

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02977-MEH

VIRGINIA F. LAFLAN,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting Commissioner of the Social Security Administration,

Defendant.

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**ORDER**

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**Michael E. Hegarty, United States Magistrate Judge.**

Plaintiff, Virginia F. Laflan, appeals from the Social Security Administration (“SSA”) Commissioner’s final decision denying her application for disability insurance benefits (“DIB”), filed pursuant to Title II of the Social Security Act, 42 U.S.C. §§ 401-433, and her application for supplemental security income benefits (“SSI”), filed pursuant to Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1383c. Jurisdiction is proper under 42 U.S.C. § 405(g). The parties have not requested oral argument, and the Court finds it would not materially assist in the determination of this appeal. Because the ALJ incorrectly applied the law in determining that Plaintiff’s impairments do not meet one of those listed in 20 C.F.R. Part 404, Subpart P, Appendix 1, the Court reverses the decision of the ALJ and remands this case to the Commissioner for further proceedings.

**BACKGROUND**

**I. Plaintiff’s Conditions**

Plaintiff was born on November 22, 1985; she was twenty-six years old when she filed her application for DIB and SSI. [AR 260, 262]. Plaintiff claims she became disabled on January 1,

1995 due to mental and physical impairments. [*Id.*]

A. Mental Conditions

On February 1, 2011, Dr. Mac Bradley performed a psychopathologic assessment on Plaintiff. [AR 358–62]. Dr. Bradley noted that Plaintiff “was alert and attentive” and “could hear and understand conversational speech.” [AR 359]. After Dr. Bradley administered an IQ test, he diagnosed Plaintiff with dysthymic disorder and borderline intellectual functioning. [AR 360–61]. Notwithstanding this diagnosis, Dr. Bradley concluded that Plaintiff’s “ability to obtain productive employment, without assistance, is not impaired.” [AR 362].

The next record concerning Plaintiff’s mental impairments occurs on April 22, 2013, when Plaintiff reported to Community Reach Center (“CRC”).<sup>1</sup> [AR 983]. Plaintiff stated that she struggles with anxiety, experiences difficulty sleeping, and has symptoms of post traumatic stress disorder (“PTSD”). [AR 984]. On May 6, 2013, CRC completed a treatment plan for Plaintiff, which noted that CRC would assist Plaintiff with her “anxiety and depressive symptoms.” [AR 1003]. On the same day, Plaintiff had an appointment with Blake Roberts, a licensed professional counselor. [AR 1077]. Plaintiff reported that she was diagnosed with bi-polar disorder in elementary school and generally had a “horrible” childhood. [*Id.*]

Plaintiff returned to CRC for a regularly scheduled appointment on May 22, 2013. [AR 1078]. The professional counselor noted that Plaintiff “made progress towards opening up in therapy and sharing her concerns. She endorses symptoms consistent with PTSD and seems to be

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<sup>1</sup> Community Reach Center is a community mental health center that provides programs and services to help meet its patients’ mental health needs. *About Community Reach Center*, Community Reach Center (June 23, 2017), <https://www.communityreachcenter.org/about-community-reach-center/>.

triggered by recent events . . . .” [*Id.*] After this meeting, Plaintiff stopped scheduling appointments at CRC for nearly a year, because Plaintiff’s counselor informed her that she cannot bring her youngest child to her appointments. [AR 834].

On August 23, 2013, Plaintiff reported to Salud Family Health Centers for a consultation regarding her behavioral health needs. [AR 815]. Dr. Carla Pallares referred Plaintiff to the Pennock Center for Therapy and encouraged Plaintiff to make a medical appointment to manage her medications. [*Id.*] On August 26, 2013 and September 4, 2013, Plaintiff visited Dr. Lauren Ramnarine, who prescribed Plaintiff with medication for anxiety, depression, and PTSD. [AR 776]. Dr. Ramnarine continued to see Plaintiff for regular medication management appointments. [AR 752, 755]. At one of these follow-ups, Dr. Ramnarine assessed Plaintiff with “depress psychosis-mild.” [AR 784–85].

