Martin-Johnson v. Commissioner of Social Security Doc. 36

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

FRANKIE MARTIN-JOHNSON,

Plaintiff,

v. Case No. 3:14-cv-1331-J-MCR

CAROLYN W. COLVIN, Commissioner of the Social Security Administration,

Defendant.
_____________________________________/

MEMORANDUM OPINION AND ORDER[1]

THIS CAUSE is before the Court on Plaintiff's appeal of an administrative decision denying her application for Supplemental Security Income. Plaintiff alleges she became disabled on September 18, 2007. (Tr. 246-48.) Plaintiff's claim was denied initially and on reconsideration. (Tr. 92-93, 117-21, 126-28.) A hearing was held before the assigned Administrative Law Judge ("ALJ") on January 26, 2010, at which Plaintiff was represented by an attorney. (Tr. 60-91.) The ALJ issued an unfavorable decision on April 13, 2010. (Tr. 97-106.) However, on July 7, 2011, the Appeals Council remanded the case back to the ALJ for reconsideration. (Tr. 113-14.) The Appeals Council reasoned that:

> The claimant alleged disability, in part, due to depression. The hearing decision found that the claimant's severe impairments included depression. Additionally, in evaluating this

[1] The parties consented to the exercise of jurisdiction by a United States Magistrate Judge. (Doc. 15.)

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> impairment in accordance with the special technique, the decision found that she had moderate difficulty in maintaining concentration, persistence or pace. Despite these findings, the assessed residual functional capacity does not include any mental limitations. Further consideration should be given to the claimant's maximum residual functioning capacity.

(Tr. 113 (internal citations omitted).) Upon remand, the ALJ was instructed to further evaluate Plaintiff's mental impairments, "providing specific findings and appropriate rationale for each of the functional areas described in 20 CFR 416.920(a)(c)," give further consideration to Plaintiff's maximum residual functional capacity ("RFC") with specific references to the evidence of record in support of the assessed limitations, and, if warranted, obtain supplemental evidence from a vocational expert ("VE") to clarify the effect of the assessed limitations on Plaintiff's occupational base. (Tr. 113-14.)

On September 16, 2011, a second hearing was held before the assigned ALJ. (Tr. 43-56.) The ALJ rendered a new decision on June 29, 2012, finding Plaintiff not disabled from December 17, 2007, the date the application was filed, through the date of the decision. (Tr. 18-33.)

In reaching the decision, the ALJ found that Plaintiff had the following severe impairments: "chronic low back pain (relatively benign), chronic neck pain, chronic knee pain, mild obesity, chronic headaches, history of drug and alcohol abuse, dysthymia vs. major depression, personality disorder, and anxiety disorder." (Tr. 20.) The ALJ also found that Plaintiff had the RFC to perform light

work with limitations. (Tr. 22.)

Plaintiff is appealing the Commissioner's decision that she was not disabled from December 17, 2007, through June 29, 2012. Plaintiff has exhausted her available administrative remedies and the case is properly before the Court. The undersigned has reviewed the record, the briefs, and the applicable law. For the reasons stated herein, the Commissioner's decision is **REVERSED and REMANDED.**

I. Standard of Review

As an initial matter, the parties argue their respective positions as to which law should apply here as this case was transferred from Oklahoma. Plaintiff argues that this Court should apply the law of the Tenth Circuit Court of Appeals because the hearing was held in Oklahoma, Plaintiff resided in Oklahoma at the time of the hearing, and the decision was issued out of Oklahoma. (Doc. 29 at 9-10.) Nevertheless, Plaintiff referenced both Tenth and Eleventh Circuit case law interchangeably throughout her memorandum. Defendant, on the other hand, contends that the law of the Eleventh Circuit Court of Appeals governs the issues presented in this matter.

It does not appear that the Eleventh Circuit has addressed the issue of which law applies in a case where an administrative hearing is held in a different judicial district than the district in which a plaintiff brings an action of judicial review of a final decision of the Commissioner. Upon review of the parties'

arguments in their memoranda and the relevant case law referenced therein, the undersigned follows the decision reached by the court in *Towenson by Mickeal v. Apfel*, 16 F. Supp. 2d 1329 (D. Kan. 1998).

