IN THE

United States Court of Appeals

For the Second Circuit

AUGUST TERM 2021

ARGUED: SEPTEMBER 1, 2021
DECIDED: JANUARY 3, 2022

No. 20-3297

RACHEL COLGAN,

Plaintiff-Appellant,

v.

KILOLO KIJAKAZI,

ACTING COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.[*]

Appeal from the United States District Court
for the Northern District of New York.
19-cv-954 – David E. Peebles, *Magistrate Judge*.

[*] The Clerk of Court is directed to amend the caption as set forth above.

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3 Before: WALKER, CALABRESI, and MENASHI, *Circuit Judges*.
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6 Plaintiff-Appellant Rachel Colgan appeals from a judgment entered in the
7 United States District Court for the Northern District of New York (Peebles, *M.J.*)
8 affirming an administrative law judge's denial of her application for disability
9 insurance benefits under the Social Security Act, 42 U.S.C. §§ 401–434. Following
10 an evidentiary hearing on her claim for disability benefits, the administrative law
11 judge determined that Colgan possessed the residual functional capacity to
12 perform sedentary work, 20 C.F.R. § 404.1567(a), and was therefore not disabled
13 within the meaning of the Social Security Act, 42 U.S.C. § 423(d)(1)(A). The Social
14 Security Administration's Appeals Council denied review, and the District Court
15 affirmed.

16 Upon consideration of the administrative record, we conclude that the
17 administrative law judge's factual determination with respect to Colgan's
18 residual functional capacity was not supported by substantial evidence. We
19 therefore **VACATE** the District Court's judgment and **REMAND** the case to

the District Court with instructions to remand to the Social Security Administration for further action consistent with this opinion.

Judge Menashi dissents in a separate opinion.

PETER A. GORTON, Lachman & Gorton, Endicott, New York, *for Plaintiff-Appellant*.

MICHAEL L. HENRY, Special Assistant United States Attorney, Social Security Administration (Michael J. Pelgro, Regional Chief Counsel, *on the brief*), *for* Antoinette T. Bacon, Acting United States Attorney for the Northern District of New York, Albany, New York, *for Defendant-Appellee*.

CALABRESI, *Circuit Judge*:

Plaintiff-Appellant Rachel Colgan appeals from a judgment entered in the United States District Court for the Northern District of New York (Peebles, *M.J.*) affirming an administrative law judge's ("ALJ") denial of her application for

disability insurance benefits under the Social Security Act ("the Act"), 42 U.S.C. §§ 401–434. Following an evidentiary hearing on her claim for disability benefits, the ALJ determined that Colgan possessed the residual functional capacity ("RFC") to perform sedentary work, 20 C.F.R. § 404.1567(a), and hence was not disabled within the meaning of the Act, *see* 42 U.S.C. § 423(d)(1)(A). The Social Security Administration's ("the Administration") Appeals Council denied review of this decision and the District Court affirmed.

On appeal, Colgan contends that the ALJ's determination was not supported by substantial evidence and, in particular, that the ALJ misapplied the treating physician rule, which, under certain circumstances, requires the agency to assign "controlling weight" to the medical opinion of a claimant's treating physician when evaluating disability status, *see* 20 C.F.R. § 404.1527(c)(2).

Upon consideration of the administrative record, we hold that the ALJ's decision was not supported by substantial evidence. We therefore **VACATE** the District Court's judgment and **REMAND** the case to the District Court with instructions to remand to the Social Security Administration for further action consistent with this opinion.

BACKGROUND

I.

Colgan was employed as a teacher at a special education high school in the Binghamton City School District when, in February 2015, she came across two sixteen-year-old students fighting on school grounds. Colgan attempted to break up the fight but, in the course of doing so, either fell or was pushed into a wall, leading to serious injuries. Specifically, the administrative record reflects that Colgan was "hit in the head" with enough force for her head to penetrate "part of a wall." App'x at 12. As a result of the incident, Colgan went to the emergency room with a closed head injury; there she also reported pain in her head, neck, and upper back, as well as "nausea and tingling in her right fingers." *Id.* at 77.

Colgan's injuries and their symptoms persisted in the years that followed. During this time, she sought clinical treatment from a number of medical sources. According to her treating physician, Dr. Claudine Ward—a concussion specialist who regularly treated Colgan from September 2015 to April 2018—Colgan satisfied the medical criteria for mild traumatic brain injury and post-concussion syndrome with, *inter alia*, persistent cognitive defects and fatigue, chronic post-traumatic headaches, sleep disturbance, and dizziness. Of particular relevance to

this appeal, Dr. Ward's medical notes from treatment sessions with Colgan indicate that she suffered from debilitating headaches which, in turn, severely hampered her ability to carry out activities of daily living and basic job-related functions. Due to these serious symptoms, Colgan did not take up any gainful employment following the incident and instead, successfully applied for workers' compensation benefits.