On September 5, 2013, Plaintiff reported to the Pennock Center for an initial assessment. [AR 773–74]. Among other issues, Plaintiff requested treatment for anxiety, agitation, hyper vigilance, flashbacks, and paranoia. [*Id.*] Furthermore, the treatment notes from a follow-up appointment with Dr. Ramnarine indicate Plaintiff was diagnosed with obsessive compulsive disorder at the Pennock Center. [AR 753]. Rachel Morici, a licensed professional counselor, created a treatment plan for Plaintiff, which included teaching interpersonal effectiveness strategies and using behavioral therapy materials to teach self-soothing. [AR 775]. Beginning on September 5, 2013, Ms. Morici scheduled weekly treatment sessions with Plaintiff, some of which Plaintiff failed to attend. [AR 776–80].

Plaintiff returned to CRC for treatment on May 21, 2014. [AR 1005]. CRC created a twelve-month treatment plan, which included individual therapy sessions and meetings with

psychiatrists for medication adjustments. [AR 1007–08, 1079]. At one of the therapy sessions, Plaintiff reported hearing a derogatory male voice that largely subsides when she takes her medication. [AR 1028]. Additionally, Plaintiff stated she sometimes sees a shadow in her peripheral vision. [*Id.*]

Plaintiff continued with her regular out-patient treatment sessions until August 29, 2014, when she reported to a voluntary inpatient treatment program at CRC. [AR 1094]. During her approximately one-month stay at this program, Plaintiff participated in group and individual therapy sessions and medication monitoring. [AR 1036–38, 1094–1106]. During one of the group sessions, Plaintiff stated that she cannot read or write well and is often embarrassed, because her young children can read better than she. [AR 1096]. Plaintiff had mixed progress during the program. At times, Plaintiff isolated herself in her room for the majority of the day, [AR 1103], while on other days Plaintiff engaged in treatment sessions and contributed to the group discussions. [AR 950]. By September 16, 2014, Plaintiff stated she was using multiple coping skills, such as calling a friend, journaling, singing, and praying. [AR 970]. Plaintiff discharged from the inpatient program on September 23, 2014. [AR 883].

After her discharge, Plaintiff regularly visited CRC for refills of her medication, but only occasionally attended group and individual therapy sessions. [AR 895, 899, 904–926, 977–78]. On April 7, 2015, a case manager at CRC informed Plaintiff that if she did not attend therapy sessions more frequently, CRC would close her file. [AR 927]. Plaintiff subsequently resumed with individual counseling. [AR 930, 934, 936].

On August 31, 2015, Plaintiff had a follow-up appointment with Susan Ponder at CRC. [AR 1062–66]. Plaintiff reported that “she is doing pretty good other than getting easily side tracked.”

[AR 1063]. She stated that her current level of depression is a six out of ten, and her “mood ups and downs have improved.” [Id.] On September 14, 2015, Plaintiff was diagnosed with borderline intellectual functioning. [AR 1001]. Plaintiff continued to attend individual therapy sessions and receive medication at CRC at least until December 4, 2015. [AR 938–44].

**B. Physical Conditions**

The relevant portion of Plaintiff’s medical history regarding her physical impairments begins on March 18, 2011, when she reported to the emergency department at the University of Colorado Hospital. [AR 1274–83]. Plaintiff complained of numbness and tingling in her arms. [AR 1274]. On July 10, 2011, Plaintiff returned to the emergency department, where she reported numbness, migraines, and neuropathy. [AR 1286]. The hospital performed a head CT scan, which had normal results. [AR 1287]. Plaintiff again reported to the University of Colorado Hospital on March 6, 2012. [AR 1304–08]. Plaintiff complained of worsening headaches, blurry vision, and increased fatigue as a result of being assaulted two days prior. [AR 1308].

The next record concerning Plaintiff’s physical impairments occurred on May 8, 2013, when Plaintiff reported to Salud Family Health Centers with complaints of numbness and tingling in her hands and feet. [AR 819]. Kristin Burden, P.A., treated Plaintiff for paresthesia.<sup>2</sup> On May 14, 2014, during an appointment with Dr. Ramnarine, Plaintiff reported that she had been feeling regular arm and leg numbness for the past eight months, which causes her to drop items out of her left hand. [AR 831]. Dr. Ramnarine referred Plaintiff to a neurologist for nerve conduction tests. [AR 833].

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<sup>2</sup> “Paresthesia refers to a burning or prickling sensation that is usually felt in the hands, arms, legs, or feet, but can also occur in other parts of the body.” *Paresthesia Information Page*, National Institute of Neurological Disorders and Stroke (June 23, 2017), <https://www.ninds.nih.gov/Disorders/All-Disorders/Paresthesia-Information-Page>.

After reviewing the results of these tests, Dr. Ramnarine diagnosed Plaintiff with peripheral neuropathy.<sup>3</sup> [AR 826–27]. On August 21, 2014, Plaintiff began treatment for neuropathy at the University of Colorado Hospital’s outpatient clinic. [AR 1347–58].

On October 22, 2014, Plaintiff visited the outpatient clinic because of increased migraines. [AR 1383]. The doctor ordered a brain MRI, which revealed generally unremarkable results. [AR 1386, 1426–30].

## **II. Procedural History**

Plaintiff alleges she first became disabled on January 1, 1995. [AR 260]. The SSA initially denied Plaintiff’s application for DIB and SSI on June 25, 2012. [AR 168–69]. After a hearing, an ALJ issued an opinion on June 5, 2013, determining that Plaintiff is not disabled. [AR 25–36]. According to the ALJ, although Plaintiff has severe impairments, they do not meet the severity of one of the impairments listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. [AR 29–31]. Specifically, the ALJ held that Plaintiff does not meet Listing 12.05 for mental retardation, because the evidence does not document significant deficits of adaptive functioning. [AR 30–31]. Furthermore, the ALJ found that, despite Plaintiff’s limitations, she is capable of performing her past work as a dining room attendant, a deep fat fry cook, and a baker’s helper. [AR 34–35]. After the SSA Appeals Council denied Plaintiff’s request for review, Plaintiff appealed to this District. *See* [AR 553–65, 570–73].

On September 14, 2015, the Honorable Michael J. Watanabe reversed the ALJ’s decision.

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<sup>3</sup> Peripheral neuropathy results from damage to an individual’s peripheral nerves. *Peripheral neuropathy*, Mayo Clinic (June 23, 2017), <http://www.mayoclinic.org/diseases-conditions/peripheral-neuropathy/home/ovc-20204944>. It often causes weakness, numbness, and pain in an individuals hands and feet. *Id.*

[AR 553–65]. According to Judge Watanabe, the ALJ’s holding that Plaintiff does not meet Listing 12.05 was not based on substantial evidence, because the medical opinions on which the ALJ relied do not “offer support for the ALJ’s finding.” [AR 559]. Accordingly, Judge Watanabe remanded the case to the ALJ for “further fact-finding on the sole question of whether [Plaintiff] has ‘deficits in adaptive functioning’ sufficient to meet Listing 12.05’s capsule definition.” [AR 561].

On February 23, 2016, the ALJ held a subsequent hearing. [AR 610]. Plaintiff and a vocational expert testified at the hearing. [AR 517–50]. The ALJ issued her second decision denying Plaintiff’s application for DIB and SSI on May 10, 2016. [AR 493–508]. Although the ALJ found that the evidence demonstrated deficits in adaptive functioning, the ALJ concluded they were not caused only by Plaintiff’s subaverage intellectual functioning. [AR 500]. As a result, the ALJ held that Plaintiff does not meet Listing 12.05. [*Id.*] Furthermore, the ALJ found jobs exist in the national economy that Plaintiff can perform. [AR 507]. Accordingly, the ALJ determined Plaintiff was not disabled from January 1, 1995 to the date of her decision. [AR 508].

The SSA Appeals Council subsequently denied Plaintiff’s request for review, making the SSA Commissioner’s denial final for the purpose of judicial review. [AR 482–85]; *see* 20 C.F.R. § 416.1481. Plaintiff timely filed her Complaint with this Court seeking review of the ALJ/Commissioner’s final decision. ECF No. 1.

### **III. Hearing Testimony**

The ALJ held a second hearing regarding Plaintiff’s applications on February 23, 2016. [AR 518–49]. Plaintiff and a vocational expert testified at the hearing. [*Id.*]

Plaintiff first spoke about her current abilities. [AR 522–24]. She stated that she drives once or twice a week, but her husband does most of the driving. [AR 522]. Although Plaintiff does not

take the trash out or garden, she is able to do the laundry, go grocery shopping, and occasionally cook dinner. [AR 529–30].

Plaintiff also testified about her education and employment history. [AR 524–25]. She first stated that she completed up to the seventh or eighth grade, and she currently reads between a first and third grade level. [AR 523]. Regarding her prior employment, she testified that she worked as a cashier for King Soopers for a couple of months, but had to stop because “[i]t was hard to remember stuff, like, items and stuff.” [AR 524]. She then worked as a bagger for four or five months, but had to leave due to family issues. [*Id.*]

The ALJ asked Plaintiff whether she has physical issues that prevent her from seeking other employment, to which Plaintiff responded that her fingers and hands go numb often. [AR 525]. Plaintiff also stated that she experiences panic attacks lasting approximately thirty minutes “a couple of times a week or a day . . . .” [AR 528].

Plaintiff’s attorney then asked Plaintiff a series of questions regarding her daily routine and abilities. [AR 533–43]. Plaintiff stated that she has trouble sleeping and gets only four to six hours of sleep per night. [AR 533]. As a result, when Plaintiff tries to accomplish tasks during the day, she frequently gets sidetracked and cannot complete her chores. [AR 534]. Additionally, Plaintiff testified that she has difficulty remembering the times of her appointments, which causes her to be late or miss them altogether. [AR 540–41].

The ALJ then questioned the vocational expert. [AR 545–46]. The ALJ asked the expert to imagine a hypothetical person who can have occasional interaction with supervisors and coworkers, but cannot climb ladders and scaffolds, work at unprotected heights, operate a motor vehicle, or perform any tasks that require reading. [AR 545]. The ALJ asked the expert whether

this individual could perform Plaintiff's past work, to which the expert responded "no." [*Id.*] The ALJ then asked the expert whether there are other jobs in the national economy that the hypothetical person could perform. [*Id.*] The vocational expert stated that the individual could maintain employment as a laundry worker, dishwasher, or floor waxer. [*Id.*]

Next, Plaintiff's attorney examined the vocational expert. [AR 546–49]. The expert first testified that if the individual in the ALJ's hypothetical had to take two unscheduled thirty-minute breaks per day, the person would be excluded from competitive employment. [AR 546]. Additionally, the expert stated that a laundry worker, dishwasher, or floor waxer could be absent no more than one day per month and would have to be on task ninety percent of the day. [AR 547].

The ALJ issued an unfavorable decision on May 10, 2016. [AR 493–508].

## **LEGAL STANDARDS**

### **I. SSA's Five-Step Process for Determining Disability**

Here, the Court will review the ALJ's application of the five-step sequential evaluation process used to determine whether an adult claimant is "disabled" under Title II of the Social Security Act, which is generally defined 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. § 1382c(a)(3)(B); *see also Bowen v. Yuckert*, 482 U.S. 137, 140 (1987).

Step One determines whether the claimant is presently engaged in substantial gainful activity. If he is, disability benefits are denied. *See* 20 C.F.R. § 404.1520. Step Two analyzes whether the claimant has a medically severe impairment or combination of impairments, as governed by 20 C.F.R. § 404.1520(c). If the claimant is unable to show that his impairment(s) would have

more than a minimal effect on his ability to do basic work activities, he is not eligible for disability benefits. *See id.* Step Three analyzes whether the impairment is equivalent to one of a number of listed impairments deemed to be so severe as to preclude substantial gainful employment. *See* 20 C.F.R. § 404.1520(d). If the claimant's impairment is listed or is equivalent to a listed impairment, he is presumed to be disabled. If the impairment does not satisfy Step Three, the ALJ must proceed to Step Four, which requires the claimant to show that his impairment(s) and assessed residual functional capacity ("RFC") prevent him from performing work that he has performed in the past. If the claimant is capable of performing his previous work, he is not disabled. *See* 20 C.F.R. § 404.1520(e), (f). However, if the claimant establishes a *prima facie* case of disability based on the previous four steps, the analysis proceeds to Step Five, where the SSA Commissioner has the burden to demonstrate that the claimant has the RFC to perform other work in the national economy in view of his age, education, and work experience. *See* 20 C.F.R. § 404.1520(g).

## **II. Standard of Review**

This Court's review is limited to whether the final decision is supported by substantial evidence in the record as a whole and whether the correct legal standards were applied. *See Williamson v. Barnhart*, 350 F.3d 1097, 1098 (10th Cir. 2003); *see also White v. Barnhart*, 287 F.3d 903, 905 (10th Cir. 2001). Thus, the function of the Court's review is "to determine whether the findings of fact . . . are based upon substantial evidence and inferences reasonably drawn therefrom. If they are so supported, they are conclusive upon the reviewing court and may not be disturbed." *Trujillo v. Richardson*, 429 F.2d 1149, 1150 (10th Cir. 1970); *Bradley v. Califano*, 573 F.2d 28, 31 (10th Cir. 1978). "Substantial evidence is more than a scintilla, but less than a preponderance; it is such evidence that a reasonable mind might accept to support the conclusion." *Campbell v. Bowen*,

822 F.2d 1518, 1521 (10th Cir. 1987) (citing *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). The Court may not re-weigh the evidence nor substitute its judgment for that of the ALJ. *Bowman v. Astrue*, 511 F.3d 1270, 1272 (10th Cir. 2008) (citing *Casias v. Sec’y of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991)). However, reversal may be appropriate when the ALJ either applies an incorrect legal standard or fails to demonstrate reliance on the correct legal standards. *See Winfrey v. Chater*, 92 F.3d 1017, 1019 (10th Cir. 1996).

### **THE ALJ’S RULING**

The ALJ first ruled that Plaintiff met the insured status requirements of the Social Security Act through March 31, 2011. [AR 496]. Next, the ALJ determined that Plaintiff has engaged in substantial gainful activity since January 1, 1995, such as working thirty-five hours per week as a cashier and bagger. [*Id.*] Accordingly, “[s]he cannot be found disabled during the time she performed this work.” [*Id.*] At step two, the ALJ held that Plaintiff has the following severe impairments: borderline intellectual functioning, learning disorder versus dyslexia, dysthymic disorder versus major depressive disorder, generalized anxiety disorder, panic disorder, obsessive-compulsive disorder, and PTSD. [AR 496–98].

Moving to step three, the ALJ found Plaintiff does not have an impairment that meets or equals the severity of one of those listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. [AR 499 – 500]. The ALJ considered whether Plaintiff’s impairments meet Listings 12.02, 12.04, 12.05, and 12.06. [*Id.*] First, the ALJ held that “[t]he ‘B’ criteria of sections 12.02, 12.04, and 12.06 are not satisfied in that the claimant’s mental impairments have resulted in no more than mild restrictions in her activities of daily living.” [AR 499]. The ALJ then determined the evidence does not support a finding that Plaintiff has an intellectual disability under Listing 12.05(C). [AR 499–500]. In

determining whether Plaintiff suffers from deficits in adaptive functioning—a necessary element of Listing 12.05—the ALJ considered whether the evidence demonstrates significant limitations in two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. [AR 499–500]. The ALJ held that “the evidence as a whole supports the existence of significant limitations in social/interpersonal skills, functional academic skills, and work.” [AR 500]. However, the ALJ went on to find that Plaintiff does not meet Listing 12.05, because her limitations result from “a combination of her severe mental impairments and not primarily from her borderline intellectual functioning.” [*Id.*]

The ALJ then discussed step four, where she held that Plaintiff has the RFC to perform a full range of work at all exertional levels, but cannot climb ladders, work at unprotected height or with unprotected machinery, read as a part of her job duties, or operate a motor vehicle. [AR 500–06]. Additionally, the ALJ found Plaintiff is limited to simple, routine tasks, and can interact occasionally with supervisors, coworkers, and the public. [*Id.*] In making these determinations, the ALJ considered Plaintiff’s medical records, the results of the consultative examinations, and Plaintiff’s activities of daily living. [*Id.*]

Although the ALJ held Plaintiff is unable to work in her prior employment, the ALJ found jobs exist in the national economy that Plaintiff can perform. [AR 506–07]. Specifically, Plaintiff has the RFC to maintain employment as a laundry worker, floor waxer, or dishwasher. [*Id.*] Accordingly, the ALJ held that Plaintiff was not disabled from January 1, 1995 through the date of her decision. [AR 508].