In *Towenson*, the only published decision cited by the parties, the district court followed the Tenth Circuit Court of Appeals' decision in *Smith v. Shalala*, 5 F.3d 547 (10th Cir. 1993), and applied the law of the circuit in which the district court conducting the review is located. The district court noted that the Tenth Circuit in *Smith* reached its conclusion because ordinary conflict of laws principles have no relevance when federal courts apply federal law. *Towenson*, 16 F. Supp. 2d at 1331 (acknowledging that *Smith* cited *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) for this proposition). The district court in *Towenson* acknowledged, however, that regardless of the law applied, the same result would be reached under either circuit's law.

Following the reasoning in *Towenson*, this Court will apply Eleventh Circuit law to the issues presented in this matter. Similar to the acknowledgment of the district court in *Towenson,* however, the undersigned is convinced that the same result would be reached here regardless of whether the Court applies Tenth or Eleventh Circuit law to the issues presented in this review. *Towenson*, 16 F. Supp. 2d at 1331 ("[T]he court is convinced the same result is reached under both standards."). Moreover, neither party even attempts to argue that a conflict exists between the circuits on any issue presented and Plaintiff referenced both

circuit's case law within her memorandum. *Cf. Hatton v. Chrysler Canada, Inc.*, 937 F. Supp. 2d 1356, 1367 (M.D. Fla. 2013) ("A comprehensive conflict-of-law analysis is required only if the case involves a 'true' conflict between the jurisdictions with an interest in the case."); *Copeland v. Colvin*, 771 F.3d 920, 925 n.3 (5th Cir. 2014) ("The interest in uniform national application of the law is particularly strong in an area like Social Security, where the number of cases is so high.") (citation omitted).

Applying the Eleventh Circuit standard, the scope of this Court's review is limited to determining whether the Commissioner applied the correct legal standards, *McRoberts v. Bowen*, 841 F.2d 1077, 1080 (11th Cir. 1988), and whether the Commissioner's findings are supported by substantial evidence, *Richardson v. Perales*, 402 U.S. 389, 390 (1971). "Substantial evidence is more than a scintilla and is such relevant evidence as a reasonable person would accept as adequate to support a conclusion." *Crawford v. Comm'r of Soc. Sec.*, 363 F.3d 1155, 1158 (11th Cir. 2004). Where the Commissioner's decision is supported by substantial evidence, the district court will affirm, even if the reviewer would have reached a contrary result as finder of fact, and even if the reviewer finds that the evidence preponderates against the Commissioner's decision. *Edwards v. Sullivan*, 937 F.2d 580, 584 n.3 (11th Cir. 1991); *Barnes v. Sullivan*, 932 F.2d 1356, 1358 (11th Cir. 1991). The district court must view the evidence as a whole, taking into account evidence favorable as well as

unfavorable to the decision. *Foote v. Chater*, 67 F.3d 1553, 1560 (11th Cir. 1995); *accord Lowery v. Sullivan*, 979 F.2d 835, 837 (11th Cir. 1992) (stating the court must scrutinize the entire record to determine the reasonableness of the Commissioner's factual findings).

II. Discussion

Plaintiff raises two general issues on appeal. Plaintiff first argues that the ALJ violated her due process rights by failing to schedule a supplemental hearing when one was requested, or by otherwise failing to allow Plaintiff an opportunity to cross-examine the VE. Second, Plaintiff argues that the ALJ erred in evaluating the medical opinion evidence of record. Specifically, Plaintiff argues that the ALJ improperly evaluated the opinions of state agency doctors Donald Morford, M.D., Timothy Foster, Ph.D., and Barbara Felkins, M.D.

Defendant responds Plaintiff failed to show that she was prejudiced by the ALJ's failure to grant her request for a supplemental hearing. Defendant also argues that the ALJ's oversight in failing to specifically consider the opinions of the state agency doctors was, at most, harmless error.

A. Post-Hearing Proceedings and the ALJ's Decision

The ALJ did not elicit VE testimony at the September 16, 2011 hearing. (Tr. 45-56.) Although a VE was present at the hearing, the VE did not testify. The ALJ instead decided to send Plaintiff to a psychologist for further evaluation and then to determine whether another hearing would be necessary. (Tr. 55.)