On June 29, 2016, Colgan filed for social security disability insurance benefits, but her claim was denied. In August 2018, Colgan appeared before an ALJ for an evidentiary hearing on her application. The following month, the ALJ issued a written denial of Colgan's claim, concluding that she had the RFC to perform sedentary work, subject to certain physical and cognitive limitations, and was therefore not disabled within the definition of the Act.

II.

According to the Act, a "claimant is disabled . . . if she is unable to 'engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment [that] 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.'" *Estrella v. Berryhill*, 925 F.3d 90, 94 (2d Cir. 2019) (quoting 42 U.S.C.

§ 423(d)(1)(A)) (alteration in original). In interpreting this statutory definition, the Administration has set forth by regulation a "five-step, sequential evaluation process" to determine disability status:

> (1) whether the claimant is currently engaged in substantial gainful activity; (2) whether the claimant has a severe impairment or combination of impairments; (3) whether the impairment meets or equals the severity of the specified impairments in the Listing of Impairments; (4) based on a "residual functional capacity" assessment, whether the claimant can perform any of his or her past relevant work despite the impairment; and (5) whether there are significant numbers of jobs in the national economy that the claimant can perform given the claimant's residual functional capacity, age, education, and work experience.

Id. (internal citations and quotation marks omitted); *see* 20 C.F.R. §§ 404.1520(a)(4)(i)–(v). At steps one through four of this analysis, the claimant bears the burden of proof; but at step five, the burden shifts to the Commissioner. *See Estrella*, 925 F.3d at 94.

In this case, the ALJ applied the five-step evaluation process and found that Colgan had satisfied steps one through four of the disability status analysis.

Specifically, the ALJ determined: (1) that Colgan had not engaged in substantial gainful activity since February 12, 2015; (2) that she suffered from severe impairments including degenerative disease of the cervical and lumbar spine, post-concussion syndrome, depression, anxiety, and post-traumatic stress disorder; (3) that these impairments did not satisfy or equal the severity of the specified impairments in the Listing of Impairments that would automatically result in a finding that she is disabled; and (4) that given her severe impairments, Colgan would be unable to perform any of her past relevant work.

The disqualifying factor, however, that the ALJ ultimately rested his adverse decision on was at step five of the disability analysis: that is, whether "there are significant numbers of jobs in the national economy that the claimant can perform given the claimant's residual functional capacity, age, education, and work experience." *Estrella*, 925 F.3d at 94. In assessing this factor, the ALJ first determined that, despite her impairments, Colgan had the RFC to perform sedentary work, as defined in 20 C.F.R. § 404.1567(a), subject to certain physical

and cognitive limitations.[1] Relying on the testimony of a vocational expert, the ALJ then found that, given Colgan's RFC, age, education, and work experience, there were significant numbers of sedentary jobs in the national economy that Colgan could perform. And, in light of those findings, the ALJ concluded that Colgan was not disabled within the meaning of the Act from February 12, 2015 through the date of decision. *See* 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1520(g)(1).

Significantly, however, the national employment numbers of available jobs identified by the vocational expert at step five were based on the ALJ's assessment that Colgan would *not* have to be off-task for more than 15 percent of the day or be absent more than one day per month.

This RFC assessment is what lies at the heart of this appeal. In the evidentiary hearing before the ALJ, Colgan submitted an expert opinion by Dr. Ward stating that Colgan's impairments would require her to be off-task for more than 33 percent of the day and absent more than four days each month.

[1] The ALJ found that, given her impairments, Colgan could not perform work involving reaching or lifting with either upper extremity; climbing; frequently using both upper extremities; more than occasional exposure to bright lights; or more than simple cognitive functions or a low level of work pressure.

According to the administrative record, Dr. Ward's opinion was based on her clinical notes from treatment sessions with Colgan, which, taken collectively, described a pattern of chronic, debilitating headaches that would last for several hours each day. Specifically, in her October 10, 2017 treatment note, Dr. Ward wrote that Colgan "ha[d] reached maximal medical improvement in regards to concussion" but that she had "permanent impairments related to the injury." App'x at 276. This treatment note subsequently concluded that "[c]hronic fatigue and headaches . . . [would] interfere with her ability to perform [activities of daily living] and perform job-related duties." *Id.*

The ALJ asserted that there were several problems with Dr. Ward's expert opinion and, accordingly, assigned it "little weight" in assessing Colgan's RFC. *Id.* at 43–44. Then, looking at the rest of the record, the ALJ concluded that Colgan's claim for insurance benefits failed at step five of the disability analysis because she had the RFC to perform sedentary work sufficiently available in the national economy. *See* 20 C.F.R. § 404.1567(a). The Appeals Council denied review of this decision and the District Court affirmed.

DISCUSSION

I.

In reviewing "an appeal from the denial of disability benefits, we focus on the administrative ruling rather than the district court's opinion," *Estrella*, 925 F.3d at 95 (internal citation and quotation marks omitted), to determine whether the ALJ's decision was supported by "substantial evidence," *Selian v. Astrue*, 708 F.3d 409, 417 (2d Cir. 2013) (per curiam). Whether substantial evidence lies in support of the ALJ's determination requires us to "conduct a plenary review of the administrative record[.]" *McIntyre v. Colvin*, 758 F.3d 146, 149 (2d Cir. 2014) (quoting *Kohler v. Astrue*, 546 F.3d 260, 265 (2d Cir. 2008)). Although, as the Supreme Court has said, the evidentiary threshold for the substantial evidence standard "is not high," *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019), the substantial evidence standard is also not merely hortatory: It requires relevant evidence which would lead a "reasonable mind" to concur in the ALJ's factual determinations. *McIntyre*, 758 F.3d at 149 (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)); *see Burgess v. Astrue*, 537 F.3d 117, 127–28 (2d Cir. 2008).

In the context of disability adjudications, the Administration's discretion in making factual determinations is also constrained by self-imposed regulations—

one of which sets forth the treating physician rule, *see* 20 C.F.R. § 404.1527(c)(2); *see also Burgess*, 537 F.3d at 128–29.[2] The treating physician rule, as its name connotes, states that the medical opinion of a claimant's treating physician must be given "controlling weight" if it "is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the case record."[3] *Estrella*, 925 F.3d at 95 (internal citations and quotation marks omitted); *see* 20 C.F.R. § 404.1527(c)(2). Put another way, the rule requires the ALJ to defer to the treating physician's opinion when making disability determinations if the opinion is supported by reliable medical

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[2] For claims filed after March 27, 2017, however, ALJs "will not defer or give any specific evidentiary weight, *including controlling weight*, to any medical opinion(s) or prior administrative medical finding(s), including those from your medical sources." 20 C.F.R. §§ 404.1520c(a) (emphasis added), 416.920(c). Pursuant to the new regulation, the ALJ will consider a series of factors, including, *inter alia*, supportability, consistency, relationship to the claimant, and specialization when evaluating a medical opinion. The new regulatory regime is clear that claims filed before March 27, 2017—such as Colgan's—are still governed by the framework and evidentiary standards set out in 20 C.F.R. § 404.1527. For that reason, although we are certainly aware of the new regulatory scheme, we need not speculate here as to its potential effects on a case that is not before us.

[3] If an ALJ reasonably finds that the treating physician's medical opinion is not entitled to "controlling weight" under the treating physician rule, then the ALJ must determine how much weight to assign the treating physician's opinion. The ALJ does so by "explicitly" applying the *Burgess* factors: "(1) the frequen[cy], length, nature, and extent of treatment; (2) the amount of medical evidence supporting the opinion; (3) the consistency of the opinion with the remaining medical evidence; and (4) whether the physician is a specialist." *Estrella*, 925 F.3d at 95-96 (quoting *Selian*, 708 F.3d at 419–20). Failure to do so, we have said, constitutes a procedural error subject to a harmless error analysis. *Id.* Here, the ALJ failed explicitly to apply the *Burgess* factors in his written denial of Colgan's disability claim. But because we hold that Dr. Ward's opinion was entitled to "controlling weight" at step one of the treating physician rule, we need not reach the question of whether this procedural error was harmless.

techniques and is not contradicted by other reasonable evidence in the administrative record. *See* 20 C.F.R. § 404.1527(c)(2). Moreover, the ALJ must articulate "good reasons" to rebut the presumption of controlling deference conferred on the treating physician's opinion. *See, e.g.*, *Estrella*, 925 F.3d at 96; *Burgess*, 537 F.3d at 129–30.

II.

Colgan's principal argument on appeal is that the ALJ misapplied the treating physician rule by assigning "little weight" to the medical opinion of Dr. Ward—a concussion specialist who, as previously noted, had regularly treated Colgan from September 2015 to April 2018. During the evidentiary hearing before the ALJ, Dr. Ward produced a medical opinion on a standard check-box form stating that, given her impairments, Colgan would have to be off-task for more than 33 percent of the day and absent more than four days each month. *See supra* 7–9. Colgan first contends that the treating physician rule required the ALJ to assign controlling weight to Dr. Ward's opinion in determining her RFC to perform sedentary work. She then asserts that the ALJ erred in not providing good reasons for assigning little weight to Dr. Ward's expert opinion.

We agree with these arguments and hold that the ALJ misapplied the treating physician rule to Dr. Ward's medical opinion and hence that his RFC determination was not supported by substantial evidence. Based on the administrative record before us, we find that the ALJ did not provide good reasons to discount Dr. Ward's opinion and further, that Dr. Ward's opinion was "well-supported by medically acceptable clinical and laboratory diagnostic techniques" and "not inconsistent with the other substantial evidence in the case record."[4] 20 C.F.R. § 404.1527(c)(2). Accordingly, we conclude that, on the record before us, the ALJ erred in failing to assign her expert opinion controlling weight in the determination of Colgan's RFC.

A.

