

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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VICTORIA J. HERZOG,

Plaintiff,

v.

5:11-CV-1108  
(GTS)

MICHAEL J. ASTRUE, Comm'r of Soc. Sec.,

Defendant.

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APPEARANCES:

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Counsel for Plaintiff  
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U.S. SOCIAL SECURITY ADMIN.  
OFFICE OF REG'L GEN. COUNSEL – REGION II  
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GLENN T. SUDDABY, United States District Judge

OF COUNSEL:

PETER W. ANTONOWICZ, ESQ.

BENIL ABRAHAM, ESQ.

**DECISION and ORDER**

Currently before the Court, in this Social Security action filed by Victoria J. Herzog (“Plaintiff”) against the Commissioner of Social Security (“Defendant” or “the Commissioner”) pursuant to 42 U.S.C. § 405(g), are the parties’ cross-motions for judgment on the pleadings. (Dkt. Nos. 12, 14.) For the reasons set forth below, Defendant’s motion is granted and Plaintiff’s motion is denied.

## **I. RELEVANT BACKGROUND**

### **A. Factual Background**

Plaintiff was born on March 10, 1955. She completed education through the 12<sup>th</sup> grade. During her life, Plaintiff has worked as a mold maker and finisher for a china manufacturing company. Generally, her alleged disability consists of arthritis, major depression and anxiety. Her alleged disability onset date is September 1, 2002, and her date last insured is December 31, 2007.

### **B. Procedural History**

On August 3, 2007, Plaintiff applied for Social Security Disability Insurance. Plaintiff's application was initially denied, after which she timely requested a hearing before an Administrative Law Judge ("the ALJ"). On September 2, 2009, Plaintiff appeared before the ALJ. (T. 43-64.) The ALJ issued a written decision finding Plaintiff not disabled under the Social Security Act on September 18, 2009. (T. 31-42.) On July 18, 2011, the Appeals Council denied Plaintiff's request for review, rendering the ALJ's decision the final decision of the Commissioner. (T. 1-7.) Thereafter, Plaintiff timely sought judicial review in this Court.

### **C. The ALJ's Decision**

Generally, in his decision, the ALJ made the following five findings of fact and conclusions of law. (T. 36-42.) First, the ALJ found that Plaintiff had not engaged in substantial gainful activity between her alleged onset date and her date last insured. (T. 36.) Second, the ALJ found that Plaintiff's depression and anxiety are severe impairments. (*Id.*) Third, the ALJ found that Plaintiff's impairments did not meet or medically equal one of the listed impairments located in 20 C.F.R. Part 404, Subpart P, Appendix. 1. (T. 36-38.) The ALJ considered listings

12.04 and 12.06. (*Id.*) Fourth, the ALJ found that, through the date last insured, Plaintiff had the residual functional capacity (“RFC”) to perform light work, except that she is limited to unskilled work. (T. 38-42.) Fifth, and finally, the ALJ determined that Plaintiff is able to perform her past relevant work, which does not require the performance of work-related activities precluded by her RFC, and therefore, Plaintiff is not disabled under the Social Security Act. (T. 42.)

## **II. THE PARTIES’ BRIEFINGS ON PLAINTIFF’S MOTION**

### **A. Plaintiff’s Arguments**

Plaintiff makes two arguments in support of her motion for judgment on the pleadings. First, Plaintiff argues that the ALJ erred in failing to apply the treating physician rule when he assigned little weight to the opinion of Plaintiff’s treating psychiatrist. (Dkt. No. 12 at 8-11 [Pl.’s Mem. of Law].) Second, Plaintiff argues that the ALJ erred when he failed to apply the appropriate legal standards in assessing her credibility. (*Id.* at 11-16.)

### **B. Defendant’s Arguments**

In response, Defendant makes two arguments. First, Defendant argues that the ALJ properly evaluated the medical opinions of record in determining Plaintiff’s RFC. (Dkt. No. 14 at 8-12 [Def.’s Mem. of Law].) Second, Defendant argues that the ALJ properly evaluated Plaintiff’s credibility. (*Id.* at 12-15.)

## **III. RELEVANT LEGAL STANDARD**

### **A. Standard of Review**

A court reviewing a denial of disability benefits may not determine de novo whether an individual is disabled. *See* 42 U.S.C. §§ 405(g); *Wagner v. Sec’y of Health & Human Servs.*,

906 F.2d 856, 860 (2d Cir. 1990). Rather, the Commissioner's determination will only be reversed if the correct legal standards were not applied, or it was not supported by substantial evidence. *See Johnson v. Bowen*, 817 F.2d 983, 986 (2d Cir. 1987) ("Where there is a reasonable basis for doubt whether the ALJ applied correct legal principles, application of the substantial evidence standard to uphold a finding of no disability creates an unacceptable risk that a claimant will be deprived of the right to have her disability determination made according to the correct legal principles."); *Grey v. Heckler*, 721 F.2d 41, 46 (2d Cir. 1983); *Marcus v. Califano*, 615 F.2d 23, 27 (2d Cir. 1979).

