UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

YELISKA ENID ESPADA MARTINEZ,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 12-30075 FDS**
MICHAEL J. ASTRUE, Commissioner, Social Security Administration,	)	
Defendant.	)	

MEMORANDUM AND ORDER ON
PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS AND
DEFENDANT'S MOTION TO AFFIRM THE DECISION OF THE COMMISSIONER

SAYLOR, J.

This is an appeal of the final decision of the Commissioner of the Social Security Administration denying the application of plaintiff Yeliska Enid Espada Martinez for social security disability insurance ("SSDI") and supplemental security income ("SSI") benefits.[1] Espada contends that the ruling of the administrative law judge ("ALJ") was in error because (1) the ALJ did not properly evaluate the opinions of her nurse practitioner with regard to her physical limitations, and (2) he did not properly evaluate and apply the opinions of her mental-health therapist.

Pending before the Court is plaintiff's motion for judgment on the pleadings and defendant's motion to affirm the decision of the Commissioner. For the reasons set forth below,

[1] The courts below as well as the administrative record largely refer to the plaintiff as Yeliska Espada. For the sake of clarity, the Court will do the same.

the motion to affirm will be granted and the motion for judgment on the pleadings will be denied.

I. Background

Yeliska Espada is 29 years old. (AR at 96). She lives in Holyoke, Massachusetts with her daughter. (*Id.* at 353; 360). She has no past work experience. (*Id.* at 995). She did not complete high school, instead leaving in the tenth grade after repeating ninth grade twice. (*Id.* at 142). She primarily attended special-education classes while in school, and her reading and writing skills tested at a second-grade level. (*Id.* at 182). She testified that she has twice attempted the GED and has been unable to pass. (*Id.* at 993).

A. Physical Impairments

1. Asthma

Espada has suffered since childhood with severe persistent asthma. (*Id.* at 166; 395). The record contains conflicting evidence as to the severity of her condition. In January 2002, she told an examiner that she could not do any exercise because it triggered her asthma. (*Id.* at 180). However, a report from her pulmonologist in March 2002 suggested that she was capable of some activity, stating that if she was "really active" she needed to sit down in order for her wheezing to resolve. (*Id.* at 173).

Espada's asthma was well-controlled between 2001 and 2003, with a doctor noting as early as October 2001 that it "seem[ed] to be under excellent control." (*Id.* at 166). In October 2002, her doctor noted that her asthma had not been seen "in ages" and that she had not been treated by a physician for asthma in more than a year. (*Id.* at 249). A doctor's note in March 2003 similarly indicated that she had not been admitted to a hospital for asthma exacerbations in

two years. (*Id.* at 405). She also reported exercising at her local gym during this time period. (*Id.* at 448). Although she experienced occasional exacerbations between 2001 and 2003, they could mostly be attributed to lack of access to asthma medication, including prednisone. (*Id.* at 166; 186–87).

Espada had two Physical Residual Functional Capacity Assessments ("RFCs") completed in 2002. (*Id.* at 185–190; 202–209). Both indicated that she was limited to climbing stairs or ramps only "occasionally" and that her exposure should be limited to extreme heat, cold, fumes, dust, and odors. (*Id.*). They also assessed her physical capacity at a level that allowed her to "occasionally" lift 20 pounds, "frequently" lift ten pounds, and to stand or walk for about six hours in an eight-hour work day. (*Id.*). The RFCs determined that she had unlimited ability to sit, push, and pull during a normal work day, subject to her other physical limitations. The second RFC, completed in July 2002, also limited her exposure to humidity and "hazards," including machinery and heights. (*Id.* at 206).

In January 2004, Espada experienced a "borderline obstruction" with no "evidence of breathing difficulty." (*Id.* at 401). Her exacerbations continued to coincide with periods where her medication changed in some way; she does not appear to have been taking prednisone at the time of the January exacerbation. (*Id.* at 400–01). In July 2004, she was instructed to taper her prednisone usage, taking Advair instead. (*Id.* at 399). In October of the same year, she reported asthma symptoms. (*Id.* at 463). Those problems continued into 2005. (*Id.* at 397). A doctor's note from that period suggests that she was not taking Advair or prednisone at that time, instead taking only Foradil and Pulmicort. (*Id.*). Although she was healthy for a March 2005 visit, she reported to the emergency room with asthma symptoms in May 2005 after tapering off her

prednisone use at the instruction of her physician. (*Id.* at 370; 388; 395). A note from a follow-up appointment suggests that she was not taking prednisone at the time of the May exacerbations and had "been out of some of her asthma medications." (*Id.* at 425).

Espada's asthma remained relatively stable for the remainder of 2005. She reported symptoms following a flu shot, which she explained was not uncommon for her. She also had some breathing difficulty shortly after moving into an apartment that required fumigation. (*Id.* at 416; 419).