On January 11, 2012, the VE completed written interrogatories that included a hypothetical question regarding whether Plaintiff could perform light work with the mental limitation of understanding, remembering and carrying out simple but not detailed or complex tasks. (Tr. 378-81.) The ALJ proffered the post-hearing evidence from the VE to Plaintiff's counsel by letter dated January 18, 2012, with a copy sent to Plaintiff. (Tr. 229.) The ALJ's letter noted Plaintiff's right to submit written comments, additional records, or interrogatories to be sent to the VE. The ALJ further stated:

> You may also request a supplemental hearing at which you would have the opportunity to appear, testify, produce witnesses, and submit additional evidence and written or oral statements concerning the facts and law. If you request a supplemental hearing, I will grant the request unless I receive additional records that support a fully favorable decision. In addition, you may request an opportunity to question witnesses, including the author(s) of the enclosed report(s). I will grant a request to question a witness if I determine that questioning the witness is needed to inquire fully into the issues. If an individual declines a request by me to appear voluntarily for questioning, I will consider whether to issue a subpoena to require his or her appearance.

(*Id.*) Plaintiff's counsel responded by letter dated January 23, 2012. (Tr. 382-83.) He objected to the proffered evidence as incomplete, as it did not include a hypothetical question with any additional mental limitations as shown by the medical evidence of record, and he "request[ed] a supplemental hearing and the opportunity to confront [the VE] with [Plaintiff's] mental health records and the opinions of the physicians who examined her." (*Id.*)

On January 31, 2012, the ALJ sent Plaintiff's counsel revised, proposed interrogatories to be sent to the VE that included a second hypothetical regarding Plaintiff's ability to perform sedentary work with "some [mental] limitations, but [she] can understand, remember and carry out simple but not detailed or complex tasks." (Tr. 232-37.) Plaintiff's counsel responded via letter on February 7, 2012, and objected to the proposed interrogatories as failing to include additional mental limitations. (Tr. 384-85.) Plaintiff's counsel again requested a supplemental hearing if the ALJ was unable to include the additional mental limitations. (Tr. 385.)

On March 12, 2012, the VE completed another set of written interrogatories that included the two hypothetical questions described above and a third hypothetical question regarding Plaintiff's ability to perform sedentary work with additional mental limitations as requested by Plaintiff's counsel. (Tr. 386-92.) The ALJ proffered the post-hearing evidence from the VE to Plaintiff's counsel by letter dated March 16, 2012, with a copy sent to Plaintiff. (Tr. 239-40.) The ALJ's letter again noted Plaintiff's right to submit written comments, additional records, or interrogatories to be sent to the VE. The ALJ reiterated that he "will grant [a] request [for a supplemental hearing] unless [he] receive[s] additional records that support a fully favorable decision," and that he "will grant a request to question a witness if [he] determine[s] that questioning the witness is needed to inquire fully into the issues." (Tr. 239.) Plaintiff's counsel responded via letter on March 22,

2012. (Tr. 393.) Plaintiff's counsel again objected to the proffered evidence, stating that the third hypothetical regarding Plaintiff's ability to perform sedentary work with additional mental limitations was unnecessary because the VE had previously stated there were no jobs Plaintiff could perform that involved sedentary work. Plaintiff's counsel stated that he required a hypothetical question posed to the VE that included Plaintiff's ability to perform light work (as opposed to sedentary work) with the additional mental limitations requested by Plaintiff's counsel. Plaintiff's counsel specifically requested "a Supplemental Hearing be scheduled in order that [he] may inquire of [the VE] about the effect of the mental health issues on our Hypothetical person with a <u>light RFC</u>." (Tr. 393 (emphasis in original).)

No supplemental hearing was held, and the Record contains no indication that the ALJ responded to Plaintiff's counsel's March 22, 2012 correspondence. Defendant appears to concede as much. (Doc. 34 at 7 ("The ALJ apparently failed to respond to the March 22 letter from Plaintiff's counsel, and he did not schedule a supplemental hearing.").) By decision dated June 29, 2012, the ALJ found that Plaintiff was not disabled. (Tr. 18-33.) The ALJ's decision does not mention that Plaintiff had requested a supplemental hearing. (*Id.*)

As a part of that decision, the ALJ found that Plaintiff had severe impairments, including chronic low back pain, neck pain, knee pain, and headaches; mild obesity; history of drug and alcohol abuse; dysthymia vs. major

depression; and personality and anxiety disorders. (Tr. 20.) At Step Three in the evaluation process, the ALJ found that Plaintiff does not have an impairment or combination of impairments that meets or equals the severity of one of the listed impairments. (*Id.*)