## ISSUES ON APPEAL

On appeal, Plaintiff alleges the following errors by the Commissioner: (1) failing to find that Plaintiff's impairments meet Listing 12.05 and (2) failing to consider Plaintiff's physical impairments when calculating her RFC. Pl.'s Opening Br. 16–21, ECF No. 17.

### ANALYSIS

#### **I. The ALJ's Holding That Plaintiff Does Not Meet Listing 12.05(C)**

The Social Security Administration's Listing of Impairments includes Section 12.00 titled, "Mental Disorders." In this case, Plaintiff challenges the ALJ's holding that she does not meet the requirements of Listing 12.05 for intellectual disability. When the ALJ issued her opinion in May 2016, Listing 12.05 provided:

12.05 Intellectual disability: Intellectual disability refers to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; i.e., the evidence demonstrates or supports onset of the impairment before age 22.

The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied.

A. Mental incapacity evidenced by dependence upon others for personal needs (e.g., toileting, eating, dressing, or bathing) and inability to follow directions, such that the use of standardized measures of intellectual functioning is precluded;

OR

B. A valid verbal, performance, or full scale IQ of 59 or less;

OR

C. A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function;

OR

D. A valid verbal, performance, or full scale IQ of 60 through 70, resulting in at least two of the following:

1. Marked restriction of activities of daily living; or
2. Marked difficulties in maintaining social functioning; or
3. Marked difficulties in maintaining concentration, persistence, or pace; or
4. Repeated episodes of decompensation, each of extended duration.

20 C.F.R. Pt. 404, subpt. P, app. 1 (2016).

A claimant must meet the “capsule” definition in addition to meeting one of the four severity prongs listed in subsections A–D. *Barnes v. Barnhart*, 116 F. App’x 934, 939 (10th Cir. 2004) (“[I]t is now clear that the capsule definition imposes additional elements to the claimant’s burden under Listing 12.05(C) and (D).”). Therefore, a claimant cannot satisfy Listing 12.05(C) without first showing that (1) she has significantly subaverage intellectual functioning, (2) she has deficits in adaptive functioning, and (3) those deficits manifested prior to age twenty-two. *Id.* “‘Adaptive functioning’ . . . refers to how effectively an individual copes with common life demands and how well [he or she] meet[s] the standards of personal independence of someone with similar characteristics.” *Haddock v. Astrue*, No. 09-cv-01922-LTB, 2010 WL 2197403, at \*4 (D. Colo. May 28, 2010) (citation omitted).

In determining whether a particular claimant satisfies the capsule definition, the ALJ cannot create her own standard for deficits in adaptive functioning. *Barnes*, 116 F. App’x at 942. Instead, the ALJ must adopt and apply one of the four definitions from the major professional organizations. *Id.*; Technical Revisions to Medical Criteria for Determinations of Disability, 67 Fed. Reg. 20018, 20022 (Apr. 24, 2002) (stating that the Commissioner allows “use of any of the measurement methods recognized and endorsed by the professional organizations”).

Here, the ALJ adopted the definition used in the DSM-IV. [AR 499–500]. Under this standard, mental health professionals consider whether an individual has significant limitations in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. *Barnes*, 116 F. App’x at 942; 67 Fed. Reg. at 20022. The ALJ found that “the evidence as a whole supports the existence of significant limitations in social/interpersonal skills, functional academic skills, and work.” [AR 500]. However, the ALJ held that Plaintiff’s “limitations of functional academic skills result from a combination of her borderline intellectual functioning and her learning disorder versus dyslexia.” [*Id.*] Additionally, her “limitations in her ability to work result from the combination of her severe mental impairments and not primarily from her borderline intellectual functioning.” [*Id.*] Because Plaintiff’s limitations in adaptive functioning are not caused only by her intellectual impairment, the ALJ held that Plaintiff does not meet Listing 12.05. [*Id.*]