Espada had a third RFC completed in 2005, which did not indicate any of the lifting, carrying, or standing restrictions assessed in the prior RFCs. (*Id.* at 521). The examiner instead noted what he interpreted as good control of her asthma, and limited her only to avoiding concentrated exposure to fumes, odors, and gases. (*Id.* at 524). A fourth RFC in September 2006 included the previous lifting, carrying, and standing limitations, as well as further limiting the amount of time she could climb, balance, stoop, kneel, crouch, or crawl. (*Id.* at 745–48). It reiterated the fume and temperature-related restrictions of previous RFCs. (*Id.*).

From the period between 2006 and the ALJ hearing in 2010, Espada's asthma remained largely stable, although she experienced acute exacerbations in October 2006, May 2008, and April 2009, the last of which required an overnight hospital stay. (*Id*. at 839–47; 875–81; 909–14). The following day she reported that she was doing "very well." (*Id.* at 926).

In February 2010, Robbie Lauter, a nurse-practitioner, completed a physical RFC. (*Id.* at 968–70).[2] Lauter assessed that the Espada could sit for eight hours per eight–hour workday, stand for two hours, and walk for one hour. (*Id.* at 968). She also assessed that Espada's

[2] Lauter's RFC form did not match the SSA RFC form, and accordingly the limitations it assessed were not always the subject of direct inquiry in previous RFC evaluations.

attendance at work would be "inconsistent or sporadic," and limited her to only occasionally lifting objects weighing 6–20 pounds. (*Id.*). She assessed that Espada could frequently lift objects weighing up to five pounds. (*Id.*). Lauter also assessed limited hand movements, stating that Espada could only occasionally grasp, push, pull, or execute fine manipulation. (*Id.* at 970). She categorized Espada's limitations due to pain as "moderately severe," an assessment that limited physical activity to periods of five to fifteen minutes at a time for no more than two hours total per day. (*Id.*). The categorization also indicated that activity would be substantially compromised in terms of speed or accuracy. (*Id.*). Finally, she concluded that Espada's symptoms would frequently be severe enough to interfere with attention and concentration, as well as the ability to remember and carry out simple instructions. (*Id.*).

2. Osteopenia

Espada also contends that she suffers from osteopenia. (*Id.* at 987).[3] That condition resulted from prolonged use of prednisone, which was used to treat her asthma. (*Id.* at 400). In 2003 she was assessed as having "minimally decreased bone mineral density" and was recommended for osteopenia treatment. (*Id.* at 487). She began taking Fosamax once a week with "no problems," although she eventually claimed that the medication made her "shaky and sleepy." (*Id.* at 440, 662). She associated her hand pain with osteopenia, listing Fosamax as the medication she took to treat her hand pain, which she claims "comes and goes" every day, lasting approximately one half hour. (*Id.*). To further treat her condition, her physician instructed her to exercise, as well as to increase her calcium intake. (*Id.* at 431, 440).

[3] The record, the memoranda submitted by the parties, and the ALJ decision are inconsistent in their references to Espada's condition, and appear to use the terms osteopenia and osteoporosis interchangeably. The diagnostic difference between those conditions is the measure of bone mass, with osteoporosis being the more severe of the two. The ALJ ultimately found that the plaintiff suffers from osteopenia. (*Id.* at 30).

3. Other Physical Impairments

Espada also suffers from Graves' disease with thyroid ablation and allergic rhinitis. (*Id*. at 779). Neither the record nor the plaintiff suggests that the first condition has an effect on her ability to work, except to the extent that the medication makes her "shaky," an assertion discussed later in this memorandum. The allergic rhinitis appears to be relevant only as it relates to her asthma.

B. Mental Impairments

1. Borderline Intellectual Functioning

Espada contends that she has borderline intellectual functioning, an assessment that has repeatedly been confirmed by medical examiners. A consultation in 2002 placed her overall academic achievement at the level of a second-grade child, and concluded that she had "low-normal intellectual functioning." (*Id.* at 182). Subsequent assessments were in agreement, and assessed largely identical limitations. A 2002 RFC found that she was moderately limited in her ability to understand, remember, and carry out detailed instructions, but that she could learn simple and multi-step directions. (*Id.* at 194). A psychiatric review prepared in conjunction with that RFC also found that she had moderate difficulties in maintaining concentration, persistence, and pace and had mild limitations on her daily life because of her impairment. (*Id.* at 200F). A second RFC in 2002 made the same findings as the earlier assessment. (*Id.* at 224–27).