At Step Four, the ALJ found that Plaintiff retained the RFC to perform light work, but limited her to occasionally stooping, crouching, crawling, kneeling, balancing, and climbing stairs, but never climbing ladders. (Tr. 22.) The ALJ also found the "[d]ue to psychologically based factors, [Plaintiff] has some limitations but can understand, remember and carry out simple but not detailed or complex tasks." (*Id.*)

In making this finding, the ALJ did not discuss the opinions of state agency physician Donald Morford, M.D. and state agency psychological consultant Timothy Foster, Ph.D. However, the ALJ accorded "substantial weight" to the opinions of state agency medical consultant, Barbara Felkins, M.D.

The ALJ relied on the proffered opinions of the VE to determine at Step Five that Plaintiff could perform jobs that exist in significant numbers in the national economy, such as cleaner-housekeeper maid, food production inspector, peeled potato inspector, and meat dresser. (Tr. 32.)

B. The ALJ Erred by Denying Due Process

Plaintiff argues that the ALJ committed reversible error by not scheduling a supplemental hearing when one was requested and by not allowing Plaintiff an

opportunity to cross-examine the VE. The undersigned agrees.

"It is indisputable that the ability to cross-examine witnesses is fundamental to due process." *Marin v. Comm'r of Soc. Sec.*, 535 F. Supp. 2d 1263, 1264 (M.D. Fla. Feb. 28, 2008) (citing *Goldberg v. Kelly*, 397 U.S. 254, 269 (1969)); *see also* 5 U.S.C. § 556(d) (" A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."). As such, a claimant's right to procedural due process is violated where benefits are denied without affording the claimant an opportunity to cross-examine the authors of post-hearing reports. *See, e.g., Demenech v. Sec'y of the Dept. of Health & Humas Servs.*, 913 F.2d 882, 883 (11th Cir. 1990) ("This court previously has held that it violates a claimant's right to procedural due process for the Secretary to deny a claimant Social Security benefits based upon post-hearing medical reports without giving the claimant an opportunity to subpoena and cross-examine the authors of such reports.") (citations omitted); *Townley v. Heckler*, 748 F.2d 109, 114 (2d Cir. 1984) ("[A] disability benefits claimant has a right to cross examine the author of an adverse report and to present rebuttal evidence.") (citations omitted).

Here, Plaintiff's right to procedural due process was violated. When the ALJ proffered the VE's March 12, 2012 answers to interrogatories to Plaintiff's counsel, the ALJ notified Plaintiff that he "*will grant* [a] request [for a supplemental

hearing] unless [he] receive[s] additional records that support a fully favorable decision," and that he "*will grant* a request to question a witness if [he] determine[s] that questioning the witness is needed to inquire fully into the issues." (Tr. 239 (emphasis added).) Plaintiff's counsel specifically requested a supplemental hearing if the VE was not presented with a hypothetical question regarding the effects of Plaintiff's suggested mental limitations upon her ability to perform light work. (Tr. 393. ("I ask that if [the VE] can not be given an Interrogatory reflecting <u>light work</u> <u>and</u> the psychological limitations listed in Q8, Hypo 3 of the March 12, 2012 Interrogatories, that a Supplemental Hearing be scheduled in order that I may inquire of [the VE] about the effect of the mental health issues on our Hypothetical person with a <u>light RFC</u>.") (emphasis in original).) There is no evidence that the ALJ forwarded Plaintiff's attorney's suggestions to the VE. The ALJ did not, thereafter, advise Plaintiff's counsel that he had decided not to grant the request for a supplemental hearing or for an opportunity to confront the VE. There is no indication in the record that Plaintiff's counsel knew that his request for a supplemental hearing and for cross-examination of the VE were denied until the ALJ issued his unfavorable decision. As such, Plaintiff was not afforded a meaningful opportunity to rebut the report of the VE.

