Butler has the ability to sustain concentration and pace. (Mem. of Supp. of Comm'r Decision at 7.) Specifically, notes from various evaluations, including the evaluation of Butler that took place on January 28, 1998, reflect that Butler's attention and effort were "good." (R. at 175.) Furthermore, a psychological evaluation on December 14, 1998 revealed that the claimant was able to sustain concentration and persistence at an age appropriate level. (R. at 187.) The Commissioner also notes that "as of March 13, 2000, Dr. Lynn was going to try [claimant] on a new medication to see if it would help him with his symptoms related to concentration." (Mem. of Supp. of Comm'r Decision at 7.) Furthermore, the Mental Residual functional Capacity Assessment completed by Dr. Lynn does not indicate that Butler was "markedly limited" in any area of functioning, including sustained concentration and persistence. (R. at 240-41.) The court finds the while the evidence regarding Butler's abilities in concentration, persistence, or pace does indicate functional

limitations, there is substantial evidence to support a finding that Butler does not have "marked" limitation in this area as that term is defined in the Social Security Regulations. Therefore, the ALJ's determination that Butler had no "marked" limitation in the concentration, persistence, or pace area of development is supported by substantial evidence.

CONCLUSION

The totality of the record indicates that the ALJ's decision was supported by substantial evidence at each step of the decision-making process. Accordingly, it is recommended that the Commissioner's decision be affirmed.

Respectfully submitted this 30th day of March, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE