

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DIANA AGUILAR, :
 :
 Plaintiff, :
 :
 v. : CASE NO.3:15CV643 (DFM)
 :
 CAROLYN W. COLVIN, :
 COMMISSIONER OF SOCIAL SECURITY, :
 :
 Defendant. :

RULING ON PENDING MOTIONS

Plaintiff, Diana Aguilar, seeks judicial review of the denial of her applications for disability insurance benefits ("DIB") and supplemental security income ("SSI").¹ Currently

¹Plaintiff filed applications for DIB and SSI on June 22, 2012. She alleged a disability onset date of July 30, 2011. Her applications were denied initially and upon reconsideration. (R. 17.)

The Administrative Law Judge ("ALJ") found at step 1 that plaintiff has not engaged in substantial gainful activity since her alleged onset date. (R. 20.) At step 2, the ALJ found that plaintiff has the following severe impairments: affective disorder/depression and obesity. (R. 20.) She found at step 3 that plaintiff's conditions did not meet or medically equal a listed impairment. (R. 20.) She determined that plaintiff retained the residual functional capacity ("RFC") to perform a medium exertional work. The ALJ found that plaintiff is able to maintain routine work, with few steps and few changes day to day, in an environment that includes no timed work or strict quotas. She can perform work that includes no tandem tasks or interaction with the general public; she is capable of only brief and superficial contact with others; and she should avoid concentrated exposure to fumes, odors, dusts, gases, and poorly ventilated areas. (R. 23.) At step 4, the ALJ determined that plaintiff is able to perform her past relevant work as a book packager. (R. 27.) She thus concluded that plaintiff was not disabled within the meaning of the Social Security Act. (R. 27.)

pending are plaintiff's motion to reverse the decision of the Commissioner of Social Security ("Commissioner") (doc. #15) and defendant's motion to affirm the decision of the Commissioner. (Doc. #16.) Pursuant to the court's order, counsel filed a joint stipulation of facts and medical chronology, which I incorporate by reference. (Doc. #15-1.) For the following reasons, plaintiff's motion is DENIED and defendant's motion is GRANTED.²

I. Legal Standard

The standards for determining an individual's entitlement to DIB and SSI, the Commissioner's five-step framework for evaluating claims, and the district court's review of the final decision of the Commissioner are well-settled. I am following those standards, but do not repeat them here.

II. Discussion

Plaintiff makes several arguments. She contends that the ALJ erred by (a) failing to find that plaintiff has a listed impairment; (b) committing factual errors in her evaluation of the evidence; (c) improperly applying the treating physician rule; (d) failing to properly assess plaintiff's credibility;

Plaintiff appealed the ALJ's decision to the Appeals Council, which denied her request for review on March 27, 2015. (R. 1-3.)

²This is not a recommended ruling. On November 6, 2015, the parties consented to the jurisdiction of a magistrate judge. (Doc. #14.) See 28 U.S.C. § 636(c); Fed.R.Civ.P. 73(b).

and (e) failing to consider plaintiff's non-severe impairments in her RFC determination. I consider each argument in turn.

A. Listed Impairment

Plaintiff first argues that the ALJ erred at step three by failing to find that her bipolar disorder meets or medically equals Listing 12.04 (bipolar disorder), 20 C.F.R. Pt. 404, Subpt. P, App. 1. Listing 12.04 is met when the requirements in both paragraphs A and B are satisfied, or when the requirements of paragraph C are satisfied.³ It is uncontested that plaintiff's mental impairments satisfy the paragraph A criteria,

³The paragraph A criteria for Listing 12.04 require medical documentation of three or more of the following: pressured speech; flight of ideas; inflated self-esteem; decreased need for sleep; distractibility; involvement in activities that have a high probability of painful consequences that are not recognized; or increase in goal-directed activity or psychomotor agitation. 20 C.F.R. Pt. 404, Subpt. P, App. 1.

To meet the paragraph C criteria, plaintiff must have "a medically documented history of chronic mental disorder of at least two years' duration that has caused more than a minimal limitation of ability to do basic work activities, with symptoms or signs currently attenuated by medication or psychosocial support, and one of the following: repeated episodes of decompensation, each of extended duration; or a residual disease process that has resulted in such marginal adjustment that even a minimal increase in mental demands or change in the environment would be predicted to cause the individual to decompensate; or current history of one or more years' inability to function outside a highly supportive living arrangement, with an indication of continued need for such an arrangement." (R. 22.) The ALJ determined that plaintiff does not satisfy the paragraph C criteria. (R. 22.) Plaintiff does not challenge this finding.

and she contends she also meets the paragraph B criteria. To satisfy paragraph B of § 12.04, the claimant's mental impairment

must result in at least two of the following: marked restriction of activities of daily living; marked difficulties in maintaining social functioning; marked difficulties in maintaining concentration, persistence, or pace; or repeated episodes of decompensation, each of extended duration. A marked limitation means more than moderate but less than extreme. Repeated episodes of decompensation, each of extended duration, means three episodes within 1 year, or an average of once every 4 months, each lasting for at least 2 weeks.

(R. 21.)

Plaintiff argues that she satisfies the paragraph B criteria because she is markedly impaired in activities of daily living; social functioning; and concentration, persistence, and pace. Plaintiff directs the court to a medical source statement completed by Dr. Raj Bansal and co-signed by licensed clinical social worker Nellie Rivera. (R. 517-20.) Although these clinicians assessed that plaintiff has obvious problems using good judgment regarding safety and dangerous circumstances and handling frustration appropriately, they did not indicate any serious problems with activities of daily living. Similarly, the clinicians assessed only a slight problem getting along with others without distracting them or exhibiting behavioral extremes, but no problem in any other area of social interaction. (R. 519.) With regard to task performance, the clinicians assessed only one serious problem--performing work

activity on a sustained basis. (R. 519.) They noted that plaintiff has obvious problems carrying out multi-step instructions; focusing long enough to finish assigned simple activities or tasks; and changing from one simple task to another. (R. 519.) She has no problem carrying out single-step instructions and only a slight problem performing basic work activities at a reasonable pace/finishing on time. (R. 519.)

The ALJ correctly determined that plaintiff's bipolar disorder does not satisfy the paragraph B criteria because she does not have any marked limitations, nor has she experienced any episodes of decompensation for an extended period of time. (R. 22.) The ALJ explained that the record, including plaintiff's own statements,⁴ supports a finding of only moderate difficulties in concentration, persistence, or pace, and mild limitations in activities of daily living and social functioning. (R. 21-22.) The ALJ's determination that plaintiff has not satisfied the paragraph B criteria of Listing 12.04 is supported by substantial evidence.

⁴Plaintiff completed a statement of daily activities in which she reported being able to independently care for herself and her children, drive, leave the house daily, bring her children to activities and sports practices, grocery shop, prepare meals, perform household chores, and manage the household bills using a computer. (R. 246-53.)

B. Alleged Factual Errors

Plaintiff next contends that the ALJ misconstrued the evidence and made several erroneous factual findings, namely: (1) that plaintiff independently cares for her two children; (2) that plaintiff stated she can perform her past work; and (3) that plaintiff has "continued to gain weight without any attempts to try to lose weight, such as diet restrictions and exercise." (R. 24.) Plaintiff argues that these errors led the ALJ to conclude that plaintiff is able to function at a higher level than she actually can.

Plaintiff maintains that her children spend a significant amount of time with their grandmother and that "they are involved with the Department of Children and Families." (Pl. Br., Doc. #15-1, p. 9.) To the contrary, the record reflects that plaintiff's children live with her and that she cares for them on a daily basis by getting them ready for school, preparing food for them, and taking them to their sports practices. (R. 246-52.) The children temporarily lived with their grandmother when plaintiff was working at night. (R. 408.) The Department of Children and Families was called on one occasion in 2011 because her autistic son reportedly had bruises. (R. 542.) There is no implication in the record that plaintiff is incapable of caring for her children, and plaintiff

testified that no one ever has complained about the way she takes care of her children. (R. 77.)

Plaintiff next criticizes the ALJ's characterization of her testimony about her ability to work. Plaintiff maintains that she testified she could not work because of her "mental statuses." (R. 65.) A review of the transcript, however, reveals that plaintiff testified that she could perform her past relevant work, subject to her temporary lifting restriction following bariatric surgery. (R. 27, 46-48.)

Lastly, when the ALJ's discussion of plaintiff's weight gain is read in context, it is clear that she did not ignore plaintiff's efforts to lose weight:

The medical evidence of record reveals that the claimant's obesity also contributes to her depression. She sought treatment for obesity in order to lose weight. In November 2012, the claimant reported gaining weight; however, she admitted to not being active or exercising In early 2013, the claimant continued to seek treatment for her obesity so that she could undergo bariatric surgery. Treatment notes from March 2013 reveal that the claimant continued to gain weight without any attempts to try to lose weight, such as diet restrictions and exercise She also attempted several diet programs, but was unsuccessful in losing weight. The claimant underwent bariatric surgery in September 2013 and the surgery went well with no complications. She continues to monitor her obesity

(R. 24-25.)