Plaintiff argues that no statute, regulation, rule, or case law requires that Plaintiff’s deficits in adaptive functioning be caused only by her borderline intellectual functioning. Pl.’s Opening Br. 17. According to Plaintiff, after “the ALJ found [Plaintiff] had significant limitations in the areas of social/interpersonal skills, functional academic skills, and work . . . [Plaintiff] ha[d] satisfied the criteria and should [have been] found disabled.” *Id.*

The Court holds the ALJ improperly determined that deficits in adaptive functioning must be caused exclusively by the claimant’s intellectual disability. Listing 12.05 arguably requires that the deficits in adaptive functioning be at least partially caused by the claimant’s subaverage intellectual functioning. *See Harris v. Comm’r of Soc. Servs.*, No. 3:08cv472, 2010 WL 749654, at \*11 (S.D. Ohio Mar. 1, 2010) (affirming the ALJ’s finding that the plaintiff does not meet Listing

12.05, because the “[p]laintiff’s academic problems were caused by substance abuse rather than mental retardation”); *see also Eddy v. Comm’r of Soc. Servs.*, No. 10-14891, 2011 WL 6963105, at \*3 (E.D. Mich. Aug. 29, 2011) (stating that the plaintiff “must establish that her deficits in adaptive functioning (caused by sub-average intellectual functioning) manifested themselves before age 22, in order to meet section 12.05 of the Listing of Impairments”).

However, neither the text of the listing, nor subsequent interpretations of it, support the ALJ’s finding that the deficits in adaptive functioning must be “due entirely to her borderline intellectual functioning.” Def.’s Resp. Br. 7, ECF No. 18. To the contrary, the listing suggests that a claimant who meets Listing 12.05(C) will almost certainly have other impairments that contribute to her deficits in adaptive functioning. Subpart (C) requires that the claimant have “a physical or other mental impairment imposing an additional and significant work-related limitation or function.” 20 C.F.R. Pt. 404, subpt. P, app. 1 (2016). If a claimant has a separate physical or mental impairment, as subpart (C) requires, it is likely that it will contribute to the claimant’s ability to communicate, care for herself, perform academically, and engage in gainful employment. Therefore, the ALJ’s holding that a claimant must show her deficits are caused entirely by her subaverage intellectual functioning is inconsistent with subpart (C)’s requirement that a claimant have a second impairment. Such an interpretation would significantly undercut, if not entirely eliminate, the instances when a claimant is disabled pursuant to Listing 12.05(C).

Furthermore, the language of the capsule definition does not suggest that the claimant’s subaverage intellectual functioning must be sole cause of her deficits in adaptive functioning. The regulation states only that the claimant must have subaverage intellectual functioning “*with* deficits in adaptive functioning.” 20 C.F.R. Pt. 404, subpt. P, app. 1 (2016) (emphasis added). If the SSA

wanted to require that the deficits in adaptive functioning be caused entirely by the claimant's intellectual disability, it could have said so. The fact that the SSA chose to require only that the subaverage intellectual functioning be accompanied by deficits in adaptive functioning supports the Court's holding that the listed impairment need not be the sole cause of the adaptive functioning deficits.

Therefore, the ALJ's analysis of Listing 12.05(C) was in error. The ALJ rejected Plaintiff's applications, because Plaintiff's limitations "result from the combination of her severe mental impairments and not primarily from her borderline intellectual functioning." [AR 500]. Once the ALJ held Plaintiff has deficits in adaptive functioning that are at least partially related to her intellectual functioning impairment, the ALJ's analysis on that portion of Listing 12.05 was complete. The ALJ should have then analyzed whether Plaintiff's impairment manifested before age twenty-two. Because the ALJ erred in this respect, remand is appropriate.

Plaintiff asks the Court to remand to the ALJ for an immediate award of DIB and SSI. Pl.'s Opening Br. 21. According to Plaintiff, this remedy is appropriate, because "the ALJ's decision is legally flawed on its face and correction of any of these errors would necessarily result in a finding of 'disabled.'" *Id.* The Court disagrees and finds that remand for an award of benefits is improper. The ALJ failed to discuss whether Plaintiff's deficits in adaptive functioning manifested before the age of twenty-two, which is a necessary element to a finding that Plaintiff meets Listing 12.05. Because additional fact finding on this issue would serve a useful purpose, remand for an award of benefits is inappropriate. *Sorenson v. Bowen*, 888 F.2d 706, 713 (10th Cir. 1989) ("Outright reversal and remand for immediate award of benefits is appropriate when additional fact finding would serve no useful purpose." (quoting *Williams v. Bowen*, 844 F.2d 748, 760 (10th Cir. 1988))).