In 2005, an assessment that agreed with the diagnosis of borderline intellectual functioning found her able to follow three-step instructions and remember three objects placed out of view after five minutes. (*Id.* at 498–499). In 2005, her third RFC confirmed her limitations with regard to her ability to follow detailed instructions, and also assessed a new

limitation on her ability to maintain attention and concentration. The RFC also found that she was limited in her ability to complete a workday or week without interruption from psychological symptoms, to get along with coworkers, to respond appropriately to workplace changes, and to travel to unfamiliar places or use public transportation. (*Id.* at 515–16). However, it also noted that, if required, she could do simple tasks for two-hour periods, generally get along with co-workers, and handle changes and travel. (*Id.* at 518).

A 2006 examination found that although her academic testing was "deficient," it appeared "inconsistent with her history and level of functioning," suggesting to the examiner that "she functions somewhat higher in both reading and mathematics." (*Id.* at 741). A 2006 psychiatric review and RFC assessed moderate difficulties in social functioning and maintaining concentration and mild restrictions on daily living. (*Id.* at 763). The RFC did not find significant limitations in her ability to carry out "very short and simple instructions." (*Id.* at 767).

Finally, a 2009 evaluation found that she "did not put effort [into] the assessment phase" of her examination, and found that academic testing which placed her at a first-grade level was "an underrepresentation of her abilities" and inconsistent with previous results. (*Id.* at 903). The examiner determined that Espada could understand and follow basic instructions, and could "sustain attention to perform a simple repetitive task." (*Id.* at 904). She also felt that Espada was moderately limited in her ability to interact with others. (*Id.* at 906). A psychologist examining that report concluded that she would have moderate difficulty with complex instructions or work decisions, and mild restrictions in her ability to maintain social functioning, concentration persistence, and pace. (*Id.* at 953–55).

2. Depression

Espada also contends that she suffers from depression, which she says is caused, at least in part, by her health issues. (*Id.* at 741). Medical records from 2004 indicated that she took antidepressants, which made her feel "brighter." (*Id.* at 440). In August 2006, she reported that she had been visiting Dr. Jackson, a therapist, twice a month for "nervousness and depression." (*Id.* at 684). Her therapist's report in September 2006 diagnosed "major depression, recurrent, non-psychotic [and] generalized anxiety." (*Id.* at 736). He felt that she could not remember "work-like tasks [or instructions]." (*Id.* at 684). By 2009, the therapist wrote that she had made "some progress" with what he described as anger management, depression, and impulse control disorder. (*Id*. at 965). He stated that her progress was slow, which he ascribed to her health. (*Id.*). Finally, he commented that he found it "difficult to picture Ms. Espada functioning successfully in the job market with limited skills and her poor ability to tolerate stressors." (*Id.* at 966). In 2009, an examiner reported that she was not taking her prescribed depression medication. (*Id.* at 960).

C. Daily Activities

At the time of her 2010 hearing, Espada lived alone with her daughter. Her daily activities generally consisted of caring for her daughter and watching television. (*Id.* at 664). She prepared meals for her daughter on a daily basis, and completed some household chores. (*Id.* at 666). Espada stated that she ventured outside about three times per week, although she did not like to go out because it worsened her depression. (*Id.* at 667; 989). She sometimes played with her daughter in their backyard. (*Id.* at 499). She reported that she did, on occasion, go shopping for clothes and food and that she was able to pay her bills, count change, handle a

savings account, and use a checkbook or money orders. (*Id*. at 667).[4] She visited her mother's house "sometimes," but reported needing reminders to go places. (*Id.* at 668). She testified that she has been attending appointments at Holyoke Health Center, "sometimes two or three times a week," and has one friend who has visited her at her home. (*Id.* at 987; 990). She contends that she has been getting up approximately two times per night to use her Nebulizer machine, which she has also been using three times during the day. (*Id.* at 991).

D. Vocational Expert Testimony

The ALJ solicited the input of a vocational expert during the hearing, initially posing the following hypothetical:

> This is a hypothetical female, 25 years of age with a tenth grade education, obtained in the mainland of [the] United States and no past relevant work. The tenth grade education was obtained under the auspices of special education classes. This individual has a medical history which includes persistent, severe asthma, allergic rhinitis, osteopenia, depression, [and] hypothyroidism status post Graves' disease with thyroid ablation. There is some question of heart disease[,] for which she was given an echocardiogram. I want to limit this individual to a light [e]xertional level and to indoor work with no concentrated exposure to dust, fumes, strong odors, temperature or humidity extremes. It should be work that would be a low probability of this individual being bumped aggressively . . . [.] We are going to limit this individual to one to two step tasks.