Upon review of the record, it is clear that the ALJ did not mischaracterize the evidence.

C. Treating Physician Rule

Plaintiff next argues that the ALJ did not properly evaluate the medical opinion evidence, specifically, the opinions of psychiatrist Dr. Bansal and licensed clinical social worker Rivera. She contends that the ALJ violated the treating physician rule by not giving these opinions controlling weight and by failing to articulate the precise amount of weight she assigned.

Under the treating physician rule, a treating physician's opinion is accorded controlling weight when that opinion is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] record." 20 C.F.R. § 404.1527(c)(2); see Halloran v. Barnhart, 362 F.3d 28, 31-32 (2d Cir. 2004). The ALJ must "give good reasons" for the weight accorded to the treating physician's opinion. See Halloran, 362 F.3d at 32; see also 20 C.F.R. § 404.1527(c)(2) ("We will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion."). It is well settled that "a social worker is not an 'acceptable medical source' for purposes of the treating physician rule." Van Allen v. Colvin, No. 3:15CV174 (DJS), 2016 WL 5660377, at *9 (D. Conn.

Sept. 29, 2016) (citing Monette v. Colvin, 654 Fed. App'x 516, 519 (2d Cir. July 7, 2016)).⁵

Here, contrary to plaintiff's contention, the ALJ explicitly stated that she assigned Dr. Bansal and social worker

⁵In this and other cases in this district, counsel for the plaintiff has pressed the argument that DeLeon v. Sec'y of Health and Human Svcs., 734 F.2d 930 (2d Cir. 1984) stands for the proposition that the treating physician rule applies to the opinions of mental health professionals such as licensed clinical social workers and licensed marriage and family therapists. The argument is wrong. See Kelsey v. Colvin, No. 3:14CV867(MPS) (DFM) (July 7, 2015) (explaining that DeLeon does not hold that licensed marriage and family therapists are mental health professionals whose opinion are subject to treating physician rule) (report & recommendation adopted Sept. 29, 2015); see also Davis v. Astrue, No. 3:13CV170(RNC) (DFM) (Sept. 9, 2016) ("The plaintiff argues that the ALJ erred because 'the findings and conclusions of a mental health provider . . . are entitled to weight usually given to a Treating Physician under the Treating Physician Rule' and cites in support DeLeon The plaintiff's argument is simply wrong.") (report & recommendation adopted Mar. 31, 2017); Nieves v. Colvin, No. 3:14CV1736 (VLB) (SALM) (Feb. 10, 2016) ("The applicable regulation lists those treating providers who are considered 'acceptable medical sources.' **Licensed Clinical Social Workers are not included in that list.** There is no need for further discussion. The insistence of plaintiff's counsel in pursuing this argument has needlessly wasted the time of the Court.") (emphasis in original) (report & recommendation adopted Mar. 20, 2017. Indeed, on February 10, 2016--just two months after plaintiff's counsel filed the instant memorandum of law--Magistrate Judge Merriam instructed plaintiff's counsel that "if she is now, or in the future becomes, involved in a case in which she argues that the treating physician rule should be applied to a professional such as a LCSW, a therapist, or any other professional not listed in 20 C.F.R. §404.1513, she must bring both this decision and the Kelsey decision to the attention of the presiding Court." See Nieves, No. 3:14CV1736 (VLB) (SALM) (Feb. 10, 2016) (citing Connecticut Rules of Professional Conduct 3.3(a)(1); 3.3(a)(2)). Inexplicably, plaintiff's counsel failed to.

Rivera's assessment "little weight." (R. 26.) She articulated the reason for this assignment of weight as follows:

The claimant sought treatment [with Dr. Bansal and social worker Rivera] from October 2009 to November 2012. They indicated the claimant experienced slight improvement in her mood swings and depression. They noted that the claimant has been compliant with medications and she has been stable. They noted she continually presented with normal hygiene. They remarked that the claimant has some problems with activities of daily living, slight problems with social interaction, and obvious problems with task performance. The undersigned has considered their opinions that the claimant has some problems, but not to the extent that she is disabled. They only provided an opinion up to November 2012, despite the claimant alleging ongoing mental health problems at the hearing. Adding further contrast to this was the claimant's own acknowledgement that she could perform her prior work, but for temporary lifting limitations status post her September 2013 surgery. For these reasons, their assessments have been given little weight.