"Substantial evidence" is evidence that amounts to "more than a mere scintilla," and has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427 (1971). Where evidence is deemed susceptible to more than one rational interpretation, the Commissioner's conclusion must be upheld. *See Rutherford v. Schweiker*, 685 F.2d 60, 62 (2d Cir. 1982).

"To determine on appeal whether the ALJ's findings are supported by substantial evidence, a reviewing court considers the whole record, examining evidence from both sides, because an analysis of the substantiality of the evidence must also include that which detracts from its weight." *Williams v. Bowen*, 859 F.2d 255, 258 (2d Cir. 1988).

If supported by substantial evidence, the Commissioner's finding must be sustained "even where substantial evidence may support the plaintiff's position and despite that the court's independent analysis of the evidence may differ from the [Commissioner's]." *Rosado v. Sullivan*, 805 F. Supp. 147, 153 (S.D.N.Y. 1992). In other words, this Court must afford the

Commissioner's determination considerable deference, and may not substitute "its own judgment for that of the [Commissioner], even if it might justifiably have reached a different result upon a de novo review." *Valente v. Sec'y of Health & Human Servs.*, 733 F.2d 1037, 1041 (2d Cir. 1984).

## **B. Standard to Determine Disability**

The Commissioner has established a five-step evaluation process to determine whether an individual is disabled as defined by the Social Security Act. 20 C.F.R. §§ 404.1520, 416.920. The Supreme Court has recognized the validity of this sequential evaluation process. *See Bowen v. Yuckert*, 482 U.S. 137, 140-42, 107 S. Ct. 2287 (1987). The five-step process is as follows:

First, the [Commissioner] considers whether the claimant is currently engaged in substantial gainful activity. If he is not, the [Commissioner] next considers whether the claimant has a "severe impairment" which significantly limits his physical or mental ability to do basic work activities. If the claimant suffers such an impairment, the third inquiry is whether, based solely on medical evidence, the claimant has an impairment which is listed in Appendix 1 of the regulations. If the claimant has such an impairment, the [Commissioner] will consider him disabled without considering vocational factors such as age, education, and work experience; the [Commissioner] presumes that a claimant who is afflicted with a "listed" impairment is unable to perform substantial gainful activity. Assuming the claimant does not have a listed impairment, the fourth inquiry is whether, despite the claimant's severe impairment, he has the residual functional capacity to perform his past work. Finally, if the claimant is unable to perform his past work, the [Commissioner] then determines whether there is other work which the claimant could perform. Under the cases previously discussed, the claimant bears the burden of the proof as to the first four steps, while the [Commissioner] must prove the final one.

*Berry v. Schweiker*, 675 F.2d 464, 467 (2d Cir. 1982).

#### IV. ANALYSIS

##### A. Whether the ALJ Erred in Failing to Assign Controlling Weight to the Opinion of Plaintiff's Treating Physician

After carefully considering the matter, the Court answers this question in the negative, generally for the reasons stated in Defendant's memorandum of law. (Dkt. No. 14 at 8-45 [Def.'s Mem. of Law].) The Court would only add the following analysis.

Under the "treating physician's rule," an ALJ must give controlling weight to the treating physician's opinion when (1) the opinion is well supported by medically acceptable clinical and laboratory diagnostic techniques, and (2) the opinion is consistent with other substantial evidence in the record, such as opinions of other medical experts. 20 C.F.R. § 404.1527(d)(2); *Halloran v. Barnhart*, 362 F.3d 28, 31-32 (2d Cir. 2004); *Brogan-Dawley v. Astrue*, No. 11-2907, 2012 WL 2096630, at \*1 (2d Cir. June 12, 2012). The factors an ALJ should consider when determining the proper weight of a treating physician's opinion include the following: (1) frequency of the examination and the length, nature and extent of the treatment relationship; (2) the evidence in support of the opinion; (3) the opinion's consistency with the record as a whole; and (4) whether the opinion is from a specialist. *See* 20 C.F.R. § 404.1527(d); *Shaw v. Chater*, 221 F.3d 126, 134 (2d Cir. 2000). Regulations require ALJs to set forth their reasons for the weight they assign to a treating physician's opinion. *Shaw*, 221 F.3d at 134.

Here, the ALJ acknowledged that Dr. Kou, a psychiatrist, had been treating Plaintiff at three month intervals beginning in 2005, but noted that her sessions with Plaintiff consisted of fifteen minute status checks and medication monitoring. (T. 41.) The ALJ also properly noted that Dr. Kou's opinions were inconsistent with her own treatment notes as well as other objective

medical evidence in the record. Where, as here, the treating physician's opinion is not supported by, or consistent with, other evidence in the record, the ALJ is entitled to accord that opinion less than controlling weight, and may instead rely on the opinions of consultative examiners. See *Petrie v. Astrue*, 412 F. App'x 401, 405 (2d Cir. 2011) (citing *Halloran v. Barnhart*, 362 F.3d 28, 32 (2d Cir. 2004), and *Mongeur v. Heckler*, 722 F.2d 1033, 1039 (2d Cir. 1983)).