## II. The ALJ's Consideration of Plaintiff's Physical Impairments

Plaintiff also argues the ALJ erred by labeling Plaintiff's migraines and neuropathy non-severe and by failing to consider these impairments when determining Plaintiff's RFC. Pl.'s Opening Br. 18–21. The Court disagrees.<sup>4</sup>

First, the ALJ cited to substantial evidence in support of her finding that Plaintiff's physical impairments are not severe. The ALJ noted that the record documents only minimal physical complaints and treatment. [AR 498]. Furthermore, according to the ALJ, a review of the minor physical complaints appearing in the record confirms they were not severe. [AR 497–98]. Although Plaintiff reported numbness and tingling in her arms, the resulting exam was not concerning. [AR 497]. Furthermore, the ALJ noted that notwithstanding Plaintiff's complaints of headaches, Plaintiff's head CT scan was normal. [*Id.*] Plaintiff's testimony that ibuprofen takes "the edge of her headache pain" also supports a finding that Plaintiff's pain was not severe. [AR 498]. The ALJ cited Dr. Joseph Sever's opinion, which concluded Plaintiff does not have physical symptoms that would limit her from performing any job activity. [*Id.*] The Court holds that the ALJ supported her findings with "more than a scintilla" of evidence. *Campbell*, 822 F.2d at 1521. To be sure, the record contains evidence supporting a conclusion that Plaintiff's physical impairments affect her ability to function. *See* [AR 525–26; 539]. However, the Court may not re-weigh the evidence and substitute its judgment for that of the ALJ. *Bowman*, 511 F.3d at 1272. Therefore, the ALJ did not err in concluding that Plaintiff's physical impairments were not substantial.

Second, the Court holds that, contrary to Plaintiff's assertion, the ALJ considered Plaintiff's

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<sup>4</sup> The Court notes that this issue will be relevant to the ALJ's decision on remand only if the ALJ re-analyzes Listing 12.05 at step three and concludes that Plaintiff's deficits in adaptive functioning did not manifest prior to Plaintiff turning twenty-two.

non-severe physical impairments when determining Plaintiff's RFC. As stated by the ALJ, "the undersigned has considered the effects of the claimant's non-severe physical impairments, particularly her neuropathy, in assessing the residual functional capacity, which precludes her from climbing ladders/scaffolds, working at unprotected heights or with dangerous, unprotected machinery, or operating a motor vehicle as part of her job duties." [AR 498]. Therefore, the Court holds that the ALJ properly considered Plaintiff's physical impairments.

### CONCLUSION

In sum, the ALJ erred by requiring that Plaintiff's deficits in adaptive functioning be caused only by her borderline intellectual functioning. The ALJ's conclusion that Plaintiff has significant limitations in adaptive functioning that are related, at least in part, to her subaverage intellectual functioning, was sufficient to satisfy the first two requirements of Listing 12.05's capsule definition. On remand, the ALJ must consider whether Plaintiff's deficits in adaptive functioning initially manifested before age twenty-two. The Court does not suggest a result that should be reached on remand; rather, the Court encourages the parties, the ALJ, and the Commissioner on remand to consider fully and anew the evidence and all issues raised. *See Kepler v. Chater*, 68 F.3d 387, 391–92 (10th Cir. 1995) ("We do not dictate any result [by remanding the case]. Our remand simply assures that the correct legal standards are invoked in reaching a decision based on the facts of the case.") (citation and quotation marks omitted). Accordingly, the decision of the ALJ that Plaintiff Virginia F. LaFlan was not disabled is **reversed and remanded** to the Commissioner for further consideration and/or clarification in accordance with this order.

Dated at Denver, Colorado this 19th day of July, 2017.

BY THE COURT:

A handwritten signature in black ink that reads "Michael E. Hegarty". The signature is written in a cursive style with a large initial 'M' and a distinct 'H'.

Michael E. Hegarty  
United States Magistrate Judge