(R. 26.)

The ALJ also assigned little weight to an updated statement by social worker Rivera from August 2013. The ALJ explained:

Nellie Rivera provided an updated statement in August 2013, stating that the claimant continues to seek treatment for mental health problems. She remarked that the claimant experiences mood swings and suicidal ideation, flashbacks, difficulties sleeping, and difficulties controlling her emotions/moods. Ms. Rivera also stated that the claimant has a tendency to become severely depressed, where she cries throughout the day unable to control her emotions. Due to her mental illness, Ms. Rivera stated that the claimant is not able to function on a daily basis as needed in a work environment. The undersigned gives her opinion little weight because she is not considered an acceptable medical source. Moreover, although she stated the claimant is not able to function on a daily basis as needed in a work environment, she has not provided

treatment notes to support her opinion. This assessment lacks support from objective findings.

(R. 27.)

It is clear from the ALJ's decision that she not only stated with specificity the weight given to these assessments, but also considered the supportability of the assessments against the record as a whole and provided "good reasons" for her assignment of little weight. The ALJ also correctly noted that because social worker Rivera is not an "acceptable medical source," her opinion is not entitled to controlling weight. See Conlin ex rel. N.T.C.B. v. Colvin, 111 F. Supp. 3d 376, 386 (W.D.N.Y. 2015) ("Licensed clinical social workers are not considered acceptable medical sources in 20 C.F.R. § 416.913(a), and their opinions are therefore not entitled to controlling weight."). There is no error.

D. Credibility Assessment

Plaintiff next argues that the ALJ failed to support her credibility assessment with substantial evidence.

Plaintiff first takes issue with the ALJ's boilerplate credibility determination: "After careful consideration of the evidence, the undersigned finds that the claimant's medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, the claimant's statements concerning the intensity, persistence and limiting effects of

these symptoms are not credible for the reasons explained in this decision.” (R. 25.) Plaintiff argues that while “[t]he ALJ is not required to discuss all of the evidence,” she “must explain why [she] rejects significant probative evidence.” (Pl. Br., Doc. #15-2, p. 13.) Here, the ALJ’s boilerplate language does not stand alone--it is paired with a detailed explanation of the evidence the ALJ considered when making her credibility determination. See Lumpkin v. Colvin, No. 12-cv-1817(DJS), 2014 WL 4065651, at *10 (D. Conn. Aug. 13, 2014) (notwithstanding use of boilerplate language, ALJ satisfied standard for assessing credibility where he also discussed plaintiff’s activities and inconsistent statements).

The ALJ compared plaintiff’s statements about her symptoms to the medical evidence and found that although the record supports plaintiff’s allegations of depression and obesity, it does not support the “elevated level of severity alleged.” (R. 25.) The ALJ explained that

[t]he limited treatment record reflects that the claimant’s mental health symptoms and obesity are largely stable when she is compliant with her medication and treatment regimen. The claimant has not required inpatient treatment for her conditions and there is no evidence that she is unable to function independently. She has not required Emergency Department presentations due to mental health problems. These other factors and the lack of objective medical evidence concerning the claimant’s impairments do not support her allegation of disability.

(R. 25.)

The ALJ also discussed the inconsistencies between plaintiff's reported daily activities and her allegations of disabling depression. The ALJ noted that plaintiff is able to live and function independently, while caring for her two children, one of whom has autism. Plaintiff performs household chores, cooks, cleans, does laundry, manages the household finances, drives, grocery shops, visits with her mother daily, and brings her children to their sports practices. (R. 25.) Plaintiff also is compliant with her diet and exercise regime and walks about four miles a day. (R. 26.) The ALJ concluded that plaintiff's "ability to perform these daily activities is contrary to the allegation of total disability." (R. 26.) The ALJ remarked that this finding is supported by plaintiff's testimony that she would be able to perform her past relevant work as a laundry attendant, subject to a temporary lifting restrictions following bariatric surgery. (R. 26, 46-49.)

"Credibility findings of an ALJ are entitled to great deference and therefore can be reversed only if they are 'patently unreasonable.'" Pietrunti v. Dir., Office of Workers' Comp. Programs, 119 F.3d 1035, 1042 (2d Cir. 1997). Here, the ALJ's credibility assessment is not patently unreasonable. It contains specific reasons for her credibility finding and is supported by substantial evidence. See Social Security Ruling 96-7P, 1996 WL 374186, at *2 (July 2, 1996) (ALJ's "decision

must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight."). The court will not "second-guess the credibility finding . . . where the ALJ identified specific record-based reasons for [her] ruling." Stanton v. Astrue, 370 F. App'x 231, 234 (2d Cir. 2010). There is no error.