As a preliminary matter, the ALJ partly rested his decision to discount Dr. Ward's medical opinion on the fact that it was presented in a check-box form. The Commissioner argued in her appellate brief before us as well as at oral argument that the ALJ's reasoning in this respect was appropriate given our

[4] Because the ALJ did not specifically find issue with the "clinical and laboratory diagnostic techniques" underlying Dr. Ward's expert opinion, the scope of our discussion, for purposes of the treating physician rule, is confined to whether her opinion was "not inconsistent with the other substantial evidence in the case record." 20 C.F.R. § 404.1527(c)(2).

statements in *Halloran v. Barnhart*, 362 F.3d 28, 32 (2d Cir. 2004) (per curiam), and *Heaman v. Berryhill*, 765 F. App'x 498, 501 (2d Cir. 2019). The Commissioner reads those cases to hold that an ALJ may discount a treating physician's medical opinion in the determination of disability benefits if the opinion is provided in a check-box form.

We are, however, unable to discern any such rule, either in our case law or in relevant federal regulations. In *Halloran*, we set forth the modest proposition that a treating physician's medical opinion is not entitled to controlling weight where it is provided in a check-box form and is unaccompanied by meaningful medical evidence in the administrative record. 362 F.3d at 31–32. There, the disability claimant had relied on a check-box opinion completed by her treating physician which simply noted that the claimant was unable to take up sedentary work because she "could sit for less than 6 hours per day[.]" *Id.* at 31 (internal quotation marks omitted). Because the treating physician's check-box opinion was unsupported by substantial medical evidence, including the opinions of other medical experts, and "not particularly informative," we agreed with the ALJ's decision not to grant controlling weight to the physician. *Id.* at 32; *see also Heaman*, 765 F. App'x at 501 (relying on *Halloran* and affirming ALJ's discounting of treating

physicians' opinions where they were provided in stand-alone "checkbox forms" that "offer[ed] little or nothing with regard to clinical findings and diagnostic results" and "were inconsistent with . . . findings reflected in the doctors' notes").

Needless to say, *Halloran* did not then and does not now stand for the rule that the evidentiary weight of a treating physician's medical opinion can be discounted by an ALJ based on the naked fact that it was provided in a check-box form.[5] To endorse such a peculiar rule would, moreover, contravene our general approach to agency factfinding which, though deferential, as relevant federal regulations also make clear, is a functional and not a formalist one. *See, e.g.*, 20 C.F.R. § 404.1527(c) (setting forth various factors in the ALJ's consideration of medical evidence with respect to disability determinations); *cf. Biestek*, 139 S. Ct. at 1157 (rejecting disability applicant's argument calling for a "categorical rule" in assessing the substantial evidence standard and explaining that the relevant

[5] The Commissioner also relies on 20 C.F.R. § 404.1527(c)(3) to argue that check-box form opinions may be discounted by an ALJ in making disability determinations. But the regulatory provision cited by the Commissioner makes no mention of check-box opinions and instead states the obvious principle that a better explained medical opinion will, as a general matter, be given more weight by the ALJ. *See* 20 C.F.R. § 404.1527(c)(3) ("The more a medical source presents relevant evidence to support a medical opinion, particularly medical signs and laboratory findings, the more weight we will give that medical opinion. The better an explanation a source provides for a medical opinion, the more weight we will give that medical opinion.").

"inquiry, as is usually true in determining the substantiality of evidence, is case-by-case"); *id.* at 1162 (Gorsuch, J., dissenting) (discussing capacious categories of evidence that would not satisfy the substantial evidence standard). Accordingly, we take this occasion to reassert and clarify that the nature of an ALJ's inquiry in disability factfinding turns on the substance of the medical opinion at issue—not its form—and ultimately whether there is reasonable evidence in the record that supports the conclusions drawn by the medical expert, *see McIntyre*, 758 F.3d at 149.

Applying those principles here, we conclude that the ALJ's reasoning for discounting Dr. Ward's expert opinion was, like his reliance on *Halloran*, flawed. In contrast to the medical report at issue in *Halloran*—which completely lacked any supporting evidence in the medical record—Dr. Ward's check-box form opinion was supported by voluminous treatment notes gathered over the course of nearly three years of clinical treatment. In light of these circumstances, then, the ALJ's first reason for assigning little weight to Dr. Ward's opinion was erroneous.[6]

[6] Troublingly, the ALJ did not seem to mind that a state agency psychologist's adverse opinion had been provided on a check-box form when assigning it "significant weight." *See infra* 20–22. Although we have no reason to doubt the impartiality of the ALJ in this case, we find it appropriate to reiterate at this juncture

B.

The ALJ also determined that Dr. Ward's opinion was not entitled to controlling weight because: (1) it was internally inconsistent and (2) it was unsupported by other substantial evidence in the administrative record. Additionally, the ALJ asserted that Dr. Ward's opinion was entitled to little weight based on other expert opinions. For the following reasons, we disagree.