(*Id.* at 995). The vocational expert reported that Espada, with those limitations, could work as an assembler, with approximately 179,000 national jobs and 1,500 Massachusetts jobs; an inspector, with approximately 71,000 jobs nationally and 2,700 in Massachusetts; or a packer, with 110,000 jobs nationally and 2,000 in Massachusetts. (*Id.* at 996). She described the jobs as "more [] stationary bench jobs." (*Id.*). The ALJ then added an additional limitation that the hypothetical worker should not have to have more than occasional interaction with coworkers

[4] Espada's ability to pay bills was indicated by a checkmark on a 2006 SSA form. In a 2009 psychological evaluation, she alleged that did not know how to pay her bills. (*Id.* at 903).

and supervisors and none with the public. (*Id.*). The vocational expert testified that that would have no adverse affect on the number of positions. (*Id.*). Finally, the ALJ limited the hypothetical to jobs which require a "clean" environment, such as computer parts or medical supplies. (*Id.*). The vocational expert explained that that would reduce the numbers from the previous hypothetical by one-third. (*Id.* at 997). The number of inspector jobs, for example, decreased to approximately 47,000 nationally, with 1,400 in Massachusetts. (*Id.*).

The ALJ then asked Espada how much time her daytime medical treatments required and whether they imposed any limitation on her ability to perform activities immediately afterward. (*Id.*). Espada testified that the treatments took approximately twenty minutes and that she needed to "relax and take a couple of minutes and just wait." (*Id.* at 997). She commented that after a treatment she becomes "nervous" and that her "hands start shaking." (*Id.* at 997). However, she also testified that there was nothing she needed to do post-treatment before she could return to "household tasks." (*Id.* at 998). The ALJ then asked the vocational expert whether accommodating twenty-minute breaks in both the morning and afternoon would be possible. (*Id.*). The vocational expert responded that it would be a reasonable accommodation unless the shakiness would preclude her from using her hands to "maintain a production pace." (*Id.*). Espada then testified that "sometimes when [she goes to] get something to eat [she shakes] so much [that] things fall out of [her] hand." (*Id.* at 999).

E. Procedural History

In November 1995, an application for SSI under Title XVI was filed on behalf of the Espada on the basis that she had an impairment that would render an adult disabled. (*Id.* at 303). That application was successful. On October 13, 2001, she attained the age of 18, prompting a

redetermination of her disability. (*Id.* at 583). On March 1, 2002, she was notified that she was no longer considered disabled, effective February 27, 2002, and that her SSI payments were scheduled to end in May 2002. (*Id.* at 43–52). On May 27, 2002, her application for Child's Disability Benefits based on her father's income was also denied. (*Id.*. at 283). She requested reconsideration for both decisions and had a hearing before a disability hearing officer on October 9, 2002. (*Id.* At 63–74). Both decisions were affirmed on October 23, 2002. (*Id.* at 55–62; 77–79). On October 30, 2002, she requested an ALJ hearing, which was held on November 12, 2003. (*Id.* at 80–81). On January 7, 2004, the ALJ affirmed that she was no longer disabled as of October 13, 2001, and, in a separate decision, denied her application for Child's Disability Benefits. (*Id.* at 297–317). She then filed a request for review with the Appeals Council on November 15, 2004. (*Id.* at 318). The Appeals Council remanded both claims because a recording of the November 2003 hearing could not be located, rendering the record incomplete. (*Id.* at 329–35). The Appeals Council also instructed the ALJ to associate all earlier claims for SSI benefits, including a Title XVI claim. (*Id.* at 331).

Upon remand, the ALJ affirmed that Espada's disability had ceased effective February 27, 2002 and denied her Child's Disability Benefits Claim. (*Id.* at 555–67). She filed a request for review with the Appeals Council on August 1, 2006. (*Id.* at 572–80). On August 8, 2006, the Appeals Council issued a remand order requiring the ALJ to adjudicate Espada as an adult during the time periods in question rather than under a standard of continuing review from her childhood claims. (*Id.* at 581–86). The Appeals Council also ordered that the ALJ correct the onset date to include the periods encompassed by Espada's 2005 Title XVI claim as well as the period after the February 27, 2002 date and prior to Espada's attaining the age of 22 on October

13, 2005. (*Id.*). Finally, the Appeals Council required that the ALJ evaluate the opinions of Espada's therapist, Dr. Jackson. (*Id.*).

Pursuant to those instructions, a third ALJ hearing was held on January 15, 2010. (*Id.* at 979–1000). On April 22, 2010, a decision was issued denying Espada benefits. (*Id.* at 21–36). She filed a request for review with the Appeals Council on June 2, 2010. (*Id.* at 17–18). On February 10, 2010, the Appeals Council denied the request, thereby affirming the ALJ's decision. (*Id.* at 13–16). She has now appealed that decision to this Court.

II. Analysis

A. Standard of Review

Under the Social Security Act, this Court may affirm, modify, or reverse the final decision of the Commissioner, with or without remanding the case for a rehearing. 42 U.S.C. § 405(g). The Commissioner's factual findings, "if supported by substantial evidence, shall be conclusive," 42 U.S.C. § 405(g), because "the responsibility for weighing conflicting evidence, where reasonable minds could differ as to the outcome, falls on the Commissioner and his designee, the ALJ. It does not fall on the reviewing court." *Seavey v. Barnhart*, 276 F.3d 1, 9 (1st Cir. 2001) (citation omitted); *Rodriguez Pagan v. Secretary of Health & Human Servs.*, 819 F.2d 1, 3 (1st Cir. 1987) (noting that the court "must affirm the Secretary's resolution, even if the record arguably could justify a different conclusion, so long as it is supported by substantial evidence"). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Questions of law, to the extent that they are at issue in the appeal, are reviewed *de novo*. *Seavey*, 276 F.3d at 9.

B. Standard for Entitlement to SSDI or SSI Benefits

An individual is not entitled to SSDI or SSI benefits unless he or she is "disabled" within the meaning of the Social Security Act. See 42 U.S.C. §§ 1382(a)(1), 1382c(a)(3) (setting forth the definition of disabled in the context of SSI). "Disability" is defined, in relevant part, 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)(A). The impairment must be severe enough to prevent the plaintiff from performing not only past work, but any substantial gainful work existing in the national economy. 42 U.S.C. § 1382c(a)(3)(B); 20 C.F.R. §§ 404.1560(c)(1), 416.960(c)(1).

The Commissioner uses a sequential five-step analysis to evaluate whether a claimant is disabled. See 20 C.F.R. § 404.1520. The steps are:

> 1) if the applicant is engaged in substantial gainful work activity, the application is denied; 2) if the applicant does not have, or has not had . . . a severe impairment or combination of impairments, the application is denied; 3) if the impairment meets the conditions for one of the 'listed impairments' in the Social Security regulations, then the application is granted; 4) if the applicant's 'residual functional capacity' is such that he . . . can still perform past relevant work, then the application is denied; 5) if the applicant, given his or her residual functional capacity, education, work experience, and age, is unable to do any other work, the application is granted.

Seavey, 276 F.3d at 5; *see* 20 C.F.R. § 404.1520(a)(4).[5] The claimant has the burden of production and proof during steps one through four, and the Commissioner has the burden at step five to offer evidence of specific jobs in the economy that the applicant can perform. *Freeman v. Barnhart*, 274 F.3d 606, 608 (1st Cir. 2001). At that juncture, the ALJ assesses the claimant's

[5] "All five steps are not applied to every applicant, as the determination may be concluded at any step along the process." *Seavey*, 276 F.3d at 5.

RFC in combination with the "vocational factors of [the claimant's] age, education, and work experience," to determine whether he or she can "engage in any . . . kind of substantial gainful work which exists in the national economy." *See* 20 C.F.R. § 404.1560(c)(1); 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

C. Administrative Law Judge's Finding

In evaluating the evidence, the ALJ conducted the five-part analysis called for by SSA regulations. First, he concluded that plaintiff has not engaged in substantial gainful activity since the alleged onset date of the disability. (*Id.* at 30). Second, he found that petitioner's asthma, allergic rhinitis, osteopenia, Graves' disease with thyroid ablation, borderline intellectual functioning, and depression were all severe impairments. (*Id.*). Third, he concluded that those medically determinable impairments did not meet or medically equal one of the listed impairments in Appendix 1, Subpart P, Regulation No. 4. (*Id.* at 31). At the fourth step, he found that

> [Espada] has the residual functional capacity to perform light work as defined in 20 CFR 404.1567(b) and 416.967(b). [She] can lift 20 pounds occasionally and 10 pounds frequently. She can sit, stand, and walk for six hours each per 8-hour day. She is limited to indoor work with no concentrated exposure to dust, fumes, strong odors, temperature or humidity extremes. She requires work with low probability of being bumped aggressively (prophylactically for osteopenia). She is limited to simple, one-to-two step tasks and requires no more than occasional interaction with coworkers and supervisors and none with the public.

(*Id.* at 32). Because the plaintiff has no relevant work experience, the ALJ proceeded to the fifth step and combined that residual functional capacity assessment with her age, education, and work experience in conjunction with the Medical-Vocational Guidelines, 20 CFR Part 404, Subpart P, Appendix 2. That led to a conclusion that plaintiff could perform some, but not all, of the exertional demands at the "light work" level. (AR at 32).