Moreover, by not granting Plaintiff's counsel's request for a supplemental hearing and by not mentioning any objections to the proffered evidence, the ALJ

appears to have violated the agency's internal policy with respect to proffered evidence. The proffer procedures set forth in HALLEX I-2-7-30 provide, in relevant part, that "[i]f the claimant requests a supplemental hearing, the ALJ *must* grant the request unless the ALJ has already decided to issue a favorable decision. HALLEX I-2-7-30, 1993 WL 643048 (emphasis added). The policy also provides that:

> The ALJ will address any comments on the proffered evidence in the rationale of the written decision. If the claimant objects to the proffered evidence, the ALJ will make a formal ruling, either in the decision or by separate order. If the ALJ addresses an objection in a separate order, the ALJ must provide the claimant and appointed representative, if any, with a copy of the order. The ALJ will also add the order to the record.

Id. The ALJ in this instance did not grant Plaintiff's supplemental hearing request, address Plaintiff's objections to the proffered evidence, or render a fully favorable decision.

The Commissioner acknowledges that the ALJ ignored Plaintiff's counsel's objections to the interrogatories, request for a supplemental hearing, and request to cross-examine the VE. (Doc. 34 at 7 ("The ALJ apparently failed to respond to the March 22 letter from Plaintiff's counsel, and he did not schedule a supplemental hearing.").) The Commissioner contends, however, that the ALJ did not violate Plaintiff's due process rights because the authority cited by Plaintiff "supports only that a claimant has a due process right to cross-examine a

physician who authors a post-hearing medical report," and the VE interrogatory answers do not constitute a medical report. (*Id.* at 9 (emphasis in original).) Notably, the Commissioner failed to cite any authority for its position that due process rights only extend to post-hearing, proffered *medical* reports. The Commissioner also failed to explain why she believes due process rights exist only with respect to certain categories of proffered evidence. It is also important to note that neither the proffer letter sent to Plaintiff's counsel nor the proffer procedures in HALLEX I-2-7-30 appear to make such a distinction. *Compare* language of the proffer letter for VE evidence in the record (Tr. 239), with language of the proffer letter for medical evidence in *Thomas v. Astrue*, Case No. 2:09-cv-969-SRW, 2011 WL 798840 at *3 (M.D. Ala. Mar. 3, 2011); *see also* HALLEX I-2-7-30, 1993 WL 643048.

Further, although not cited by Plaintiff in her memorandum, it appears that courts have addressed similar due process concerns within the context of post-hearing proffered interrogatories to a VE. *See, e.g., Preston v. Astrue*, Case No. 2:09-cv-485-SRW, 2010 WL 2465530 at *8 (M.D. Ala. June 15, 2010) ("There is no indication in the record that the VE's October 23, 2007 response to the interrogatory was proffered to the plaintiff for comment at any time before the ALJ's decision. This constitutes an additional basis for reversal.") (citations omitted); *Townley*, 748 F.2d at 114 ("[A]ppellant was denied an opportunity to examine that vocational report, and, despite claimant's request, no additional

hearing was held. Although the ALJ asked appellant's attorney to submit objections and additions to the interrogatories posed to the [VE], there is no evidence that the attorney's suggestions were ever forwarded. Moreover, appellant was denied his due process rights to cross-examine the expert and present rebuttal evidence."). In fact, the Second Circuit Court of Appeals in *Townley* considered and rejected the argument presented by the Commissioner here. 748 F.2d at 114 ("The Secretary's attempt to distinguish the cases requiring a right to cross-examination or to rebuttal as cases dealing with medical reports, as opposed to vocational reports, is unpersuasive.").

Finally, the undersigned disagrees with the Commissioner that Plaintiff has failed to show prejudice here. It is clear in this instance that the ALJ relied on the VE's responses to interrogatories in rendering the decision, and the credibility of that testimony was untested. Therefore, the ALJ's error was prejudicial. *See, e.g., Marin*, 535 F. Supp. 2d at 1264 ("The decision by the ALJ clearly relied on [the VE's] testimony, and the credibility of that testimony was untested. Thus, the limitations placed on [the plaintiff's] cross-examination was prejudicial."). The additional errors by the ALJ in evaluating the record medical opinions as discussed in detail below belie any argument by the Commissioner that the ALJ's error was harmless because the ALJ properly determined Plaintiff's RFC.