E. RFC Determination

Plaintiff lastly argues that the ALJ erred by not taking into consideration all of her medically determinable impairments--whether severe or not--when making her RFC determination.⁶ See SSR 96-8P, 1996 WL 374184, at *5 (July 2, 1996) ("In assessing RFC, the adjudicator must consider limitations and restrictions imposed by all of an individual's impairments, even those that are not 'severe.'"). Specifically, plaintiff contends that the ALJ failed to consider the

⁶The ALJ found that plaintiff has the RFC to perform a medium exertional work. She assessed that plaintiff is able to maintain routine work, with few steps and few changes day to day, in an environment that includes no timed work or strict quotas. She can perform work that includes no tandem tasks or interaction with the general public; she is capable of only brief and superficial contact with others; and she should avoid concentrated exposure to fumes, odors, dusts, gases, and poorly ventilated areas. (R. 23.)

limitations caused by plaintiff's urinary stress incontinence; gastroesophageal reflux disease and hiatal hernia; and hip, knee, and joint pain. Plaintiff argues that had the ALJ taken these limitations into consideration, she would have found that plaintiff does not have the RFC to perform medium work.

The ALJ noted that when plaintiff originally applied for disability benefits, and again at the hearing, she stated that her ability to work was limited only by her mental impairments and obesity. (R. 23, 65, 220.) At the time of the hearing, the only physical conditions for which plaintiff was being treated were obesity, asthma, and a thyroid condition. (R. 52.) She testified that her asthma and thyroid problem were well controlled with medication and that her primary care physician had not placed her under any restrictions due to these conditions. (R. 52-53.)

Plaintiff bears the burden of establishing her RFC. 20 C.F.R. § 404.1512(c). "Step Four findings need only afford[] an adequate basis for meaningful judicial review, appl[y] the proper legal standards, and [be] supported by substantial evidence such that additional analysis would be unnecessary or superfluous There is no requirement that the ALJ explicitly mention every one of the claimant's limitations." Connole v. Astrue, No. 3:10-CV-01382 (JAM), 2016 WL 1626816, at *5 (D. Conn. Apr. 25, 2016) (citation and internal quotation

marks omitted); see, e.g., McIntyre v. Colvin, 758 F.3d 146, 150 (2d Cir. 2014) (affirming ALJ's findings at step four that "did not explicitly include [plaintiff's] non-exertional functional limitations.").

In support of her contention that the ALJ ignored several of her conditions, plaintiff cites only to the diagnoses of these conditions. Durgan v. Astrue, No. 12-CV-279 (DNH/CFH), 2013 WL 1122568, at *3 (N.D.N.Y. Feb. 19, 2013) ("[A] diagnosis alone is insufficient to establish a severe impairment as instead, the plaintiff must show that the medically determinable impairments significantly limit the ability to engage in basic work activities."). With regard to urinary stress incontinence, the record shows that plaintiff underwent a medical procedure on August 10, 2011. (R. 417-18.) There are no other complaints in the record related to this condition. As to her gastroesophageal reflux disease and hiatal hernia, plaintiff refers the court to record citations documenting the diagnoses of these conditions (R. 624, 644), but fails to demonstrate that either of these conditions limit her ability to perform basic work-related activities. Lastly, plaintiff makes only generalized references to her hip, knee, and joint pain. (R. 305, 452, 458, 485.) She does not point to any evidence that her joint pain causes functional limitations.

The ALJ's RFC determination is supported by substantial evidence. Plaintiff has failed to meet her burden of showing that the alleged limitations caused by these conditions result in an inability to perform work-related activities.

III. Conclusion

For these reasons, plaintiff's motion to reverse the decision of the Commissioner (doc. #15) is DENIED and defendant's motion to affirm the decision of the Commissioner (doc. #16) is GRANTED.

This is not a recommended ruling. The consent of the parties allows this magistrate judge to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Appeals can be made directly to the appropriate United States Court of Appeals from this judgment. See 28 U.S.C. § 636(c)(3); Fed.R.Civ.P. 73(c).

SO ORDERED at Hartford, Connecticut this 31st day of March, 2017.

_____/s/_____
Donna F. Martinez
United States Magistrate Judge