The ALJ then consulted with a vocational expert to determine whether jobs existed in the national economy for an individual with the plaintiff's age, education, work experience, and residual functional capacity. Based on that testimony, the court found that even if an additional environmental limit were put into place limiting her to only "clean" environments, a "significant numbe[r] of jobs" were still available. (*Id.* at 35–36). As discussed above, according to the vocational expert's testimony as accepted by the ALJ**,** approximately 120,000 clean jobs fitting plaintiff's qualifications as determined by the ALJ exist nationally, with approximately 3,200 in Massachusetts. (*See id.* at 997).

The ALJ declined to give controlling weight to nurse practitioner Robbie Lauter's RFC, explaining that he considered the state agency assessments' less stringent limitation to "generally be accurate reflections of the claimant's residual functional capacity," and that as a nurse practitioner, Lauter does not qualify as an acceptable medical source whose opinion is entitled to controlling weight. (*Id.* at 33–34). The ALJ gave two principal reasons for declining to give weight to Lauter's assessment. First, he explained that it was internally inconsistent, in that it described physical limitations not inconsistent with sedentary work. (*Id.* at 34). Second, he stated that it imposed upper-extremity limitations for which he found no objective basis in the medical record. (*Id.*).

The ALJ gave moderate weight to a September 2009 opinion of plaintiff's therapist, Dr. Jackson, noting that he also did not qualify as an acceptable medical source. (*Id.*).[6] The ALJ

[6] Although acknowledging that the ALJ did not consider Jackson an acceptable medical source, the plaintiff appears to base portions of her objection on an assumption that Jackson *is* an acceptable medical source and thus should be given the appropriate deference. Because, pursuant to 20 C.F.R. § 404.1513 (a), he does not qualify for the acceptable-medical-source classification, plaintiff's assertions that the ALJ erred in not granting Jackson's opinions controlling weight will be disregarded.

found that Dr. Jackson's opinion was conclusory in nature, invasive of an area left to the Commissioner's discretion, and that it spoke to an area outside of its scope by discussing the plaintiff's physical limitations. (*Id.*). The ALJ did not give weight to limitations assessed by Dr. Jackson in May 2006 on an SSA form, noting the brief period of treatment that had occurred by that point as well as the inconsistencies between the SSA form and the remainder of the record. (*Id.*).[7]

D. Plaintiff's Objections

1. Nurse Practitioner Lauter

Plaintiff first objects to the ALJ's treatment of the RFC prepared by nurse practitioner Robbie Lauter. She contends that the ALJ "rel[ied] on the basis that [Lauter's RFC] was 'submitted by a less than acceptable medical source[,]'" rather than adequately explaining his treatment of the opinion. (Pl. Br. at 13).

An ALJ must give controlling weight to the opinion of an "acceptable" treating source when that opinion is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence." *See* 20 C.F.R. § 416.927(c)(2)–(6); 20 C.F.R. § 404.1513. If an ALJ does not give controlling weight to a treating source's opinion, he or she must consider the length, nature, and extent of the treatment relationship, the opinion's supportability and consistency with the record as a whole, whether the treating source specializes in the area, and any other factors brought to the attention of the ALJ by the parties. *See* 20 C.F.R. § 416.927(c)(2)–(6). The ALJ must also provide "good reasons"

[7] The Court was unable to obtain copies of the May 15, 2006 SSA form. (*Id.* at 34). Because plaintiff has not objected to the ALJ's characterization of that document, the Court will accept those descriptions as provided where necessary.

for the weight ultimately assigned to the opinion. (*Id.*).

However, those restrictions apply only to "acceptable medical sources," a classification for which nurse practitioners do not qualify. *See* 20 C.F.R. § 404.1513(a), 416.913. Nurse practitioners are considered "other sources," whose evidence may be used to show the severity of impairments and how they affect a patient's ability to work. (*Id.*). Plaintiff's objection implies that an ALJ *must* adequately explain his treatment of the opinion of an "other source," a rule that has no basis in any of the precedent she cites. (Pl. Br. at 14).

Plaintiff's sole citation for the proposition that an ALJ must "adequately explain the weight given to [the evidence of the other source]" is *Taylor v. Astrue*, 899 F. Supp. 2d 83 (D. Mass. 2012). However, that opinion itself differed as to whether such an explanation is truly mandated. First, as plaintiff notes, the court cited to SSR 06-03P (S.S.A.), 2006 WL 2329939, which explains that "other sources" should be "evaluated" on "key issues." (Pl. Br. at 15) (citing *Taylor*, 899 F. Supp. 2d at 88) (citing SSR 06-03P). However, the regulation does not explicitly impose a strict requirement to provide an in-depth explanation of the ALJ's reasons for his treatment of the opinion. Instead, as the *Taylor* court explained, the regulation requires only that an ALJ "*generally*" should elaborate on the weight he assigns to these other sources so that a subsequent reviewer or the claimant may follow his reasoning. (*Id.*) (emphasis added). The *Taylor* court correctly pointed out that an ALJ "is not required to provide 'good reasons' for the weight assigned to such opinions or consult [the factors required to be considered for an acceptable medical source]." (*Id.*). Accordingly, *Taylor* does not establish a bright line rule that an ALJ must give a detailed explanation of the weight he assigned to "other sources."