C. The ALJ Failed to Properly Evaluate Record Medical Opinions

Plaintiff contends that the ALJ erred by failing to consider, weigh, and

explain the weight given to the opinions of Drs. Morford and Foster. Plaintiff further contends that the ALJ improperly failed to include Dr. Felkins' suggested social limitations in the Plaintiff's RFC finding although he accorded her opinion "substantial weight." The Commissioner asserts that any error by the ALJ in failing to address the opinions of Drs. Morford and Foster is, at most, harmless. The Commissioner further argues that the ALJ was not required to adopt Dr. Felkins' opinions verbatim and that the ALJ's evaluation of Dr. Felkins' opinions is supported by substantial evidence.

The ALJ is required to consider all the evidence in the record when making a disability determination. See 20 C.F.R. §§ 404.1520(a)(3), 416.920(a)(3). With regard to medical opinion evidence, "the ALJ must state with particularity the weight given to different medical opinions and the reasons therefor." *Winschel v. Comm'r of Soc. Sec.*, 631 F.3d 1176, 1179 (11th Cir. 2011). Substantial weight must be given to a treating physician's opinion unless there is good cause to do otherwise. *See Lewis v. Callahan*, 125 F.3d 1436, 1440 (11th Cir. 1997). "'[G]ood cause' exists when the: (1) treating physician's opinion was not bolstered by the evidence; (2) evidence supported a contrary finding; or (3) treating physician's opinion was conclusory or inconsistent with the doctor's own medical records." *Phillips v. Barnhart*, 357 F.3d 1232, 1240-41 (11th Cir. 2004). When a treating physician's opinion does not warrant controlling weight, the ALJ must nevertheless weigh the medical opinion based on: (1) the length of the treatment

relationship and the frequency of examination, (2) the nature and extent of the treatment relationship, (3) the medical evidence supporting the opinion, (4) consistency of the medical opinion with the record as a whole, (5) specialization in the medical issues at issue, and (6) any other factors that tend to support or contradict the opinion. 20 C.F.R. §§ 404.1527(c)(2)-(6), 416.927(c)(2)-(6).

Although a treating physician's opinion is generally entitled to more weight than a consulting physician's opinion, see *Wilson v. Heckler*, 734 F.2d 513, 518 (11th Cir. 1984) (per curiam); 20 C.F.R. §§ 404.1527(c)(2), 416.927(c)(2), "[t]he opinions of state agency physicians" can outweigh the contrary opinion of a treating physician if "that opinion has been properly discounted," *Cooper v. Astrue*, 2008 WL 649244 at *3 (M.D. Fla. Mar. 10, 2008). Further, "the ALJ may reject any medical opinion if the evidence supports a contrary finding." *Wainwright v. Comm'r of Soc. Sec. Admin.*, 2007 WL 708971 at *2 (11th Cir. Mar. 9, 2007) (per curiam); *see also Sryock v. Heckler*, 764 F.2d 834, 835 (11th Cir. 1985) (per curiam) (same).

"The ALJ is required to consider the opinions of non-examining state agency medical and psychological consultants because they 'are highly qualified physicians and psychologists, who are also experts in Social Security disability evaluation.'" *Milner v. Barnhart*, 275 F. App'x 947, 948 (11th Cir. May 2, 2008) (per curiam); s*ee also* SSR 96-6p (stating that the ALJ must treat the findings of State agency medical consultants as expert opinion evidence of non-examining

sources). While the ALJ is not bound by the findings of non-examining physicians, the ALJ may not ignore these opinions and must explain the weight given to them in his decision. SSR 96-6p.

i. Dr. Morford

Dr. Morford, a state agency consultant, reviewed the record and completed a physical RFC assessment in September 2008. (Tr. 655-62.) Dr. Morford assessed greater physical limitations than those determined by the ALJ in the Plaintiff's RFC determination. Yet, the ALJ failed to address Dr. Morford's opinions in his decision although he was required to do so. *See, e.g., Winschel*, 631 F.3d at 1179 (stating that the Commissioner "must state with particularity the weight given to different medical opinions and the reasons therefor"); *Meek v. Astrue*, 2008 WL 4328227 at *1 (M.D. Fla. Sept. 17, 2008) ("Although an ALJ need not discuss all of the evidence in the record, he may not ignore evidence that does not support his decision . . . . Rather, the judge must explain why significant probative evidence has been rejected.") (internal citations and quotation marks omitted); *Lord v. Apfel*, 114 F. Supp. 2d 3, 13 (D.N.H. 2000) (stating that although the Commissioner is not required to refer to every piece of evidence in his decision, the Commissioner may not ignore relevant evidence, particularly when it supports the claimant's position). The Commissioner acknowledges the ALJ's error in this regard, but argues such error was harmless because Dr. Felkins considered and rejected Dr. Morford's opinions. However, it