1. Internal Inconsistencies

The ALJ found that Dr. Ward's medical opinion was internally inconsistent because, on the check-box form, Dr. Ward listed "a side effect of fatigue" while, in several of her treatment notes, she had written that Colgan's fatigue rose and fell depending on the dosage levels of prescribed medications. App'x at 43–44. Additionally, the ALJ found that Dr. Ward's diagnosis of "anxious mood, emotional lability, perseverative speech, and impaired concentration" was

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that, "the Commissioner is not a litigant and has no representative at the agency level . . . . Thus, it is the ALJ's duty to investigate and develop the facts and develop the arguments both for and against the granting of benefits." *Butts v. Barnhart*, 388 F.3d 377, 386 (2d Cir. 2004) (internal citations and quotation marks omitted).

contradicted by her treatment records which showed that, on certain occasions, Colgan did not appear to present those infirmities. *Id.* at 44.

It was legal error for the ALJ to deem these to be internal inconsistencies. As this Court explained recently—and powerfully—in *Estrella v. Berryhill*, an ALJ commits legal error in resting his disability determination on "a one-time snapshot of a claimant's status" because that episode "may not be indicative of her longitudinal mental health." 925 F.3d at 98. "Cycles of improvement and debilitating symptoms [of mental illness]," we said, "are a common occurrence, and in such circumstances it is error for an ALJ to pick out a few isolated instances of improvement over a period of months or years and to treat them as a basis for concluding a claimant is capable of working." *Id.* at 97 (quoting *Garrison v. Colvin*, 759 F.3d 995, 1017 (9th Cir. 2014)) (alteration in original). What the ALJ here did, by cherry-picking particular instances of improvement from Dr. Ward's treatment notes in order to create an inconsistency within her medical opinion, was precisely what we deemed erroneous in *Estrella*. *Id.* at 97–98; *see Selian*, 708 F.3d at 418–19.

2. Unsupported by the Record

The ALJ also determined that Dr. Ward's opinion was unsupported by treatment records which the ALJ viewed as stating that Colgan's debilitating

headaches were "short-lived" when she could "remove herself from the trigger" (e.g., noise). App'x at 279. This finding, however, was based on a misconstruction of the record. *See Selian*, 708 F.3d at 418. In the very next sentence after the above quoted language, Dr. Ward noted that Colgan's "headaches last all day if she is unable to rest" and that prescribed medications "did not improve [her] symptoms." App'x at 279. Read in this proper context, these treatment notes support Dr. Ward's medical opinion that Colgan needed to be off-task for more than 33 percent of the day and absent more than four days each month. Because the ALJ "ignored the context of the notation" and "made no effort to reconcile this apparent inconsistency," *Selian*, 708 F.3d at 418–19, this reason also did not provide a sufficient basis to discount Dr. Ward's opinion.

Finally, we disagree with the ALJ that Colgan's ability to engage in certain activities of daily living—such as caring for her two children, preparing meals and washing dishes, and driving to her medical appointments—provided substantial record evidence to discount Dr. Ward's medical opinion.

There is some evidence that Colgan, a single mother, could to some extent care for her two young children and engage in activities necessary to her own welfare. But we cannot say that these make a treating physician's findings flawed

and foreclose an applicant's entitlement to disability benefits. *See, e.g.*, *Balsamo v. Chater*, 142 F.3d 75, 81 (2d Cir. 1998) ("We have stated on numerous occasions that a claimant need not be an invalid to be found disabled under the Social Security Act.") (internal citations and quotation marks omitted). Indeed, as we powerfully explained in *Balsamo*:

> [W]hen a disabled person gamely chooses to endure pain in order to pursue important goals, such as attending church and helping his wife on occasion go shopping for their family, it would be a shame to hold this endurance against him in determining benefits unless his conduct truly showed that he is capable of working.

Id. at 81–82 (internal citation and quotation marks omitted). Because we find that reasoning to apply with equal force here, we conclude that the ALJ erred in discounting Dr. Ward's opinion on this basis.

3. Other Expert Opinions

In assigning little weight to Dr. Ward's medical opinion, the ALJ stated that he took into account other expert opinions provided by medical authorities. In particular, the ALJ assigned "significant weight" to the opinion of state agency

psychologist, O. Fassler, Ph.D., who had conducted a consultative cognitive assessment of Colgan in connection with her disability claim. App'x at 46. According to the administrative record, Dr. Fassler provided on a check-box form his psychological view that, despite Colgan's cognitive defects, she was capable of "performing unskilled work." *Id.* at 69. The ALJ, in turn, assigned this opinion significant weight on the grounds that it was "from a relevant medical specialist who is familiar with Agency disability program rules, and is supported by the medical and other evidence of record." *Id.* at 46.