Even assuming a firm requirement both to evaluate an "other source's" opinion and to

explain the weight assigned to it, the ALJ did not violate that requirement. First, by noting his objections to Lauter's RFC, the ALJ demonstrated that he did in fact evaluate that opinion. Second, as plaintiff notes, the ALJ pointed out that he was not *required* to give controlling weight to Lauter's opinion, because she is not an acceptable medical source. However, he went on to explain his reasons. As discussed above, he first noted his disapproval of the "internal inconsisten[cies]." (AR at 34). That was a reference to the fact that Lauter imposed a number of limitations that would not preclude plaintiff from performing sedentary work in the first portion of the RFC assessment and then imposed unsubstantiated limitations that would essentially render plaintiff incapable of performing any level of work in the latter half of the assessment. Second, the ALJ objected to the upper-extremity limitations that Lauter imposed on the basis that they were unsubstantiated by the record. Plaintiff's memorandum of law points to reports in the record that show she had shaky hands. However, plaintiff does not refer to any information, objective or otherwise, that definitively precludes the grasping or pulling that Lauter claims would have been only "occasionally possible" for the plaintiff, nor do the other examiners echo Lauter's assessment. That left a conflict in the evidence for the ALJ to resolve. The ALJ could have chosen to assign more weight to that report, or to interpret plaintiff's reports of shakiness as an upper-extremity limitation, but the lack of such limitations imposed by other examiners provides substantial evidence for not doing so. While that portion of the ALJ's opinion could have been more artfully phrased, it is possible to follow his reasoning, and to discern that Lauter's RFC was not given substantial weight.[8]

[8] Plaintiff points to the fact that the ALJ discussed Lauter's limitations in the context of sedentary work while he found that the plaintiff is capable of modified light level work. (P. at 37). However, the ALJ appears to refer to sedentary work as evidence that Lauter's opinion was less credible because of internal inconsistency rather than because it was inconsistent with his own RFC assessment.

Again, the ALJ was not required to give "good reasons" for his treatment of an "other source's" opinion. At most, he was obligated to explain his reasoning in a manner that is possible for subsequent reviewers to follow, a burden he met here. Accordingly, plaintiff is not entitled to judgment on the pleadings on this basis.

2. Dr. Jackson

Plaintiff also objects to the ALJ's evaluation of Dr. Jackson's opinions.[9] First, she points to the ALJ's failure to discuss an evaluation form completed by Dr. Jackson in 2006. (*Id.* at 735–738). Again, however, there is no clear requirement that the ALJ explain his treatment of the opinions of such "other sources," and even if there were, the ALJ's actions would still be acceptable.

The First Circuit has held that "an ALJ is not required to expressly refer to each document in the record, piece-by-piece." *Rodriguez v. Sec'y of HHS*, 1990 WL 152336, at *1 (1st Cir. Sept. 11, 1990). In *Coggon v. Barnhart*, 354 F. Supp. 2d 40, 55 (D. Mass. 2005), the court suggested two requirements for an ALJ decision to be upheld even when the ALJ neglects to address certain evidence. First, the decision that contradicts the neglected evidence should be supported by citations to substantial medical evidence in the record. *Id.* at 55 (citing *Lord v. Apfel*, 114 F. Supp. 3d 3, 13 (D.N.H. 2000). The ALJ did so here. He stated that he chose to adopt the psychological assessments of the consultative examiners, as well as the plaintiff's own

[9] SSR 06-03P explains that licensed or certified psychologists qualify as treating sources. Dr. Jackson's credentials are not offered in the record, and the ALJ states that his opinion is rendered by a "less than acceptable medical source," an assessment in which respondent's brief concurs. (Res. Br. at 15; AR at 34). Plaintiff's brief refers to Dr. Jackson as a "treating source," which the SSA uses to refer to "acceptable medical sources." However, plaintiff's brief also refers to Lauter as a "treating source," and, coupled with the fact that plaintiff does not advance an argument that Dr. Jackson qualifies as an acceptable medical source, this court will accept his designation as an "other source."

statements, rather than Dr. Jackson's assessments.