is the duty of the ALJ (not the doctor) to consider and discuss the weight accorded to the medical opinions of record, and to make a disability determination. Moreover, the error was prejudicial in that Dr. Morford's suggested limitations, if accepted, would place Plaintiff at the sedentary level of work. The VE opined that Plaintiff would be unable to perform work at the sedentary level when combined with the other limitations set forth in the ALJ's RFC finding. (Tr. 22, 387, 390.)

ii. Dr. Foster

Similarly, the Commissioner recognizes that the ALJ failed to discuss or assign weight to the opinions of state agency psychologist, Timothy Foster, Ph.D. (Doc. 34 at 12.) However, the Commissioner argues that the ALJ's failure in this regard constitutes harmless error because Dr. Foster's opinions are consistent with the ALJ's RFC finding. The undersigned disagrees.

The ALJ found that Plaintiff retains the RFC to perform light work and has "some [mental] limitations but can understand, remember and carry out simple but not detailed or complex tasks." (Tr. 22.) While Dr. Foster concurred with this finding, he also found that Plaintiff "has moderate limits in ability to work within a schedule," that she "will require extra supervision," and that she "has moderate limit[ations in] the ability to adapt to changes in the workplace." (Tr. 679.) By not discussing the weight accorded to Dr. Foster, the ALJ failed to address why he did not accept the limitations suggested by Dr. Foster. *See, e.g., Krauss v.*

Comm'r of Social Sec., No. 6:13–cv–640–Orl–GJK., 2014 WL 4639143 at *3 (M.D. Fla. Sept. 16, 2014) ("The ALJ is required to provide a reasoned explanation as to why he chose not to include a particular limitation in his RFC determination.") (citing *Winschel*, 631 F.3d at 1178-79 and *Monte v. Astrue*, Case No. 5:08–cv–101–Oc–GRJ, 2009 WL 210720 at *6–7 (M.D. Fla. Jan.28, 2009)).

Moreover, the Court cannot draw the inference (as the Commissioner suggests that it should) that Dr. Foster's comment, that Plaintiff "appears to be able to complete simple instructions and could likely function adequately with simple, repetitive tasks," fully incorporates all of Plaintiff's limitations associated with concentration, persistence, pace, and adaptation. *See, e.g., Hensley v. Colvin*, 89 F. Supp.3d 1323, 1328 (M.D. Fla. 2015) (reversing the Commissioner's decision because "the ALJ failed to explain how the[] limitations [included in the doctor's opinion] were accounted for in the RFC assessment, or articulate his reasons for rejecting them"); *Monte*, 2009 WL 210720 at *6 ("The Commissioner urges the Court to interpret Dr. Alvarez-Mullin's comment that '[Plaintiff] is, however, [a]ble to interact appropriately with others and able to carry out simple/short instructions' as fully incorporating all of Plaintiff's limitations associated with his concentration, persistence and pace. In the absence of any mention of the limitations in the ALJ's written decision, the Court may not draw that inference."). Thus, the ALJ's error in failing to address Dr. Foster's opinions

cannot be considered harmless.[2]

iii. Dr. Felkins

The ALJ accorded non-examining medical consultant, Barbara Felkins, M.D., substantial weight. However, Dr. Felkins opined that Plaintiff has moderate limitations in the area of social functioning, including interacting with the public, co-workers, and supervisors. (Tr. 957.) She also opined that Plaintiff has moderate limitations in her ability to respond appropriately to usual work situations and to changes in a routine work setting. (*Id.*) The ALJ did not include any of these limitations in the RFC finding despite according Dr. Felkins' opinions as a whole "substantial weight" and failed to explain why he rejected those limitations. *Winschel*, 631 F.3d at 1178-79; *Krauss*, 2014 WL 4639143 at *3; *Monte v. Astrue*, 2009 WL 210720 at *6–7. Moreover, the hypothetical addressed to the VE does not include light work with limitations in social functioning and the ALJ ignored Plaintiff's counsel's request to include such limitations. While the Commissioner is correct that the ALJ was not required to