We find that the ALJ erred in assigning significant weight to Dr. Fassler's opinion. Dr. Fassler's opinion was based on a single consultative cognitive assessment and "[w]e have frequently cautioned that ALJs should not rely heavily on the findings of consultative physicians after a single examination." *Estrella*, 925 F.3d at 98 (internal citation and quotation marks omitted). Moreover, Dr. Fassler was not a physician, and his assessment that Colgan could perform unskilled work was unsupported by any substantial medical evidence. In his report, Dr. Fassler noted that, at times, Colgan appeared to be "appropriate," "not silly, not tearful and not emotional." App'x at 69. Based on these cursory observations, Dr. Fassler concluded that "on the whole," Colgan would be able to perform "unskilled

work." *Id.* It is hard to see how these conclusory remarks could constitute substantial medical evidence sufficient to undermine Dr. Ward's medical opinion. *See Biestek*, 139 S. Ct. at 1159 (Gorsuch, J., dissenting) (explaining that "conclusory assertions" fail to satisfy the substantial evidence standard). In passing, but significantly, in *Burgess v. Astrue*, we stated that "an opinion couched in terms so vague as to render it useless in evaluating the claimant's residual functional capacity" cannot "rise to the level of evidence that is sufficiently substantial to undermine the opinion of the treating physician." 537 F.3d at 128–29 (internal citation and quotation marks omitted). Dr. Fassler's opinion fits that description all too well.[7]

Nor do we find any other substantial evidence in the record, whether considered individually or together, that would raise a genuine conflict with

[7] At some level of generality, in disability cases, there will often be medical opinions that are not entirely consistent with each other. A person suffering from an ailment may reasonably consult multiple physicians in order to get a comprehensive view of his illness and at times, some of those consultations may give rise to inconsistent medical opinions. Given this reality of medical practice, the treating physician rule should not be construed so narrowly as to set aside a treating physician's opinion whenever there are some indicia of inconsistency in the medical record. *See Burgess*, 537 F.3d at 128–29 (recognizing that "not all expert opinions rise to the level of evidence that is sufficiently substantial to undermine the opinion of the treating physician"). This would preclude the treating physician rule from having any effect and frustrate its core rationale, which is that the treating physician is typically best situated to provide the most accurate representation of the disability claimant's condition. *See* 20 C.F.R. § 1527(c)(2) ("Generally, we give more weight to medical opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s)[.]").

Dr. Ward's medical opinion. Apart from his reliance on Dr. Fassler's opinion, the ALJ cited the opinions of several other authorities, most of whom were consultative physicians. These consulting sources diagnosed Colgan with moderate to marked limitations in her day-to-day activities and employment. Crucially, their reports did not address or dispute the crux of Dr. Ward's medical opinion: that Colgan suffered from debilitating headaches which would require her to be off-task more than 33 percent of the day and absent more than four days each month. The reports did make relevant comments as to Colgan's appearance and functionality on various occasions. But given the reality that one afflicted by cognitive pain can appear coherent on some occasions while still be suffering from debilitating headaches at other times, *see Estrella*, 925 F.3d at 98, we find it hard to read these reports as inconsistent with Dr. Ward's assessment.

* * *

For all the above reasons, we conclude that, on this record, Dr. Ward's opinion was entitled to controlling weight under the treating physician rule. We therefore **VACATE** the judgment of the District Court and **REMAND** the case to the District Court with instructions to remand to the Social Security Administration for further action consistent with this opinion.

MENASHI, *Circuit Judge*, dissenting:

The court holds that the administrative law judge erred when he failed to give Dr. Ward's opinion—expressed on a check-box form—"controlling weight." Were Sarah Colgan to file an application for disability insurance benefits today, that would not be an error. In part to eliminate "confusion about a hierarchy of medical sources," the Social Security Administration has repealed its rule requiring deference to a treating physician. *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 82 Fed. Reg. 5844, 5853 (Jan. 18, 2017). The applicable regulation now provides that the ALJ "will not defer or give any specific evidentiary weight, including controlling weight, to any medical opinion(s)." 20 C.F.R. § 404.1520c(a).

But Colgan filed her application in 2016, so we must apply the "treating physician rule." Even under that regime, I would leave the ALJ's decision in place. The ALJ determined that Dr. Ward's opinion—that Colgan would be off task more than 33 percent of the day and absent more than four days per month—was not entitled to controlling weight. He instead accorded it "little weight." App'x 43. Because substantial evidence in the record supports the ALJ's determinations, I dissent from the court's decision to remand the case to the agency.

I

According to the treating physician rule, "the opinion of a claimant's treating physician as to the nature and severity of the impairment is given controlling weight so long as it is well-supported by medically acceptable clinical and laboratory diagnostic techniques

and is not inconsistent with the other substantial evidence in the case record." *Burgess v. Astrue*, 537 F.3d 117, 128 (2d Cir. 2008) (internal quotation marks and alterations omitted). "Medically acceptable clinical and laboratory diagnostic techniques include consideration of a patient's report of complaints, or history, as an essential diagnostic tool." *Id.* (internal quotation marks and alterations omitted). Any "[g]enuine conflicts in the medical evidence are for the Commissioner to resolve." *Veino v. Barnhart*, 312 F.3d 578, 588 (2d Cir. 2002).