Accordingly, the ALJ's decision is affirmed in this regard.

**B. Whether the ALJ Erred in Failing to Properly Assess Plaintiff's Credibility**

After carefully considering the matter, the Court answers this question in the negative, generally for the reasons stated in Defendant's memorandum of law. (Dkt. No. 14 at 12-15 [Def.'s Mem. of Law].) The Court would only add the following analysis.

A Plaintiff's allegations of pain and functional limitations are "entitled to great weight where ... it is supported by objective medical evidence." *Rockwood v. Astrue*, 614 F. Supp. 2d 252, 270 (N.D.N.Y. 2009) (quoting *Simmons v. U.S. R.R. Ret. Bd.*, 982 F.2d 49, 56 (2d Cir.1992)). However, the ALJ "is not required to accept [a plaintiff's] subjective complaints without question; he may exercise discretion in weighing the credibility of the [plaintiff's] testimony in light of the other evidence in the record." *Montaldo v. Astrue*, 10-CV-6163, 2012 WL 893186, at \*17 (S.D.N.Y. Mar. 15 2012). "When rejecting subjective complaints, an ALJ must do so explicitly and with sufficient specificity to enable the Court to decide whether there are legitimate reasons for the ALJ's disbelief." *Rockwood*, 614 F. Supp. 2d at 270.

"The ALJ's credibility assessment must be based on a two step analysis of pertinent evidence in the record. First, the ALJ must determine whether the claimant has medically determinable impairments, which could reasonably be expected to produce the pain or other symptoms alleged." *Id.*, at 271.

Second, if medically determinable impairments are shown, then the ALJ must evaluate the intensity, persistence, and limiting effects of the symptoms to determine the extent to which they limit the claimant's capacity to work. Because an individual's symptoms can sometimes suggest a greater level of severity of impairment than can be shown by the objective medical evidence alone, an ALJ will consider the following factors in assessing a claimant's credibility: (1) claimant's daily activities; (2) location, duration, frequency, and intensity of claimant's symptoms; (3) precipitating and aggravating factors; (4) type, dosage, effectiveness, and side effects of any medication taken to relieve symptoms; (5) other treatment received to relieve symptoms; (6) any measures taken by the claimant to relieve symptoms; and (7) any other factors concerning claimant's functional limitations and restrictions due to symptoms.

*Id.*

Here, the ALJ found Plaintiff's apparent delay in seeking treatment to be inconsistent with her allegations regarding the intensity and persistence of her impairments. To be sure, "an ALJ must not draw an adverse inference from a claimant's failure to seek or pursue treatment 'without first considering any explanations that the individual may provide, or other information in the case record, that may explain infrequent or irregular medical visits or failure to seek medical treatment.'" *McGregor v. Comm'r of Soc. Sec.*, No. 10-CV-1483, 2012 WL 2873559, at \*10 (N.D.N.Y. Jun. 1, 2012) (quoting Social Security Ruling 96-7p, 61 Fed. Reg. 34483-01 (July 2, 1996)). Accordingly, the ALJ's evaluation of Plaintiff's allegations regarding the intensity and persistence of her impairments on the basis of her apparent failure to seek treatment for three years after her alleged onset date was not proper. Nonetheless, Plaintiff's alleged symptoms are unsupported by the objective medical evidence, as noted by the ALJ. (T. 39.)

Moreover, the ALJ properly considered Plaintiff's testimony regarding her psychological limitations in addition to Plaintiff's allegations regarding her daily activities as well as her lack



of concentration, finding them inconsistent with the objective medical evidence. Therefore, the ALJ's decision is affirmed in this regard.

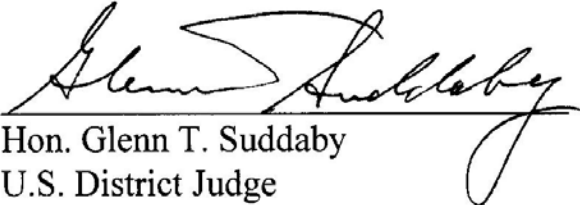
**ACCORDINGLY**, it is

**ORDERED** that Defendant's motion for judgment on the pleadings (Dkt. No. 14) is **GRANTED**; and it is further

**ORDERED** that Plaintiff's motion for judgment on the pleadings (Dkt. No. 12) is **DENIED**; and the Complaint is **DISMISSED** in its entirety with prejudice; and it is further

**ORDERED** that the Clerk of the Court shall enter judgment in favor of Defendant and close this case.

Dated: October 26, 2012  
Syracuse, New York

  
Hon. Glenn T. Suddaby  
U.S. District Judge