[2] The ALJ also failed to address Dr. Foster's opinion that Plaintiff retains a moderate degree of limitation in the area of activities of daily living. (Tr. 673.) While the Commissioner is correct that Dr. Foster's opinion was made to assist the ALJ at Step Three of the evaluation, the Commissioner is incorrect that Dr. Foster's opinion is irrelevant at Step Four. The ALJ is required to conduct "a more detailed analysis" of the four categories of limitations. *See, e.g.,Brunson v. Astrue*, 850 F. Supp. 2d 1283, 1301-02 (M.D. Fla. 2011). By ignoring Dr. Foster's opinions, the undersigned cannot conclude that the ALJ conducted such detailed analysis especially since, as noted by Plaintiff, treating physician Dr. Lipnick (whose opinions the ALJ also did not discuss in the decision) opined that Plaintiff's mental impairment significantly interferes with her daily functioning. (Tr. 527.)

adopt Dr. Felkins' opinions verbatim, he was required to articulate why he decided not to include certain limitations suggested by her when according her opinions substantial weight. *See, e.g., Alexander v. Comm'r of Social Sec.*, No. 8:13–cv–1602–T–GJK, 2014 WL 4211311 at *3 (M.D. Fla. Aug. 26, 2014) ("It is axiomatic that the ALJ's RFC determination does not have to include or account for every limitation contained in a medical opinion. The ALJ, however, is required to provide a reasoned explanation as to why he or she chose not to include a particular limitation") (citations omitted).[3]

III. Conclusion

In light of the foregoing, the Court cannot conclude that the ALJ applied the correct legal standards with respect to Plaintiff's disability evaluation and that the Commissioner's findings are supported by substantial evidence. Therefore, this case will be reversed and remanded with instructions to the ALJ to reconsider the opinions of Drs. Morford, Foster, and Felkins, explain what weight their opinions are being accorded, and the reasons therefor. If the ALJ rejects any portions of the opinions, he must clearly articulate and explain his reasons for doing so. The

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[3] The undersigned finds unpersuasive the argument by the Commissioner that the ALJ was not required to consider the moderate social limitations in light of Dr. Felkins' comment that "moderate [] mean[s] satisfactory." (Tr. 957.) Adopting such argument would mean that opinions regarding "moderate" limitations would be tantamount to opinions that Plaintiff would have no limitation at all. If Dr. Felkins believed Plaintiff not to be limited in area of social functioning, she could have stated so as she did with respect to Plaintiff's ability to understand, remember, and carry out instructions. (Tr. 956-57.)

ALJ will also be instructed to reconsider Plaintiff's RFC assessment, including limitations in activities of daily living, social functioning, and other mental limitations. Finally, the ALJ will be instructed to conduct a new hearing to provide Plaintiff the opportunity to cross-examine the VE.

Accordingly, it is **ORDERED**:

1. The Commissioner's decision is **REVERSED** pursuant to sentence four of 42 U.S.C. § 405(g) and **REMANDED** with instructions to the ALJ to: (a) reconsider the opinions of Drs. Morford, Foster, and Felkins, explain what weight they are being accorded, and the reasons therefor; (b) reconsider the RFC assessment, including limitations in activities of daily living, social functioning, and other mental limitations; (c) conduct a new hearing to provide Plaintiff the opportunity to cross-examine the VE; and (e) conduct any further proceedings deemed appropriate.

2. The Clerk of Court is directed to enter judgment consistent with this Order and close the file.

3. Should this remand result in the award of benefits, pursuant to Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure, Plaintiff's attorney is **GRANTED** an extension of time in which to file a petition for authorization of attorney's fees under 42 U.S.C. § 406(b). Plaintiff's attorney shall file such a petition within **thirty (30) days** from the date of the Commissioner's letter sent to Plaintiff's counsel of record at the conclusion of the Agency's past due benefit

calculation stating the amount withheld for attorney's fees. *See* In re: *Procedures for Apply for Attorney's Fees Under 42 U.S.C. §§ 406(b) & 1381(d)(2)*, Case No. 6:12-mc-124-Orl-22 (M.D. Fla. Nov. 13, 2012). This Order does not extend the time limits for filing a motion for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412.

DONE AND ORDERED at Jacksonville, Florida, on March 9, 2016.

Copies to:

Counsel of Record