"The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). The court agrees that the "threshold" for the substantial evidence standard is "not high." *Ante* at 10 (quoting *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019)). Substantial evidence means only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It is "a very deferential standard of review—even more so than the 'clearly erroneous' standard." *Brault v. Soc. Sec. Admin., Comm'r*, 683 F.3d 443, 448 (2d Cir. 2012). "The substantial evidence standard means once an ALJ finds facts, we can reject those facts only if a reasonable factfinder would *have to conclude otherwise*." *Id.* (internal quotation marks omitted). When "there is substantial evidence to support either position, the determination is one to be made by the factfinder" and a court may not second-guess that determination. *Alston v. Sullivan*, 904 F.2d 122, 126 (2d Cir. 1990).

A

Substantial evidence supports the ALJ's finding that Dr. Ward's opinion in the check-box form was not entitled to controlling weight

because it "lack[ed] [a] supportive rationale" and was "not well-explained." App'x 43. As the ALJ noted, "[a]side from a brief list of diagnoses, the only information in the form volunteered by [Dr. Ward] is a list of medications, a side effect of fatigue prompted by the form, and another side effect of impaired concentration." *Id.* at 43-44. The record contains no explanation of how Dr. Ward arrived at her opinion—reflected in checked-off boxes on the form—that Colgan would be off task more than 33 percent of the day or absent more than four days per month.

The court oversimplifies the issue when it suggests that the ALJ "discounted" Dr. Ward's medical opinion "based on the naked fact that it was provided in a check-box form." *Ante* at 15. The ALJ decided he could not accord controlling weight to Dr. Ward's opinion not simply because that opinion was reflected in checked boxes on a form but because Dr. Ward did not provide any basis for that opinion. We do not give controlling weight to medical opinions that are "not particularly informative." *Halloran v. Barnhart*, 362 F.3d 28, 32 (2d Cir. 2004). So the ALJ did not do so here.[1]

Because Dr. Ward provided no rationale for her opinion, the court attempts to supply one on appeal. The court argues that "Dr. Ward's check-box form opinion was supported by voluminous treatment notes gathered over the course of nearly three years of clinical treatment" and that Dr. Ward's "treatment notes support" her assessment of Colgan's working ability. *Ante* at 16, 19. Yet the form by which Dr. Ward communicated her opinion did not rely on these

[1] The ALJ's approach is consistent with agency regulations, which explain that "[t]he better an explanation a source provides for a medical opinion, the more weight we will give that medical opinion." 20 C.F.R. § 404.1527(c)(3).

materials. We refuse to "scour the record" for reasons to *affirm* an agency decision, even though the agency is entitled to significant deference. *Song Jin Wu v. INS*, 436 F.3d 157, 164 (2d Cir. 2006). In this case, the court conducts an exhaustive search for reasons to *reject* the agency's decision by rehabilitating a medical opinion the agency reasonably found to be less than fully informative.

B

Even if Dr. Ward had provided a basis for her opinion along the lines the court suggests, the ALJ considered those materials and properly found that Dr. Ward's opinion was not entitled to controlling weight because it was "inconsistent with the other substantial evidence in the case record." *Burgess*, 537 F.3d at 128 (alteration omitted). The ALJ identified record evidence that was "not consistent" with Dr. Ward's evaluation of Colgan's working ability. App'x 44. While Dr. Ward listed "fatigue" as a side effect of Colgan's medications, *id.* at 253, her treatment records indicated that the side effect was not constant. Those records also showed that Colgan's problems with anxiety, emotional lability, perseverative speech, psychomotor slowing or agitation, and concentration were similarly variable and sometimes receded—which is relevant information for determining Colgan's residual functional capacity. Additionally, the treatment records explained that Colgan's headaches were "short-lived if she is able to remove herself from the headache trigger," *id.* at 279, and that she was "caring for her 10- and 6-year-old," which involved "cook[ing], do[ing] dishes, … driv[ing]," and "read[ing] first-grade level books," *id.* at 270. A "reasonable mind" could accept this evidence as adequate to support the conclusion that Colgan would not be off task or absent as often as Dr. Ward asserted. *Perales*,

402 U.S. at 401. That requires us to treat the ALJ's finding as conclusive.

The court disagrees with this straightforward conclusion, holding instead that there is no "substantial evidence in the record, whether considered individually or together, that would raise a genuine conflict with Dr. Ward's medical opinion." *Ante* at 22-23. But to maintain that position, the court must do more than show that a reasonable mind would be able to interpret the record to be consistent with Dr. Ward's opinion. To remand to the agency, the court must show that *no* reasonable mind could possibly accept the evidence on record as adequate to support a conclusion contrary to Dr. Ward's. *Brault*, 683 F.3d at 448.