Second, *Coggon* indicated that evidence may rightly remain unaddressed if it may be considered cumulative or would not appreciably help plaintiff's position. *See Coggon*, 354 F. Supp. 2d at 55. Dr. Jackson's evidence from 2006 may be considered both cumulative and, in part for that reason, evidence that would not support the claimant's position. Dr. Jackson made a subsequent evaluation of Espada's mental health in 2009. The 2006 evaluation form was recorded almost four years prior to the ALJ hearing, and, more importantly, three years prior to the 2009 evaluation. A more recent assessment of plaintiff's mental health would be far more probative than considerably outdated information. Dr. Jackson himself noted in his 2009 memorandum that the plaintiff had made "some progress." Thus, the 2009 report could "reasonably could be viewed as incorporating more up-to-date information." *Renaudette v. Astrue*, 482 F. Supp. 2d 121 (D. Mass. 2007). The ALJ was well within the bounds of reasonableness to consider Dr. Jackson's 2009 opinion to be cumulative, and to find that the 2006 opinions would not have helped the claimant's position. Therefore, the ALJ did not need to address the 2006 evaluation even if a requirement to explicitly address the evidence of other sources was imposed.[10]

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[10] Plaintiff also argues that the ALJ relied on plaintiff's testimony about her day-to-day activities and "ignore[d] medical evidence or substitute[d] his own views for an uncontroverted medical opinion." *Rose v. Shalala*, 34 F.3d 13, 18 (1st Cir. 1994). *Rose*, however, found that an ALJ may not substitute his own opinion for the opinion of *an acceptable medical source* when there is no contradiction of the opinion in the record. Dr. Jackson is not an acceptable medical source, nor is his opinion about her capabilities uncontroverted. Plaintiff also finds fault with the ALJ's analysis of her day-to-day activities. The case cited in support of that objection, *Rohrberg v. Apfel*, 26 F. Supp.2d 303 (D. Mass. 1998), is readily distinguishable. *Rohrberg* addressed a scenario in which the claimant's day-to-day ability to attend to chores or activities was very unpredictable as a result of her disability. (*Id.*). The court noted that an intermittent ability to perform activities did not render her capable of performing the "regular activity needed for gainful employment." *Id.* at 311. Here, however, the ALJ assessed plaintiff's testimony that she was "independent and self-motivated" with regard to regularly completing activities of daily living, rather than pointing to clearly sporadic evidence of activity in support of his view that the claimant could regularly attend work. Furthermore, the ALJ did not rely solely on plaintiff's testimony, instead using it as support for his acceptance of the examiner's assessments.

Plaintiff also objects to the treatment of Dr. Jackson's 2009 opinion, on largely the same basis as she objects to the treatment of Lauter's RFC, apparently contending that the ALJ did not adequately explain the reasons for his treatment of the opinion. Here, the ALJ clearly fulfilled any requirement for explanation of his treatment by explicitly finding that the report was inconsistent with the record at the time as well as "invasive of an area left to the Commissioner's discretion." He also noted the lack of support provided by Dr. Jackson, particularly for his assertion that it was "difficult" to picture the claimant working "with limited skills and her poor ability to tolerate stressors." In reaching those findings, the ALJ applied two of the factors set forward for consideration in SSR 06-03P—supportability and inconsistency. Again, the ALJ was not required to provide "good" reasons for his treatment of the opinion of an "other source," but he nonetheless did so here. Plaintiff makes a similar objection to the treatment of a 2006 SSA form completed by Dr. Jackson. However, the ALJ again utilized SSA factors to discredit the report based on the brief period of treatment and its inconsistency with the record as a whole. Accordingly, plaintiff's objections are without merit.

Plaintiff's final contention is that the amount of weight given to Dr. Jackson's opinion is not sufficiently clear. Specifically, she contends that the ALJ was required to detail which parts of Dr. Jackson's evidence he chose to accept and reject, citing as support *Custodio v. Astrue*, 2010 WL 3860591 (D. Mass. Sept. 27, 2010). However, that case does not contain the quotations plaintiff includes, nor does it appear to support her argument. Plaintiff's only other citation in support of this proposition is an out-of-circuit case that speaks to disregarding evidence from acceptable medical sources. *See* Pl. Br. at 19; *see also Cotter v. Sec'y of HHS*, 642 F.2d 700 (3rd Cir. 1980). Assuming that the ALJ was required to "adequately explain" the

weight he gave to Jackson's opinion, this Court finds that it is possible to discern that Dr. Jackson's opinion has been disregarded where it conflicted with the evidence cited in support of the ALJ's opinion and with the ALJ's Mental Functional Capacity Assessment itself. In any event, it is certainly not the case here that the reviewing court cannot tell whether Jackson's evidence "was credited or simply ignored." *Cotter*, 642 F.2d at 705. While the ALJ could have explained his process with more clarity, this Court finds that the plaintiff is not entitled to judgment on the pleadings on this basis.

III. Conclusion

For the foregoing reasons, plaintiff's motion for judgment on the pleadings is DENIED, and the Commissioner's motion to affirm is GRANTED.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated: August 2, 2013