The court fails to make that showing. It begins by holding that it was erroneous for the ALJ to consider Dr. Ward's opinion to be inconsistent with the fact that "on certain occasions, Colgan did not appear to present" her maladies. *Ante* at 18. To reproach the ALJ on this point, the court relies on our statement in *Estrella v. Berryhill* that "a one-time snapshot of a claimant's status may not be indicative of her longitudinal mental health." 925 F.3d 90, 98 (2d Cir. 2019); *see ante* at 18. But the context of that statement was our warning that "ALJs should not rely heavily on the findings of consultative physicians after a single examination." *Estrella*, 925 F.3d at 98 (quoting *Selian v. Astrue*, 708 F.3d 409, 419 (2d Cir. 2013)). Here, the ALJ was not relying on such findings but on the treatment notes of Colgan's long-term treating physician—the very same physician to which the court says the ALJ should have deferred. Those treatment notes—as the court implicitly acknowledges by itself relying on the notes—provided more evidence of Dr. Ward's views than did the check-box form. It is not clear, therefore, that the statement from *Estrella* is relevant. Even

so, we did not suggest in *Estrella* that the ALJ could not consider at all the findings even of a one-time consultative physician. Here, it was appropriate for the ALJ to consider what specific details the record revealed about Colgan's condition in order to determine her ability to work.

It was also proper for the ALJ to take into account Colgan's efforts at "caring for her 10- and 6-year old." App'x 270. The court refers to our decision in *Balsamo v. Chater*, 142 F.3d 75 (2d Cir. 1998), and suggests that the ALJ found that Colgan's ability to "care for her two young children and engage in activities necessary to her own welfare" was enough to "foreclose [her] entitlement to disability benefits." *Ante* at 19-20. The ALJ made no such finding. Colgan's ability to care for her children was only one of the reasons the ALJ gave for according little weight to Dr. Ward's opinion. In *Balsamo*, we described circumstances in which "a disabled person gamely chooses to endure pain in order to pursue important goals, such as attending church and helping his wife on occasion go shopping for their family," and we said "it would be a shame to hold this endurance against him in determining benefits *unless his conduct truly showed that he is capable of working*." 142 F.3d at 81-82 (internal quotation marks omitted and emphasis added). Here, the ALJ did not focus on intermittent activities, such as attending church or occasional shopping, that do not demonstrate capacity for work. Instead, the ALJ found that Colgan's ongoing activities in combination with the record as a whole showed she was "capable of working." *Id.* That finding is consistent both with our precedents and with substantial evidence in the record.

II

Having determined that Dr. Ward's check-box assessment was not entitled to controlling weight, the ALJ also properly accorded that assessment "little weight." App'x 43. To "determine how much weight, if any, to give" the treating physician's opinion, the ALJ "must explicitly consider … (1) the frequency, length, nature, and extent of treatment; (2) the amount of medical evidence supporting the opinion; (3) the consistency of the opinion with the remaining medical evidence; and (4) whether the physician is a specialist." *Estrella*, 925 F.3d at 95-96 (alteration omitted). Moreover, "[i]f … a searching review of the record assures us that the substance of the treating physician rule was not traversed, we will affirm." *Id.* at 96 (internal quotation marks omitted).

Substantial evidence supports the ALJ's decision to accord "little weight" to Dr. Ward's opinion on the check-box form. In *Halloran*, we "conclude[d] that the ALJ applied the substance of the treating physician rule" when it was "unclear on the face of the ALJ's opinion whether the ALJ considered (or even was aware of) the applicability of the treating physician rule." 362 F.3d at 32. Here, the ALJ expressly acknowledged that Dr. Ward was a "treating source" and went on to identify aspects of the treatment record that contradicted Dr. Ward's assessment of Colgan's working ability. App'x 43-44. As in *Halloran*, the ALJ "explained the consistency of [the treating physician's] opinion with the record as a whole." 362 F.3d at 32 (internal quotation marks omitted). And as in *Halloran*, there is no ground for vacating the ALJ's decision.

The treating physician rule recognizes the possibility that a treating physician's opinion will be afforded no weight at all. *See*

Estrella, 925 F.3d at 95 ("[I]f the ALJ decides the opinion is not entitled to controlling weight, it must determine how much weight, *if any*, to give it.") (emphasis added). The ALJ in this case determined that Dr. Ward's opinion on the check-box form was entitled to "little weight," not none. App'x 43. Because substantial evidence supports that determination, the court is wrong to remand this case to the agency.

* * *

The ALJ—not Dr. Ward—is "responsible for making the determination or decision about whether [a claimant] meet[s] the statutory definition of disability." 20 C.F.R. § 404.1527(d)(1). Likewise, "the final responsibility for deciding" a claimant's "residual functional capacity … is reserved to the Commissioner." *Id.* § 404.1527(d)(2). These regulations would mean little if a conclusory check mark, devoid of reasoning, must receive "controlling deference" that supplants the agency's well-explained judgment. *Ante* at 12. I would affirm the district court, and therefore I dissent.